

INDIAN CHILD WELFARE ACT

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JOINT HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

AND THE

COMMITTEE ON RESOURCES

UNITED STATES HOUSE OF

REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

**S. 569 and H.R. 1082**

TO AMEND THE INDIAN CHILD WELFARE ACT OF 1978

JUNE 18, 1997

WASHINGTON, DC

Serial No. 105-44



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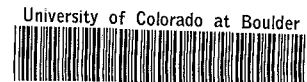
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## INDIAN CHILD WELFARE ACT

WEDNESDAY, JUNE 18, 1997

U.S. SENATE, COMMITTEE ON INDIAN AFFAIRS, MEETING  
JOINTLY WITH THE COMMITTEE ON RESOURCES, U.S.  
HOUSE OF REPRESENTATIVES,

*Washington, DC.*

The committees met, pursuant to notice, at 10:35 a.m. in room 106, Dirksen Senate Office Building, Hon. Ben Nighthorse Campbell (chairman of the Senate Committee on Indian Affairs) presiding.

Present from the U.S. Senate Committee on Indian Affairs: Senators Campbell, Inouye, and McCain.

Present from the Committee on Resources, U.S. House of Representatives: Representatives Young, Kennedy, Christian-Green, and Faleomavaega.

### STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning. The joint hearing of the Senate Indian Affairs Committee and the House Committee on Resources will be in session. If folks will take your seats, we'll get started.

Welcome to the Committee on Indian Affairs. Chairman Young is on his way and will be along shortly.

This morning we will receive testimony regarding two bills to amend the Indian Child Welfare Act of 1978. The proper standard to judge these amendments is simply this: Do we serve the best interest of Indian children? I believe that these changes will serve the best interest of Indian children, protecting families and tribes, and alleviate the cost, time, and heartache that some adoptive parents have experienced in adopting Indian children.

With rare exceptions, the ICWA statute has worked well since its enactment in 1978. To understand the bills we are considering today, we must understand the crisis that led to the passage of the ICWA in 1978. Prior to that time, there simply were no protections available in situations involving the removal of Indian children from their families, their tribes, and their cultures. Prior to the passage of that act, between 25 percent and 35 percent of all Indian children were separated from their families and adopted or put in foster care or in institutions.

The Congress sought to stop this practice by providing procedural safeguards for Indian families and tribes. The ICWA rein-

forces the strong interest Indian families and tribes have in maintaining the relationships with their children.

The bills before us today will strengthen that statute by providing certainty, stability, and finality to adoptions and other placements involving Indian children. These bills provide tribes with detailed notice of pending voluntary placements. They require a tribe to certify up front if a child is a tribal member or eligible for tribal membership, place strict time limits on tribal rights to intervene. It places also time limits on birth parents' rights to withdraw their consent to a placement, and proposes tough new criminal sanctions for any person who knowingly falsifies documents or conceals facts about a child's Indian heritage.

[Text of S. 569 and H.R. 1082 follows:]

105TH CONGRESS  
1ST SESSION

**S. 569**

To amend the Indian Child Welfare Act of 1978, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

APRIL 14, 1997

Mr. MCCAIN (for himself, Mr. CAMPBELL, Mr. DOMENICI, and Mr. DORGAN) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

---

**A BILL**

To amend the Indian Child Welfare Act of 1978, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; REFERENCES.**

4 (a) **SHORT TITLE.**—This Act may be cited as the  
5 “Indian Child Welfare Act Amendments of 1997”.

6 (b) **REFERENCES.**—Whenever in this Act an amend-  
7 ment or repeal is expressed in terms of an amendment  
8 to or repeal of a section or other provision, the reference  
9 shall be considered to be made to a section or other provi-



1 sion of the Indian Child Welfare Act of 1978 (25 U.S.C.  
2 1901 et seq.).

3 **SEC. 2. EXCLUSIVE JURISDICTION.**

4 Section 101(a) (25 U.S.C. 1911(a)) is amended—

5 (1) by inserting “(1)” after “(a)”; and  
6 (2) by striking the last sentence and inserting  
7 the following:

8 “(2) An Indian tribe shall retain exclusive jurisdiction  
9 over any child custody proceeding that involves an Indian  
10 child, notwithstanding any subsequent change in the resi-  
11 dence or domicile of the Indian child, in any case in which  
12 the Indian child—

13 “(A) resides or is domiciled within the reserva-  
14 tion of the Indian tribe and is made a ward of a  
15 tribal court of that Indian tribe; or

16 “(B) after a transfer of jurisdiction is carried  
17 out under subsection (b), becomes a ward of a tribal  
18 court of that Indian tribe.”

19 **SEC. 3. INTERVENTION IN STATE COURT PROCEEDINGS.**

20 Section 101(e) (25 U.S.C. 1911(e)) is amended by  
21 striking “In any State court proceeding” and inserting  
22 “Except as provided in section 103(e), in any State court  
23 proceeding”.

24 **SEC. 4. VOLUNTARY TERMINATION OF PARENTAL RIGHTS.**

25 Section 103(a) (25 U.S.C. 1913(a)) is amended—

1 (1) by inserting “(1)” before “Where”;

2 (2) by striking “foster care placement” and in-  
3 serting “foster care or preadoptive or adoptive place-  
4 ment”;

5 (3) by striking “judge’s certificate that the  
6 terms” and inserting the following: “judge’s certifi-  
7 cate that—  
8 “(A) the terms”;

9 (4) by striking “or Indian custodian.” and in-  
10 serting “or Indian custodian; and”;

11 (5) by inserting after subparagraph (A), as des-  
12 ignated by paragraph (3) of this subsection, the fol-  
13 lowing new subparagraph:

14 “(B) any attorney or public or private agency  
15 that facilitates the voluntary termination of parental  
16 rights or preadoptive or adoptive placement has in-  
17 formed the natural parents of the placement options  
18 with respect to the child involved, has informed  
19 those parents of the applicable provisions of this  
20 Act, and has certified that the natural parents will  
21 be notified within 10 days of any change in the  
22 adoptive placement.”;

23 (6) by striking “The court shall also certify”  
24 and inserting the following:

25 “(2) The court shall also certify”;

(7) by striking "Any consent given prior to,"  
and inserting the following:

"(3) Any consent given prior to,"; and

(8) by adding at the end the following new  
paragraph:

"(4) An Indian custodian who has the legal authority  
to consent to an adoptive placement shall be treated as  
a parent for the purposes of the notice and consent to  
adoption provisions of this Act."

**SEC. 5. WITHDRAWAL OF CONSENT.**

Section 103(b) (25 U.S.C. 1913(b)) is amended—

(1) by inserting "(1)" before "Any"; and

(2) by adding at the end the following new  
paragraphs:

"(2) Except as provided in paragraph (4), a consent  
to adoption of an Indian child or voluntary termination  
of parental rights to an Indian child may be revoked, only  
if—

"(A) no final decree of adoption has been en-  
tered; and

"(B)(i) the adoptive placement specified by the  
parent terminates; or

"(ii) the revocation occurs before the later of  
the end of—

"(I) the 180-day period beginning on the  
date on which the Indian child's tribe receives  
written notice of the adoptive placement pro-  
vided in accordance with the requirements of  
subsections (c) and (d); or

"(II) the 30-day period beginning on the  
date on which the parent who revokes consent  
receives notice of the commencement of the  
adoption proceeding that includes an expla-  
nation of the revocation period specified in this  
subclause.

"(3) The Indian child with respect to whom a revoca-  
tion under paragraph (2) is made shall be returned to the  
parent who revokes consent immediately upon an effective  
revocation under that paragraph.

"(4) Subject to paragraph (6), if, by the end of the  
applicable period determined under subclause (I) or (II)  
of paragraph (2)(B)(ii), a consent to adoption or voluntary  
termination of parental rights has not been revoked, be-  
ginning after that date, a parent may revoke such a con-  
sent only—

"(A) pursuant to applicable State law; or

"(B) if the parent of the Indian child involved  
petitions a court of competent jurisdiction, and the  
court finds that the consent to adoption or voluntary

1 termination of parental rights was obtained through  
2 fraud or duress.

3 “(5) Subject to paragraph (6), if a consent to adop-  
4 tion or voluntary termination of parental rights is revoked  
5 under paragraph (4)(B), with respect to the Indian child  
6 involved—

7 “(A) in a manner consistent with paragraph  
8 (3), the child shall be returned immediately to the  
9 parent who revokes consent; and

10 “(B) if a final decree of adoption has been en-  
11 tered, that final decree shall be vacated.

12 “(6) Except as otherwise provided under applicable  
13 State law, no adoption that has been in effect for a period  
14 longer than or equal to 2 years may be invalidated under  
15 this subsection.”

16 **SEC. 6. NOTICE TO INDIAN TRIBES.**

17 Section 103(c) (25 U.S.C. 1913(c)) is amended to  
18 read as follows:

19 “(c)(1) A party that seeks the voluntary placement  
20 of an Indian child or the voluntary termination of the pa-  
21 rental rights of a parent of an Indian child shall provide  
22 written notice of the placement or proceeding to the Indian  
23 child’s tribe. A notice under this subsection shall be sent  
24 by registered mail (return receipt requested) to the Indian

1 child’s tribe, not later than the applicable date specified  
2 in paragraph (2) or (3).

3 “(2)(A) Except as provided in paragraph (3), notice  
4 shall be provided under paragraph (1) in each of the fol-  
5 lowing cases:

6 “(i) Not later than 100 days after any foster  
7 care placement of an Indian child occurs.

8 “(ii) Not later than 5 days after any  
9 preadoptive or adoptive placement of an Indian  
10 child.

11 “(iii) Not later than 10 days after the com-  
12 mencement of any proceeding for a termination of  
13 parental rights to an Indian child.

14 “(iv) Not later than 10 days after the com-  
15 mencement of any adoption proceeding concerning  
16 an Indian child.

17 “(B) A notice described in subparagraph (A)(ii) may  
18 be provided before the birth of an Indian child if a party  
19 referred to in paragraph (1) contemplates a specific adop-  
20 tive or preadoptive placement.

21 “(3) If, after the expiration of the applicable period  
22 specified in paragraph (2), a party referred to in para-  
23 graph (1) discovers that the child involved may be an In-  
24 dian child—

1 "(A) the party shall provide notice under para-  
2 graph (1) not later than 10 days after the discovery;  
3 and

4 "(B) any applicable time limit specified in sub-  
5 section (e) shall apply to the notice provided under  
6 subparagraph (A) only if the party referred to in  
7 paragraph (1) has, on or before commencement of  
8 the placement, made reasonable inquiry concerning  
9 whether the child involved may be an Indian child."

10 **SEC. 7. CONTENT OF NOTICE.**

11 Section 103(d) (25 U.S.C. 1913(d)) is amended to  
12 read as follows:

13 "(d) Each written notice provided under subsection  
14 (c) shall contain the following:

15 "(1) The name of the Indian child involved, and  
16 the actual or anticipated date and place of birth of  
17 the Indian child.

18 "(2) A list containing the name, address, date  
19 of birth, and (if applicable) the maiden name of each  
20 Indian parent and grandparent of the Indian child,  
21 if—

- 22 "(A) known after inquiry of—
- 23 "(i) the birth parent placing the child
- 24 or relinquishing parental rights; and

1 "(ii) the other birth parent (if avail-  
2 able); or

3 "(B) otherwise ascertainable through other  
4 reasonable inquiry.

5 "(3) A list containing the name and address of  
6 each known extended family member (if any), that  
7 has priority in placement under section 105.

8 "(4) A statement of the reasons why the child  
9 involved may be an Indian child.

10 "(5) The names and addresses of the parties in-  
11 volved in any applicable proceeding in a State court.

12 "(6)(A) The name and address of the State  
13 court in which a proceeding referred to in paragraph  
14 (5) is pending, or will be filed; and

15 "(B) the date and time of any related court  
16 proceeding that is scheduled as of the date on which  
17 the notice is provided under this subsection.

18 "(7) If any, the tribal affiliation of the prospec-  
19 tive adoptive parents.

20 "(8) The name and address of any public or  
21 private social service agency or adoption agency in-  
22 volved.

23 "(9) An identification of any Indian tribe with  
24 respect to which the Indian child or parent may be  
25 a member.

1       “(10) A statement that each Indian tribe iden-  
2       tified under paragraph (9) may have the right to in-  
3       tervene in the proceeding referred to in paragraph  
4       (5).

5       “(11) An inquiry concerning whether the Indian  
6       tribe that receives notice under subsection (c) in-  
7       tends to intervene under subsection (e) or waive any  
8       such right to intervention.

9       “(12) A statement that, if the Indian tribe that  
10      receives notice under subsection (c) fails to respond  
11      in accordance with subsection (e) by the applicable  
12      date specified in that subsection, the right of that  
13      Indian tribe to intervene in the proceeding involved  
14      shall be considered to have been waived by that In-  
15      dian tribe.”.

16 **SEC. 8. INTERVENTION BY INDIAN TRIBE.**

17       Section 103 (25 U.S.C. 1913) is amended by adding  
18       at the end the following new subsections:

19       “(e)(1) The Indian child's tribe shall have the right  
20       to intervene at any time in a voluntary child custody pro-  
21       ceeding in a State court only if—

22       “(A) in the case of a voluntary proceeding to  
23       terminate parental rights, the Indian tribe filed a  
24       notice of intent to intervene or a written objection  
25       to the termination, not later than 30 days after re-

1       ceiving notice that was provided in accordance with  
2       the requirements of subsections (c) and (d); or

3       “(B) in the case of a voluntary adoption pro-  
4       ceeding, the Indian tribe filed a notice of intent to  
5       intervene or a written objection to the adoptive  
6       placement, not later than the later of—

7               “(i) 90 days after receiving notice of the  
8               adoptive placement that was provided in accord-  
9               ance with the requirements of subsections (c)  
10              and (d); or

11             “(ii) 30 days after receiving a notice of the  
12             voluntary adoption proceeding that was pro-  
13             vided in accordance with the requirements of  
14             subsections (c) and (d).

15       “(2)(A) Except as provided in subparagraph (B), the  
16       Indian child's tribe shall have the right to intervene at  
17       any time in a voluntary child custody proceeding in a State  
18       court in any case in which the Indian tribe did not receive  
19       written notice provided in accordance with the require-  
20       ments of subsections (c) and (d).

21       “(B) An Indian tribe may not intervene in any vol-  
22       untary child custody proceeding in a State court if the  
23       Indian tribe gives written notice to the State court or any  
24       party involved of—

1       “(i) the intent of the Indian tribe not to inter-  
2       vene in the proceeding; or

3       “(ii) the determination by the Indian tribe  
4       that—

5       “(I) the child involved is not a member of,  
6       or is not eligible for membership in, the Indian  
7       tribe; or

8       “(II) neither parent of the child is a mem-  
9       ber of the Indian tribe.

10       “(3) If an Indian tribe files a motion for intervention  
11       in a State court under this subsection, the Indian tribe  
12       shall submit to the court, at the same time as the Indian  
13       tribe files that motion, a certification that includes a state-  
14       ment that documents, with respect to the Indian child in-  
15       volved, the membership or eligibility for membership of  
16       that Indian child in the Indian tribe under applicable trib-  
17       al law.

18       “(f) Any act or failure to act of an Indian tribe under  
19       subsection (e) shall not—

20       “(1) affect any placement preference or other  
21       right of any individual under this Act;

22       “(2) preclude the Indian tribe of the Indian  
23       child that is the subject of an action taken by the  
24       Indian tribe under subsection (e) from intervening in  
25       a proceeding concerning that Indian child if a pro-

1       posed adoptive placement of that Indian child is  
2       changed after that action is taken; or

3       “(3) except as specifically provided in sub-  
4       section (e), affect the applicability of this Act.

5       “(g) Notwithstanding any other provision of law, no  
6       proceeding for a voluntary termination of parental rights  
7       or adoption of an Indian child may be conducted under  
8       applicable State law before the date that is 30 days after  
9       the Indian child's tribe receives notice of that proceeding  
10       that was provided in accordance with the requirements of  
11       subsections (c) and (d).

12       “(h) Notwithstanding any other provision of law (in-  
13       cluding any State law)—

14       “(1) a court may approve, if in the best inter-  
15       ests of an Indian child, as part of an adoption de-  
16       cree of that Indian child, an agreement that states  
17       that a birth parent, an extended family member, or  
18       the Indian child's tribe shall have an enforceable  
19       right of visitation or continued contact with the In-  
20       dian child after the entry of a final decree of adop-  
21       tion; and

22       “(2) the failure to comply with any provision of  
23       a court order concerning the continued visitation or  
24       contact referred to in paragraph (1) shall not be

1 considered to be grounds for setting aside a final de-  
2 cree of adoption.”

3 **SEC. 9. FRAUDULENT REPRESENTATION.**

4 Title I of the Indian Child Welfare Act of 1978 is  
5 amended by adding at the end the following new section:

6 **“SEC. 114. FRAUDULENT REPRESENTATION.**

7 “(a) IN GENERAL.—With respect to any proceeding  
8 subject to this Act involving an Indian child or a child  
9 who may be considered to be an Indian child for purposes  
10 of this Act, a person, other than a birth parent of the  
11 child, shall, upon conviction, be subject to a criminal sanc-  
12 tion under subsection (b) if that person knowingly and  
13 willfully—

14 “(1) falsifies, conceals, or covers up by any  
15 trick, scheme, or device, a material fact concerning  
16 whether, for purposes of this Act—

17 “(A) a child is an Indian child; or

18 “(B) a parent is an Indian; or

19 “(2)(A) makes any false, fictitious, or fraudu-  
20 lent statement, omission, or representation; or

21 “(B) falsifies a written document knowing that  
22 the document contains a false, fictitious, or fraudu-  
23 lent statement or entry relating to a material fact  
24 described in paragraph (1).

1 “(b) CRIMINAL SANCTIONS.—The criminal sanctions  
2 for a violation referred to in subsection (a) are as follows:

3 “(1) For an initial violation, a person shall be  
4 fined in accordance with section 3571 of title 18,  
5 United States Code, or imprisoned not more than 1  
6 year, or both.

7 “(2) For any subsequent violation, a person  
8 shall be fined in accordance with section 3571 of  
9 title 18, United States Code, or imprisoned not more  
10 than 5 years, or both.”

○

105TH CONGRESS  
1ST SESSION

# H. R. 1082

To amend the Indian Child Welfare Act of 1978, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 13, 1997

Mr. YOUNG of Alaska (for himself and Mr. MILLER of California) introduced the following bill; which was referred to the Committee on Resources

## A BILL

To amend the Indian Child Welfare Act of 1978, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*  
3 **SECTION 1. SHORT TITLE; REFERENCES.**  
4 (a) **SHORT TITLE.**—This Act may be cited as the  
5 “Indian Child Welfare Act Amendments of 1997”.  
6 (b) **REFERENCES.**—Whenever in this Act an amend-  
7 ment or repeal is expressed in terms of an amendment  
8 to or repeal of a section or other provision, the reference  
9 shall be considered to be made to a section or other provi-  
10 sion of the Indian Child Welfare Act of 1978 (25 U.S.C.  
11 1901 et seq.).

2

### 1 SEC. 2. EXCLUSIVE JURISDICTION.

2 Section 101(a) (25 U.S.C. 1911(a)) is amended—

3 (1) by inserting “(1)” after “(a)”; and

4 (2) by striking the last sentence and inserting  
5 the following:

6 “(2) An Indian tribe shall retain exclusive jurisdiction  
7 over any child custody proceeding that involves an Indian  
8 child, notwithstanding any subsequent change in the resi-  
9 dence or domicile of the Indian child, in any case in which  
10 the Indian child—

11 “(A) resides or is domiciled within the reserva-  
12 tion of the Indian tribe and is made a ward of a  
13 tribal court of that Indian tribe; or

14 “(B) after a transfer of jurisdiction is carried  
15 out under subsection (b), becomes a ward of a tribal  
16 court of that Indian tribe.”.

### 17 SEC. 3. INTERVENTION IN STATE COURT PROCEEDINGS.

18 Section 101(c) (25 U.S.C. 1911(c)) is amended by  
19 striking “In any State court proceeding” and inserting  
20 “Except as provided in section 103(e), in any State court  
21 proceeding”.

### 22 SEC. 4. VOLUNTARY TERMINATION OF PARENTAL RIGHTS.

23 Section 103(a) (25 U.S.C. 1913(a)) is amended—

24 (1) by inserting “(1)” before “Where”;



(2) by striking "foster care placement" and inserting "foster care or preadoptive or adoptive placement";

(3) by striking "judge's certificate that the terms" and inserting the following: "judge's certificate that—

"(A) the terms";

(4) by striking "or Indian custodian." and inserting "or Indian custodian; and";

(5) by inserting after subparagraph (A), as designated by paragraph (3) of this subsection, the following new subparagraph:

"(B) any attorney or public or private agency that facilitates the voluntary termination of parental rights or preadoptive or adoptive placement has informed the natural parents of the placement options with respect to the child involved, has informed those parents of the applicable provisions of this Act, and has certified that the natural parents will be notified within 10 days of any change in the adoptive placement.";

(6) by striking "The court shall also certify" and inserting the following:

"(2) The court shall also certify";

(7) by striking "Any consent given prior to," and inserting the following:

"(3) Any consent given prior to,"; and

(8) by adding at the end the following new paragraph:

"(4) An Indian custodian who has the legal authority to consent to an adoptive placement shall be treated as a parent for the purposes of the notice and consent to adoption provisions of this Act."

#### SEC. 5. WITHDRAWAL OF CONSENT.

Section 103(b) (25 U.S.C. 1913(b)) is amended—

(1) by inserting "(1)" before "Any"; and

(2) by adding at the end the following new paragraphs:

"(2) Except as provided in paragraph (4), a consent to adoption of an Indian child or voluntary termination of parental rights to an Indian child may be revoked, only if—

"(A) no final decree of adoption has been entered; and

"(B)(i) the adoptive placement specified by the parent terminates; or

"(ii) the revocation occurs before the later of the end of—

1           “(I) the 180-day period beginning on the  
2           date on which the Indian child’s tribe receives  
3           written notice of the adoptive placement pro-  
4           vided in accordance with the requirements of  
5           subsections (c) and (d); or

6           “(II) the 30-day period beginning on the  
7           date on which the parent who revokes consent  
8           receives notice of the commencement of the  
9           adoption proceeding that includes an expla-  
10          nation of the revocation period specified in this  
11          subclause.

12          “(3) The Indian child with respect to whom a revoca-  
13          tion under paragraph (2) is made shall be returned to the  
14          parent who revokes consent immediately upon an effective  
15          revocation under that paragraph.

16          “(4) Subject to paragraph (6), if, by the end of the  
17          applicable period determined under subclause (I) or (II)  
18          of paragraph (2)(B)(ii), a consent to adoption or voluntary  
19          termination of parental rights has not been revoked, be-  
20          ginning after that date, a parent may revoke such a con-  
21          sent only—

22               “(A) pursuant to applicable State law; or

23               “(B) if the parent of the Indian child involved  
24               petitions a court of competent jurisdiction, and the  
25               court finds that the consent to adoption or voluntary

1           termination of parental rights was obtained through  
2           fraud or duress.

3           “(5)(A) Subject to paragraph (6), if a consent to  
4           adoption or voluntary termination of parental rights is re-  
5           voked under paragraph (4)(B), with respect to the Indian  
6           child involved—

7               “(i) in a manner consistent with paragraph (3),  
8               the child shall be returned immediately to the parent  
9               who revokes consent; and

10              “(ii) if a final decree of adoption has been en-  
11              tered, that final decree shall be vacated.

12              “(6) Except as otherwise provided under applicable  
13              State law, no adoption that has been in effect for a period  
14              longer than or equal to 2 years may be invalidated under  
15              this subsection.”.

16              **SEC. 6. NOTICE TO INDIAN TRIBES.**

17              Section 103(c) (25 U.S.C. 1913(c)) is amended to  
18              read as follows:

19              “(c)(1) A party that seeks the voluntary placement  
20              of an Indian child or the voluntary termination of the pa-  
21              rental rights of a parent of an Indian child shall provide  
22              written notice of the placement or proceeding to the Indian  
23              child’s tribe. A notice under this subsection shall be sent  
24              by registered mail (return receipt requested) to the Indian

1 child's tribe, not later than the applicable date specified  
2 in paragraph (2) or (3).

3 "(2)(A) Except as provided in paragraph (3), notice  
4 shall be provided under paragraph (1) in each of the fol-  
5 lowing cases:

6 "(i) Not later than 100 days after any foster  
7 care placement of an Indian child occurs.

8 "(ii) Not later than 5 days after any  
9 preadoptive or adoptive placement of an Indian  
10 child.

11 "(iii) Not later than 10 days after the com-  
12 mencement of any proceeding for a termination of  
13 parental rights to an Indian child.

14 "(iv) Not later than 10 days after the com-  
15 mencement of any adoption proceeding concerning  
16 an Indian child.

17 "(B) A notice described in subparagraph (A)(ii) may  
18 be provided before the birth of an Indian child if a party  
19 referred to in paragraph (1) contemplates a specific adop-  
20 tive or preadoptive placement.

21 "(3) If, after the expiration of the applicable period  
22 specified in paragraph (2), a party referred to in para-  
23 graph (1) discovers that the child involved may be an In-  
24 dian child—

1 "(A) the party shall provide notice under para-  
2 graph (1) not later than 10 days after the discovery;  
3 and

4 "(B) any applicable time limit specified in sub-  
5 section (e) shall apply to the notice provided under  
6 subparagraph (A) only if the party referred to in  
7 paragraph (1) has, on or before commencement of  
8 the placement made reasonable inquiry concerning  
9 whether the child involved may be an Indian child."

10 **SEC. 7. CONTENT OF NOTICE.**

11 Section 103(d) (25 U.S.C. 1913(d)) is amended to  
12 read as follows:

13 "(d) Each written notice provided under subsection  
14 (c) shall contain the following:

15 "(1) The name of the Indian child involved, and  
16 the actual or anticipated date and place of birth of  
17 the Indian child.

18 "(2) A list containing the name, address, date  
19 of birth, and (if applicable) the maiden name of each  
20 Indian parent and grandparent of the Indian child,  
21 if—

22 "(A) known after inquiry of—

23 "(i) the birth parent placing the child  
24 or relinquishing parental rights; and

1                   “(ii) the other birth parent (if avail-  
2                   able); or

3                   “(B) otherwise ascertainable through other  
4                   reasonable inquiry.

5                   “(3) A list containing the name and address of  
6                   each known extended family member (if any), that  
7                   has priority in placement under section 105.

8                   “(4) A statement of the reasons why the child  
9                   involved may be an Indian child.

10                  “(5) The names and addresses of the parties in-  
11                  volved in any applicable proceeding in a State court.

12                  “(6)(A) The name and address of the State  
13                  court in which a proceeding referred to in paragraph  
14                  (5) is pending, or will be filed; and

15                  “(B) the date and time of any related court  
16                  proceeding that is scheduled as of the date on which  
17                  the notice is provided under this subsection.

18                  “(7) If any, the tribal affiliation of the prospec-  
19                  tive adoptive parents.

20                  “(8) The name and address of any public or  
21                  private social service agency or adoption agency in-  
22                  volved.

23                  “(9) An identification of any Indian tribe with  
24                  respect to which the Indian child or parent may be  
25                  a member.

1                   “(10) A statement that each Indian tribe iden-  
2                   tified under paragraph (9) may have the right to in-  
3                   tervene in the proceeding referred to in paragraph  
4                   (5).

5                   “(11) An inquiry concerning whether the Indian  
6                   tribe that receives notice under subsection (e) in-  
7                   tends to intervene under subsection (e) or waive any  
8                   such right to intervention.

9                   “(12) A statement that, if the Indian tribe that  
10                  receives notice under subsection (e) fails to respond  
11                  in accordance with subsection (e) by the applicable  
12                  date specified in that subsection, the right of that  
13                  Indian tribe to intervene in the proceeding involved  
14                  shall be considered to have been waived by that In-  
15                  dian tribe.”

16   **SEC. 8. INTERVENTION BY INDIAN TRIBE.**

17                  Section 103 (25 U.S.C. 1913) is amended by adding  
18                  at the end the following new subsections:

19                  “(e)(1) The Indian child’s tribe shall have the right  
20                  to intervene at any time in a voluntary child custody pro-  
21                  ceeding in a State court only if—

22                  “(A) in the case of a voluntary proceeding to  
23                  terminate parental rights, the Indian tribe filed a  
24                  notice of intent to intervene or a written objection  
25                  to the termination, not later than 30 days after re-

1 ceiving notice that was provided in accordance with  
2 the requirements of subsections (c) and (d); or

3 “(B) in the case of a voluntary adoption pro-  
4 ceeding, the Indian tribe filed a notice of intent to  
5 intervene or a written objection to the adoptive  
6 placement, not later than the later of—

7 “(i) 90 days after receiving notice of the  
8 adoptive placement that was provided in accord-  
9 ance with the requirements of subsections (c)  
10 and (d); or

11 “(ii) 30 days after receiving a notice of the  
12 voluntary adoption proceeding that was pro-  
13 vided in accordance with the requirements of  
14 subsections (c) and (d):

15 “(2)(A) Except as provided in subparagraph (B), the  
16 Indian child’s tribe shall have the right to intervene at  
17 any time in a voluntary child custody proceeding in a State  
18 court in any case in which the Indian tribe did not receive  
19 written notice provided in accordance with the require-  
20 ments of subsections (c) and (d).

21 “(B) An Indian tribe may not intervene in any vol-  
22 untary child custody proceeding in a State court if the  
23 Indian tribe gives written notice to the State court or any  
24 party involved of—

1 “(i) the intent of the Indian tribe not to inter-  
2 vene in the proceeding; or

3 “(ii) the determination by the Indian tribe  
4 that—

5 “(I) the child involved is not a member of,  
6 or is not eligible for membership in, the Indian  
7 tribe; or

8 “(II) neither parent of the child is a mem-  
9 ber of the Indian tribe.

10 “(3) If an Indian tribe files a motion for intervention  
11 in a State court under this subsection, the Indian tribe  
12 shall submit to the court, at the same time as the Indian  
13 tribe files that motion, a certification that includes a state-  
14 ment that documents, with respect to the Indian child in-  
15 volved, the membership or eligibility for membership of  
16 that Indian child in the Indian tribe under applicable trib-  
17 al law.

18 “(f) Any act or failure to act of an Indian tribe under  
19 subsection (e) shall not—

20 “(1) affect any placement preference or other  
21 right of any individual under this Act;

22 “(2) preclude the Indian tribe of the Indian  
23 child that is the subject of an action taken by the  
24 Indian tribe under subsection (e) from intervening in  
25 a proceeding concerning that Indian child if a pro-

posed adoptive placement of that Indian child is changed after that action is taken; or

“(3) except as specifically provided in subsection (e), affect the applicability of this Act.

“(g) Notwithstanding any other provision of law, no proceeding for a voluntary termination of parental rights or adoption of an Indian child may be conducted under applicable State law before the date that is 30 days after the Indian child’s tribe receives notice of that proceeding that was provided in accordance with the requirements of subsections (c) and (d).

“(h) Notwithstanding any other provision of law (including any State law)—

“(1) a court may approve, if in the best interests of an Indian child, as part of an adoption decree of the Indian child, an agreement that states that a birth parent, an extended family member, or the Indian child’s tribe shall have an enforceable right of visitation or continued contact with the Indian child after the entry of a final decree of adoption; and

“(2) the failure to comply with any provision of a court order concerning the continued visitation or contact referred to in paragraph (1) shall not be

considered to be grounds for setting aside a final decree of adoption.”

**SEC. 9. FRAUDULENT REPRESENTATION.**

Title I of the Indian Child Welfare Act of 1978 is amended by adding at the end the following new section:

**“SEC. 114. FRAUDULENT REPRESENTATION.**

“(a) IN GENERAL.—With respect to any proceeding subject to this Act involving an Indian child or a child who may be considered to be an Indian child for purposes of this Act, a person, other than a birth parent of the child, shall, upon conviction, be subject to a criminal sanction under subsection (b) if that person knowingly and willfully—

“(1) falsifies, conceals, or covers up by any trick, scheme, or device, a material fact concerning whether, for purposes of this Act—

“(A) a child is an Indian child; or

“(B) a parent is an Indian; or

“(2)(A) makes any false, fictitious, or fraudulent statement, omission, or representation; or

“(B) falsifies a written document knowing that the document contains a false, fictitious, or fraudulent statement or entry relating to a material fact described in paragraph (1).

1 " (b) CRIMINAL SANCTIONS.—The criminal sanctions  
2 for a violation referred to in subsection (a) are as follows:

3 " (1) For an initial violation, a person shall be  
4 fined in accordance with section 3571 of title 18,  
5 United States Code, or imprisoned not more than 1  
6 year, or both.

7 " (2) For any subsequent violation, a person  
8 shall be fined in accordance with section 3571 of  
9 title 18, United States Code, or imprisoned not more  
10 than 5 years, or both."

The CHAIRMAN. The decision to adopt a child is done with much love and affection. It is often a process also fraught with both emotional and financial obstacles. This bill will provide what many have complained of—finality in cases involving Indian children.

With that, I'd ask if the vice chairman, Senator Inouye, has a statement.

**STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS**

Senator INOUE. I thank you very much, sir.

Last week there was a very interesting add in Roll Call, a newspaper on Capitol Hill, and it reminded us of the history of Indian country, which continues to impact current events throughout this land.

Although this ad focused upon a different challenge confronting Indian country, I believe it is relevant and appropriate that we consider just a few of the statements that were contained in this Roll Call ad, and I would like to quote from them.

It was very simple. It said,

Two hundred years of exploitation and neglect, more than 700 broken treaties, \$2 billion in tribal trust funds lost or mismanaged, \$200 million in funding cuts last year, and now politicians want to levy new taxes against tribal governments. Have not they paid enough?

That was the ad.

As the committee meets today, it is important that we be ever mindful that we are speaking of the most precious resource in Indian country, the children, and that Indian country has already paid very dearly.

The Indian Child Welfare Act is premised upon the conclusion by the Congress that Indian country had paid enough. It was enacted into law to bring an abrupt halt to an insidious process—a process initiated under the auspices of protecting those children and a process which resulted in thousands upon thousands of Indian infants and children being removed from their mothers and fathers, from their sisters and brothers, from their grandparents and their elders, and from the love in those families that bound them all together.

In contemporary times, we may be tempted to relegate the justification for this act to historical circumstances that are no longer relevant, to suggest that the protections of the Indian Child Welfare Act are no longer needed in a society that values homogeneity and seeks equal opportunities for all children, good homes, good schools, good families.

The challenge is today the same as it has always been: Who defines what is good for Indian children? Whose standards? Whose values? Whose visions? Whose dreams for the well-being of the Indian children will be allowed to define and shape their future?

Let us be certain that the amendments which we address today are considered within the context of the history, which informed the need for the passage of the Indian Child Welfare Act in 1978, and the contemporary circumstances which make the act the crucial cornerstone of the foundation upon which the future of Indian country will be built.

I thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Vice Chairman, for that very eloquent statement. There is no question throughout Indian country of your ongoing commitment to making the lives of Indian people a little better, and we do thank you.

We also welcome our friends from the other body, and would ask Representative Pat Kennedy if he has a statement.

**STATEMENT OF HON. PATRICK J. KENNEDY, U.S.  
REPRESENTATIVE FROM RHODE ISLAND**

Mr. KENNEDY. Thank you, Mr. Chairman. It's an honor to be with you in this joint hearing on this very important subject that has come before both of our respective chambers, and I want to commend you for your leadership and that of Senator Inouye on this matter.

I ask for unanimous consent to enter into the record a statement by our ranking member, Mr. Miller, and also say that I want to associate myself with your own remarks and that of Senator Inouye in saying that it was very disturbing that we did pass a bill last year that I think went absolutely contrary to what—there was almost unanimity, and, in fact, there was unanimity amongst Indian country. All 557 nations said that this went against their beliefs and interests in this issue.

I think, on a government-to-government basis, we ought to have more respect for the tribal sovereignty and the wishes of Native American nations when we consider legislation that usurps their own tribal sovereignty in such a dramatic way as to do away with the protections given to Native American children for adoption proceedings.

I think the experience that gave rise to ICWA in the first place, where there was no protection for Indian children, and the fact that up to one-quarter of Indian children were separated from their tribal cultures and their families in many proceedings that did not take into account the tribe's wishes and the family's wishes, I think is more than enough evidence to why we needed ICWA. And we cannot let a few publicized failures in the adoption proceedings be the reason why we do away with ICWA altogether, and what we need to do is fix problems if they need to be fixed without taking such a dramatic approach as has been proposed in the House and, unfortunately, which passed the House.

I want to thank the Senate for having stopped that legislation from ever going forward, and hence we have checks and balances. In this case the Senate acted as a great check on the House's actions on that case.

With that, I would like to yield back the balance of my time.

The CHAIRMAN. Thank you. Without objection, Congressman Miller's opening statement will be also included in the record.

[Prepared statement of Mr. Miller appears in appendix.]

The CHAIRMAN. Chairman Young, welcome to the Senate.

**STATEMENT OF HON. DON YOUNG, U.S. REPRESENTATIVE  
FROM ALASKA**

Mr. YOUNG. Thank you, Mr. Chairman. I apologize for being a little late. This modern technology of trying to get from the House to the Senate, halfway across I was on a lonely island. The thing

quit running. Very interesting experience, because you can't get out.

I want to welcome everybody, especially the Alaskans, coming down here for the Indian Child Welfare Act amendments of 1997. It has been a long process with the participation of tribal representatives, adoption attorney representatives, and both public and private adoption agencies to reach a common approach to solve existing problems with the adoptive placement of Native American children.

Since the highly-publicized California case of *Bridget R.*'s adoption proceedings in 1995, various Members of Congress have attempted to amend the Indian Child Welfare Act, ICWA. The proposed House bills were opposed by tribal representatives, and with good cause.

I believe the tribes are not consulted without litigation, which would have a major effect upon their membership. Based upon the conflicting views with regard to ICWA, in May 1996 I instructed the Tanana Chiefs Conference, TCC, the National Indian Welfare Association, and the National Congress of American Indians to meet with the American Academy of Adoption Attorneys and the Academy of California Adoption Attorneys to seek a common approach to avoid prolonged litigation over Native American adoptive placements and promote the stability of Native American adoptions.

I want to expressly thank the TCC, in particular, Frank Walleri and Jane Gorman and Mark Gradstein from the AAA, and the Academy of California Adoption Attorneys for the extensive and exhaustive work on these amendments. They have worked diligently for the past 2 years to reach this common goal to help solve existing problems with the adoption and placement of Native American children.

H.R. 1082 and S. 569 are bills that will reduce the possibility of conflict between birth parents and adoptive families. They provide for a notice to Indian tribes of involuntary adoption, termination of parental rights, and foster care proceedings. They also provide for time limitation on the intervention of adoption and set forth criminal sanctions for persons who knowingly falsify or cover up information the child may be an Indian child or a parent is an Indian.

These amendments have been endorsed by tribal representatives and by adoption attorneys and adoption advocates. I believe we have great legislation before us and urge Members to support and vote for the passage of these important bills.

Before I close, Mr. Chairman, I want to include into the two committees' records the American Indian abortion statistics from Allan Guttmacher Institute library records and archives. They are a nationally-recognized repository of abortion statistics information relied upon by U.S. Government, the Center for Disease Control in Atlanta, and I believe the National Right of Life [sic] Organizations.

I've heard rumors that there has been some concern expressed that H.R. 1082 and S. 569 may increase abortion rates among Native American women. This report shows that Native American women have, by far, the lowest rate of abortion among any ethnic group in the U.S. population. I want to dispel that because I re-



member this on the floor last year. We discussed this saying it was a pro-abortion bill. It is not.

Again, welcome. I welcome and look forward to working with the Senate, and especially you, Mr. Chairman, as a former House member sitting in my committee. I look forward to working with you to make this important legislation move forward.

Thank you, Mr. Chairman.  
The CHAIRMAN. Thank you.

The Chair will recognize Representative Donna Christian-Green. Do you have a statement?

**STATEMENT OF HON. DONNA CHRISTIAN-GREEN, U.S.  
DELEGATE FROM THE VIRGIN ISLANDS**

Ms. CHRISTIAN-GREEN. Thank you, Mr. Chairman, for giving me this opportunity to make brief opening remarks.

This is a very important hearing, and I commend you, Chairman Campbell and Chairman Young, for your willingness in holding this joint hearing today.

Let me begin by saying, first of all, that the issue of the welfare of Indian children is of great concern to me. Indeed, I am concerned about all of the issues that affect Native Americans.

In the last Congress, as a result of several high-profile adoption cases involving lengthy disputes under the Child Welfare Act, questions were raised about whether the Indian Child Welfare Act fairly took into account the best interests of the children, parents, and the tribes.

The ICWA, as you know, Mr. Chairman, was enacted in 1978 to address the widespread removal of Indian children from Indian families and placing them with non-Indian families or institutions.

Recognizing the need for legislation to address the concerns raised by the high-profile cases in the last Congress, both Chairman Young and Ranking Member Miller introduced legislation which is virtually identical to the bills before us today in the hopes of addressing these problems.

H.R. 1082 and S. 569 are the product of a proposal which emerged from the mid-year convention of the National Congress of American Indians in Tulsa, OK, in 1985, and which is known as the Tulsa Compromise.

Mr. Chairman, I look forward to working with you and the members of both committees represented here today in moving forward to address the issues in the bills before us, while protecting and preserving the tribal sovereignty and Native American culture and traditions.

Thank you again, Mr. Chairman, for allowing me to make this brief opening statement, and I look forward to hearing from our witnesses.

The CHAIRMAN. Thank you.

Is Representative Pryce here? If you'd come to the table there, we'll—I'd mention, too, that in going through the written testimony, some witnesses—we have eight witnesses. Some of it seems very, very extensive, and I would tell those people with very extensive testimony, all of it will be included in the record and studied copiously, but for the duration that we'll be in here today, if you could abbreviate your comments a little bit we would appreciate it.

With that, Representative Pryce, welcome to the Senate. You may proceed.

**STATEMENT OF HON. DEBORAH PRYCE, U.S.  
REPRESENTATIVE FROM OHIO**

Ms. PRYCE. Thank you very much, Mr. Chairman.

I appreciate the opportunity to be here, and Chairman Young and the rest of the committee members, thank you very much.

My interest in this issue began when my constituents, the Rost family in Columbus, OH, told me the story of their fight to keep their adoptive twin daughters. When these little girls were placed for adoption by their birth parents, nobody knew of their Indian heritage. It was only after their grandmother signed them up with the Pomo Tribe that the ICWA was invoked and the adoption was put on hold.

Three years later, after taking a second mortgage on their home, accruing thousands of dollars in legal bills, and enduring a tremendous emotional toll, the Rost fight still continues.

This case is not an anomaly. Since I became involved in this issue, I have heard numerous horror stories from people all over the country who are victims of the ICWA. Much of this stems from a broad and inconsistent application of this very well-intentioned law.

I won't dwell on these horror stories today or I won't have time to continue on with my testimony and we'd be here all day.

Let me begin by saying that our Constitution protects the rights of individuals against classifications based on race, and it protects the rights of parents to control their children's upbringing. These are fundamental liberties and they are privacy issues.

The ICWA excludes all other circumstances to the sole factor of race and denies these basic Constitutional rights to parents who have a child with any Indian blood.

I feel strongly that the very good and important protections of ICWA will be lost if we don't correct some of the problems.

For example, a mother who has no Indian blood whatsoever or any ties to Indian culture who voluntarily places her child for adoption and who chooses the adoptive parents can have those decisions that she made for her child overturned by an unknown third party solely because her child has some small quantum of Indian blood.

Now, as more and more Americans become outraged by the violations of basic individual rights that had interpretations by courts of ICWA embodies, I believe we will see the demise of this law.

As a former judge and an adoptive mother, I am sorry to testify today that S. 569 and H.R. 1082 do not address the fundamental issues. Instead, these bills take a procedural approach that, in my view, is cumbersome enough to significantly discourage the adoption of Indian children and to make many lawyers rich. The complexity of these requirements almost guarantees an inability to comply.

Now, I plead, I implore the members on the committees to read this legislation and understand just how cumbersome it really, really is.

As a former judge, I can tell you that courts are going to have a very difficult time applying the provisions. Frankly, these bills'

procedural reforms do not go nearly far enough to address the real concerns that are denying the placement of needy children in permanent loving homes.

I will reintroduce substantive legislation that is similar to the language that the House passed last year, however, in an effort to make a very good faith compromise, I will remove many of the provisions of this legislation that are objectionable to the Native American community.

This new bill will not address retroactive membership in a tribe, nor will it require adults to give written consent to become a tribal member. In addition, a provision that the tribes felt would limit their ability to appeal will be deleted.

The language that remains will codify into statute the law applied by many State courts known as the "existing Indian family doctrine." Under this doctrine the ICWA does not apply to children who do not live on a reservation unless at least one parent of Indian descent maintains significant social, cultural, or political ties to the tribe of which either parent is a member.

It is this doctrine that has been applied to the *Rost* case by the California court of appeals. The U.S. Supreme Court denied the petitions that asked for a review of this decision, indicating that the court accepts the application of this doctrine as a correct interpretation and application of the ICWA.

Codifying the existing Indian family doctrine into law is a good first step toward reforming the ICWA that should have the support of all parties interested in the law's preservation.

I continue to look forward to working with the committees, the Native American community, and all interested parties to improve the ICWA so that it can work to protect the rights of children, the Native American tribes, and all adoptive families.

Thank you very much for this opportunity.

Mr. Chairman, as you know, I am not alone in my support to reform the Indian Child Welfare Act in the House, along with what we did last year. My colleagues, Jerry Solomon and Todd Tiahrt share my views and are dedicated to this issue. And I understand Congressman Tiahrt has already submitted his written testimony to the committees, and with your permission I would like to submit Congressman Solomon's testimony to be included in the record.

The CHAIRMAN. Without objection, that will be included.

Ms. PRYCE. Thank you very much.

[Prepared statements of Ms. Pryce and Mr. Solomon appear in appendix.]

The CHAIRMAN. Let me ask you a couple of questions before I turn to my colleagues.

Ms. PRYCE. Yes, sir.

The CHAIRMAN. Just for my own information, how old was the Pomo youngster to which you referred, the Rost child?

Ms. PRYCE. How old were they? They, I think, were—they were not infants, but they were just months old when they were adopted.

The CHAIRMAN. They're still in the legal custody of their adoptive parents now?

Ms. PRYCE. Yes; they are in custody of the adoptive parents.

The CHAIRMAN. Would this pending legislation that we're dealing with today not have corrected that problem with those particular adoptions had it been in place?

Ms. PRYCE. There are some who would argue that it would, but it still leaves it open to court interpretation, and that's the problem. Mr. Chairman, courts are all over the board on interpreting this law, and it just needs shored up.

And the changes made in these two bills are—I think just further complicates it, as opposed to simplifying it, and it just will lead to further and further litigation.

The CHAIRMAN. Yes; in your opinion, other things being equal, is it better to place a child with a member of its close or extended family for either foster care or adoption, would you think?

Ms. PRYCE. All things being equal, I think it is better to place the child with a member of its family, if that doesn't also include bouncing through foster care for years and years.

The CHAIRMAN. You apparently feel this does not go far enough. I was wondering, when we deal with State courts, State adoption proceedings, would that conflict with the Federal regulations about who is determined to be an Indian or who is not, which currently leaves it to each tribe?

Ms. PRYCE. That is correct. No, I don't believe it does, sir. I don't think this touches that issue. Now, you'll hear testimony later on today that says it does, but this doesn't change that portion of

ICWA at all.

The CHAIRMAN. Under your bill would it?

Ms. PRYCE. No.

The CHAIRMAN. It would not. Okay. Thank you. Chairman Young, did you have some questions?

Mr. YOUNG. Thank you, Mr. Chairman. I have information that the Rost family does support my legislation. I know we discussed this before and there will be testimony to that fact later on, so they apparently feel that this would have taken care of the problem. I understand your feelings about it.

The only thing—I read in your testimony and also listened to your testimony. I'd like to remind you that, being one that was involved, that ICWA was originally based on a government-to-government relationship, and that's what sovereignty is all about. It's not about the Constitutional rights of any one person unless it comes under the doctrine of the American flag. This is a country-to-country relationship.

We reviewed that. In fact, the Department of Justice will testify later. And at the time we wrote this act, we reviewed the 14th amendment very closely, and it was the opinion of the Justice Department and the opinion of this Congress that, in fact, it was a country-to-country relationship and not individual-to-individual.

So, although I respect your belief and what you're trying to do, I hope you don't base your total argument on that premise, because I don't think it will hold up in the courts, nor will it hold up with the Justice Department or with this Body, itself, because we did do this when we wrote this legislation.

Ms. PRYCE. If I might comment.

Mr. YOUNG. Yes, go ahead.

Ms. PRYCE. I understand that, sir, and I believe you are correct in that respect. My greatest angst comes from the fact that if we allow these situations to continue and these horror stories to keep appearing in the press, that the very good parts of ICWA—there will be a public outcry to have the whole thing repealed. There already is that movement over in the House, as you are well aware. I do not want to see that happen. And—

Mr. YOUNG. I appreciate that very much. The thing that I'm concerned is that this is a classic example of a bill that was written correctly, I believe, that had some weaknesses which we did not see, some lawyers that were not too scrupulous, and consequently we've had a problem.

But when we get to the horror stories, I've lived through the horror stories—

Ms. PRYCE. I know you have.

Mr. YOUNG. [continuing]. In the previous years before we had ICWA, the reason I got involved in this, and I watched whole groups of people being expropriated out of their community and no one really knew what was going on. This was the reason ICWA was created.

I'm going to—I think my legislation is pretty well construed, and I want to thank the chairman. And we'll just have to debate this on the floor and debate it in the communities and see what's correct.

But I hope we have the one goal in mind, and what I hear you say is to try to make that work better.

Ms. PRYCE. That's right.

Mr. YOUNG. But also keep the premise of the act as we originally passed.

I thank you for your testimony.

Thank you, Mr. Chairman.

Ms. PRYCE. Thank you very much.

The CHAIRMAN. Vice Chairman Inouye, do you have any questions?

Senator INOUE. Mr. Chairman, may I commend Chairman Young for his statement and observation.

Many Americans, including myself, find it very difficult to, at times, understand the scope and the importance of Indian sovereignty, and that is what is involved in this case.

For example, I note that today many Americans are going abroad—in fact, two of my staff people have gone as far as China to adopt their children. I commend them for that. But they found that, in both cases, they had to comply with the laws of China. It mattered very little as far as parental consent was concerned. In every case, the parents consented, but the Government had to say yes or no. That is the nature of sovereignty.

The other matter that Chairman Young brought up I think is very important to the matter before us. On the matter of the 14th amendment, I think that has been cleared. I am certain you will agree that the status of an Indian tribe is not a racial classification; it is a political and legal one. Our relationship with Indian country is, as Chairman Young put it, country-to-country or nation-to-nation or government-to-government, and I believe that is what the act was premised upon.

So I hope that we will keep those matters in mind as we proceed here.

Thank you very much.

The CHAIRMAN. Without objection, what I'm going to do is go back and forth from side to side.

Senator McCain, did you have any opening statement or questions of this witness?

**STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA**

Senator MCCAIN. Mr. Chairman, I would like to have my opening statement be made a part of the record, if I may.

The CHAIRMAN. Without objection, so ordered.

[Prepared statement of Senator McCain appears in appendix.]

Senator MCCAIN. I'd just say I want to thank Congressman Young, Chairman Young, and my dear friend, Dan Inouye, and others, and you, Mr. Chairman, who have been involved in this issue. It has been a terribly frustrating one for me personally, as well as the Indian community, because we were able to, thanks to a lot of people, get the tribal attorneys—the adoption attorneys together and tribal representatives in what was an agreement that was, we believed, entirely acceptable. We passed it through the Senate here, as you know, and then it was blocked in the House.

I just don't quite understand how people could object to this. I understand on most issues the objections, but everybody admits that this compromise would improve the situation, make it easier to protect the interests of the child primarily, the family, and the tribes.

I hope we can move forward with it this year, and I want to thank you, Mr. Chairman, for your leadership, as well as Chairman Young, Senator Inouye, and others who have been involved in it.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, clearly any bill that we deal with that has effect on people's lives and something as emotional as adoption can be isn't going to satisfy everybody, but I certainly thank you for all the effort and leadership, Senator McCain, that you've put in on this issue.

Senator MCCAIN. Thank you, Mr. Chairman.

The CHAIRMAN. Congressman Kennedy.

Mr. KENNEDY. Thank you, Mr. Chairman.

I want to address my colleague, Representative Pryce.

You said that you do not support today the Young-Miller proposal?

Ms. PRYCE. I say I don't believe that it goes far enough, and I think that we're missing what may be our only opportunity to correct this situation once and for all. And I really think that the cumbersome nature of the requirements of these bills will just create more litigation, more problems in the courts, make a lot of business for a lot of lawyers.

In the long run, these things—many of the problems will be solved but it will just create a horrendous cycle of litigation for many families that don't necessarily have to go through it.

Mr. KENNEDY. So this proposal, having been a compromise proposal, taking it into consideration, meetings that the tribal attor-



neys had, including the couple in your District, it improves on the existing law with respect to the concerns that you have, but it's not sufficient, in your mind, to—you don't—last year you supported it and this year you don't?

Ms. PRYCE. Last year I gave it qualified support because I think it does correct some of the problems, but, at the same time, it creates new ones.

And so there are elements in the adoption community that truly believe that the status quo is better than this bill, and so it is qualified support. I think that it does correct some of the problems, but in the same instrument creates new ones.

Mr. KENNEDY. Well, what I'm trying to understand is I believe that the Native American community that sort of signed off on this compromise as a viable compromise weren't happy with it, themselves. They figured they'd rather have it stay with the status quo and they felt that they were giving up a great deal to even come this far.

But if that's not good enough for you, I think the feeling amongst Native Americans is: Why even make the effort if this isn't even going in the direction we want it to go in in the first place?

Ms. PRYCE. Good question.

Mr. KENNEDY. So you can see where they would want to—

Ms. PRYCE. Certainly.

Mr. KENNEDY [continuing]. Keep the status quo, as opposed to even making the effort.

Ms. PRYCE. And there are many in the adoption community who would prefer the status quo, as well. That's my only point.

Mr. KENNEDY. But what I've been trying to figure out is if we're interested in making a—moving forward your proposal, or whether we want to just have a stalemate and have a face-off between two sides that are diametrically opposed.

Ms. PRYCE. Well, I don't know that it has to come to that. You know, it has been a process. It has been a painful process, but I think we're making progress.

The bill that we passed in the House last year is going to be re-introduced, much watered down, with many of the concerns addressed, and so I don't see this as a waste of time.

Mr. KENNEDY. Well, it may be a waste of time if you don't support it and it doesn't have—because in terms of Native American community, they're making an effort to listen and consider, but if they're—I mean, in their interest, they're trying to protect their own community.

Ms. PRYCE. Right.

Mr. KENNEDY. And for them, the flexibility they've tried to offer is not something that I think is out of their own best interest. And if you look at it from their own good faith compromise attempt, they've made some efforts to meet some of the concerns that your bill brought up. But now you're saying you don't think that that is sufficient or—I mean—

Ms. PRYCE. I don't know. I wasn't really a party to drafting it. My point is that we're all here with the same objective, and that is to preserve ICWA, and we really need to be careful how we do it.

Nobody feels more strongly about it than I do, after dealing with this for a few years now and being right in the middle of it. And so I'm just saying that I believe that we can do it better.

Mr. KENNEDY. I appreciate that. This is my last point. The fact of the matter is, it's hard for me to think that you're in the middle of it if there were 557 tribes that were against it at the outset when you first introduced your bill. It was unanimously rejected by Native American nations. And we do have a sovereign-to-sovereign, government-to-government relationship with Native American nations.

The fact that we're talking about a compromise where they, at least in this phase of the deliberations, have at least had some say in the matter, whereas before they didn't feel they had any say in the matter.

Ms. PRYCE. Congressman, I'm very encouraged because at least now they're talking to me. The reason they didn't is because we couldn't engage them. It was very difficult because it was a—it's a very emotional issue.

I think that we're all heading in the right direction, and the fact that we're all here talking about this is a very good thing.

Mr. KENNEDY. All right. Well, in conclusion, Mr. Chairman, I'd again like to associate myself with the remarks of Senator Inouye. The fact that there is a government-to-government relationship here, and that needs to be considered, because this isn't simply our Government's wishes. We need to take into consideration the governments that we're dealing with.

And when they have such a unanimity of opposition to this legislation, I think we need to definitely respect the sovereignty of their position and approach this on a negotiation basis, as opposed to a compromise basis that I think so far has only left them with a feeling that they are not sure who they are dealing with if they don't feel at the end of the day there's an assurance that the bill that they've signed off on that they feel is better than what was proposed is going to be the accepted alternative. And if it isn't, then I think they're dealing with a shifting foundation. I think that can be very unsettling. I can understand why it causes them a great deal of concern in going forward on this matter.

Thank you, Mr. Chairman.

The CHAIRMAN. Yes, Representative Christian-Green, do you have questions of the witness?

Ms. CHRISTIAN-GREEN. Yes, thank you, Mr. Chairman.

Congressman Pryce, you said in your statement that the complexity of the requirements almost guarantees an inability to comply. Could you point to one or two of the requirements that would be difficult to comply?

Ms. PRYCE. I don't have it in front of me, but if you have a copy of it, if you just turn to—just the notifications through each stage and how cumbersome that process is, that's a very good example of how difficult it will be to actually comply without setting up a cause for interruption later on of the adoption, because if everything isn't done to the letter of the law, now there's cause for tribes or whoever, family members, to come back later on, and if it's not done correctly, those adoptions can be then interrupted.

Ms. CHRISTIAN GREEN: Thank you. You also responded to the first question when you answered that, if all things being equal, you felt it would be better for the Native American child to remain with the tribe. But all things are not always equal, truly equal. Would you also agree that, barring any serious circumstances that would create a negative effect or a dangerous situation for the child, that it would still be better, even if circumstances were not exactly equal, for the Native American child to remain with the tribe?

Ms. PRYCE: I think that's always preferable, except when a child bounces around for years and years of his or her life before there is any permanency in a family relationship.

And there's also some exceptions when you have a mother who is going to have a baby and would like to place that child with a family that she chooses, and she doesn't have any Indian blood, and her child may have some small quantum of Indian blood, but that woman then is denied the opportunity to place the child where she believes it should be.

And so there are exceptions to that general statement that you would like me to make, but obviously, I agree that children of Indian heritage—you know, if they can stay in the tribal family and be brought up without having them bounced and bounced and bounced—and we have all heard those stories—I think definitely it would be preferable without that happening.

Ms. CHRISTIAN GREEN: Thank you.

Ms. PRYCE: Yes.

The CHAIRMAN: Our good friend from the House side, good to see you here. Do you have some questions?

#### STATEMENT OF HON. ENI F.H. FALEOMAVAEGA, U.S. DELEGATE FROM AMERICAN SAMOA

Mr. FALEOMAVAEGA: Thank you, Mr. Chairman. I just want to say we do miss your presence in the House, but we also know that you're doing a tremendous job here in the Senate and really want to commend you for always being supportive of the important issues of confronting our Native American community.

I do also want to personally welcome my good friend from Ohio, the gentle lady from Ohio, Congresswoman Pryce.

As you know, Mr. Chairman, we are revisiting this issue again, and hopefully there will be some resolution to some of these very serious dilemmas that we find ourselves in.

I do have a sensitivity of what Congresswoman Pryce is trying to say, not because they're white parents or any parents. The whole concept of adoption, I think is really where my good friend from Ohio is trying to make her point, and I fully understand and appreciate that.

Ms. PRYCE: Thank you.

Mr. FALEOMAVAEGA: It isn't because of white parents. We have instances where white parents, who in good faith, followed the adoption laws, somewhere along the line got really messed up and they've incurred tremendous bills in paying their attorneys and trying to find out, and the agony and the suffering that they've had in just trying to adopt a child, whether they be Indian or any other.

But at the same time, we also have a dilemma in trying to have the Members of both chambers of this institution, the Congress, to understand that, of all American citizens in our Nation, Native Americans have a very unique relationship with our Nation.

I believe, if I am correct in reading the Constitution, I believe Native American Indian tribes are the only entity expressly stated under the Constitution where, by treaty relationship, the U.S. Government has a very different and unique relationship with Native American Indian tribes.

By my last count, I guess about 400 treaties were entered between the U.S. Government and these Indian tribes, and by my last count every one of these treaties was broken by the U.S. Government. So we have a relationship, yes, and I don't want to dwell on the sins of the past, Mr. Chairman, but we've had too many trails of tears. These Indians have suffered. And I don't want to get into that, I get very emotional when I talk about this.

But at the same time I can sympathize, empathize, and appreciate the concerns that Congresswoman Pryce has brought before the committee.

ICWA was established for the very purpose to make sure that there is some sense of stability for Indian communities throughout our Nation. Yes, our first national policy was to kill the Indians, annihilate them, get rid of them. And then we came out with this so-called "assimilation" policy. Make them Americans. It wasn't until 1924 that we finally granted them U.S. citizenship.

So I think we have to have some sense of appreciation and a perspective about the problems that we're faced with when we deal with Native Americans and adoptions. It's a very relative issue.

I come from a society that is very communal, very similar to Native Americans, and I want to share with my colleagues my own personal experience about adoptions.

My wife is from Tahiti. We had two boys, two girls, and the last child that was born to us was a girl. And so my first cousin, who is a minister—he's only about 6 feet 5 inches, 250 pounds, typical Samoan weight and height—he had six sons. And he's just like an older brother to me. He comes up and says,

Hey, cuz, I just understand that your wife just gave birth to a girl. I have six boys. They need a sister. Could you please give us your girl so that it will make my family a little happier to have a girl around?

I said,

No problem. You can have my daughter.

Mr. Chairman, for a whole week my wife was in tears. She couldn't believe that I would be so callous and so without any sense of love and affection for this child that we'd just had. Yes, she had to give birth. I didn't give birth to this daughter. But in the essence, this was a cultural thing. And I suspect that Native Americans do the same thing. In fact, I wasn't even raised by my parents. I was raised by my grandparents.

So the whole concept of adoption has a very different meaning, I think. And I fully agree with my good friend from Ohio. We have laws. White parents, blue parents, red parents, they want to comply because they love the children they want to adopt.

So we're caught in this quagmire in saying how do we treat Indian children? Do we treat them just like any other American citizen?

zen? Or do we pass Federal laws, as is the responsibility of the Congress? The full responsibility to deal directly with Indian tribes, is vested in the Congress because Indian tribes are sovereign nations.

Yes, we can talk on until we're blue in the face about sovereignty. I don't need to get into that, Mr. Chairman, but my colleagues can talk about gaming all day if we talk about Indian sovereignty.

But I do want to say that I fully support the Young-Miller version, hopefully that we are making a sincere effort to strike a balance and to see absolutely that the wishes or the Constitutional rights of white parents, blue parents, are fully protected when they adopt children, whether they be Indian children or any other child.

I think this is what I'm sensing where my good friend from Ohio is coming from.

But I want to share with you what Indian Child Welfare has done for our Indian community. It has saved countless Indian families. It has saved countless Indian children from losing their heritage. It has enabled and mobilized Indian tribes to develop their own juvenile courts, codes, and children welfare services.

What I want everyone to understand is that Indian tribes and Indian families are not the bad guys. We didn't draft and the Indians didn't create ICWA because Indians were the problem. No, ICWA was created because unethical adoption agencies were the problem, and they still are.

Indian tribes only want to make sure that Indian children find loving homes as soon as possible. This bill helps tribes accomplish that goal.

Yes, maybe our Indian court system was not very stable. Maybe they have problems. But this bill tries to address those issues.

We're giving due notice to the Indian court system that we currently have. Buckle up. You need to get your act together, too, to make sure that there is proper timing, proper authorities, proper procedures so that the rights of white parents are fully protected just as well.

So I just want to share this with you, Mr. Chairman. I'm proud to support the measure that Congressman Young and Congressman Miller have now proposed before the committee, and I will fight with all my energy any proposal that lessens the protection Indian children currently have under the Indian Child Welfare Act.

Again, Mr. Chairman, I want to thank my good friend from Ohio in expressing this concern of parents who have had to go through the agonizing experience of being taken around or given the run-around and never seem to get a final decision.

I would strongly suggest that my good friend from Ohio would offer some language in certain provisions of this bill that maybe we can work together and see how we can work this thing out and iron out the concerns that she has. I personally would welcome that, Mr. Chairman, and I would welcome my good friend that we could continue working the language of the current bill and see that maybe we can find the middle ground, we can find a position which is satisfactory to the needs of her constituents and the problems that she's had to face with them.

With that, Mr. Chairman, I thank you.

The CHAIRMAN. Thank you.

Mr. FALCOMAVAEGA. And I thank my good friend for being here.

Ms. PRYCE. Thank you.

The CHAIRMAN. I might say that a lot of times I think in this city we're driven by reports and legal positions and polls and statistics and a number of things, but I thank my friend from the House side for making that statement because he comes from a Native American culture—offshore, but a Native American culture—and I think he understands, as I do, that from a cultural standpoint there are a lot of things that we don't deal with in all these square boxes here in Washington.

When I tell people, for instance, that in the Indian community you can have two mothers, it's hard for them to believe that, but we very often do. I do. I have two mothers. One has passed away, my biological mother. I have an adopted mother. But there is nothing written. There were no reports, no court decisions.

There was nothing in many of the—most Indian cultures, and perhaps where my friend comes from, too—

Mr. FALCOMAVAEGA. Would the chairman yield?

The CHAIRMAN. Yes; Sure, for 1 moment.

Mr. FALCOMAVAEGA. I've got constituents, Samoan constituents, that write to me all the time and say, "I've got to go see my mother." I said, "Okay. Go ahead. What's the problem?" They'll say, "Well, I have no papers, no adoption papers." And whether the you're about to join the service or to even go to school, I said, "But you mean we have to go through this process?" "Well, see the court of law. We have laws." I said, "But, geez, my aunt raised me since I was a baby. As far as I'm concerned, she's my mother." This is the situation.

And by the way, we didn't give our daughter to my—we did not. We still have our daughter. But as far as my cousin was concerned, that's his daughter and she's got six brothers, and which I never doubt in my mind that they're going to look after her when I die.

The CHAIRMAN. That's the Native communal way that you may have two mothers, you may be raised by an uncle or an aunt just as if you were a son. And when you try to put all that in some kind of legal jargon, it doesn't fit. But everybody understands it in the Native community and accepts it and treats it as if your "adopted mother" is your real mother, with all the deference you would pay to a real mother.

And none of that stuff fits, I suppose, here in Washington, but it certainly complicates the whole question when you're talking about how do you fit cultural values that have been generation after generation, century after century, as the accepted practice. How do you fit that in some law in Washington, DC? It doesn't fit. It simply doesn't fit.

Let me just maybe ask you one last question. Under your proposal for the purposes of ICWA, the State courts would determine—as I understand it, the State courts would determine who is an Indian. Is that or is that not right?

Ms. PRYCE. Well, Mr. Chairman, the process is the same as it is now. That does not change.

The CHAIRMAN. That means under your language the State courts would accept the tribes' determination of who is their en-



rolled member and therefore Indian, because the Federal Government accepts each tribe's determination?

Ms. PRYCE. But that is the subject of litigation under the bill—under the current status of the law now all the time. That won't change by my bill.

Like I said before, we don't—and that's the argument, that it's very hard to rebut, but we don't change that portion of ICWA at all. We're just codifying what the Supreme Court, by its denying a certiorari on this case, and many of the State courts have found as a sound basis for determination.

The CHAIRMAN. I see. Well, I do appreciate your appearance. Thank you very much.

I might ask you if you have any additional comments you'd like to make or things that you think could make the Young bill supportable, if you would give us those comments I'd appreciate it.

Ms. PRYCE. Thank you very much. I appreciate the opportunity to work with all of you.

The CHAIRMAN. And with that I'd ask Senator Inouye if he would Chair for the next few minutes. I have to run. I've got a little conflict. I'll be back in just a few minutes.

Senator THANK YOU.

Senator INOUEY [ASSUMING CHAIR]. Thank you. Our next panel consists of the assistant secretary for Indian Affairs, Ada Deer; the director of the Office of Tribal Justice of the Department of Justice, Thomas LeClaire.

Secretary Deer, welcome to the committee.

**STATEMENT OF HON. ADA E. DEER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY BETTY TIPPECONNIE, PRINCIPAL CHILD WELFARE SPECIALIST**

Ms. DEER. Good morning, Chairman Campbell, Chairman Young, and members of the committees. I have accompanying me today Betty Tippeconnie, who is the Principal Child Welfare Specialist.

I appreciate the opportunity to present the Department of the Interior's views on the proposed amendments to the Indian Child Welfare Act of 1978.

I also want to note my appreciation for the strong leadership of each of the chairmen and former Chairman McCain and Chairman Inouye for all you have done on issues of concern to Native Americans.

Today's hearing will continue our cooperative efforts, exemplified most recently by our joint efforts to protect tribal governments from taxation and in the success of Chairman Young and Secretary Babbitt in reaching agreement on ways to reform the national wild-life refuge system.

I will summarize the written statement I have submitted for the record with the following points.

First, the Department of the Interior supports H.R. 1082 and its companion bill, S. 569, which incorporate the consensus-based tribal amendments developed last year by your tribal governments, the National Congress of American Indians, and representatives of the adoption community.

Second, while the Indian Child Welfare Act has fulfilled its objectives in giving the Indian tribes the opportunity to intervene in custody proceedings on behalf of their Indian children, the act should be amended to give it greater clarity and certainty in its implementation.

The proposed amendments will end any uncertainty that the Indian Child Welfare Act applies in voluntary child custody matters. The amendments will ensure that Indian tribes receive notice of voluntary ICWA proceedings and clarify what should be included in the notices.

If a tribe seeks to intervene in the voluntary proceeding, it must certify the tribal membership status of Indian children or their eligibility for membership. This certification will add certainty to the question of whether a child is Indian under the ICWA and ensures that tribal membership determinations are not made arbitrarily.

To reduce uncertainties in the adoption process, the amendments will also place time limits on when Indian tribes and families may intervene and when birth parents may withdraw their consent to an adoption, but only after the tribe receives adequate notice of proceedings.

As my colleague Tom LeClaire, from the Department of Justice, will discuss, the amendments will provide criminal sanctions to discourage fraudulent practices by individuals or agencies which knowingly fail to disclose the Indian identity of a child or their birth parents in order to circumvent ICWA.

All these are good amendments and will make the act work better for tribes, birth parents, persons seeking to adopt, State courts, and, most importantly, Indian children. After all, that's what this is all about—protecting the best interests of Indian children.

In closing, and as the Department statement more fully discusses, I'm gravely concerned that the objectives of ICWA continue to be frustrated by State court created exceptions. These involved certain State courts who have sought to second-guess tribes as to who is an Indian or eligible for membership in the tribe.

This doctrine is called the "existing Indian family exception," and has been used by certain State judges to run amuck by delving into sensitive and complicated areas of Indian cultural values, customs, and practices that, under existing law, have been left exclusively to the judgment of Indian tribes.

A bill proposed last year which sought to codify this misguided practice was wisely rejected by the two committees here today. The Administration strongly opposes any legislative recognition of the existing Indian family exception because it is bad policy.

I also must take exception to Congresswoman Pryce's concern that ICWA is unconstitutional. The Supreme Court has long held in cases like *Morton v. Mancari* that Congress can legislate in the area of Indian affairs based on the political status of tribes and their members.

This concludes my testimony, and we at the Department of the Interior stand ready to assist you in any way so that there will be swift passage of these amendments by Congress and approval by the president.

Thank you.  
Senator INOUEY. Thank you very much, Secretary Deer.

[Prepared statement of Ms. Deer appears in appendix.]  
 Senator INOUE: May I now call on Director LeClaire?

**STATEMENT OF THOMAS L. LECLAIRE, DIRECTOR, OFFICE OF TRIBAL JUSTICE, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.**

Mr. LECLAIRE: Thank you.

Chairman Campbell, Chairman Young, and members of the Senate Indian Affairs and House Resources Committees, I am Tom LeClaire, director of the Office of Tribal Justice for the Department of Justice. Thank you for inviting the Department to present its views on S. 569 and the companion bill, H.R. 1082, which would amend the Indian Child Welfare Act.

The administration and the Attorney General recognize the need for caring families and nurturing homes for Indian children. To this end, the Department supports S. 569 and H.R. 1082. The proposed legislation advances the best interests of Indian children, while preserving tribal self-government.

We are informed by the Departments of the Interior and Health and Human Services that ICWA generally works well. The implementation of ICWA in a relatively small number of voluntary adoption cases, however, has evoked intense debate both in Congress and elsewhere.

Generally Indian parents or tribes in these problematic cases allege that ICWA was not complied with and seek to recover custody of the Indian children involved.

The time consumed by the legal proceedings disrupts lives and causes significant anguish.

In addressing these problematic cases through S. 569 and H.R. 1082, Congress has been mindful of ICWA's important purposes and affirmed tribal rights of self-government.

Since the early days of this Nation, the United States has recognized that Indian tribes have the authority to govern their members and their territory. The United States has entered into hundreds of treaties and agreements with Indian tribes, pledging protection for Indian tribes and securing the tribes' rights to the highest and best form of government—self-government.

ICWA is a constitutionally-valid statute that is closely tied to Congress' unique obligations to Indian tribes by protecting the best interest of Indian children and families while promoting tribal rights of self-government.

Mr. Vice Chairman, let me reiterate. As it exists and when amended by these proposed bills, it is our belief that ICWA is constitutional. Under ICWA, courts are able to tailor foster care and adoptive placements of Indian children to meet the best interests of children, families, and tribes. We understand that the vast majority of the cases are adjudicated without significant problems. The application of ICWA to a limited number of cases involving adoptive placement that are later challenged by the biological parents or the children's tribes has drawn criticism.

While these cases are heart-rending and they are difficult, they have a tragic result for all the parties involved, it is important to reiterate that these problematic cases are not indicative of the manner in which ICWA operates in most cases.

Further, many of these cases would not have been problematic if ICWA's dictates had been complied with at the outset of the adoption process.

For example, among the cases commonly cited for the need to amend ICWA is the adoption that provided the factual predicate for the *Rex Bridget R.* decision by the California court of appeals. The ensuing protracted litigation has disrupted the lives of all who are involved in that litigation.

Had ICWA been complied with in that instance, however, most of the delay and quite possibly the litigation, itself, would have been avoided.

*Bridget R.* therefore signals a need to fine-tune ICWA's statutory mechanisms to provide incentives for early compliance with ICWA in the adoptive process. And I would note that we think these bills do that.

Many opponents of ICWA have focused solely on *Bridget R.* and other anomalous cases and made the assumption that ICWA's application to these cases will produce a particular outcome; namely, the removal of children from non-Indian adoptive parents.

Cases such as *Mississippi Band of Choctaw Indians v. Holyfield* demonstrate that this assumption is mistaken. After the Supreme Court ordered the case transferred to the Choctaw tribal court, the tribal court determined that it was in the children's best interest to remain in the current placement with Vivian Holyfield, the non-Indian adoptive parent.

In order to preserve the link between the children and the tribe, the court made arrangements for continued contact with extended family members and the tribe. As *Holyfield* demonstrates, ICWA does not resolve the ultimate issue of who should have custody of a particular Indian child; rather, it allows courts to make that decision on a case-by-case basis, taking into account the best interests of the child.

I would like to address briefly the so-called "existing Indian family doctrine," a judicially-created exception to ICWA which has been fashioned by State court judges. That doctrine establishes an exemption from ICWA's mandates where the biological parents of the child fail to maintain a sufficient nexus with the tribe.

Pursuant to this exception, Federal statutory protections turn on a tribal member's degree of social, cultural, or political affiliation with an Indian tribe rather than on a tribal government's determination of tribal membership. This doctrine is contrary to recognized rights of tribal self-government.

For example, the Supreme Court held in *Santa Clara Pueblo v. Martinez* in 1978 that the power to determine tribal membership is a fundamental aspect of tribal self-government, akin to the power of the United States to determine its own citizenship. Tribal membership is thus a matter of tribal law which should be determined by tribal government institutions.

Moreover, the existing Indian family doctrine grafts onto ICWA a subjective and open-ended test that, if anything, will increase litigation. The existing trigger for ICWA, tribal membership or eligibility for tribal membership, is simple and discernible by an inquiry to the relevant tribal government.



S. 569 and its companion bill, H.R. 1082, reflect a carefully-crafted agreement between Indian tribes and adoption attorneys, an agreement designed to make Indian child adoption and custody proceedings more fair, swift, and certain.

In improving the fairness and certainty of ICWA, S. 569 and H.R. 1082 promise to advance the best interests of Indian children while preserving longstanding principles of tribal self-government. These bills would clarify ICWA, establish deadlines to provide certainty, reduce delay in custody proceedings, and strengthen Federal enforcement tools to ensure compliance with the statute in the first instance.

We appreciate the efforts that this committee, Chairman Campbell, Chairman Young, have made to foster dialog on the Indian Child Welfare Act.

This concludes my prepared statement. At this time, Mr. Vice Chairman, I am prepared to answer any questions.

Senator INOUE. Thank you very much, Director LeClaire.

[Prepared statement of Mr. LeClaire appears in appendix.]

Senator INOUE. Because of the limitation of time, I will be submitting my questions for your consideration and response; however, I have been asked by the chairman, Senator Campbell, to ask certain selected questions.

Secretary Deer, as a former social worker, do you believe it would be in the best interest of Indian children to allow visitation under the proposed open adoptions provision if that child is adopted by a non-Indian family?

Ms. DEER. Yes, I do.

Senator INOUE. And, Mr. LeClaire, I realize that this is repetitive, but with respect to the so-called "existing Indian family doctrine," do you believe it is appropriate for State courts to make determinations regarding their membership in a tribe?

Mr. LECLAIRE. Well, in a word, Mr. Vice Chairman, no.

First of all, we don't believe that the doctrine, itself, is necessary because its purported use was to render constitutional a statute which the State courts suggested may have been unconstitutional, and our position is it is constitutional as it is currently drafted and would be constitutional after the amendments proposed before these committees would be applied.

As I indicated, by adding a subjective test we simply increase the opportunity for litigation. For example, in this room are a number of people, Indian people who have been in Washington serving Indian people in many capacities, both for the Federal Government and for private interests, and have perhaps not returned to their own reservations for quite some time. Would it be appropriate for a State court to examine, because of that, whether those people indeed were Indian? I believe they would believe they are Indian, and I certainly would believe that of my own tribal membership.

It is inconsistent with the historical relationship between the United States and tribes, and this is an area where States have little or no role.

Finally, State judicial additions to a Federal law is simply a bad precedent. It's inconsistent with the supremacy clause and it undermines the nationwide preemption in a particular area that Congress has attempted to craft.

Senator INOUE. Mr. LeClaire, does this measure before us enhance or diminish tribal sovereignty?

Mr. LECLAIRE. To the extent that it gives tribes an opportunity to participate outside of their territory in an issue that is fundamental to those tribes, I don't think that it in any way lessens tribal sovereignty.

Certainly to the extent that the tribes in some ways lose the ability to control their children and therefore their destiny, tribal sovereignty is affected. But in the reality of the way Indian adoptions occur, both in the tribal courts and often outside of tribal courts, the Indian Child Welfare Act is a good balance of those competing—at times—competing interests.

Senator INOUE. Thank you very much.

The CHAIRMAN. I'd just welcome my friend Ada, and let me just jump in with a few questions.

Let me—perhaps Ada would answer the first one. Does the United States grant benefits to Indian people on tribal membership as determined by the tribes?

Ms. DEER. As determined by the tribes, yes.

The CHAIRMAN. How would this legislation affect that? Would it affect benefits to a youngster that's reclaimed by a tribe?

Ms. DEER. Could you elaborate on that question?

The CHAIRMAN. Let's say a youngster has been adopted out, and then the tribe comes along a few years later and makes a claim on him and he has perhaps not been enrolled, or whatever circumstances. I was just wondering how it would affect that youngster, how tribal benefits would be affected, or if they would at all.

Ms. DEER. I think Mr. LeClaire could answer that question a little better. It's a legal one.

Mr. LECLAIRE. Mr. Chairman, I'm not quite certain how that would ultimately work out. I suppose it has something to do with whether or not the child is, in fact, a member of the tribe, and, if a member, entitled to, for example, medical benefits. The child may continue to be eligible for those benefits even if adopted by a non-Indian family.

If the tribal membership were determined, even judicially, that there was no membership, I suppose that would raise a much different question which we would have to examine pretty closely.

The CHAIRMAN. Tom, you heard earlier testimony—I managed to hear it all before I had to run out for a little bit—about the sponsor of the alternative bill, that she did not think that the State courts, in making determinations on adoptions, would have any effect on sovereignty or membership in a tribe. Do you agree with that? Or perhaps that question has already been asked, but let me ask it again.

Mr. LECLAIRE. I respectfully disagree with Congresswoman Bryces statement in that area because I think, as this committee well knows, and having been involved in Indian issues for a long time—especially you, Mr. Chairman, and other members of the committee—that a determination of tribal membership is simply one that is done by the tribe. It is the essence of self-government. And, having made that determination and to be second-guessed by a State court using subjective tests would be inconsistent with the historical relationship that the United States has with tribes and

the power that tribes retain to determine their own membership as recognized by the Supreme Court.

The CHAIRMAN: Okay.

Mr. LECLAIRE: I think I have enumerated—before you came back into the room, I enumerated a number of reasons why we thought that the existing Indian family doctrine is inappropriate, particularly because it gets the State involved in an area that has been predominantly a Federal/tribal relationship.

The CHAIRMAN: Thank you.

Are there any further questions from any Members? Congressman Kennedy?

Mr. KENNEDY: Thank you, Mr. Chairman.

Just following that up, what in these compromise bills preempts that existing family doctrine from ever being employed by State courts? I mean, what safeguards do these bills provide for a Native American country in making sure that State courts aren't going to preempt that fundamental right that they had to determine their own membership and to exercise their rights under ICWA?

Mr. LECLAIRE: The amendments, as I review them, do not alter ICWA in a way that has existed since its original passage, and so the doctrine, which is not actually enumerated in the act, I don't believe, would be affected. It may be that State courts will continue to find this doctrine existing even after these amendments were passed.

Mr. KENNEDY: Would it not then be important to put some language in these amendments, understanding that they have been agreed to and the like, but understanding also that Ms. Pryce and those that have come at this from her point of view haven't signed off on this bill, per se, any more, that we put in some language that State—very clearly that State courts, in matters with respect to ICWA, have no rights interpreting this doctrine, this existing family doctrine in such a loose way.

That seems to me the rub here in this problem is that State courts are interpreting something in their subjective opinion that runs contrary to a tribe's definition of membership.

Mr. LECLAIRE: I would agree with that, Congressman Kennedy, that addressing it directly would be the way to ensure that Congress will be upheld—it would be a determination by this Body to determine whether or not it's appropriate to include that in amendments. I know that last year the attempts to codify that exception or doctrine were rejected.

Mr. KENNEDY: I understand that. I'm just saying, given the testimony of Ms. Pryce this morning, she said that basically this is—she's no longer satisfied with this as a compromise. And if that's the case, what I'm trying to think of is, you know, you give an inch, they take a mile, and then what do you have at the end of the day but continued problems because the fundamental issue here—and that is respect for tribal sovereignty—is still cast in the balance because State courts still ultimately have the discretion to use existing family doctrine in their proceedings.

And whereas you do make the mousetrap a little bit better so as to give tribes more access, I should say, to State courts, at the end of the day that's still all they have is access to State courts. They

don't have what remains and should remain in their dominion, that sovereign right to determine their own tribal members.

Mr. LECLAIRE: I would agree with that, and my understanding of the amendments is that they focus on streamlining and simplifying compliance with the ICWA, and it would be our belief that the doctrine itself does the opposite—it creates a more subjective test which is open to interpretation.

It may often ask State court judges to make determinations of membership that are in areas which are very unfamiliar to them; and to have people who do not have maybe a historical understanding of the special and significant relationship between the Federal Government, tribes, and the overriding principle of tribal self-government to determine its own membership making determinations in those critical areas.

Mr. KENNEDY: Well, I would only ask that if you could, for at least this Member, provide some possible language changes, and I look forward to discussing this further with yourself and the other panelists, because if this is going to become the bill that's debated, I think it is important that we start off from a more realistic standpoint for the purposes of understanding this issue so that we don't get into the minutia of making the proceedings run better, which I understand these compromise bills do, but go back to the fundamentals, and that is we wouldn't be in this problem to begin with if there was a basic acknowledgement, as you said, of the sovereignty in these cases.

Mr. LECLAIRE: Thank you. We'd be happy to work with you and your staff on any such request.

Mr. KENNEDY: Thank you.

The CHAIRMAN: I would point out, if there are no further questions, we've only got a little over one-third of the way through all the witnesses. We've been here 1½ hours. We're going to have to speed it up if we don't want to be here all afternoon.

Mr. FALCOMAVAEGA: Mr. Chairman, I do have a quick—

The CHAIRMAN: Go ahead, Congressman Falcomavaega.

Mr. FALCOMAVAEGA: I would just be remiss, Mr. Chairman, if I didn't express my personal welcome to Secretary Deer and my good friend, Mr. LeClaire, for their presence.

Gut reaction very quickly, Mr. LeClaire. Isn't the bottomline issue that Ms. Pryce is trying to share with the committee, if I were a white parent and I have to appear before an Indian court and I see all these Indians before, how would I be assured that I will be given justice and fairness in the whole adoption matter, because I really think that's the bottomline. I really think that's the bottomline.

Do you believe that there are sufficient provisions in the proposed bill that corrects those deficiencies? In other words, giving due notice to the Indian court system in the country that we'd better get the system worked out so that if a white parent has to go before them they'll be given a fair hearing? I really think that's the bottomline. We're talking about fairness.

Mr. LECLAIRE: Well, there has only been a small number of cases adjudicated in this contentious area. I think the fear—

Mr. FALCOMAVAEGA. Excuse me. The reason why they prefer going to State court is because they feel that they'll be better treated there.

Mr. LECLAIRE. I think the fear is that ICWA is somehow outcome determinative, and the fact is it is not. It is a process.

Whether under a tribal court or whether in a State court, the overriding interests are the best interests of the child.

As I indicated in my statement, one of the most recognized cases in this area was the *Mississippi Choctaw v. Holyfield* case in which that very thing happened. The case was transferred out of—

Mr. FALCOMAVAEGA. My time is up, but I just want to get—do we have sufficient mechanics in the way this bill is being written to correct any problems of the Indian court system to make sure that they also are going to give that kind of assured justice when the situation like this occurs? That's all I'm trying to—

Mr. LECLAIRE. I think tribal courts, as they exist, when applying the best interests of the child, will do the same job that State courts do.

Mr. FALCOMAVAEGA. Do you think it might be helpful if we had a provision in the bill that maybe the Justice Department will inform every adoption agency in this country that before they touch an Indian child they'd better read ICWA first, because this seems to be one of the problems? Some of these attorneys didn't even know, or maybe they knew that the child was an Indian, but they went ahead and made the adoptions through State law, completely disregarding the ICWA. I think that might be helpful also.

Mr. LECLAIRE. I think the criminal provisions do intend to bring some attention to the need to have compliance, notice—

Mr. FALCOMAVAEGA. Do you think it might also be helpful if we had a provision to really—I mean, whatever attorney that purposely, knowing that this child is an Indian, and puts a white parent through the most agonizing experience, we've got to place criminal charges against them. Put due notice that if this person knowingly does something like this, that they will really be answerable for it, because that's another instance that I think we have with the problems of adoptions of Indian children.

Do you think that might be helpful also in adding those provisions to the bill?

Mr. LECLAIRE. We would certainly review those additions and work with the committees on any provisions that you thought would be helpful in that area.

Mr. FALCOMAVAEGA. Thank you.

Thank you, Mr. Chairman. I'm sorry.

The CHAIRMAN. And I thank this panel for appearing.

The next panel will be Deborah Doxtator, chairperson of the Oneida Tribe of Indians of Wisconsin; Thomas Atcitty, vice president of the Navajo Nation, and Ron Allen, president of the National Congress of American Indians.

Chairperson Doxtator.

STATEMENT OF DEBORAH DOXTATOR, CHAIRPERSON, ONEIDA TRIBE, ONEIDA, WI, ACCOMPANIED BY AURENE MARTIN, ESQUIRE, ATTORNEY FOR ONEIDA TRIBE

MS. DOXTATOR. Thank you, Mr. Chairman, for the invitation and opportunity to testify. I would also like to thank the chairmen of both committees and the individual committee members for their attention to this very important legislation involving Indian children.

I'm accompanied this morning by our attorney, Aurene Martin. If there are any technical questions at the end of the presentation, she'll be able to answer those. She worked with the attorney working group and the adoption attorneys on the Tulsa compromise.

I bring our greetings to you and to the members of your committee this morning. My name is Deborah Doxtator, and my Oneida name is Yukhiwanaw which means "she keeps our words for us."

As the elected chair of my nation, as a mother of four children who are growing up on our reservation, as a woman existing in our nation's legitimate matrilineal traditions, and as a person who recognizes the traditional obligations of acting now in consideration of those who will exist in seven generations, I am honored to be here.

I am humbled to think that I am having this opportunity to address an issue that will so significantly impact our future. My written testimony provides an overview of ICWA, and I am well aware that most of you know too well how it came to be passed.

With 25 to 30 percent of our children being removed from Indian country, our future was clear. The traditional obligations which we have for our young people could not possibly be fulfilled. They would grow up knowing they were different from the other non-Indian children that they encountered, but outside of color they would not know why. They would never learn our history, our culture, our traditions, or the obligations we hold so close to our hearts.

Years ago one of our tribal members was living temporarily in the Boston area. He was invited to address the Massachusetts State Committee as it considered passage of a bill similar to ICWA for State-recognized Indians. He brought his then 5-year-old daughter with him. Her name is Yakotu Hahe "she's happy."

The committee members smiled and all acknowledged the beauty of the name, but no matter how well-intentioned their statements, they did not understand that the beauty in her name is not found in its utterances. The true beauty is found in the carrying out of its obligations.

Yakotu Hahe was charged in the Long House with the responsibility to go to those tribal members who are sick or in pain. She was to bring them happiness and joy and to make them whole again. Were she removed from Indian country, she would never have carried out her personal responsibilities, nor would the nation have benefited from her involvement.

Our Indian children are integral to our present and our future. It is through them that the past has living meaning. If our children are taken from us, even through the best of intentions, the circle of our tradition will be broken and our future will come to an abrupt end.



I'm going to move directly to the end of my testimony, in light of the time. I wanted to summarize that there are two items that absolutely are vital in the consideration of any bill that would come forward, and that is the notice of voluntary proceedings and the time lines for intervention. For Indian country we definitely have to have those included in any language that would come forward.

But we also cannot accept any language in any bill that gives State courts the authority to determine whether a child is Indian or not. This invades our tribal sovereignty to the utmost extent, and I know that the U.S. Congress is very cognizant of that, from the remarks that I heard this morning, and so we would like to have that a part of our record.

Thank you for convening this hearing, to provide Indian country an opportunity to be heard on this most vital issue.

We recall how your efforts in the last Congress were circumvented and how many of your colleagues were called upon to vote without a true understanding of ramifications of the issues, and we trust that what we have shared today provides a meaningful basis for legitimate dialogue on the issue.

Thank you.

The CHAIRMAN. Thank you. By the way, your complete written testimony will be included in the record.

Ms. DOXTATOR. Thank you.

[Prepared statement of Ms. Doxtator appears in appendix.]

The CHAIRMAN. Vice Chairman Atcitty.

#### STATEMENT OF THOMAS ATCITTY, VICE PRESIDENT, NAVAJO NATION, WINDOW ROCK, AZ

Mr. ATCITTY. Thank you, Mr. Chairman and members of the two committees.

I appreciate your invitation to be here, and above all appreciate the participation of the various members of the committee. Normally I testify just before one individual, but I see several Members of the Congress here, and that's very heartening and encouraging to me that we have a bill here that is of interest to Members of the Congress. Certainly this is of interest and import to the Navajo Nation.

You have our written testimony, so I will briefly highlight what we deem as most important issues to us.

First, the Navajo Nation supports S. 569 and H.R. 1082 sponsored by Senator McCain and Congressman Young, with some clarifications and friendly amendments.

S. 569 and the companion bill propose a new section, 1913.C and D, that requires that Indian child's tribe must receive notice of the proceeding, and that the notice must contain information to allow the Indian child's tribe to verify application of ICWA.

We are concerned that erroneous information may be provided to a tribe through oversight, error, or lack of a good faith investigation which does not rise to fraud and which would negatively affect both the tribe's ability to determine the child's enrollment and whether a tribe will intervene in the State court proceeding.

It is of critical importance that a good faith investigation be made into the information required by section 1913.D notice.

The Navajo Nation is also concerned that section 1913.E provides Indian nations only 30 days to file a notice to intervene. The 30-day deadline could drastically affect our ability to intervene in hundreds of cases across the country. I fear this may not be sufficient time to allow Indian nations to retain local counsel and negotiate attorney contracts which may be approved by the BIA pursuant to 25 U.S.C. section 81, which we do not have control over.

Additional time is also needed to address the determination of enrollment eligibility of an Indian child.

For these reasons, we recommend the time period be expanded to 90 days. If extending the time lines is not feasible, we recommend clarifying language be added to direct that the notice of intent to intervene only requires a simple statement which may be submitted by the tribe's ICWA program.

This clarification is needed to prevent ICWA from being deprived of any meaning.

It is important to remember that ICWA was not only enacted to preserve American Indian tribes' most precious resources, its members, but also to prevent the type of alienation experienced by Indian children who were adopted by non-Indian families before ICWA was adopted.

As they become older, many of these children faced difficulties in self-identification and adaption. While much has been said about children and parents, both natural and adoptive, it is extremely critical to be mindful of the long-term effects of depriving Indian children of their heritage.

Second, the Navajo Nation recommends language be added that would provide direct title 4-E funding to Indian nations for foster care and adoption assistance programs. Although this funding was intended to serve all eligible children in the United States, Indian children living in tribal areas are not being served.

To receive title 4-E money, a tribe must enter into agreement with States, with the State passing through these funds to the tribe. It has been very difficult to negotiate such agreements. Currently only 50 of the 558 federally-recognized tribes receive any title 4-E funding. This funding would allow Indian tribes to keep these families closer together rather than placing them in off-reservation and non-Indian homes.

We recommend that if direct title 4-E funding is not possible, then title 4-E funding be included in this legislation to require:

First, a provision requiring States to serve tribes rather than stipulating a tribal-State agreement.

Second, applying penalties as in public law 103-382, Multi-Ethnic Placement Act, should discrimination occur.

Third, that Navajo nation is also concerned about recent developments in State courts where judges are requiring, in addition to membership in a tribe, that they also have significant ties to an Indian tribe in determining whether ICWA applies.

Federal law and U.S. Supreme Court decisions consistently recognize the fundamental right of Indian nations to determine membership. Federal courts do not even attempt to make this inquiry. Therefore, it is a violation of tribal sovereignty and inappropriate for a State court to determine whether an Indian child or Indian parents are really Indian.

The Navajo recommends additional amendments be incorporated to halt this practice of State courts. Otherwise, ICWA will be undetermined incorrectly by the States.

As a 14-year State legislator, I have seen well-intended Congressional legislation being misused by many of the States, and so this is the reason that we feel that care needs to be taken in this particular legislation.

I just want to say, in conclusion, thank you, Mr. Chairman, for your kind invitation. We would stand to any question you might have.

The CHAIRMAN. Thank you, Mr. Vice Chairman.

[Prepared statement of Mr. Atcitty appears in appendix.]

The CHAIRMAN. Ron Allen, if you'd like to proceed.

**STATEMENT OF W. RON ALLEN, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, DC, AND CHAIRMAN, JAMESTOWN S'KLALLAM TRIBE**

Mr. ALLEN. Thank you, Mr. Chairman.

I, too, join with my colleagues here in thanking you for the invitation to testify before the committees to express our views for the National Congress of American Indians regarding these two pieces of legislation.

We're very thankful that you and the House committee have brought this bill up and have introduced these bills in response to the tribes' response to this issue, as it was brought up in the 104th Congress. When it came up, as you know, it caused a great deal of concern in Indian country. I don't think I need to spend a great deal of energy conveying why. You know why.

Our testimony conveys the fundamentals in Indian law and Indian policy that we're concerned about, and also it conveys where our hearts are with regard to our Indian children and the welfare of our Indian children and the preservation of their culture and who they are and what their relationship is to our Indian communities. Those things are very important to us.

ICWA, you know, basically addressed a lot of problems, and we recognize that it has been addressing these problems. We also know that there are other problems that surface in any legislation. We see that, and we are very open to refinements of laws that would improve their procedures.

Congresswoman Pryce had raised a number of issues, and in her testimony this morning she conveyed the notion that adoption procedures are very cumbersome and unwieldy to wade your way through. It's not just Indian adoption that's cumbersome and unwieldy. All adoptions are cumbersome and unwieldy. It's a very delicate matter that the United States and the States take very sincerely.

With regard to ICWA, there's another extra hoop or two that Indian people want to see the procedure to go through.

Our amendments that came out of what we often refer to as the "Tulsa amendments" from our conference there last year, provided what we consider the issues that Congresswoman Pryce raised and Senator Glenn and others about certainty of procedure, certainty of process, timeliness of the process, and that's what those amendments are attempting to address.

We think that your bills, both on the Senate side and the House side, address that very matter. We think that it addresses those issues. So the extended family doctrine issues or concerns are really quite well covered.

We're very concerned about the notion that you should codify that in the law, and we absolutely object to that. Currently I sit on a panel screens out candidates for a Federal district judge in the northwest. There are 18 candidates, and among them 7 of them sit on the State superior court.

I'm amazed at how many of these candidates don't know a great deal about Indian law. They don't know a great deal about our culture, our traditions, our way of life, the sophistication of our court systems, or how we manage our programs. So the notion that they would all of a sudden determine the applicability of a child's membership or the relationship to a tribe politically, socially, culturally, economically, it just is beyond me. And it's beyond their capacity, in our opinion, so it is inappropriate for us to even consider that kind of a solution.

We believe the solutions are very appropriate now that tribal courts are capable and competent to handle that issue.

So our objective here is to cause you to know that those cumbersome cases out there or those anomalies that are raised, are anomalies. We can literally bring up statistics that show that out of the thousands and thousands of cases, there are only a handful where there have been some problems, and the majority of them have been handled quite well and with a great deal of integrity and responsibility to the children.

So we believe that the bills that are being introduced by the Senate and the House do go far enough. Maybe we need to do some fine-tuning. We can do that, and the tribes have always been willing to consider that. But we want to make sure that both committees understand that while we want to protect the tribes' sovereign rights, we also want to protect the interest and welfare of our children. We believe our system accomplishes that. We believe that the amendments being proposed in these two bills address that matter and address it quite well, and the procedures will be very effective.

I also want to note that in the end of the last Congress there was a lot of opposition from the pro-life groups who were concerned that this process may cause Indian women to consider abortion more readily because the procedures for adoption are more cumbersome.

I'm a pro-lifer, myself, personally, and I can tell you that in our communities that pro-life is very much a part of our culture, that we have a bias toward making sure that our children are born and that, if the family is not capable of handling it, that we will find a part of the extended family or the family from which the baby is born to be adopted.

So that is not the truth at all, and we want to make sure that these committees understand that that we do not believe in any way the statistics which show that there will be any increase in abortions because of this kind of legislation or these kinds of conditions out there.

And let me conclude by simply saying that there is a lot to this matter. We are ready and willing to work with you and your staffs,

with the other committee members and their staffs, to make sure that these concerns are being addressed.

I had shared with Congresswoman Pryce that we are ready and willing to discuss further with her to assure that her concern over this process is being met well within the framework of the tribal system and our coordination with the Federal system.

So we want to work with you as best we can to make sure that we're protecting the tribes' sovereign rights and the future of our children.

Thank you, Mr. Chairman.

The CHAIRMAN: Thank you, Ron. I can only say to your comments, the pro-life group doesn't understand the Indian culture, and they darned sure don't know Indian women.

[Prepared statement of Mr. Allen appears in appendix.]

The CHAIRMAN: I think I will defer first to our House colleagues for some questions before I ask a couple of my own.

Representative Kennedy, do you have any questions at this time?

Mr. KENNEDY: Thank you, Mr. Chairman.

The CHAIRMAN: Why don't you go ahead. And if you could also keep it down to maybe 5 minutes or so, I'd appreciate it.

Mr. KENNEDY: Yes, thanks, Mr. Chairman.

I just wanted to follow up, Ron, with some of your concerns about what is being proposed. You think that what's being proposed in terms of the compromise really strengthen ICWA and, therefore, you've come out in favor of these bills.

But if the State courts—and you're saying, with the penalties and the provisions, the State courts will have enough of an impetus to make sure that their tribes' or sovereignty is respected, so I just want to get that assurance that you think that's—

Mr. ALLEN: Yes, we do firmly believe that, and we also firmly believe that the States have authority to assure that, if anybody is misrepresenting, misusing, or abusing the adoption practices and procedures and the laws, that they will be penalized, so we need to stop those kinds of improprieties.

Mr. KENNEDY: And so that we don't have the State court—and also, with respect to the existing family doctrine, we don't want the State courts to be employing that. So you feel this legislation—would it help for it to be more explicit, or do you think the penalties speak for itself, or do you think that it would be helpful to state, as a matter of policy, that the existing family doctrine that many State courts have relied upon to complicate this process should be considered null and void? I mean, is there any—in other words, is there any opportunity in this legislation to clarify for States that they shouldn't be employing their own subjective opinions in this respect?

Mr. ALLEN: Out of our last two conferences, we were provided direction by our leadership that we are more than willing to review the existing family doctrine issue with the committees on how it is best to be addressed. We do not want to see it codified in the law. We do think that—

Mr. KENNEDY: Right.

Mr. ALLEN: [continuing] If you delegate authority to the courts to allow them to make these distinctions based on their criteria,

that it is going to be worse than what Congresswoman Pryce was conveying.

Mr. KENNEDY: Right. I understand that. What I'm saying is reverse the existing family doctrine and put that into law by saying that they do not have the ability to employ the existing family doctrine, directing them not to. That's what I'm pointing out.

Mr. ALLEN: Yes.

Mr. KENNEDY: If that should be codified into law, I mean, I—

Mr. ALLEN: That would be something, we'd be very interested in.

Mr. KENNEDY: Right. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN: Representative Faleomavaega.

Mr. FALEOMAVAEGA: Mr. Chairman, I don't have any questions, but I do welcome both the vice chairman of the Navajo Nation and Ron Allen for his testimony.

Just basically, bottomline, the administration supports the proposed legislation and the NCAI supports it, our friend from the Navajo Nation supports it, and that's fine with me.

Thank you, Mr. Chairman.

The CHAIRMAN: Let me ask a few questions.

Vice President Atcity, is it the Navajo Nation's policy only to intervene or seek jurisdiction in a case arising off-reservation if it is in the child's best interest?

Mr. ATCITY: I think in all cases, whether it's on, off, or wherever, it should be number one in the child's best interest. Yes.

The CHAIRMAN: Are there professionals from the standpoint of, you know, university backgrounds and credentials and so on that work as tribal social workers with the people who are primarily responsible for determining whether there would be tribal intervention or not?

Mr. ATCITY: Yes, we have, in our social services department, at least five individuals who have a master's degree in social work and probably the same number with baccalaureate, so it's within the tribe.

We certainly would like to see more of our people with advanced degrees, but we have—yes, we have properly-credentialed people helping us. In fact, I have with me here, Leila Help-Tulley, Master of Social Work, University of Utah; Delores Greyeyes, Master of Social Work, Arizona State University; and Sharon Clahchischillie, Master of Social Work, University of Pennsylvania.

The CHAIRMAN: Are they Navajos who also understand the culture?

Mr. ATCITY: They are Navajos, yes, and speak Navajo bilingual.

The CHAIRMAN: Yes, you recommended that the bill be amended to provide additional time before the tribe was required to intervene to 90 days. I believe you said?

Mr. ATCITY: Yes.

The CHAIRMAN: Would that time be used to determine eligibility or determine whether it is in the best interest of the child to intervene, or is that basically just to comply with some of the other statutes that you already mentioned?

Mr. ATCITY: From our experience, when there is a case of adoption anywhere in the country, we find that to try to locate an attorney who will help us handle it that has the necessary bar member-



ship in that State, it takes time. And then we have to go through a process of approval through the Bureau of Indian Affairs.

So 30 days is pushing us very, very hard, and we may not meet that particular deadline, so what we are requesting is that additional time be afforded us so that we don't find ourselves, for the sake of the child, that because of our own and other bureaucracies that we failed to intervene on behalf of the kid or the child.

The CHAIRMAN: Ron, speaking for the National Congress of American Indians, do you favor the time limits on tribal intervention?

Mr. ALLEN: We think that they're reasonable; that that is what's going to provide the certainty of the process and the timeliness of the process and the costliness.

That was one of the issues that Congresswoman Pryce had raised in terms of being too burdensome on applicants.

The CHAIRMAN: What is the NCAI's position on the so-called "existing Indian family doctrine"?

Mr. ALLEN: We are—as I was mentioning to Congressman Kennedy, we are opposed to it being codified. We believe that the current amendments provide appropriate procedures to allow that that doctrine and those conditions are being addressed by the tribal courts and the tribal system, and that if we—we basically are opposing it because it undermines our sovereignty. That's the fundamental. And beyond that, it's a matter of procedure to assure that the best interest of the child is being addressed.

The CHAIRMAN: Okay. I have no further questions. If there are no further questions from the committee—

Mr. KENNEDY: I would just ask if Mr. Allen may be—if you have additional language that would help reemphasize that for the legislation, that State courts should not be adhering to any kind of notion of existing family doctrine, that they need to be sure to follow the procedures of ICWA and recognizing tribal sovereignty, just as a language or policy matter, that might be a helpful addendum for the courts to have to use in their proceedings, so there is sure to be no confusion in this matter.

Mr. ALLEN: And we will definitely be consulting and coordinating with our member tribes, as well as the other tribes across Indian country, to come up with some language that may be helpful in that matter.

The CHAIRMAN: All right. I might just mention, before this panel leaves, I had a personal experience with this about 3 years ago with an Anglo family that lives not too far from us down by Durango, CO, who adopted a girl when she was just a baby, 1 year old, as I remember. And the girl was about 13 or 14, I guess, when I first saw her. I just happened to be sitting in a movie with my family watching a movie when she spotted me in the movie. This was a few years ago. And this young lady came up and I mean she just upbraided me like you wouldn't believe because apparently the tribe where she came from had started proceedings to have her returned to the family and the tribe. She hadn't had any contacts with them in all those years and didn't speak the language, didn't know anything about the culture or anything. You can imagine how upset she was and her parents, too.

So there is no question in my mind that we need to do something that has some certainty and finality to this issue.

I thank you for your appearance.

We will now take the last panel, which is Jane Gorman, Tustin, CA, and Mike Walleri, from the legal department of Tanana Chiefs Conference in Fairbanks, AK.

If you'd like to proceed, Jane, thank you for appearing.

#### STATEMENT OF JANE GORMAN, ESQUIRE, TUSTIN, CA

Ms. GORMAN: Thank you. I appreciate, on behalf of the adoption community, the opportunity to be here this morning.

First of all, I want to—this is not part of my prepared statement, but I do want to tell the group that these are compromise amendments. When Mark Gradstein and I first met with Bert Hersch and Jack Trope more than 2 years ago, the first issue that we attempted to talk about was the existing Indian family doctrine and all four of us practically walked out of the room. We then decided that since we'd flown 3,000 miles to meet with them, that maybe we should try to talk about some other areas and see if there were some compromises that the two communities could agree on.

The bills that are now before you are a result of those compromises that we have reached. If we attempt to deal with the existing Indian family doctrine in any form, I don't believe that there will any longer be a consensus between the adoption community and the Native American community. So I would urge, this group to not consider adding language in either direction on that issue, because I believe the consensus will fall apart, and these bills are very important for a number of reasons.

As you know, I'm Jane Gorman, and I do come here to urge passage of these proposed amendments. I'm here as president-elect of the American Academy of Adoption Attorneys, past president of the Academy of California Adoption Lawyers, and attorney for the Rosts, the prospective adoptive parents who are still, sadly, trying to adopt the twin girls who will turn 4 years old this year and over whom they are still in litigation.

Within the past few weeks, just 2 weeks ago, the birth family approached the Rosts and expressed a willingness to allow the adoption to proceed—both birth parents and the grandparents. However, their attorneys, as of 3 days ago, are not willing to enter into an agreement to withdraw their opposition to the adoption in return for visitation because, as the attorney expressed to me, the sole reason is because such an agreement is not enforceable.

These amendments, if passed, would remedy that roadblock and allow these twins to finally have the best of both worlds. They could grow up with the only family that they've ever known, which is not to say that the Rosts are any better parents than the Indian family would have been had the twins had remained with them at birth, but they're not there. They're with the Rosts. They've been there all their lives. They could also, at the same time, be exposed to their Indian relatives and to the culture.

Since I testified here last year urging support of these same amendments, hardly 1 week has gone by that I haven't received at least one call from adoptive parents telling me the same story week after week from State after State, some adopting independently,

some through agencies. The ages of the children, the States of residents, the tribes involved are all different, but the stories are strikingly similar. They tell me, "We know the child we're adopting or have adopted has Native American ancestry. We know the tribe was never notified."

The questions they ask me are always the same: What do we do now? How did this happen? Can the tribe come and take away my child? Did my attorney or the adoption agency do something wrong?

I tell them that legally, under the current law, inconsistent as this may sound, no, your attorney or the agency probably didn't do anything legally wrong in not notifying the tribe because in voluntary placements notification is not mandated, and yes, your child could be removed.

But what do we do now? That question is much harder. Do they belatedly notify the tribe and pray for mercy, or do they white knuckle it until the kid grows up and hope the tribe or the extended birth family never finds out?

I honestly don't know what to tell these people. The one thing that I do know and that I do tell them is that the Indian Child Welfare Act must be fixed so these problems don't continue to happen. Tribes must be given notice in voluntary placements, and they must have the shortest time possible after a child is placed and they receive proper notice, complete notice, to act or forever hold their peace.

I believe the amendments, as proposed, do provide 90 days notice. I believe that the Navajos are misreading the act. I understand that it is a little confusing, but if it's read as a whole it does require 90 days notice, so I don't believe that that time period needs to be extended.

On a quick reading of the Navajo proposals, other than the one which would address the existing Indian family doctrine, the other provisions I believe would be acceptable to my groups. Obviously, I haven't taken the proposals back to AAAA, but they seem consistent with our intent.

These amendments, if passed, would provide for both notice and early cut-offs of a right of a tribe to disrupt an adoption, and I believe would help both worlds.

The American Academy of Adoption Attorneys, which is a nationwide group of attorneys representing adoptive parents, birth parents, children, and agencies, supports this legislation because it will give finality to adoptive placement.

My colleague, Mark Gradstein and I began working with the tribes on this legislation more than 2 years ago in an attempt to draft amendments that would benefit everyone. We believe this bill would do that.

A small faction of the adoption community, a group of agencies who do not believe that the Indian Child Welfare Act has a valid purpose and thus should be repealed, and who routinely give no notice to tribes in voluntary placements so they can place Indian children with non-Indian families, will urge you, as they did last year, to defeat this bill. This group will claim, as it did last year, that the amendments will be detrimental to adoption and may even cause some women to abort their Indian children, but make no mis-

take about it, this group does not represent the adoption community.

The adoption community believes that these amendments would foster adoption because adoptive placements would be more secure and sooner. And there is no evidence whatsoever that more Indian children would be aborted or that attorneys and agencies would shy away from adoption of children either because of the cumbersome process, as Congresswoman Pryce predicted today, or because of these amendments.

The provision which would provide for criminal penalties against attorneys or agencies who willfully violate the notice provisions is not something we in the adoption community want or feel we need, but the ethical adoption community, we lawyers and agencies who follow the law and believe that ICWA is a law with a good purpose, are willing to give teeth to our promises and put ourselves on the line and our careers on the line in order to assure the Native American community that we mean what we say and we intend to follow the law.

We support these amendments and urge that you make them the law.

Thank you.

The CHAIRMAN. I thank you.

[Prepared statement of Ms. Gorman appears in appendix.]

The CHAIRMAN. Michael, if you'd like to continue, please.

#### STATEMENT OF MICHAEL J. WALLERI, ESQUIRE, LEGAL DEPARTMENT, TANANA CHIEFS CONFERENCE, FAIRBANKS, AK

Mr. WALLERI. Thank you, Mr. Chairman.

I have submitted our formal comments.

The CHAIRMAN. They will be in the record.

Mr. WALLERI. And I, in the interest of time, only wish to address a couple of other issues in addition to that formal testimony.

First of all, as has been beaten to death already here, but if I can beat it one more time, the issue of the 14th amendment just simply doesn't have any application or concern.

The House committee report in 1978 dealt with this exhaustively. The U.S. Supreme Court in *Fisher v. District Court*, dealt with this definitively. And since the passage of ICWA there have been at least two challenges in State courts to the constitutionality of ICWA, and the constitutionality of ICWA has been sustained in those cases.

It is a government-to-government relationship, and I think that's enough beating for 1 day.

I must take exception to the concern that these amendments are procedural in nature and not substantive. The observation is correct, the criticism I don't think is very well warranted.

In terms of being cumbersome, the notice provisions are one piece of paper and \$1.50 in stamps, and that is simply not a cumbersome burden when we're talking about a decision which is going to govern the entire lifelong life of a child. That is not a cumbersome procedure, and there is no way that you can read these amendments to suggest that there are any greater procedures than a simple notice, and that the verbiage in the bill is primarily to de-



some through agencies. The ages of the children, the States of residents, the tribes involved are all different, but the stories are strikingly similar. They tell me, "We know the child we're adopting or have adopted has Native American ancestry. We know the tribe was never notified."

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fine very precisely, very clearly, what those notices should provide for.

But that's what we're talking about is a single piece of paper and \$1.50 in stamps, and that is not a cumbersome procedure.

In terms of substantive, I think that, as Ms. Gorman pointed out, we have discussed in this whole process the existing Indian family doctrine. There were other issues, such as Public Law 280, the court determinations in Public Law 280 states, tribal court determinations and jurisdiction also in Alaska. And there were some discussions about punitive fathers.

All of these issues fell out of the discussions and the process over our commitment to develop a consensus piece of legislation that will affirmatively promote, from all perspectives—from the adoption community perspective and from the tribal community perspective—the best interest of the child.

Now, I assure you that there are existing issues out there, and we are committed to looking at those issues in either legislation, particularly the existing Indian family doctrine, which we are opposed to.

But I would recommend that any process in legislation on these other issues follow the process that we've used in this, and that is a demand that the native community, in the form of the tribal governments, be affirmatively consulted and participate in development of that legislation.

It is a government-to-government relationship and the tribal involvement is critical and it should not be a Member of Congress simply dropping in a bill and expecting everybody to fall in line. It does require some consultation with the tribes. These are the people that are being affected. These are the people that should have a say. They've got a system of government that can represent them, and it should be used.

With that, I would conclude my remarks. If there are any questions, I'd be glad to answer them.

The CHAIRMAN. Thank you.

[Prepared statement of Mr. Walleri appears in appendix.]

The CHAIRMAN. Jane, let me ask you about your association. I'm not familiar with it at all. It's a nationwide association of adoption attorneys?

Ms. GORMAN. Yes; it is.

The CHAIRMAN. How many members do you have?

Ms. GORMAN. Several hundred members, and we are from every State in the Union, as well as Canada.

The CHAIRMAN. And you primarily facilitate adoptions, obviously?

Ms. GORMAN. Yes; all of our practices are primarily adoption related.

The CHAIRMAN. Are a number of those attorneys, do they specialize in adoptions of Indian children, or kind of general?

Ms. GORMAN. I don't think—no, I don't think anyone's practice is solely in adoption of Indian children—but everyone's practice touches it. There aren't that many Native American adoptions so that anyone could specialize.

The CHAIRMAN. Do I understand from your testimony that Representative Pryce's proposal would place the jurisdiction in the

State courts? Perhaps I didn't understand your complete testimony, but do you believe that would also erode tribal sovereignty, as some of our subsequent speakers had alluded to?

Ms. GORMAN. Of course it would erode tribal sovereignty. The reason that I can't really address—two reasons that I can't really address Congresswoman's proposal are: First, I haven't seen it, but that's really a dodge, because I pretty much know what it says. Second, is because I have a conflict of interest with my own clients, perhaps, because if it does, indeed, as she represented here today, codify the State court opinion in my own case, I can't take a position against it. But what I can tell you is that I can affirmatively say is only legislation which passes into law will help my clients. I do not believe Congressman Pryce's legislation will this year or any year in the foreseeable future pass into law.

I believe these compromise amendments may, and I believe that they would, not only help my existing clients, the Rosts, but other aspects of the bill would have kept the *Rost* case from ever happening and would help many other cases that I come into contact with on at least a monthly basis, if not a weekly basis.

The CHAIRMAN. Thank you.

Mike, your testimony states that many of the cases arising from the ICWA are the cause of poor social work, in your written testimony. Is that meant to mean poor social work on the reservation?

Mr. WALLERI. No; almost all of these cases arise off reservation. In fact, I've never seen one actually arise on reservation or within the Indian country in Alaska.

What normally happens is that the agency or the person actually makes the placement. In our experience, a social worker usually isn't involved. A professional social worker usually isn't involved because most professional social workers will do a background check to determine whether or not a child is really available for adoption, and that's the big issue, whether or not these children are really available as a factual matter for adoption.

One of the ironies here is what is an existing Indian family, and an existing Indian family many times encompasses much more than the maybe western notion of a nuclear family. And many people who are engaged in the adoption field and somewhat unprofessionally simply don't know that, aren't aware of it. They don't check it out, and they don't see what—they don't do the basic background check to find out if this child is really available for adoption or whether or not there is already a home within that child's existing family which will provide a nurturing, caring, and loving home for them.

And so because there is no notice provision, they're placed. They end up bonding. And the net results is that you've got people who maybe 6 months ago were total strangers to this child having an emotional bond with the child established by this poor social work, and the result is oftentimes the conflicts that we've seen arise.

So when I used that term "poor social work," oftentimes it's a lack of any social work in terms of what we would notice as a professional standard of social work, and in some cases, actual willful disregard of the law.

The CHAIRMAN. I think you're right in that most non-Indians think in terms of a family like Mom and Dad or a nuclear family,

wherein Native peoples believe, as Congressman Faleomavaega has already alluded to, that the family is an extended family. It includes more people in the immediate family than just Mom and Dad.

With that, do you have any questions?

Mr. FALDOMAVAEGA. I just want to commend Ms. Gorman for her fine statement, and I want to assure her that if there was any sense of implication that I suggested that all the attorneys out there are a bunch of crooks trying to make a fast buck in these adoption cases, that certainly was not my intention.

But, at the same time, I do express concern that if there is willful fraudulent misrepresentation on the part of the attorneys to do something like this, then they should be corrected.

I certainly want to thank her for her support in this legislation and the process.

One of the concerns that I have and that was alluded to earlier is it's always the problem of saying, on the part of the white community, what is an Indian. Blue eyes? Blonde? How do you—how far do you go back and say you're  $\frac{1}{32}$ ?

It's an administrative problem. I'm sure that it's true with adoption agencies. I'm sure it's true even under State law. We understand that.

But, as I've tried to share with you earlier my experience—and I know exactly how the Indian communities relate to themselves. In my own island community, you may be  $\frac{1}{10}$  removed as a cousin, but you are, as far as they are concerned, brother and sister. Everybody is your aunt and uncle and the closest and most meaningful situation.

Now, I'm sure that many of our white families feel the same way, too, but for the most part it has been my experience that it's either mother and father or grandfather, and anything beyond that gets a little blurry as far as family is concerned in what I perceive as the American family.

But I do want to thank you both for your fine statements, and I sincerely hope, Mr. Chairman, that we will carry this legislation through, go through the debate process, and I hope that we will pass this legislation.

Thank you both for your testimony.

The CHAIRMAN. And I thank this committee, too.

With that, I would tell all witnesses that the record will be open for written testimony for two weeks. If you have any further comments you'd like to turn in, that will be considered.

With that, this committee is adjourned.

[Whereupon, at 12:42 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

## APPENDIX

### ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

#### PREPARED STATEMENT OF HON. DONNA M. CHRISTIAN-GREEN, U.S. DELEGATE FROM THE VIRGIN ISLANDS.

Thank you Mr. Chairman for giving me the opportunity to make brief opening remarks. This is a very important hearing and I commend you Chairman Young and Chairman Campbell for your willingness in holding this joint hearing today.

Let me begin my saying, first of all, that the issue of the welfare of Indian Children is of great concern to me—indeed I am concerned about all of the issues that affect Native Americans.

In the last Congress, as the result of several high-profile adoption cases involving lengthy disputes under the Child Welfare act, questions were raised about whether the Indian Child Welfare Act, [ICWA] fairly took into account the best interest of the children, parents and the tribes.

The IWCA, as you know Mr. Chairman, was enacted in 1978 to address the widespread removal of Indian children from Indian families and placing them with non-Indian families or institutions.

Recognizing the need for legislation to address the concerns raised by the high-profile cases in the last Congress, Chairman Young and Ranking Member Miller introduced legislation, which is virtually identical to the bills before us today, in hopes of addressing these problems.

H.R. 1082 and S. 569 are the product of a proposal which emerged from the mid-year convention of the National Congress of American Indians [NCAI] in Tulsa, OK in 1985, and which is known as the "Tulsa Compromise." Mr. Chairman I look forward to working with you and the members of both to the committees represented here today in moving forward with the bills before us. Thank you again Mr. Chairman for allowing me to make this brief opening statement. I look forward to hearing from the witnesses.

#### PREPARED STATEMENT HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Mr. Chairman, I first would like to thank you for holding this hearing today. I am a cosponsor of the Indian Child Welfare Act (ICWA) Amendments of 1997, and I am pleased that we are having this discussion about how to reasonably improve the implementation of ICWA while still preserving the rights of tribal courts and Indian parents and, most importantly, ensuring the well-being of Indian children.

Before the enactment of ICWA in 1978, one quarter of Indian children were removed from their homes and families, many times for dubious reasons and without parental notification. A large percentage of these children were then placed in foster care in non-Indian homes or were adopted by non-Indian families.

One of the major reasons for this situation was the ability of states, rather than tribal governments, to exercise jurisdiction over child welfare proceedings involving Indian children. As this Committee knows well, state judicial bodies frequently have

failed to recognize and honor tribal relations and the cultural, social and religious customs of Indian communities.

To address this problem, Congress enacted ICWA, which recognizes exclusive tribal jurisdiction over Indian child welfare proceedings arising in Indian country. ICWA also presumes tribal jurisdiction in other cases involving Indian children, while permitting concurrent state jurisdiction in custody and adoption cases for good cause. By creating a statutory mandate for tribal and parental involvement in all Indian child welfare proceedings and allowing referral to tribal courts, the current system has succeeded in protecting the rights of Indian communities, children, and families.

Unfortunately, there have been a few rare, but high profile cases involving ICWA in recent years that resulted in significant trauma for all parties involved: Indian children, adoptive parents, birth parents, and Indian tribes. These cases initially prompted the proposal of sweeping changes to ICWA in the last Congress that would have overreacted to the concerns and significantly compromised ICWA. I'm pleased that the Senate last year resisted the temptation to enact expansive changes and that instead, with this legislation, we move beyond controversy to consensus.

This legislation would address the concern these cases have caused by providing new guarantees of early notice to tribes in cases involving the placement of Indian children, balanced by new, strict timeframes within which Indian families and tribes can intervene in adoption proceedings. I understand that this bill has the support of tribes, including the four tribes located in North Dakota, as well as the support of adoption advocates.

I have been a long-standing supporter of ICWA, and it is my hope that the Senate will enact these changes in a timely manner.

PREPARED STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

Thank you, Chairman Campbell and Chairman Young, for convening this hearing on two bills, S. 569 and H.R. 1082 to amend the Indian Child Welfare Act of 1978 (ICWA). In the Senate, this bill has five cosponsors. . . myself, and Senators Campbell, Domenici, Dorgan, and Wellstone.

As we found last year, the issue of Indian child welfare stirs the deepest emotions. Nothing is more sacred than children. And while developing common ground is always difficult, it is especially difficult on such a deeply personal issue. The amendments to ICWA contained in this bill have been crafted to resolve many of the differences between Indian tribes and advocates of adoption ICWA was enacted in 1978 in response to growing concern over the consequences to Indian children, families and tribes of the separation of large numbers of Indian children from their families and tribes through adoption or foster care placements by the State courts. In response, Congress protected both the best interest of Indian children and the interest of Indian tribes in the welfare of their children, by carefully crafting ICWA to make use of the roles traditionally played by Indian tribes and families in the welfare of their children through a unique jurisdictional framework.

The bills we are discussing today will amend the Indian Child Welfare Act of 1978 to better serve the best interests of Indian children without trampling on tribal sovereignty and without eroding fundamental principles of Federal Indian law.

As with all compromises, I am sure each side would prefer language that is better for them. I am told that many Indian tribes would rather not have any amendments at all, and that many in the adoption community would rather have no ICWA. But on behalf of the Indian children and their parents, both biological and adoptive, I want to extend my personal thanks to persons on both sides of this debate who have led the way to a compromise in which both sides, and most importantly, Indian children, are the winners.

More than 2 years ago, several high-profile adoption cases captured national attention because they involved Indian children caught in protracted legal disputes under ICWA. Adoption advocates believed these cases would provide political support for amendments they had long sought to the Act. Indian tribes felt like they were under siege, battling distorted news stories about what the ICWA does and does not do while at the same time having to fend off overly broad amendments to ICWA.

It is remarkable that a few visionaries on both sides ventured away from the battle lines to begin to talk with each other about what common ground might exist. These talks began a long process of negotiation over possible compromise amendments to ICWA. Over time, the protagonists began to see ways in which some of each side's objectives could be accomplished through common agreement.

There is no doubt in my mind that, in the case of an Indian child, there are special interests that must be taken into account during an adoption placement process. But these interests, as provided for in ICWA, must serve the "best interests" of the Indian child. And those best interests are best served by certainty, speed, and stability in making adoptive placements with the participation of Indian tribes.

I firmly believe this bill better enables us to serve the best interests of all in ways that preserve fundamental principles of tribal sovereignty by recognizing and preserving the appropriate role of tribal governments in the lives of Indian children. We've delayed too long and I intend to pursue enactment of this bill as soon as possible.

PREPARED STATEMENT OF HON. GEORGE MILLER, U.S. REPRESENTATIVE FROM CALIFORNIA

Today, we are taking testimony on two identical bills, the Indian Child Welfare Act Amendments of 1997. The bill that I cosponsored in the House, H.R. 1082, is, I believe, a timely bill that reflects a carefully crafted compromise between the interests of Indian tribes seeking to protect their culture and heritage and the interests of non-Indians seeking greater clarity and security in the implementation of the Indian Child Welfare Act of 1978.

This bill is virtually the same as legislation I cosponsored last year and is the direct result of our consideration of several high-profit adoption cases involving the adoption of Indian children. These cases, involving lengthy disputes under the Indian Child Welfare Act, focused our attention on whether the Act fairly, and to the greatest degree possible, takes into account the best interests of Indian children, families, prospective parents, and Indian tribes.

H.R. 1082 stands in contrast to other attempts last Congress to rectify these problems by simply gutting the Indian Child Welfare Act and repealing many of the protections it affords Indian children and their parents. Proponents of our legislation now include the American Academy of Adoption Attorneys and Jane Gorman, the attorney who represented the family in the *Rost* case.

Our bill is intended to strengthen the act and to protect the lives and future of Indian children first and foremost. We understand that to a few parties on either side of the debate this bill may not seem perfect. Few compromises are. But what this bill does is truly important. This bill helps Indian children by providing allowing adoptions to move forward quickly and with greater certainty. This bill places limitations on when Indian tribes and families may intervene in the adoption process. Yet at the same time, this bill protects the fundamental rights of tribal sovereignty.

The point is that this bill places the interests of Indian children above all else, first by ensuring that they will have as equal a chance as any other children at having a loving family and a home, and second, by protecting their interests in their own culture and heritage.

We cannot forget why we had to have the Indian Child Welfare Act in the first place—to stop the widespread removal of Indian children from their families and tribes that was occurring on reservations across the country. Former Committee Chairman Mo Udall, who pushed through this landmark legislation in 1978, recognized that: "Indian tribes and Indian people are being drained of their children, and as a result, their future as tribes and as a people is being placed in jeopardy." Testimony taken by our Committees revealed that as much as 25 to 35 percent of all Indian children were being placed in non-Indian homes away from reservations. Much of the problem was caused by unethical adoption agencies with little regard for Indian culture, sovereignty, or family feelings. The purpose of the 1978 law was to give Indian tribes a chance to have their side of the story heard when it came to adoption proceedings. This was accomplished by giving tribes the right to participate in state court proceedings and to have those proceedings sent to tribal courts when appropriate. We will preserve that right.

One result of the passage of the Act has been the development and implementation of tribal juvenile codes, juvenile courts tribal standards, and child welfare services. Today, almost every Indian tribe provides child welfare services to their own children. Furthermore, we now know that the Act has motivated courts and agencies to place greater numbers of Indian children into Indian homes and that there has been an overall reduction in foster care placement as well.

In other words, the Indian Child Welfare Act has worked. Indian children have been placed in loving homes and the removal of children from their culture has diminished. Unlike other minority cases, there is no shortage of families willing to



adopt Indian children. Less than 1 percent of all Indian adoption cases since passage of the Act have caused problems.

Some have tried to blame the few but well-publicized failures on the Indians, some have concluded that rolling back the Indian Child Welfare Act is necessary to prevent future miscarriages of justice, and some have even asserted that they are doing it with the best interests of the Indians at heart. But Indian people have heard claims like these all too many times before. We understand how hard it must be for them to live with this rhetoric, especially when the stakes are so high. We must all bear in mind that from an Indian perspective, it is the very future of their people and their culture that is at stake.

It is time for non-Indians to understand that Indian families are not necessarily opposed to other people raising their children and giving them loving homes. But it is even more critical that they understand that Indian people must have a voice in these adoptions.

While we in Congress are often the first to prescribe what is best for American Indians, we usually fail in our attempts to deliver on our promises, largely due to our unwillingness to listen to the very people we're trying to help. I have listened to the tribes and to the families and I believe that the Indian Child Welfare Act Amendments of 1997 are a fair and balanced approach that can bring peoples and cultures together, not divide them.

PREPARED STATEMENT OF HON. DEBORAH PRYCE, U.S. REPRESENTATIVE FROM OHIO

Mr. Chairmen, distinguished members of the House and Senate Committees, thank you for inviting me to testify today regarding the Indian Child Welfare Act of 1978, known as the ICWA, and specifically to discuss S. 569 and H.R. 1082.

My interest in this issue began when my constituents, the Rost family in Columbus, OH, told me the story of their fight to keep their adopted twin daughters. When these little girls were placed for adoption by their birth parents, nobody knew of their Indian heritage. It was only after their grandmother signed the father and the girls up with the Pomo Indian tribe that the ICWA was invoked and the adoption was put on hold. Three years later, after taking a second mortgage on their home, accruing thousands of dollars in legal bills, and enduring a tremendous emotional toll—the Rosts' fight continues. The Rosts' case is not an anomaly. Since I became involved in this issue, I have heard numerous horror stories from people all over the country who are victims of the ICWA. Much of this stems from a broad and inconsistent application of the law.

An article written by Christine Bakeis, published in the Notre Dame Journal of Law, Ethics and Public Policy last year does a good job of explaining the fundamental flaws of the ICWA as applied by the courts. I respectfully recommend to my colleagues that you read this article as your committees debate ICWA reform, or perhaps invite Ms. Bakeis to testify at future hearings.

The 14th amendment of the U.S. Constitution protects the rights of individuals against classifications based on race. And, it protects the rights of parents to control their children's upbringing as fundamental liberty and privacy issues. The ICWA flies in the face of these constitutional principles that we as Americans hold dear. The ICWA excludes all other circumstances to the sole factor of race and denies basic constitutional rights to parents who have a child with Indian blood. For example, a mother who has no Indian blood or any ties to Indian culture, who voluntarily places her child for adoption, and chooses the adoptive parents, can have the decisions she makes for her child overturned by an unknown third party, solely because her child has Indian blood.

As more and more Americans become outraged by the violation of basic individual rights that the ICWA embodies, I believe we will witness the demise of this law.

S. 569 and H.R. 1082 do nothing to address these fundamental issues. Instead these bills take a procedural approach that, in my view, is cumbersome enough to significantly discourage the adoption of Indian children. The complexity of these requirements almost guarantees an inability to comply. I challenge the members of the committees to read this legislation and understand what it requires. As a former judge, I can tell you that courts are going to have a very difficult time applying the provisions. Frankly, these bills' procedural reforms do not go nearly far enough to address the real concerns that are denying the placement of needy children in permanent, loving homes.

I will reintroduce substantive legislation that is similar to language that the House of Representatives passed last year. However, in an effort to make a good-faith compromise, I will remove some of the provisions of this legislation that are objectionable to the Native American community. This new bill will not address ret-

roactive membership in a tribe, nor will it require adults to give written consent to become a tribal member. In addition, a provision that the tribes felt would limit their ability to appeal state court decisions will be deleted.

The language that remains will codify into statute the law applied by many state courts known as the "existing Indian family doctrine." Under this doctrine, the ICWA does not apply to children who do not live on a reservation, unless at least one parent is of Indian descent, and at least one parent maintains significant social, cultural, or political ties to the tribe of which either parent is a member.

It is this doctrine that has been applied to the Rost case by the California Court of Appeals. The U.S. Supreme Court denied the petitions that asked for a review of this decision, indicating that the Supreme Court accepts the application of this doctrine as the correct interpretation and application of the ICWA. Codifying the existing Indian family doctrine into law is a good first step toward reforming the ICWA that should have the support of all parties interested in the law's preservation.

I look forward to working with the Committees, the Native American community, and all interested parties to improve the ICWA so that it can work to protect the rights of children, Native American tribes, and adoptive families.

Thank you.

PREPARED STATEMENT OF HON. GERALD B.H. SOLOMON, U.S. REPRESENTATIVE FROM NEW YORK

Thank you for the opportunity to share my thoughts on the reform of the Indian Child Welfare Act.

My understanding and interest in the Indian Child Welfare Act stems from my own personal experiences with adoption. As a strong supporter of adoption, I understand the need for families who have sought to make homes for children who were not able to be raised by their biological parents.

It is up to those of us who have been adopted not only to share our stories with others, but to speak out in favor of the adoption decision. My support has grown out of my fundamental view that every human life is precious and that every person deserves the right to life and a happy home.

I, myself, was blessed to be adopted by a generous stepfather and raised in a loving family. I want to give all children the chance to grow up in a caring and loving family environment. For this reason, I write to offer my full support for reform of the Indian Child Welfare Act. The Indian Child Welfare Act was passed in 1978 in response to a terrible problem within the Indian community: the high numbers of Indian children being placed in foster care and the breakup of many Indian families because of the unwarranted removal of their children by non-tribal public and private agencies. This was clearly an unjust situation that needed to be corrected in order to protect the sanctity of the Native American family.

Though the Indian Child Welfare Act was meant to remedy this situation, the reality is that the Act has been detrimental in some cases. The problem that the Act was created to correct, namely, the inordinate number of Indian children in foster care, has actually risen since its enactment because of the increased authority the Act can give an Indian tribe. This increased authority has lengthened the adoption process and left many innocent Indian children in foster care.

This joint hearing has been convened to discuss proposed language to amend the Act to respond to many of these concerns. I believe this language represents a step in the right direction in reforming the Act and was created through negotiations between tribal governments and the adoption community. I am encouraged at sections that will facilitate voluntary agreements between Indian families or tribes and non-Indian adoptive families.

However, I am concerned that this language, while commendable, will not address cases where the adoptive child is retroactively registered with an Indian tribe. I know all my colleagues in this Congress share my interest in providing families with the assurance that their adopted children will not be removed from their family due to retroactive registration. I understand the need to allow the Indian tribes the ability to intervene in an adoption case, however, fair and unbiased regulations need to be implemented. With future discussions like this hearing between the House and the Senate, these concerns can hopefully be rectified.

This legislation is extremely important to the families of this country, Indian and non-Indian. Adoption plays a vital role in strengthening the family unit and protecting the values of this great Nation. In reforming the Indian Child Welfare Act, we must remember that the best interests of the children must be paramount in all child custody proceedings. Congress must work diligently to remove illogical barriers

to adoption and provide a sense of security to adoptive parents and children that their adoptions will be permanent. For this reason, I hope the Chairmen will continue to pursue and pass reform of the Act in this Congress.

I urge support of full reform of the Indian Child Welfare Act and thank you both for your important work on this issue.

PREPARED STATEMENT OF ADA E. DEER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS,  
DEPARTMENT OF THE INTERIOR

Good morning Chairman Campbell, Chairman Young, and members of the committees. I am pleased to be here to present the Department of the Interior's views on proposed amendments to the Indian Child Welfare Act [ICWA] of 1978. The Department of the Interior supports, without reservation, H.R. 1082 and its companion bill, S. 569, which have incorporated the consensus-based tribal amendments developed last year by tribal governments and the National Congress of American Indians [NCAI] and the adoption community to improve the Indian Child Welfare Act.

Congress passed the Indian Child Welfare Act in 1978 [ICWA], after 10 years of study on Indian child custody and placements revealed an alarming high rate of out of home placements and adoptions. The strongest attribute of the ICWA is the premise that an Indian child's tribe is in a better position than a State or Federal court to make decisions or judgments on matters involving the relationship of an Indian child to his or her tribe. The clear intent of Congress was to defer to Indian tribes issues of cultural and social values as such relate to child rearing.

In addition to protecting the best interests of Indian children, the ICWA has also preserved the cultural integrity of Indian tribes because it affirmed tribal authority over Indian child custody matters. As a result the long term benefit is, and will be, the continued existence of Indian tribes.

The Indian Child Welfare Act of 1978 is the essence of child welfare in Indian Country and provides the needed protections for Indian children who are neglected. On the whole, the ICWA has fulfilled the objective of giving Indian tribes the opportunity to intervene on behalf of Indian children eligible for tribal membership in a particular tribe.

There have been concerns over certain aspects of the ICWA and the ICWA should be revised to address problem areas and to ensure that the best interests of Indian children are ultimately considered in all voluntary child custody proceedings. Although several high-profile cases were cited to support the introduction last year of ICWA amendments, which would have been detrimental to Indian tribes and families, those cases do not warrant a unilateral and unfettered intrusion on tribal government authority.

The provisions contained in H.R. 1082 and S. 569 reflect carefully crafted consensus amendments between Indian tribes seeking to protect their children, culture and heritage and the interests of the adoption community seeking greater clarity and certainty in the implementation of the ICWA. First and foremost, the amendments will clarify the applicability of the ICWA to voluntary child custody matters so that there are no ambiguities or uncertainties in the handling of these cases. We know from experience that State courts have not always applied the ICWA to voluntary child custody proceedings.

The amendments will ensure that Indian tribes receive notice of voluntary ICWA proceedings and also clarify what should be included in the notices. Timely and adequate notice to tribes will ensure more appropriate and permanent placement decisions for Indian children. Indian parents will be informed of their rights and their children's rights under the Act, ensuring that they make informed decisions on the adoptive or foster care placement of their children. When tribes and extended family members are allowed to participate in placement decisions, the risk for disruption will be greatly reduced. While the amendments place limitations on when Indian tribes and families may intervene and when birth parents may withdraw their consent to an adoption, they protect the fundamental rights of tribal sovereignty. Furthermore, the amendments will permit open adoptions, when it is in the best interest of an Indian child, even if State law does not so provide. Under an open adoption, Indian children will have access to their natural family and cultural heritage when it is deemed appropriate.

An important consideration is that upon a tribe's decision to intervene in a voluntary child custody proceeding, the tribe must certify the tribal membership status of an Indian child or their eligibility for membership according to tribal law or custom. Thus, there would be no question that a child is Indian under the ICWA and ensures that tribal membership determinations are not made arbitrarily. Last, the amendments will provide for criminal sanctions to discourage fraudulent practices

by individuals or agencies which knowingly misrepresent or fail to disclose whether a child or the birth parent(s) are Indian to circumvent the application of the ICWA.

In summary, the tribally developed amendments contained in H.R. 1082 and S. 569 clearly address the concerns which led to the introduction of Title III of H.R. 3286 (104th Congress), including timeframes for ICWA notifications, timely interventions, and sanctions, definitive schemes for intervention, limitations on the time for biological parents to withdraw consent to adoptive placements, and finality in voluntary proceedings.

Chairman Campbell and Chairman Young, we want to express our grave concern that the objectives of the ICWA continue to be frustrated by State court created judicial exceptions to the ICWA. We are concerned that State court judges who have created the "existing Indian family exception" are delving into the sensitive and complicated areas of Indian cultural values, customs and practices which under existing law have been left exclusively to the judgment of Indian tribes. Legislation introduced last year, including H.R. 3286, sought to ratify the "existing Indian family exception" by amending the ICWA to codify this State-created concept. The Senate Committee on Indian Affairs, in striking Title III from H.R. 3286, made clear its views that the concept of the "existing Indian family exception" is in direct contradiction to existing law. In rejecting the "existing Indian family exception" concept, the Committee stated that "the ICWA recognizes that the Federal trust responsibility and the role of Indian tribes as *parens patriae* extend to all Indian children involved in all child custody proceedings." [Report 104-335 accompanying S. 1962, 104th Cong., 2nd Session].

The Department of the Interior's position on the emerging "existing Indian family exception" concept is the same as previously stated in the administration's statement of policy issued on May 9, 1996. We oppose any legislative recognition of the concept.

The Department's position is that the ICWA must continue to provide Federal protections for Indian families, tribes and Indian children involved in any child custody proceeding, regardless of their individual circumstances. Thus, the Department fully concurs with the Senate Committee on Indian Affairs' assessment and rejection of the "existing Indian family exception" concept and all of its manifestations. We share the expressed concerns of tribal leaders and a majority of your committee members about continuing efforts to amend the ICWA, particularly those bills which would seriously limit and weaken the existing ICWA protections available to Indian tribes and children in voluntary foster care and adoption proceedings.

The United States has a government-to-government relationship with Indian tribal governments. Protection of their sovereign status, including preservation of tribal identity and the determination of Indian tribal membership, is fundamental to this relationship. The Congress, after 10 years of study, passed the Indian Child Welfare Act of 1978 (Pub. L. 95-608) as a means to remedy the many years of widespread separation of Indian children from their families. The ICWA established a successful dual system that establishes exclusive tribal jurisdiction over Indian Child Welfare cases arising in Indian Country, and presumes tribal jurisdiction in the cases involving Indian children, yet allows concurrent State jurisdiction in Indian child adoption and child custody proceedings where good cause exists. This system, which authorizes tribal involvement and referral to tribal courts, has been successful in protecting the interests of Indian tribal governments, Indian children and Indian families for the past 18 years.

Because the proposed amendments contained in H.R. 1082 and S. 569 will strengthen the Act and continue to protect the lives and future of Indian children, the Department fully embraces the provisions of H.R. 1082 and S. 569.

In closing, we appreciate the good faith efforts of tribal governments in addressing the ICWA-specific concerns raised by certain Members of the Congress and in developing tribally acceptable legislative amendments toward resolving these issues within the past year. I would like to thank Chairman Campbell, Chairman Young, and the committee members for all their hard work and heartfelt assistance to tribes in shepherding the tribal amendments through the legislative process. This administration will endeavor to ensure that tribal sovereignty will not be compromised, specifically, the right of tribal governments to determine tribal membership and the right of tribal courts to determine internal tribal relations.

This concludes my prepared statement. I will be pleased to answer any questions the committees may have.

PREPARED STATEMENT OF MERVIN WRIGHT, JR., CHAIRMAN, PYRAMID LAKE PAIUTE TRIBAL COUNCIL

The Pyramid Lake Paiute Tribe supports the proposed amendments contained in S. 569 and H.R. 1082. These provisions resulted from a 3-day workgroup of tribal leaders, non-Indian adoption attorneys and the professionals who work in the area of Indian children welfare who were present at the National Congress of American Indians 1996 midyear conference. I was present at the Tulsa NCAI conference during the floor debate on the ICWA resolution and there were many emotional stories shared by Indian men and women who are products of extended families who raise them.

The provisions reflect a consensus by tribes and non-Indian adoption attorneys to strengthen the current Indian Child Welfare act for the best interests of Indian children and to protect their culture and heritage, which clearly is a very high priority.

The Pyramid Lake Tribe supports the amendments that include notification of voluntary cases. This notice would allow and improve the time line for the extended families and the tribes to respond in Indian child placement proceedings. This notice would also contain distinct information so that a tribe can make the proper judgment on intervention. The amendments would also ease the adoption process so no Indian child has to wait an extended time to become a member of a loving, caring family.

We do not support any amendment that would eliminate the right of a tribe to determine its own tribal membership. We strongly object to state court judges who have established an "existing Indian family doctrine" in which the judges have ruled that ICWA does not apply to children who have no significant ties, either cultural or by proximity, to their reservations. This doctrine infringes upon the inherent right of the tribes as sovereign nations to determine its own membership. We appreciate Senator McCain's remark in his prepared statement in which he refers to preserving the fundamental principles of tribal sovereignty by recognizing and preserving the appropriate role of tribal governments in the lives of Indian children.

We, as Indian People feel very strongly toward protecting our children. As we look back at our histories our ancestors have, at certain times, given the ultimate sacrifice to protect our ways of life. In today's society we have to use our best ability to impose the same principles of representation in these critical issues. Our intent is to protect our future, which is vested in our children. Our children are our future—we need to nurture and protect them.

The Pyramid Lake Paiute Tribe commends Chairmen Campbell and Young and members of the House Committee on Resources and the Senate Committee on Indian Affairs for holding a joint hearing on the amendments to the Indian Child Welfare Act. We urge passage of the proposed legislation developed by consensus of tribal leaders at the Tulsa NCAI midyear conference in 1996. Your efforts in representing the best interests of our Indian children are greatly appreciated.

PREPARED STATEMENT OF STANLEY CROOKS, CHAIRMAN, SHAKOPEE MDEWAKANTON SIOUX COMMUNITY COUNCIL

The Shakopee Mdewakanton Sioux Community [Dakota] Business Council appreciates the opportunity to submit a written statement on the Indian Child Welfare Amendments [ICWA] which were the subject of a joint hearing on June 18, 1996 convened by the Senate Committee on Indian Affairs and the House Resources Committee.

The Shakopee Mdewakanton Sioux [Dakota] Community supports the proposed ICWA amendments developed and approved by consensus of tribal leaders at a mid-year conference of the National Congress of American Indians in Tulsa last year. We believe, as all tribes do, that our Indian children are our future and they must be protected.

The provisions contained in both the Senate and House bills, S. 569 and H.R. 1082, reflect the combined efforts of tribes to protect our greatest resource—our children, our tribal culture and heritage, and the efforts of the non-Indian adoption community to achieve clarity and certainty in the implementation of ICWA to best benefit the Indian child.

It is our belief that ICWA has worked well although, as with non-Indian adoption proceedings, there will be from time to time, high-profile cases that will bring a sharp focus on the shortcomings of the proceedings. It is our understanding that many of the high-profile cases would not have occurred if the mandates of ICWA had been complied with during the adoption process. We would like to note that Mike Walleri, attorney for Tanana Chiefs Conference, stated in his oral testimony

that "It is important to remember that this legislation addresses issues that arise in less than 5 percent of the tribal ICWA case loads."

It is important to tribes that the government-to-government relationship be maintained so that our tribal sovereignty is not compromised and that sovereignty embodies the right of a tribe to determine its own membership. Therefore, the Shakopee Mdewakanton Sioux [Dakota] Community opposes any proposal that contains the so-called "existing Indian family doctrine" used by some state court judges who establish an exemption to ICWA in cases where, in their sole judgment, the biological parents fail to maintain a sufficient contact with the tribe. State court judges do not have the right or the knowledge to determine tribal membership; only the tribe can do that. We encourage you to oppose any amendments that would be harmful to either Indian children and families or tribal governments.

We commend the chairmen and the committees for their leadership in seeking legislation in which both the Indian and non-Indian adoption communities can concur and that will result in affirmative contributions to the well being of Indian children. Thank you.

PREPARED STATEMENT OF THE WINNEBAGO TRIBE OF NEBRASKA

The Winnebago Tribe of Nebraska appreciates the opportunity to submit for the record our written comments on amendments to the Indian Child Welfare Act.

The Winnebago Tribe is in support of S. 569 and H.R. 1082 which are identical to legislation offered by Senator McCain that passed the Senate last year. This legislation is based on a consensus of tribal leadership at the National Congress of American Indians Mid-Year Conference in Tulsa in 1996 in cooperation with the Northwest Indian Child Welfare Association and representatives of non-Indian adoptive families. Their goal was to reach suitable language to improve ICWA that would best serve not only adoptive families but most importantly, the Indian tribes and those most important to us—our Indian children and their rights to maintain their affiliation and identity with their tribes.

Our tribal government is actively pro-family and pro-child. We spend considerable amounts of tribal funds, staff time, and governmental energy working to better the lives of our children. The staff of the Winnebago Tribe Department of Human Services consists of one Indian child welfare worker who handles the Tribe's ICWA cases both on- and off-reservation and three child protection services personnel who handle ICWA cases only on the reservation. These dedicated community members serve the tribe not only as professionals in social services, but they are also parents, aunts and uncles, and grandparents of the Indian children who are so important to the future of our tribe.

The Winnebago Tribe currently has active Indian Child Welfare Act cases in seven states: eight in Iowa, three in Minnesota, one in Montana, one in Nebraska, one in New Mexico, one in Washington, four in Wisconsin, and eight of which have been transferred to tribal court. Efforts at family reunification are strong. Consequently, cases have been closed. This demonstrates that the ICWA interventions are successful. Moreover, in none of the active cases are parental rights about to be terminated.

From our Tribe's experience, we have found, generally speaking, that state courts are willing to work with the Tribe in child custody and placement proceedings. Our success rate has been good in getting cases transferred back to tribal court, particularly in instances where the case has not been going on for longer than 1 year.

The experience of the Winnebago Tribe has been that state courts have sometimes misunderstood or been unenlightened about the provisions of the Indian Child Welfare Act. However, when state courts having jurisdiction over Winnebago children are willing to work with the Tribe in custody proceedings, we have found that the outcome has furthered the best interests of the Indian children.

The Winnebago Tribe feels strongly that tribes should intervene in every ICWA case involving a child who is eligible to be a member of our Tribe. This will not necessarily lead to a request to transfer to tribal court, however. To exercise this right, however, we need notice. If we don't find out about these cases, our children run the risk of being forever lost to their heritage and to the benefits and privileges of membership in our Tribe. For these reasons, we simply believe that it is in the best interests of Indian children that each tribe should be notified when there is a placement involving a child who may be or is a tribal member. We especially support the provisions regarding notification that are contained in the bills before your committees. These amendments would ensure that Indian tribes receive timely and detailed notice of voluntary ICWA proceedings.

The Winnebago Tribe is in strong opposition to any proposal that would legitimize "the existing Indian family doctrine" imposed by some state courts in which judges have ruled that ICWA does not apply to children who do not live on a reservation unless at least one parent is of Indian descent and maintains significant social, cultural or political ties to the tribe in which the parent is a member. We strongly object to State court judges making up this doctrine in order to keep our children away from their tribal heritage and rights as tribal members. We would strenuously object to any legislative amendments to S. 569 and H.R. 1038 which would statutorily codify this doctrine. This doctrine infringes upon the fundamental right of the tribes to determine our own membership as sovereign nations.

The Winnebago Tribe appreciates the leadership of the Senate Indian Affairs Committee and the House Resources Committee on moving these bills forward. Thank you for holding this joint hearing on these ICWA amendments. We applaud your willingness to consider and to support tribally developed amendments to ICWA.

In conclusion, we urge you to move these bills to enactment as quickly as possible. The best interests of many Indian children in large part depend upon these bills being made law as quickly as possible. Thank you.



## Department of Justice

STATEMENT

OF

THOMAS L. LeCLAIRE

DIRECTOR

OFFICE OF TRIBAL JUSTICE

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE

AND THE

COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

PROPOSED AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

PRESENTED ON

JUNE 18, 1997



Chairman Campbell, Chairman Young, and members of the Senate Indian Affairs and House Resources Committees, I am Thomas L. LeClaire, Director of the Office of Tribal Justice at the Department of Justice. Thank you for inviting the Department to present its views on S. 569 and the companion bill H.R. 1082, which would amend the Indian Child Welfare Act ("ICWA"). The Administration and the Attorney General recognize the need for caring families and nurturing homes for Indian children. The Department supports S. 569 and H.R. 1082, which evolved from a dialogue among adoption attorneys and tribal representatives on how to strengthen ICWA. The proposed legislation advances the best interests of Indian children while preserving tribal self-government.

We are informed by the Departments of the Interior and Health and Human Services that ICWA generally works well, particularly when the affected parties are apprised of their statutory rights and duties and the Act's provisions are applied in a timely manner. The implementation of ICWA in a relatively small number of voluntary adoption cases, however, has evoked intense debate, both in Congress and elsewhere. Generally, Indian parents or a tribe, in these problematic cases, allege that ICWA was not complied with and seek to recover custody of the Indian children involved. The time consumed by the legal proceedings disrupts lives and causes significant anguish. One's heart goes out to the parents, prospective parents, and

especially to the children, who find themselves entangled in these disputes.

In addressing these problematic cases through legislation, Congress should be mindful of ICWA's important purposes and its affirmation of tribal rights of self-government. In the 104th Congress, the Department of Justice opposed Title III of the Adoption Promotion and Stability Act of 1996, H.R. 3286, which, in our view, was inconsistent with tribal authority over matters of tribal membership. See Letter from Andrew Foia, Assistant Attorney General for Legislative Affairs to Chairman McCain, June 18, 1996. S. 569, in contrast to Title III of the Adoption Promotion and Stability Act of 1996, preserves tribal self-governance while enhancing certainty in child custody and adoption proceedings pursuant to ICWA and while strengthening federal enforcement tools to promote compliance with ICWA in the first instance.

#### I. The Right Of Indian Tribes To Self-Government

Since the early days of this Nation, the United States has recognized that Indian tribes have the authority to govern their members and their territory. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The United States has entered into hundreds of treaties and agreements with Indian tribes, pledging protection for Indian tribes and securing the tribes' rights to the "highest and best" form of government, "self-government." Ex parte Crow Dog, 109 U.S. 556, 568 (1883). ICWA is a constitutionally valid statute that is closely tied to Congress'

"unique obligations" to Indian tribes by protecting the best interests of Indian children and families while promoting tribal rights of self-government. See Morton v. Mancari, 417 U.S. 535, 555 (1972).

## II. The Statutory Framework Of The Indian Child Welfare Act

The United States has a government-to-government relationship with Indian tribal governments. Protection of the sovereign status of tribes, including preservation of tribal identity and the ability to determine tribal membership, is fundamental to that relationship. To this end, ICWA establishes a dual jurisdictional system for Indian child custody proceedings: a) Congress confirmed the exclusive jurisdiction of tribal courts in Indian child custody proceedings when the Indian child is domiciled in tribal territory; 25 U.S.C. § 1911(a),<sup>1</sup> and b) Congress created a procedure to transfer off-reservation Indian child custody cases to tribal courts, but allowed state courts to retain jurisdiction of such cases where good cause exists.<sup>2</sup>

ICWA establishes substantive and procedural protections for Indian children, Indian families, and Indian tribes. In any involuntary state court proceeding to place an Indian child

<sup>1</sup> See Fisher v. District Court, 424 U.S. 382 (1976) (tribal courts have exclusive jurisdiction over adoptions of Indian children who are domiciled on the reservation).

<sup>2</sup> ICWA, notably, recognizes the role of biological parents in this process by reserving the right of either parent to refuse to transfer a case involving their child to tribal court. 25 U.S.C. § 1911(b).

outside the home, ICWA requires notice to the Indian parent or custodian and the child's tribe, and imposes a ten-day stay of proceedings, which may be extended to thirty days. 25 U.S.C. § 1912(a). ICWA also establishes a right to counsel for indigent parents and a right to examine records, and it requires state child welfare agencies to make remedial efforts to prevent the breakup of the Indian family. 25 U.S.C. § 1912(b)-(d).

In any voluntary state court proceeding for relinquishment of custody or parental rights, ICWA requires the court to certify that it has explained the consequences of the action and that the Indian parent has understood those consequences. 25 U.S.C. § 1913(a). No consent to adoption is valid if made before an Indian child is born or within ten days after birth.<sup>3</sup> Id. Consent to adoption may be withdrawn prior to entry of a final decree, 25 U.S.C. § 1913(c), and consent to foster care placement may be withdrawn at any time. 25 U.S.C. § 1913(b). After entry of a final adoption decree, a collateral attack on that decree alleging fraud or duress may be initiated within two years of the decree, unless a longer period is provided for by state law. 25 U.S.C. § 1913(d).

## III. The Operation Of The Indian Child Welfare Act

The Department of Justice has only a limited role in the implementation of ICWA, so our knowledge of how, and how well,

<sup>3</sup> The ICWA ten-day protective period is consonant with many state laws. More than half of the states do not permit parental consent to adoption until 3 days after a child is born. M. Hansen, "Fears of the Heart," ABA Journal (November, 1994) at 59.

ICWA works is premised largely on the reports of the Departments of the Interior and Health and Human Services.<sup>4</sup> These agencies report that ICWA generally has helped to preserve the integrity of Indian families and tribal relations with those families, especially when parties are informed about ICWA, abide by its provisions, and it is applied in a timely manner.<sup>5</sup> In fact, despite some recent concern about ICWA's application to certain off-reservation cases, legislators seem to agree that ICWA works.

Under ICWA, courts are able to tailor foster care and adoptive placements of Indian children to meet the best interests of children, families, and tribes. We understand that the vast majority of these cases are adjudicated without significant problems. The application of ICWA to a limited number of cases involving adoptive placements that are later challenged by biological parents or the child's tribe, however, has drawn criticism. This criticism, in turn, provides in part the impetus for amendments to the ICWA.

These cases are difficult and heart-rending, often having tragic consequences for all parties to the dispute. It is important to reiterate, however, that these problematic cases are not indicative of the manner in which ICWA operates in the vast

<sup>4</sup> See Hearing Before the Senate Committee on Indian Affairs, (1995) (statement of Joann Sebastian Morris, Acting Director, Office of Tribal Services, BIA); (statement of Terry L. Cross, Executive Director, National Indian Child Welfare Ass'n); (statement of gaiashkibos, President, National Congress of American Indians).

<sup>5</sup> Other positive results reported under ICWA are the development of tribal juvenile codes, tribal court processes for addressing child welfare issues, and tribal child welfare services.

majority of instances. Further, many of these cases would not have been problematic if ICWA's dictates had been complied with at the outset of the adoption process.

For example, among the cases commonly cited for the need to amend ICWA is the adoption that provided the factual predicate for the In re Bridget R. decision by the California Court of Appeal. 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996), cert. denied, U.S. (1997), 117 S. Ct. 1460. In that case, twin girls of Indian descent were placed with a non-Indian family when their biological parents relinquished them to an adoption agency. The biological parents and the interested tribe subsequently challenged the adoption. The ensuing protracted litigation has disrupted the lives of all those who are involved in the dispute.

Had ICWA been complied with in that instance, however, most of the delay -- and quite possibly the litigation itself -- would have been avoided. The biological parents would have been required to wait 10 days after birth to relinquish their rights, and prior to relinquishing their rights, they would have been instructed by a judge as to their rights under the statute and the consequences of their waiver of those rights. None of this occurred, and that created the problem. Bridget R., therefore, signals a need to fine-tune ICWA's statutory mechanisms to provide incentives for the early compliance with ICWA in the adoption process.

Many supporters of Title III of H.R. 3286 focused solely on Bridget R. and other anomalous cases and made the assumption that

held in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), that the power to determine tribal membership is a fundamental aspect of tribal self-government, akin to the power of the United States to determine citizenship. Tribal membership is thus a matter of tribal law, which should be determined by tribal government institutions.

Moreover, the "existing Indian family" doctrine grafts onto ICWA a subjective and open-ended test that, if anything, will increase the quantum of litigation. The existing trigger for ICWA -- tribal membership or eligibility for tribal membership -- is readily discernible by an inquiry to the relevant tribal government. In contrast, the "social, cultural, or political affiliation" test incorporates subjective criteria more likely to create additional litigation, with attendant delays in the adoptive placement of Indian children, than to "streamline" adoptive placements.

In the view of the Department, Title III, by incorporating the "existing Indian family" doctrine, would have undermined tribal self-government and the objectives of ICWA. The Department, therefore, opposed the Title III amendments to ICWA. The Senate Committee on Indian Affairs reached a similar conclusion, stating that the doctrine, as codified in Title III of H.R. 3286, "is completely contrary to the entire purpose of the ICWA." S. Rep. No. 335, 104th Cong., 2d Sess. 14 (1996). As a result, this Committee struck Title III of H.R. 3286 and ordered the bill reported with the recommendation that the Senate

pass the bill without Title III.

#### V. Amendments to ICWA Through S. 569 and H.R. 1082

S. 569, and its companion bill H.R. 1082, reflect a carefully crafted agreement between Indian tribes and adoption attorneys -- an agreement designed to make Indian child adoption and custody proceedings more fair, swift, and certain. In improving the fairness and certainty of ICWA, S. 569 promises to advance the best interests of Indian children while preserving longstanding principles of tribal self-government.

Although the Department has had little experience litigating ICWA issues, we have reviewed S. 569 in light of our experience with civil and criminal enforcement, the United States' commitment to supporting tribal sovereignty, and basic principles of statutory construction. S. 569 would clarify ICWA, establish some deadlines to provide certainty, reduce delay in custody proceedings, and strengthen federal enforcement tools to ensure compliance with the statute in the first instance.

#### CONCLUSION

We appreciate the efforts that the Chairman, the Vice Chairman, and the Committee have made to foster dialogue on the Indian Child Welfare Act. S. 569/H.R. 1082 amends ICWA in a manner that is both respectful of tribal self-government and conducive to certainty and timeliness in voluntary adoptions of Indian children. In conclusion, I would like to reiterate the Department's support for S. 569 and the important goals that guided Congress in enacting ICWA. In addition, we are committed

to working with the Committee, tribes, and all interested parties to further ICWA's goals.

This concludes my prepared statement. At this time, Mr. Chairman, I would be pleased to respond to questions from you or other Committee Members.

TESTIMONY OF DEBORAH J. DOXTATOR  
 CHAIRWOMAN OF THE ONEIDA NATION OF WISCONSIN  
 BEFORE THE SENATE COMMITTEE OF INDIAN AFFAIRS AND  
 THE HOUSE RESOURCES COMMITTEE  
 JUNE 18, 1997

Thank you for your invitation and the opportunity to testify. I would also like to thank the Chairmen of both Committees and the individual Committee members for their attention to this very important legislation involving Indian children.

My name is Deborah Doxtator and I appear on behalf of my Tribe, the Oneida Nation of Wisconsin. The Oneida Nation is a rather large Tribe, with more than 14,000 enrolled members, located in Northeastern Wisconsin. The Oneida, like many other Tribes, have a commitment to their community. As part of this commitment, they have chosen to devote many of their resources to the children who are part of our community through the development of the Oneida Indian Child Welfare program.

In my testimony this morning, I will cover four main areas. I will give a brief overview of the Indian Child Welfare Act (ICWA) and discuss the Oneida Indian Child Welfare Program. Then I will briefly discuss the recent concerns about the Indian Child Welfare Act in reaction to a high profile court case, and the amendments proposed by H.R. 1082 and S. 569, both of which are based on a proposal first brought to Congress by the National Congress of American Indians last year. I will explain why these amendments enhance ICWA for everyone, most importantly for Indian children.

**THE INDIAN CHILD WELFARE ACT**

The Indian Child Welfare Act was passed by Congress in 1978 (ICWA) in an effort to stop the mass removal of Indian children from their families and native communities. Evidence presented to the Senate in 1974 indicated that 25-35% of all Indian children were removed from their homes and placed in foster care, adoptive homes or institutions. Other information presented to Congress in 1978 indicated that the adoption rate of Indian children was eight times that of non-Indian children, and that 90% of placements involving Indian children were in non-

Indian homes. In 1994, sixteen years after the ICWA's enactment, more than half of Indian children placed for adoption were still adopted by non-Native Americans.

In testimony before the Senate Select Committee on Indian Affairs in 1977, Mr. Calvin Isaac stated:

One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by non-tribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit the child.

The Indian Child Welfare Act attempts to prevent the removal of Indian children from their communities by providing a jurisdictional framework for child custody cases involving Indian children who are removed from their homes, as well as establishing placement preferences for those children when they are removed.

The great majority of Indian Child Welfare Act cases begin, not as private, voluntary adoptions, but as state or Tribally initiated abuse or neglect cases. Quite often, Oneida Social Services or a local social service agency will learn of child abuse or neglect and investigate allegations made against a parent by visiting the family and interviewing them.

If the worker feels that there is a danger to the child, court proceedings are generally initiated against the parents and continued custody by the parents is reviewed by a state or Tribal court. If the court determines that the child is in danger, the judge must determine whether to remove the child from his home. It is at this point that the Indian Child Welfare Act becomes a factor.

The Indian Child Welfare Act provides a mechanism that allows Indians parents and their Tribes to become involved in child placement proceedings, where the child is placed outside his or her Tribal home. ICWA creates three distinct jurisdictional categories. An Indian Tribe may exercise exclusive jurisdiction over child custody proceedings involving a child who resides on the reservation. Where the child does not live on the reservation, it provides for concurrent jurisdiction of the state and the Indian Tribe of the child. Finally, where a child's Indian Tribe may not have a Tribal court or chooses not to exercise its right to transfer a case to its court of jurisdiction, it affirms the right of the Tribe to participate in proceedings in state court.

One other important area addressed by ICWA is codification of placement preference standards for adoptive and foster homes. ICWA, pursuant to congressional findings acknowledging the importance of the Tribal community to the individual, makes placement

preferences which stress the need to seek placement within the child's extended family and community before outside resources are considered.

The jurisdictional affirmation provided by the Act and the placement preferences are the basis for our involvement in ICWA proceedings and are vital to the continued effectiveness of our program here at Oneida.

The program we operate at Oneida is very successful. This success is based on the cooperation of state and local authorities who are aware of the program and actually look to us as an additional, positive resource for aiding families in trouble. However, there are times when the provision of ICWA are not followed. Currently under ICWA, failure to follow its requirements is grounds for vacation of the court decree granting custody.

#### ONEIDA INDIAN CHILD WELFARE PROGRAM

The Indian Child Welfare Act provides the Oneida Nation of Wisconsin with a valuable resource for maintaining contact with young tribal members and their families and retaining them as part of their community. The use of the provisions of the Act has allowed us to place hundreds of children in Indian homes, either permanently or until their parents were able to care for them.

In the period beginning in 1990 through June of 1996, the Oneida Nation intervened in cases involving 336 Oneida children. Every one of these children was enrolled or eligible for enrollment with the Oneida Nation. Over 90% of the children involved in these cases were victims of abuse and neglect. Less than 5% of these cases were voluntary, private infant adoptions (the area of concern leading to proposed legislation in the last session).

The Oneida Nation currently has devoted an entire unit of its Social Services program to administration of Indian Child Welfare Act cases. Additionally, the Indian Child Welfare Act program has two assigned attorneys who are directly responsible for those cases involving ICWA.

The Oneida Nation recommendation regarding the placement of any child which is made pursuant to ICWA is determined by a Board composed of Oneida citizens, the Oneida Child Protective Board. The Board is charged with oversight of all Indian Child Welfare Act cases involving Oneida children. It is the duty of the Oneida Child Protective Board to inform themselves regarding all Indian Child Welfare cases, and make appropriate decisions regarding the placement of Oneida children; utilizing information from the Oneida Tribal social workers, the Oneida attorney, as well as state and county social workers, and the guardian ad litem (who is the attorney that represents the best interest of the child).

Currently, it is the Oneida Nation policy to intervene in all cases involving Oneida children. An Oneida child is a child who is one-fourth Oneida and is either enrolled or the



biological child of an enrolled Tribal member. The Oneida Nation does not intervene in cases where the child does not meet these requirements.

In the period from 1993 through 1996, The Oneida Nation received inquiries regarding child custody proceedings involving 271 children. Of those 271, the Oneida Nation declined to intervene in 159 cases, because we were unable to conclusively determine whether those children were eligible for enrollment. We declined to intervene in an additional 18 cases on other grounds.

Once the Oneida Nation determines that a child is enrolled or enrollable under ICWA, the Oneida Child Protective Board gathers as much information as possible regarding the situation and makes an informed decision that it deems to be in the best interest of the child. The Oneida Child Protective Board, through its attorney, then recommends to the Court the course of action it believes to be in the best interest of the child involved. Ultimately, it is the court that makes the determination on placement taking into consideration all the interests of the parties involved.

It is important to note that the vast majority of the cases in which the Oneida Nation is a party involve children who are placed out their homes by state authorities. These children are generally a little older and quite often they are victims of abuse and neglect. Many of them have special needs. Our current ICWA program allows us to give many of these children the stability they need by placing them within our community and keeping their ties to their families. It also allows us to provide culturally oriented services which greatly benefit many of these families.

#### PERCEIVED PROBLEMS WITH THE INDIAN CHILD WELFARE ACT

The proposed amendments were drafted in response to concerns in the adoption community regarding alleged abuses of the Indian Child Welfare Act. These concerns generally focus on private adoptions and the negative effects that the Indian Child Welfare Act has on the ability of prospective families to adopt Indian children through the private adoption process.

The concerns raised in regard to voluntary, private adoptions relate to the perceived ability of an Indian Tribe to become involved and remove children after an adoptive placement has been made. Recent cases focusing on Tribal intervention in cases after such a placement has been made have made headlines and last year spurred draft legislation which would render the Indian Child Welfare Act meaningless.

In an effort to address the concerns of adoptive parents and adoption agencies, legislation was drafted and introduced by Congresswoman Pryce that would have limited Tribes' ability to intervene in cases where a child's family was not "culturally" Indian. Under last year's draft legislation, the determination of Indian status under the Act would be made by state authorities.

Several state Attorneys General opposed Congresswoman's Pryce's legislation, including the Attorney General of Wisconsin. This legislation was also opposed by the Wisconsin State Bar Board of Governors.

Virtually every Tribe in the United States took a position against the legislation. However, Tribes recognized the need to address the perceived problems with the Act, and the NCAI proposal was drafted at a meeting of Tribes that took place in Tulsa, Oklahoma in June, 1996.

#### PROPOSED AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

The proposed amendments to the Indian Child Welfare Act are based on a proposal first submitted last year by the National Congress of American Indians (NCAI). Oneida Nation representatives actively participated in the NCAI discussions of these proposals and have continued to work with a national group of adoption attorneys and Tribal representatives to effect positive amendments to ICWA which will benefit all parties involved in child custody proceedings.

The proposed amendments do address the perceived problems with ICWA while at the same time strengthening the position of Tribes. A short explanation of each of the proposed changes follows, along with a brief explanation of the rationale behind the change.

#### NOTICE TO INDIAN TRIBES FOR VOLUNTARY PROCEEDINGS

The proposed amendments include a provision which would extend the requirement of notice to a child's Indian Tribe in voluntary as well as involuntary proceedings. It also clarifies what should be included in the notice so a Tribe may make an informed decision on whether the child is a member or eligible for membership.

Currently, notice is explicitly mandatory for involuntary child custody cases only. A common problem many Tribes have encountered in voluntary cases was that the Tribe would move to intervene after a child had been placed in an adoptive or pre-adoptive home because it learned of proceedings late. Extending the notice provision to voluntary cases would allow potential adoptive parents to know right away whether an extended family member and/or the Tribe has an interest in the child. It would also expand the pool of potential adoptive parents because frequently the Tribe knows of adoptive or foster families that the state and/or private adoption agencies do not. Finally, the expanded notice provision combined with a deadline for intervention combine to definitively address concerns raised about ICWA by creating certainty for both adoptive parents and Tribes.

#### TIME LINE FOR INTERVENTION

Included in the amendments is a provision that places a deadline Tribe intervention in a voluntary proceeding once it receives valid notice. If a Tribe did not intervene within the time period specified, then it loses the right to intervene in the proceeding.

One of the criticisms of ICWA is that Tribes intervene in cases after the child had been placed for adoption. However, the most common reason for a delay in intervention in voluntary cases is the lack of notice to the Tribe. By extending the notice requirement *and* placing a deadline for when the Tribe can intervene, all parties have a more definite understanding early in the case on placement of the child.

#### CRIMINAL SANCTIONS

This provision imposes criminal sanctions on attorneys or adoption agencies that knowingly violate the Act by encouraging fraudulent misrepresentations or omissions.

This amendment will help deter attorneys and adoption agencies from failing to comply with ICWA. Many of the problem cases that prompted the last year's proposed legislation in the House started because of knowing violations of the Act. This amendment directly addresses this problem.

#### WITHDRAWAL OF CONSENT

This provision places a time limit for when a parent could withdraw his or her consent to a foster care placement or adoption. Currently, a parent can withdraw his or her consent to an adoption until the adoption is finalized. This change would place an additional requirement that the child be in the adoptive placement for less than 6 months or less than 30 days have passed since the commencement of the adoption proceeding.

There is some perception that many of the problem cases began when the biological parents withdrew their consent to the adoption under ICWA. It is important to note that the issue of withdrawal of consent occurs in non-Indian adoptions as well as Indian adoptions, but this amendment will provide more clarity for when an Indian parent can withdraw his or her consent to an adoption.

#### APPLICATION OF ICWA IN ALASKA

This provision would clarify that Alaskan villages are included in the definition of reservation.

#### OPEN ADOPTION

This provision allows state courts to provide open adoptions where state law prohibits them.

Some states prohibit a court in an adoption decree from allowing the biological parents to maintain contact with the child after an adoption is finalized, even if all the parties agree. This provision would simply leave this option open, making adoption to non-Indian families more

attractive to Tribes, because of the possibility that the child may be more likely to keep ties with his or her culture.

#### WARD OF TRIBAL COURT

This provision clarifies that the Tribe shall retain exclusive jurisdiction over children who become wards of the tribal court following a transfer of jurisdiction from state court to tribal court proceeding.

#### DUTY TO INFORM OF RIGHTS UNDER ICWA

This amendment imposes a duty on attorneys and public and private agencies to inform Indian parents of their rights under ICWA.

Although the number of fiercely litigated ICWA cases is low, many of those cases began because Indian parents were not informed of their rights under ICWA in the beginning of the proceedings. This change would allow parties to be aware of whether ICWA applies in the beginning of the case so that all appropriate parties can give input on the initial placement decision.

#### TRIBAL MEMBERSHIP CERTIFICATION

This provision requires that any motion to intervene in a state court proceeding be accompanied by a tribal certification detailing the child's membership or eligibility for membership pursuant to tribal law or custom.

This amendment directly responds to criticism that the determination of whether a child is eligible for membership is arbitrary. The certification will detail the child's relationship to the Tribe and require a court document certifying the child's membership or eligibility for membership.

#### CONCLUSION

This proposed legislation is extremely important for two reasons. These amendments signify the willingness of Indian Tribes to address the concerns of those who feel the Indian Child Welfare Act does not work. But most importantly, these amendments which are now before you attempt to meaningfully address those concerns. We believe that the only way to deal with this issue is to propose amendments that will actually provide more security for prospective adoptive parents and still allow for meaningful participation of Indian Tribes where it is appropriate. These amendments do that by requiring that Tribes be noticed in voluntary proceedings and that placing a time limit on Tribal intervention.



I would like to stress that presently the Indian Child Welfare Act works very well when it is understood, respected, and all parties cooperate in decision-making and planning. However, improvements can be made to enhance the Act as it exists, to provide more certainty to all parties involved, most importantly for the children whose interests it is meant to protect. I urge you to recognize the success of the Indian Child Welfare Act of 1978 and the positive impact it has made on Indian communities and in the lives of Indian children by passage of these amendments, which serve to make the Act stronger.

Thank you for the opportunity to present this statement. The Oneida Nation appreciates the time and effort the Senate Indian Affairs and House Resources Committee is making to understand the impacts of this proposed legislation.



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### Testimony of The Navajo Nation Senate Indian Affairs Committee Hearings on Amendments to the Indian Child Welfare Act of 1978 June 18, 1997

#### INTRODUCTION

Mr. Chairman and Members of the Committee, I am Albert Hale, President of the Navajo Nation. On behalf of the Navajo Nation, America's largest Indian Nation, I appreciate this opportunity to present our views and recommendations regarding amendments to the Indian Child Welfare Act (ICWA). ICWA is a powerful mechanism for assisting the Navajo Nation in preserving our future and valuable resource, our Navajo children. ICWA plays a key role in maintaining the Navajo culture, language and identity by ensuring that Navajo children are not removed from the Navajo Nation and Navajo families. Our issues and concerns result from our unique position of being located in three states and having had active ICWA cases in every jurisdiction within the United States.

The Navajo Nation extends into the states of Arizona, New Mexico, and Utah, which spans an area of 17.5 million acres and serves as homeland to over 250,000 Navajo citizens. By American standards, we are the poorest of America's rural poor. The average American unemployment rate is 4.8%. On Navajoland our unemployment rate is 38% to 50%, depending upon the season. Over 56% of the Navajo people live in poverty whose per capita income averages \$4,106, which is less than 1/3 of the average wage earner's yearly income outside Navajoland. Within the homes of our Navajo families, 77% lack plumbing, 72% lack adequate kitchen facilities, 76% lack telephone services, and an equally high percentage lack electricity. However, we are a rich people with a distinguished heritage who have endured attacks upon our sovereignty, language, culture, religion and families.

## NAVAJO CHILD WELFARE

The Navajo Nation Social Service Division advocates on behalf of the Navajo families and their children. Their primary function is to preserve Navajo families and assist in social issues including adoption and placement of Navajo children.

In 1980, the Navajo Nation Division of Social Services created the Navajo Nation Indian Child Welfare Act Program in response to the enactment of the "Indian Child Welfare Act of 1978". The staff of five has grown to twenty (20), of which six (6) have their Masters of Social Work credentials, and the remaining hold bachelor degree credentials in Social Work or related fields. The staff are located within Navajo communities in the states of New Mexico and Arizona. These Navajo social workers cover 27,500 square miles to reach the clients. The program serves all eligible Navajo children and families throughout the United States as well as Mexico and Canada.

The Navajo Nation ICWA program currently provides services to a total caseload of five-hundred and thirty-six (536) children. Of this total, forty-two (42) are in permanent relative placements at no cost, with legal guardianship pending; twenty-one (21) are in permanent guardianship placements without cost; eight (8) are in pre-adoption placement without costs; seventeen (17) are available for adoption in state; foster care; and four-hundred forty-eight (448) are in state foster care. Currently, there are seventeen (17) Navajo licensed adoptive homes on the reservation. Within the past six months, the ICWA program has made five placements without adoption subsidies.

## INDIAN CHILD WELFARE AMENDMENTS

The Navajo Nation wishes to emphasize three areas to ensure the ICWA is implemented correctly by states and that the child protection systems within Indian nations are equipped to protect Indian children. The three areas not addressed in Senate Bill 569 are: (1) the clarification of voluntary placements and termination, and the time lines a tribe intervenes in state proceedings; (2) the inclusion of Title IV-E funding and/or language; and (3) the judicially-created exception in state courts.

### 1. Voluntary placements and voluntary termination, and state court intervention

The Navajo Nation supports S 569, sponsored by Senator John McCain, on the condition of clarification of two major items: voluntary placements and voluntary

termination, and the time lines within which a tribe may intervene in a state proceeding.

- S. 569 proposes a new Section 1913(c) and (d) that requires the Indian child's tribe must receive notice of the proceeding, and that the notice must contain information to allow the Indian child's tribe to verify application of the ICWA. While the proposal adds language in Section 1924 to make fraudulent misrepresentation in an ICWA proceeding a crime, punishable by fine and imprisonment, there is no requirement that the information contained in the Section 1913 (d) notice be compiled in good faith or after investigation. While the criminal sanctions are important, there are many situations where erroneous information may be provided to a tribe through oversight, error, or lack of a good faith investigation, which does not rise to fraud, and which would negatively affect both the tribe's ability to determine the child's enrollment and whether the tribe will intervene in the state court proceeding. It is of critical importance that a good faith investigation be made into the information required by the Section 1913 (d) notice and forwarded to the tribe.
- The proposed Section 1913 (e) sets forth time lines within which a tribe may intervene in a state proceeding. While each of these time frames refer to the tribe filing a notice of intent to intervene, it is not clear what this notice requires. Where local counsel is required for filing the notice of intent, these time lines present particular difficulties since simply finding local counsel may take longer than the 30 days allowed, let alone determination of ICWA applicability, case staffing, or contract approval with local counsel (which is subject to Bureau of Indian Affairs approval under 25 U.S.C. Section 81 and thus involves time frames not within the tribe's control). Alternatively, if this section merely requires a statement from the tribe's ICWA program that it intends to intervene, without further procedural requirement, it may be possible to meet the proposed statutory time lines. However, depending on the adequacy and accuracy of the information received by the tribe, the 30-day time line may still present difficulties in determining enrollment eligibility of the Indian child. Clarifying language directing that the notice of intent to intervene only requires a simple statement which may be submitted by the tribe's ICWA Program is needed to prevent ICWA from being deprived of any meaning.
- The Navajo Nation is also concerned that the term "certification" as used in the addendum may be used to impose an artificial barrier in some jurisdictions. It is possible that some states may act officiously by requiring

that a particular state form be used to meet state evidentiary standards. While the proposed amendment can be read to mean that this certification is a tribal certification, language clarifying that it is a tribal certification which is required, without the need for further evidentiary authentication could greatly minimize the opportunity for later misunderstandings.

Whatever changes may be proposed to the Indian Child Welfare Act, it is important to remember that the ICWA was not only enacted to preserve American Indian Tribes' most precious resources—its members, but also to prevent the type of alienation experienced by Indian children who were adopted by non-Indian families before ICWA was adopted. During infancy and in early childhood, an Indian child may adapt to and be accepted by a non-Indian family. However, later many of these children face difficulties in self-identification and adaptation. What may have started out as a "good" intention becomes detrimental to the child. While much has been said about children and parents, both natural and adoptive, it is extremely critical to be mindful of the long-term effects of depriving Indian children of their heritage.

The Navajo Nation, subject to the above issues, believes that the proposed amendments will help clarify the ICWA. Although some of the concerns of the Navajo Nation may require further statutory language, the majority of these issues may be addressable through report language. The Navajo Nation is prepared to assist the Committee in drafting legislative history to address these concerns.

## 2. Title IV-E funding and/or language

Title IV-E of the Social Security Act, Foster Care and Assistance, is an open-ended entitlement program providing federal funds to states for foster care and adoption assistance programs. It is a federally-funded reimbursement program that is based on eligible population for foster care adoption subsidies from Title IV-E of the Social Security Act, Foster Care and Assistance. It has been in existence since 1980 and has only been available to states through matching funds to support adoption and foster care services. Although this funding was intended to serve all eligible children in the United States, the legislation lacked a provision to cover a class of children (Indian children) living in tribal areas. The statute overlooked tribal governments and children placed by tribal courts in receiving the entitlement. This issue has negatively impacted the ability of Indian children to secure a sense of permanency after being removed from their homes, especially since adoption programs are under funded.

To receive Title IV-E money, a tribe must also enter into agreements with states, with a state "passing through these funds" to the tribe. Because of the difficulty in establishing these agreements, tribes often rely on the Bureau of Indian Affairs ("BIA"). Currently, only 50 of the 558 federally recognized tribes receive any Title IV-E funding. This does not include administrative, training or date systems funding. Therefore, the Navajo Nation recommends direct funding rather than tribes entering into agreements with states.

Tribes currently depending on BIA funds have found that BIA has no money for funding permanency planning as available in the Title IV-E Adoption Assistance program. In FY 1996, the total number of substitute care placements that were subsidized under the BIA Child Welfare Assistance program was 3,400 with approximately 60% to 70% of those children estimated to be eligible for Title IV-E services. Even then, 301 children were placed in non-subsidized homes last year. This also illustrates an inadequacy of the BIA funds which the Navajo Nation would strongly encourage Congress to correct.

In 1994, President Clinton signed into law P.L. 103-382, Multiethnic Placement Act which was motivated by the large number of minority children awaiting foster care and adoptive homes. It was designed to prohibit agencies from denying or delaying foster care and adoption placements based on race and ethnicity. The bill was controversial due to the concern that states would place needy children hurriedly, without good cause in an effort to avoid losing Title IV-E funds. Not surprisingly, the bill contained no provision regarding efforts to recruit minority foster and adoptive families.

Presently, many unsubsidized care homes are established within Indian Nations to avoid leaving children in harmful situations. These unsubsidized homes are indicative of the good will of a family in the community who will commit their personal resources, time and home to a foster care, legal guardianship, or pre-adoptive placement for a child. A vast majority of these families find that this is stressful and sometimes unworkable after a period of time, especially when considering the numbers of Indian families on tribal lands who live in or close to poverty.

Currently, the Navajo Nation Division of Social Services has 297 children in non-cust relative care settings. Of the 297 children, 257 are in foster care on the reservation and 40 are ICWA placements for permanent relative guardianship and/or adoption.



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Prepared Statement of W. Ron Allen, President

National Congress of American Indians

Before a Joint Hearing of the Senate Committee on Indian Affairs  
and the House Resources Committee

Regarding Amendments to the Indian Child Welfare Act of 1978

June 18, 1997

I. INTRODUCTION

Good morning Chairman Campbell, Vice-Chairman Inouye, Chairman Young, Representative Miller and distinguished members of each Committee. I am W. Ron Allen, Chairman of the Jamestown S'Klallam Tribe and President of the National Congress of American Indians (NCAI). As the oldest and largest national organization of Indian tribal governments and Alaska Native Villages, NCAI is dedicated to advocating on behalf of the interests of our member tribes on a myriad of issues including the critical issue of amending the Indian Child Welfare Act (ICWA) of 1978.<sup>1</sup>

I first want to state for the record, Mr. Chairman, that the NCAI has always advocated that ICWA works well in its current form and, despite some highly publicized cases, continues to work well. Nonetheless, since May, 1995, when then-NCAI President gashkibos appeared before the House Native American and Insular Affairs Subcommittee and testified in strong opposition to proposed ICWA amendments<sup>2</sup>, NCAI has been involved in the debate surrounding the ICWA and efforts to amend the Act. In June, 1996, Indian tribes from around the nation convened in Tulsa, Oklahoma, to try to hammer out reasonable, appropriate changes to strengthen existing law that provide more *certainty* to adoption cases involving the ICWA while preserving and protecting tribal sovereignty. After

<sup>1</sup>25 U.S.C. §§ 1901-63 (1978).

<sup>2</sup>H.R. 1448, the "Indian Child Welfare Act Amendments of 1995". Introduced by Rep. Deborah Pryce (R-OH), and co-sponsored by Reps. Gerald Solomon (R-NY) and Dan Burton (R-IN).

many hours of intense and emotional debate the tribes, in the opinion of most, accomplished this very difficult task. Below I discuss the specific proposals put forth by the tribes and explain the context and the difficulties experienced by the tribes in Tulsa.

I would also like to thank both Chairmen for responding to the concerns of tribal governments over the possible introduction of amendments to the ICWA in the 105th Congress that would diminish the intent of the Act -- protecting Indian children from illegal and unwarranted adoption outside their tribal communities. NCAI appreciates the efforts of both Committees in crafting legislation that incorporates changes to the ICWA that the tribes agreed to just over one year ago in Tulsa.

I also want to state for the record that one week ago today, the NCAI member tribes adopted a resolution that supports both H.R. 1082 and S. 569, the *Indian Child Welfare Act Amendments of 1997*.<sup>3</sup> With the adoption of this resolution, the over 200 member tribes of NCAI, representing over 85% of the American Indian and Alaska Native population, have concluded that if the ICWA is to be amended by Congress, it should be done in a way that not only strengthens the Act for everyone involved, but moreover, protects tribal sovereignty including the rights of the tribe to care for its children.

II. FUNDAMENTAL FEDERAL INDIAN LAW AND POLICY

Any discussion of the ICWA must be grounded in those fundamental principles which underlie federal Indian law and policy. Since the earliest days of our republic, Indian tribes have been considered sovereign, albeit domestic, nations with separate legal and political existence. Along with the states and the federal government, tribal governments represent 1 of 3 enumerated sovereign entities mentioned in the U.S. Constitution. As a result of Constitutional mandate, hundreds of duly-ratified treaties, a plethora of federal statutes, and dozens of seminal federal court cases, it is settled that Indian tribes have a unique legal and political relationship with the United States. As the Supreme Court itself has determined, this relationship is grounded in the political, government-to-government relationship and is not race-based.<sup>4</sup>

In return for vast Indian lands and resources ceded to the United States, the federal government made certain promises to Indian tribes including the protection of Indian lands from encroachment, as well as promises to provide in perpetuity various goods and services such as health care, education, housing, and guarantees to the continued rights of self-determination and self-government. In addition to our inherent sovereignty therefore, Indian tribes and Indian people are to benefit from the federal government's "trust responsibility". This responsibility eludes simple definition but is grounded in the oversight and trusteeship of Indian lands and

<sup>3</sup>NCAI Resolution # JNU-97-069, *Support for ICWA Amendments: H.R. 1082 and S. 569*, adopted by the NCAI General Assembly on June 11, 1997 at the NCAI mid-year conference in Juneau, Alaska.

<sup>4</sup>See *Morton v. Mancari*, 417 U.S. 535 (1974).

resources by the United States. Using analogous common law principles of trusteeship, the trust responsibility has been determined by federal courts to be similar to the highest fiduciary duty owed a beneficiary by a trustee.

In undertaking this obligation, the United States through the Congress has assumed responsibility for the protection of tribes and Indians. This trust responsibility includes protection of Indian resources and as the Congress recognized in the 1978 Act itself, there is perhaps no more precious, vital and valuable resource to Indian tribes than their children.<sup>5</sup>

### III. INTRODUCTION TO THE INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act (ICWA) was enacted in 1978 in response to the widespread, disgraceful practice of removing Indian children through adoption from their families, tribes, and cultures. Unethical attorneys and state adoption and placement agencies arranged for the adoption of Indian children, most often with inadequate procedures and protection of the interests of the Indian family and tribe. After years of deliberation the House Resources Committee stated in its report on ICWA that "(t)he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."<sup>6</sup> In 1978, Congress sought to staunch this horrid practice, and ICWA has for the most part served this purpose well. Nevertheless, ICWA is under attack by those who would return control over Indian adoptions to state courts.

Prior to the enactment of the ICWA, the best evidence suggests that *between 25% and 35% of all Indian children* were separated from their families and placed with adoptive families, or in foster care or institutions.<sup>7</sup> The Committee concluded that at this rate, the Indian community was being drained of its lifeblood --- Indian children --- and this quite literally jeopardized the future existence of Indian tribes and Indian people.

This sad reality, combined with the special trust relationship of the United States, demanded that federal legislative action be taken. The ICWA recognizes that the interests to be served by the procedural safeguards in the Act are that of the Indian child and that of the Indian tribe. As the Supreme Court stated in *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>8</sup> "[t]he protection of this tribal interest is at the core of ICWA, which recognizes that the tribe has an interest in the child, which is distinct, but on a parity with, the interest of the parents."

<sup>5</sup> See 25 U.S.C. Sec. 1901(2), (3).

<sup>6</sup> H. Rep. 1386, 95th Congress, 2d Sess. 9; hereafter the "House Report."

<sup>7</sup> House Report at 9.

<sup>8</sup> 490 U.S. 30 (1988).

Based on the premise that the Indian family and the Indian tribe have significant, if not overriding, interests in the relationship and welfare of the Indian child, ICWA posits tribal courts --- not state courts or state authorities --- as the appropriate authority over Indian child adoptions. Jurisdiction is thus vested in the institutions with the capacity to appreciate the unique cultural concepts and values, such as the extended Indian family, that state authorities can never fully grasp. Practically, the legislative scheme takes advantage of the fact that tribal authorities are better equipped to discern whether an Indian child has other relatives that may want to adopt the child, as well as whether there are other families --- Indian and non-Indian --- that may want to provide a loving home for the Indian child.

The purpose of the ICWA is procedural in nature: to protect the integrity of Indian families by creating a framework for tribes to participate in custody proceedings involving Indian children. ICWA is applicable in voluntary adoptions, and child abuse / neglect proceedings initiated by the state, when either parent is a tribal member and the child is a tribal member or is eligible for tribal membership. The Act establishes minimum standards for placement of Indian children, and placement preferences for Indian children in foster care and adoptive homes. The Act provides procedural mechanisms that allow a tribe to participate in the proceeding, including:

A. **Intervention** - allows a tribe simply to intervene in the state court proceeding and participate as a party.

B. **Transfer** - allows a tribe or a biological parent to request a transfer to tribal court, but either parent may block the transfer by an objection. Also, state courts decide whether or not transfer is appropriate and can decline to transfer for "good cause." State courts have frequently declined to transfer when the transfer petition is received late in the proceeding or when the tribal forum would be inconvenient for the parties.

C. **Preference** - in keeping with the title of the Act, ICWA establishes preferences for placement of Indian children with extended family members, other members of the child's tribe, or other Indian families.

The debate surrounding the ICWA has included many misstatements of law and innumerable distortions of fact. One fact that is rarely heard is that ICWA contains a "good cause" exception to these placement preferences. Accompanying BIA guidelines identify situations that establish good cause *not* to follow the preferences: the wishes of the biological parents or the child; the physical or emotional needs of the child; or the unavailability of suitable families meeting the preference criteria after a diligent search.



#### IV. THE 104TH CONGRESS

During the 104th Congress, amendments were proposed to the ICWA that would have eviscerated the act and significantly harmed Indian tribal governments and Indian children.<sup>9</sup> The ICWA amendments contained in H.R. 3286 would not apply to foster care and child custody proceedings if the birth parent does not maintain a "significant affiliation" with the tribe. That determination would have to be made by state authorities; not tribal authorities. H.R. 3286 was ultimately approved by the House.

H.R. 3286 was then referred to the Senate Finance Committee. However, before the Finance Committee could begin consideration, the Senate Committee on Indian Affairs (SCIA) stripped Title III and subsequently held a hearing on tribal proposals to amend ICWA. These proposals known as the "Tulsa Amendments" - were developed at the 1996 NCAI Mid-Year Conference in Tulsa, Oklahoma, and were subsequently introduced by then-SCIA Chairman John McCain (R-AZ). Senator McCain was able to gain passage of the bill in the Senate, however, the bill did not come up for a vote in the House before the 104th Congress adjourned.

#### V. THE "TULSA AMENDMENTS"

While in Tulsa, tribes met with organizations and adoption attorneys to address concerns expressed by the sponsors of the House bill without violating either fundamental principles of tribal sovereignty and governance or the original intent of ICWA. As a result of this meeting, legislation was drafted that effectively placed requirements on all parties in voluntary proceedings. These alternative amendments signified the willingness of Indian tribes to address the specific concerns of those who feel that ICWA was "unfair" in its application. More importantly, the amendments meaningfully and substantively addressed the concerns raised about the ICWA. Those in Tulsa felt that the proper way to effectively handle those issues was to propose amendments that would actually provide more security and certainty of consequence for prospective adoptive parents and still allow for meaningful participation of Indian tribes.

Considering the fact that H.R. 1082 and S. 569 incorporate the ICWA amendment language agreed to in Tulsa, what follows is a summary of the Tulsa Amendments, along with comments and an explanation of what issues and concerns they purport to address.

##### 1. Notice to Indian Tribes for Voluntary Proceedings

In Tulsa, the tribes were cognizant that the concerns expressed about ICWA centered on the timeliness and certainty of tribal intervention and how the Act could be "tightened up" to minimize the seemingly "unfair" tribal interventions in placement proceedings. There was a perception that the ICWA is applied retroactively and therefore unfairly to the detriment of adoptive families involved in adopting an Indian child. Combined with tribal proposals for severe

<sup>9</sup> Title III of H.R. 3286, the *Adoption Promotion and Stability Act of 1996*.

sanctions for the deliberate evasion of the Act, the tribes have proposed formal notice requirements to the potentially affected tribe, and time limits for tribal intervention after such notice is received.

It was anticipated that, taken together, the Tulsa Amendments would significantly strengthen the Act and minimize the "retroactively applied" situations involving fraudulent practices by adoption attorneys. As a general matter, expanded notice provisions combined with deadlines for tribal intervention make significant strides in addressing concerns about the certainty of intervention. This amendment is more fully discussed below.

The Tulsa Amendments proposed that timely and substantive notice<sup>10</sup> to the affected tribe at the earliest possible stage would minimize the possibility that a tribe will intervene "late" in the proceeding. This provision would extend the notice provision to voluntary as well as involuntary proceedings, and clarifies what should be included in the formal notice document so that a tribe can make a fully informed decision whether the child is a member or eligible for membership. Currently, notice is mandatory in involuntary cases only. One of the problems experienced in voluntary cases is that tribes have moved to intervene after the child had been placed in an adoptive or pre-adoptive home because it received late and often inadequately descriptive notice. Extending the notice provisions would allow potential adoptive parents to know immediately if an extended family member and/or the tribe has an interest in the child. Such notice would also further a goal all parties can agree on: it would expand the pool of potential adoptive parents because frequently the tribe knows adoptive or foster families which the state and/or private adoption agencies are not aware.

##### 2. Time Lines for Tribal Intervention

In tandem with the embellished notice provisions above, the Tulsa Amendments would institute a deadline for tribal intervention in a voluntary proceeding. The time period would begin from the actual notice of the pending proceeding. If an Indian tribe chooses not to intervene within the time period, then it would be precluded from intervention in the proceeding. One of the criticisms of ICWA was that Indian tribes were intervening in cases after the child had been placed for adoption. In those instances when an Indian tribe did intervene "late" in the process, the reason most often for the delay in voluntary cases was the lack of timely notice to the tribe and/or

<sup>10</sup> The Tulsa Amendments proposed that the formal notice to the tribe include the following information so that any given tribe can make enlightened, informed decisions regarding intervention: the child's name and actual or anticipated date and place of birth; the names, maiden names, addresses and dates of birth of the Indian parents and grandparents of the child; the names and addresses of the child's extended family members having a priority of placement if known; the reasons why the child may be an Indian child; the names and addresses of the parties to the state court proceeding; the name and address of the state court in which the proceeding is pending or will be filed, and the time and date of the proceeding; the tribal affiliation, if any, of the prospective adoptive parents; the name and address of any social services of adoption agency involved; the identity of any tribe in which the child of parent is a member; a statement that a tribe may have the right to intervene; an inquiry as to whether the tribe intends to intervene or waive any right to intervene, and a statement that any right to intervene will be waived if the tribe does not respond in the manner and within the time frames required by section 1913(e).

fraudulent adoption practices by adoption attorneys. By extending the notice requirement and placing a deadline on tribal intervention, all involved would have a more definite understanding of the rights and obligations as early as possible.

### 3. Criminal Sanctions

Many "problem cases" that have been cited in the media and on the floor of the House of Representatives actually began with knowing violations of the Act. Current law does not provide explicit penalty for such violations. The Tulsa Amendments directly addressed the problem by proposing severe criminal sanctions for attorneys and adoption agencies that knowingly violated the Act through encouraging fraudulent misrepresentations or omissions by their clients. As with the celebrated *Rost Case*,<sup>11</sup> most contested ICWA cases involve the circumvention of the requirements of the law --- many because of unscrupulous attorneys and other adoption professionals whose economic interest is best served by "avoiding" the complications brought about by compliance with the ICWA. The Tulsa Amendments provided great incentive to and will deter attorneys and adoption agencies from counseling the deliberate evasion of ICWA. In cases of fraud, however, the application of the Act, along with tribal intervention and the exercise of tribal rights under the Act, will serve as a deterrent to fraudulent adoption practices. In fact, applying the Act will be the only remedy available to an Indian tribe or Indian family in such a situation.

### 4. Withdrawal of Consent

Again addressing a perceived "unfairness" in the manner ICWA operates, the Tulsa Amendments proposed a strict time limit within which a biological parent can withdraw consent to a foster care placement or adoption. Under current law, a parent can withdraw consent to an adoption *at any point until the adoption is finalized*.

The perception that many of the "problem cases" began when the biological parents withdrew consent to the adoption under the ICWA can be dealt with head-on by including limitations for withdrawals of such consent. It is important to note that the issue of withdrawal of consent occurs in non-Indian adoptions as well as Indian adoptions and the Tulsa Amendments would provide more clarity when an Indian parent can withdraw consent to adoptions.

### 5. Application of ICWA in Alaska

This provision would clarify that Alaska Native villages are included in the definition of "reservation" under the Act. In addition, the Tulsa Amendments included a sensitivity to the unique aspects of "P.L. 280 states." Indian tribes in P.L. 280 states have experienced significant

<sup>11</sup> In deposition testimony presented in the trial court *In re Bridget R.* (Ct. App. 2d Dist. 1996), *cert. denied* (1996); the Indian biological father stated that he had been advised to conceal his Indian heritage in order to avoid the procedural requirements of ICWA, and thereby expedite the adoption proceeding.

difficulty exercising jurisdiction under the ICWA. NCAI is mindful that it does not intend its proposals to negatively impact any Indian tribe's rights to exercise jurisdiction under the Act.<sup>12</sup>

### 6. Open Adoptions

The Tulsa Amendments proposed that state courts be allowed to approve "open" adoptions where prohibited by state law. Some states prohibit a court in an adoption decree from allowing the biological parents to maintain contact with the child after an adoption is finalized --- even if all the parties agree. The Tulsa Amendments proposed that this option be kept open, even if prohibited by state law.

### 7. Ward of Tribal Court

The Tulsa Amendments proposed that under the ICWA the Indian tribe shall retain exclusive jurisdiction over children who become wards of the tribal court following a transfer of jurisdiction from state court to tribal court.

### 8. Duty to Inform of Rights under ICWA

Together with the proposed notice and sanctions provisions, this proposed change to the ICWA imposes an affirmative obligation on attorneys and public and private adoption agencies to inform Indian parents of their rights under the ICWA. Although the number of fiercely litigated ICWA cases is low, many of those cases began because Indian parents were not informed of their rights under the ICWA at the beginning of the proceeding. The Tulsa Amendments would again bring more certainty to ICWA-related cases, and would allow parties to be aware of whether ICWA applies in the beginning of the case so that all appropriate parties can provide input on the initial placement decision.

### 9. Tribal Membership Certification

Of all issues and concerns addressed and debated in Tulsa, the provision dealing with tribal membership was the most contentious and rightly so. An Indian tribe's right to freely determine its membership criteria goes to the heart of self-governance and tribal sovereignty. Any tampering with the right to determine tribal membership is condemned as unacceptable and intolerable. NCAI was formed in the 1940's in direct response to then-prevalent "Termination Legislation," which sought to end the unique political and legal status of Indian tribal governments and assimilate Indian people into the mainstream. Just as we did then, NCAI opposes any amendment, any minor change, or any technical correction to any federal statute that strikes at the heart of tribal sovereignty, as does the proposed change to tribal membership determinations contained in pending legislation.

<sup>12</sup> See Resolution TLS-96-007B, "Protection of Public Law 280 Tribes Regarding Amendments to the Indian Child Welfare Act".

The Tulsa Amendments proposed that any tribal motion to intervene in a state court proceeding be accompanied by a tribal certification detailing the child's membership or eligibility for membership pursuant to tribal law or custom. Again, with the goal of bringing more certainty to ICWA-related cases, this proposed change directly responds to the criticism that the determination of whether a child is eligible for membership is "without objective basis" or "arbitrary." The tribal certification would also explain the child's relationship to the tribe and contain enough background information so that a state authority is fully informed as to the nature of the tribe's relationship with the Indian child.

#### VI. THE "EXISTING INDIAN FAMILY" DOCTRINE

Another major problem faced by tribal governments in exercising their rights under the ICWA is the legal interpretation of the Act by the states. Courts in several states have interpreted the ICWA as not applying to Indian children who have not been in the custody of an "existing Indian family." This state court interpretation removes many Indian children from the protection of the ICWA and from any relationship with their tribes. The creation of this exception by state courts can only be interpreted as a device to circumvent the application of ICWA in Indian child adoption proceedings, since ICWA's express language does not include this exception and the legislative history shows that the exception was not contemplated by Congress. For this reason, the current "existing Indian family" interpretation by state courts is universally opposed by tribes, and NCAI calls upon the Congress to consider future legislation that would apply ICWA to all Indian children as that term is defined in the Act.<sup>13</sup>

#### VII. CONCLUSION

Mr. Chairmen, I have set out the fundamental concepts and principles that are embodied in H.R. 1082 and S. 569, as reflected in the Tulsa Amendments. Attached to my Statement is a copy of the NCAI Juneau Resolution supporting both pieces of legislation. In the weeks ahead, when the Committees begin the process of adopting these bills and reporting them out to their respective floors, I encourage Congress to keep in mind the reasons for the very existence of the Indian Child Welfare Act, and why this Congress felt compelled to act as it did in 1978. Continuing to have as our ultimate goal the protection and best interests of the Indian child, Indian tribes from around the nation have put forth reasoned changes to the ICWA that will strengthen the Act and bring more certainty and predictability to foster care and adoption placements involving Indian children.

By protecting the ability of tribal governments to maintain the integrity of families and the tribes themselves, the intent of the ICWA is preserved. As you know, tribal sovereignty is more than a slogan and if it means anything, it means retaining the right to determine membership and protect tribal members.

I thank the House Resources Committee and the Senate Committee on Indian Affairs for the opportunity to appear today and comment on this legislation. I would be happy to answer any questions you may have at this time.

<sup>13</sup> 25 U.S.C. § 1903(4) (1978).



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#### Resolution # JNU-97-069

Title: Support For ICWA Amendments: H.R. 1082 And S. 569

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) is the oldest and largest national organization established in 1944 and comprised of representatives of and advocates for national, regional, and local Tribal concerns; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of NCAI; and

WHEREAS, the Indian Child Welfare Act (ICWA) was designed in consultation with tribes and was enacted to support tribes in the protection of their children from unjust removal and to strengthen their families; and

WHEREAS, in the 104th Congress, the House of Representatives, in Title III of the Adoption Promotion and Stability Act of 1996, passed amendments to ICWA which would have seriously limited the ability of Indian tribes to participate in foster care and adoption decision-making affecting their children; and

WHEREAS, various members of both the House and Senate continue to advocate for either complete repeal of the ICWA or other legislation that would seriously limit tribal involvement in foster care and adoption proceedings affecting their children; and

WHEREAS, the 1996 NCAI Mid-Year convention in Tulsa, Oklahoma considered and endorsed alternative amendments to ICWA (see Resolution #TLS-96-007A) which were the result of a one-year process of discussion between tribal representatives and the American Academy of Adoption Attorneys; and

WHEREAS, the "Tulsa Amendments" have been introduced in the 105th Congress by Congressmen Young and Miller as H.R. 1082 and Senators McCain, Campbell, Domenici and Dorgan as S. 569; and

WHEREAS, H.R. 1082 and S. 569, drafted by tribes and Indian organizations in consultation with representatives of leading adoption attorney organizations, include the following elements:

Requires notice to Indian tribes and certain extended family members in all voluntary child custody proceedings.

Provides for criminal sanctions for anyone who assists a person to conceal their Indian ancestry for the purposes of avoiding the application of the ICWA.

Authorizes state courts to enter orders allowing for continuing contact between tribes and their children who were adopted.

Provides for certain provisions placing time limits on the tribal and extended family right to intervene in voluntary child custody proceedings and the right of unwed fathers to acknowledge paternity; and

Mandates that the judge in a termination of parental rights or adoption proceeding assure that the parents of an Indian child have been informed of their ICWA rights; and

WHEREAS, Courts in several states have interpreted the ICWA as not applying to Indian children who have not been in the custody of an "existing Indian family"; and

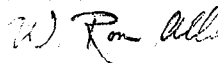
WHEREAS, the "existing Indian family" interpretation of ICWA removes many Indian children from the protection of ICWA and from any relationship with their tribes and, for this reason, is universally opposed by tribes;

NOW THEREFORE BE IT RESOLVED, by the Mid-Year Conference of the National Congress of American Indians, again endorses the above mentioned tribally-initiated amendments to the ICWA as proposed in H.R. 1082 and S. 569 and calls upon the 105th Congress to enact this legislation; and

BE IT FURTHER RESOLVED, that the NCAI calls upon the Congress to review the "existing Indian family" interpretation of ICWA and consider future legislation that would apply ICWA to all "Indian children" as that term is defined in ICWA.

## CERTIFICATION

The foregoing resolution was adopted at the 1997 Mid-Year Conference of the National Congress of American Indians, held at the Centennial Hall Convention Center in Juneau, Alaska on June 8-11, 1997 with a quorum present.



W. Ron Allen, President

ATTEST:



Juan Majel, Acting Recording Secretary

Adopted by the General Assembly during the 1997 Mid-Year Conference held at the Centennial Hall Convention Center in Juneau, Alaska, on June 8-11, 1997.

## AMERICAN ACADEMY OF ADOPTION ATTORNEYS

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June 10, 1997

United States Senate Committee on Indian Affairs  
 Washington, D.C. 20510

Re: Proposed Amendments to the ICWA  
 Hearing Date: June 18, 1997

Honorable Senators:

Thank you for your invitation to speak before the Senate Committee on Indian Affairs regarding the Indian Child Welfare Act. As President-elect of the American Academy of Adoption Attorneys, and on that organization's behalf, I urge your approval of S. 569 to amend the Indian Child Welfare Act.

I am a California attorney, and my practice is solely adoption-related litigation. Some of my cases involve ICWA issues, and I have represented birth parents and adoptive parents in dozens of cases which have actually gone to trial. The lack of clarity in the Act, particularly the absence of notice requirements in voluntary placements coupled with the tribe's right of intervention in such cases, have caused placements to be disrupted when the children are several months to several years old, and has caused my clients -- and more importantly the children involved -- great distress and uncertainty.

My colleague Marc Gradstein (who is submitting written testimony on behalf of the Academy of California Adoption Lawyers) and I have been working for more than two years with representatives of the Native American community in order to reach some sort of consensus on amendments which would give the act greater clarity. The process began in May of 1995 when we testified in support of H.R. 1448 before the House Subcommittee on Native American and Insular

Affairs. One of the testifying attorneys for the Native American community, Jack Trope, called the committee's attention to the fact that H.R. 1448 had been written and introduced with no input from the very people it would affect. He was correct, and more importantly he was right.

We spoke with him after the hearing, and began the process which has brought us here today. After more than a year of meetings, conference calls and faxes, the joint group created a final draft of "compromise language" which ultimately became last year's bill. For reasons I do not fully understand, that bill failed to become law. The same bill is now before you, and I urge its passage.

If S. 569 were enacted into law, adoption attorneys and agencies would be required to give tribes notice of adoptive placements, and tribes in turn would be required to exercise their rights or lose them. Further, adoptive parents would be able to rely on a tribe's waiver of their right to intervene and could proceed with an adoption with the knowledge that it was secure from disruption by a tribe. Finally, tribes and adoptive parents could agree to leave children in adoptive placements with enforceable agreements for visitation between the child and other family or tribal members. I will address each of these areas separately.

#### I. Significance of the notice / cutoff portion of the proposed amendments to the tribes:

The importance of requiring tribes to be given notice of placement for adoption of children with Native American heritage cannot be overstated. The Act as it now stands allows, and perhaps even encourages, adoptive parents to keep secret the ethnicity and culture of the children they are adopting. When notice is not given, the tribes are deprived of the right to enforce the placement preferences of the Act.

#### II. Significance of the notice / cutoff portion of the proposed amendments to the adoption community:

As the Act now reads, no notice is required to tribes in voluntary placements. Yet tribes are allowed to intervene in adoption proceedings, and quite possibly to bring them to a halt, at any point in the adoption process. Further, if a parent, a child, or a tribe can show a violation of sections 1911, 1912 or 1913 of the Act, they can petition to set aside the action the court has taken at any time during the child's minority.

By requiring notice to tribes, and providing criminal sanctions against those adoption attorneys and agencies who wilfully disregard this requirement, notice will be given in most cases. And where notice is given, the tribe's right to disrupt an adoption ends as soon as 30 days after the child's birth. Adoptive parents can also rely on a tribe's written waiver of its right to intervene. Under current law, even if a tribe is notified of a pending adoption, and writes back to the adoption attorney or agency that it does not want to intervene, the tribe can change its mind at any point during the adoption process.



**III. Significance of the "open adoption" provision in the proposed amendments to both the adoption and Native American communities;**

One of the proposed amendments would make legally enforceable an agreement between a tribe and an adoptive family that the child would be allowed to visit with members of his biological family and tribe.

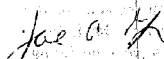
Often a tribe does not want to disrupt an adoptive placement of one of its children, but does wish to maintain contact with that child in order to let the child become connected with his heritage. Such an agreement benefits the child immensely, as he is able to remain in his stable placement while having ready-made access to other children and adults who are "like" him ethnically. The benefit to adoptive parents is obvious: They stand to keep a child they want to adopt.

If this amendment is enacted, an agreement between a tribe and adoptive parents will be legally enforceable, thus making such agreements more palatable to tribes. Although informal arrangements for post-adoption contact can be made without legal sanction, if adoptive parents decide to ignore the agreement, the tribe has no remedy and is hence less likely to enter into an agreement.

Thank you for the opportunity to address this group and urge passage of these important amendments. If the ICWA can be amended in such a way that adoptive placements can be more secure at an earlier time, everyone benefits. The Indian community will have knowledge about and access to more of their children, and adoptive parents will have the assurance that children placed in their homes are not going to be removed from their care far into the adoption.

I encourage this honorable committee to amend the Act to help provide quicker security for adoptive placements.

Sincerely,

  
Jane A. Gorman  
Attorney at Law

Statement of

**MICHAEL J. WALLERI**

GENERAL COUNSEL  
TANANA CHIEFS CONFERENCE, INC.  
122 FIRST AVE., SUITE 600  
FAIRBANKS, AK. 99701

Testimony before the

SENATE COMMITTEE ON INDIAN AFFAIRS  
HOUSE COMMITTEE ON RESOURCES

on

S. 569/H.R. 1082  
**AMENDMENTS TO THE INDIAN CHILD WELFARE ACT**

Washington, D.C.  
June 18, 1997

Test. M. Walleri 1

Chairman Nighthorse Campbell, Chairman Young, Members of the Committees, Good Morning. Thank you for your kind invitation to offer comments on the proposed amendments to the Indian Child Welfare Act.

I strongly urge the Committees to support passage of the legislation. The amendments contained in these bills are the product of discussions which began over two years ago between the American Academy of Adoption Attorneys (AAAA), the National Indian Child Welfare Association (NICWA) and Tanana Chiefs Conference (TCC). Since that time, the proposal has developed and evolved into the legislation before you today, and is supported by tribes, adoption professionals, and social service agencies nationally.

The prime focus of the ICWA has been involuntary placements. For example, TCC has an average ongoing ICWA case load which ranges between 120-160. Over 95% of this case load involves involuntary placements arising in the context of child protection proceedings. Generally, ICWA has worked well in this context. Often state and local agencies lack information about the extended family of Indian children in their care. Tribes receive notice and assist in placement with extended families or other members of the tribe. When the provisions of ICWA are followed, Native American children are most often placed with extended family members, who are best equipped to address a troubled child's needs. These are children who are at the most risk and in the greatest need. ICWA has been very successful in maintaining contact between tribal children, their extended families and tribal communities, and delivering placement and rehabilitative services to Native American children and their families.

But there have been problems in the context of voluntary placements, which comprise less than 5% of tribal ICWA caseloads. Practitioners involved in these voluntary adoptions seem to agree that in a few notable cases, unnecessary litigation over the placement of Indian children has delayed permanent placement of Indian children and caused needless problems for the all those involved. It must be remembered, that these few cases are exceptions, and involve the most wanted children caught in the system. These legal disputes involve extended birth families and adoptive parents, who both want to provide healthy nurturing homes to these children. For tribes, the resulting conflicts are frustrating, since these legal battles consume tremendous resources fighting over certain children, when every tribe has hard to place children in need of these precious resources.

At the root of each of these disputes is poor social work. In almost every case, the adoptive parents are kind loving people who simply want to raise a child- any child. A child is placed with them. They become emotionally attached to that child, and will fight to preserve their connection

to the child. But also in every contested case, the child was placed in the home -most often by well meaning but poorly trained individuals- who simply failed to make preliminary background checks to determine if the child was Indian, or if the child had extended family available for placement. In other words, the placement agent simply failed to determine whether the child was actually available for adoption. And in these cases, the extended family has a loving and nurturing family wanting to take care of its own children. If this were not the case, the Courts would easily dismiss the dispute. But the extended family always seems to find out after the adoptive placement is made.

In the most publicized case- the Rost case- a more sinister element was injected. The original attorney handling the case solicited a perjured document denying the children's Indian ancestry with the intention to evade application of ICWA, in conscious disregard of the possibility for placement within the child's existing family. The victims of this deceit were the children, the extended family, and the adoptive family.

The goal of the amendments before these committees is to reduce the possibility of conflict between birth and adoptive families by establishing procedures which will clarify the availability of a child for adoption early in the process, and put all parties on notice of these facts before an attachment can form between child and adoptive parents. These amendments will promote stability and certainty of Indian child adoptive placements, by addressing the causes of protracted and needless litigation and providing

- \* clear ICWA procedures related to voluntary adoptions,
- \* incentives for early dispute resolution, and
- \* penalties for those who intentionally violate ICWA.

#### 1. NOTICE TO INDIAN TRIBES

Currently, ICWA requires that tribes receive notice of involuntary foster care placements, but does not require tribal notice of voluntary adoptions. This has resulted in a serious dichotomy illustrated by two Alaskan cases which have set national precedence. In In Re IRS, 690 P.2d 10 (Alaska 1984) and Catholic Social Services v C.A.A., 783 P.2d 1159 (Alaska, 1989) the Courts held that tribes could intervene into voluntary adoption proceedings to enforce ICWA placement preferences, but were not entitled to notice of these proceedings. Consequently, tribes depend upon learning of proposed adoptions by word of mouth, which needlessly delays the development of tribal responses and interventions. This has been unnecessarily disruptive of adoptive placements and promotes litigation. In some cases, the distinction between foster care, pre-adoptive and adoptive placements becomes blurred so that emotional bonding of children to a placement family occur long before the commencement of any legal proceeding to initiate an adoption.

The legislation provides for notice to tribes of voluntary adoptions and specifies the content of the notice to assure that tribes have adequate information to identify the child and the child's extended family and respond in a timely manner. Notice provisions are triggered by a number of different events other than the commencement of an adoption proceeding. This will prevent a child lingering in a pre-adoptive placement unnoticed.

## 2. TIME LINES FOR INTERVENTION

Under ICWA, tribes can intervene at any time in the proceedings. This can be disruptive of an adoptive family placement if the intervention occurs after physical placement of the child in the adoptive home. Since tribes do not currently receive notice of the adoption, their intervention is delayed. This can be a common problem. Generally, tribes would oppose time limits on intervention into adoption proceedings, because they do not have prior notice of the proceedings. However, if tribes receive early and adequate notice, it is reasonable that tribes be limited to file their intent to intervene, or objection to the adoption within 90 days after receiving notice of a placement, or be precluded from further intervention. The legislation includes this provision. Additionally, the legislation provides that if the tribe files a determination within the 90 days that the child is not a member, the court and adoptive parents can rely upon that representation in the adoption proceedings. In cases where a placement is made substantially prior to the actual legal proceedings, additional notice of 30 days is required. Such a provision encourages adoptive parents to proceed with adoption proceedings in a timely manner and not leave a child in legal limbo unnecessarily.

On the other hand, the bills provide that if no notice is sent to the tribe, the time limits for tribal intervention do not apply. This preserves the rights of the tribe, and also provides a clear and unequivocal incentive to adoption practitioners to send early notice to the tribes, and make adequate preparation to assure a timely adoptive placement, and legal follow-through to complete the adoption.

## 3. CRIMINAL SANCTIONS

As noted above, in the *Rost* case [*In re Bridget R.*, 49 Cal. Rpt. 2d 507 (1996)] the original attorney for the adoptive parents counseled the biological parents to not disclose that they were tribal members. This was clearly malpractice, but the threat of civil liability has not been sufficient to deter these deceptive practices. These practices are a fraud upon the courts, adoptive parents, Indian children, and Indian extended families, with destructive repercussions to all involved parties. The legislation would provide needed criminal penalties for such acts.

## 4. WITHDRAWAL OF CONSENT

The current ICWA does not provide specific time lines for a parent to withdraw his/her consent to adoption. Instead, ICWA precludes withdrawal of parental consent to adoption based on one of several procedural benchmarks in the termination of parental rights or adoption process. In its current form, it is very unclear as to when a parent may or may not withdraw consent, since various states have differing adoption procedures that may or may not trigger the applicable sections of ICWA. The interplay between various state laws has led to litigation in several states with varying outcomes. Additionally, the time lines between entry of consents to adoptions and the actual commencement of an adoption procedure varies with the laws and practice patterns of the various states. The longer time between parental consent to adoption and commencement of the adoption proceeding increases the potential for problems. This may become more complex with inter-state adoptions in which consents to adopt are obtained in one jurisdiction and the adoption proceedings are initiated in another state.

This legislation provides a national standard as to when an Indian parent may withdraw consent to an adoption and provides more predictability and stability to the adoption process. Under the legislation, a parent may withdraw a consent to adoption up to 30 days after commencement of adoption proceedings, six months after notice to the tribe if no adoption proceeding is commenced, or entry of a final adoption order, whichever occurs first. These are clear and unambiguous standards, which would apply nationally without regard to local practice procedures.

## 5. OPEN ADOPTIONS

Litigation over Indian children has a winner-take-all characteristic, which is common in child custody/adoption litigation. In many states, adoptions must totally terminate the relationship between children and biological parents. In states that allow open adoptions, this option has provided a basis for settlement of contentious litigation which allows Indian children to maintain contact with their extended family and/or tribe, while remaining in an adoptive placement to which the child has emotionally bonded. This legislation would authorize open adoptions for Indian children in all states.

The proposal reflects traditional customs of Native American cultures which generally permit open adoptions by custom and tradition. While the practice may be debated in the context of the dominant non-Native culture, it is a widely accepted, and culturally appropriate practice common throughout Native American culture.

It is also important to note that under the terms of the legislation, it is purely optional, and premised upon the consent of the adoptive family and the child's birth family. It is likely that it would be most commonly used in trans-cultural adoptions, but it cannot be imposed upon non-Native adoptive parents without their consent.

#### 6. WARD OF TRIBAL COURT

Ambiguity over who is a ward of a tribal court has led to some confusion and litigation. The issue is important since wards of a tribal court are subject to the exclusive jurisdiction of tribal courts. The legislation would clarify that under ICWA, a child may become a ward of a tribal court only if the child was domiciled or resident within a reservation, or where proceedings were transferred from state court to tribal court.

#### 7. INFORMING INDIAN PARENTS OF RIGHTS.

Currently, ICWA only provides that an Indian parent is advised of his/her rights respecting the adoption of his/her child by the court. This usually occurs long after the parent has decided to consent to the child's adoption, and for the most part is perfunctory. It is not required that the parents be advised about his/her rights before the decision respecting adoption is made. This has resulted in Indian parents changing their minds after they have consulted a lawyer and been advised of their rights. The legislation would provide that attorneys, and public and private agencies must inform Indian parents of their rights and their children's rights under ICWA prior to the entry of a consent to adoption. Hopefully, this will reduce the number of parents who change their minds about adoption after consulting an attorney subsequent to signing a consent to adoption.

#### 8. ALTERNATIVES

The alternatives to this legislation are not attractive. Congress could do nothing, and simply be content with having a small number of Indian children and their birth and adoptive families battle it out in needless protracted litigation. Congress could repeal the Indian Child Welfare Act, and have this nation return to a time when the majority of Indian children were raised outside of Native homes, and simply accept the devastation of the Indian family as a necessary accommodation to avoid inconvenience in a few notable cases. Congress could simply ban adoption of Native children by non-Natives, and remove any hope of a normal family life to many Indian children, who are unable to find placement in their tribes and families. Or Congress could recommit itself to the balanced and reasoned approach offered in this legislation.

Some opponents to this bill will attempt to link this legislation with more controversial issues. But this legislation is about how best to resolve the disputes which occasionally plague Indian child adoptive placement. It is important to remember that this legislation addresses issues which arise in less than 5% of the tribal ICWA caseloads. More often than not, the dispute is between two loving and caring families, and what begins as an abundance of placement resources for a child quickly degenerates into the disruption of both the child's natural and proposed adoptive families. And at the core is simply bad social work practice. In every case, the issues addressed by this legislation arise substantially after the birth of a child, since adoptive parents rarely develop emotional attachments to a child prior to birth.

We should consider the true consequences of this legislation, and its affect on the children, who are the beneficiaries of its intent. The Indian family is in danger without ICWA, and we cannot ignore that danger to large numbers of Indian children in order to address the problems which may be easily avoided by a more balanced approach.

I urge the Congress to affirm its commitment to support Indian families, and reaffirm the policy and goals of ICWA, which have served Indian children well in the last nineteen years. And, at the same time, I would urge the Congress to adopt these amendments to provide greater certainty and stability for Indian adoptive placements in the future.

STATEMENT OF KELLER GEORGE  
PRESIDENT OF UNITED SOUTH AND EASTERN TRIBES

PREPARED FOR A JOINT HEARING ON PROPOSED AMENDMENTS TO THE INDIAN  
CHILD WELFARE ACT OF 1978 BEFORE THE HOUSE RESOURCES COMMITTEE  
AND THE SENATE COMMITTEE ON INDIAN AFFAIRS

Members of the House Resources Committee, and members of the Senate Committee on Indian Affairs. I am Keller George, President of the United South and Eastern Tribes ("USET"). I am writing to you on behalf of the USET regarding H.R. 1082, which Representatives Don Young and George Miller introduced on March 13, 1997 to amend the Indian Child Welfare Act of 1978 ("ICWA"). We urge you to adopt the amendments offered by Representatives Young and Miller. Nonetheless, we are concerned that the proposed amendments fail to address one critical issue that threatens Indian children with increasing frequency throughout the country. Accordingly, USET would prefer that you include an additional amendment to the ICWA, as explained below.

Congress enacted the ICWA almost two decades ago in an effort to assist Indian nations in regaining control over welfare decisions concerning their children. After conducting hearings over a period of ten years, Congress concluded that abusive, state and private child welfare practices had decimated tribal communities--with devastating effects upon those Indian children who were, ultimately, deprived of their cultures by being placed in non-Indian foster and adoptive homes. Recognizing that ethnocentric and racist attitudes by child welfare advocates had resulted in a genocidal phenomenon, Congress enacted a statutory scheme which recognized the primacy of the tribal role in child welfare decisions regarding tribal children. The ICWA imposed upon state courts, and state and private agencies, federal

standards that govern both the removal of Indian children from their parents and the placement of those children in homes outside of their parent's care. Congress concluded that the ICWA's provisions were in the best interest of Indian children, and that imposition of these statutory requirements on state child welfare proceedings would help promote the stability and security of Indian families and communities--and halt the genocide.

The ICWA has greatly benefitted Indian nations, Indian children, and Indian families since its enactment almost twenty years ago, in spite of the negative publicity and public controversy that it has recently engendered. The ICWA has helped Indian people by encouraging--if not requiring--state agencies and judicial officers to understand and recognize the importance that an Indian child's culture should--and must--play in custody and welfare decisions regarding that child. By strengthening our Indian nations' involvement in child welfare matters affecting our children, the Act has helped facilitate culturally appropriate upbringing for many Indian children. This ultimately benefits not only Indian children and their families and communities, but state governments and their taxpayers, as well: it is axiomatic that children who grow up fully imbued with, and conversant in, their cultural heritage and identity bring more stability to their communities, and cause a concomitant decrease in the need for state social welfare services. In addition, increasing numbers of Indian nations now provide substantially improved child welfare and family support services, as well as judicial services, to their children and communities as a direct result of the ICWA.

Unfortunately, because not all adoption agencies and state judicial officers appreciate the immense benefit that the ICWA has provided to our numerous and diverse communities, controversy regarding the implementation of the ICWA has erupted between the Congress, the



Indian nations, and the private adoption industry. Congressmen Young and Miller have reintroduced ICWA amendments in an effort to quell that controversy. We support these amendments as an effort to "fine-tune" the ICWA.

We believe, however, that the amendments are seriously flawed in that they fail to address a problem that deeply affects tribal sovereignty and tribal identity, a problem that calls into question the very notion of who is an "Indian child." While section 1903 of the ICWA defines the term "Indian child" clearly and unequivocally, numerous state courts have taken it upon themselves to re-define that term through a judicially-created exception to the ICWA that has become known as the "existing Indian family doctrine."<sup>1</sup> These courts have openly demonstrated their hostility to the ICWA by refusing to enforce its mandates in those cases where the judicial officer subjectively determines that the Indian child has not maintained significant social, cultural or political relations with their "tribal" communities. The states of Alabama, California, Kansas, Louisiana, Missouri, Oklahoma, South Dakota, and Washington have applied this doctrine in numerous cases as recently as this year.

The "existing Indian family doctrine" effectively eviscerates the mandates of the ICWA--based upon nothing more than the individual whim of the presiding judicial officer applying the doctrine. The Act contains no language which would permit a state court to enforce such an exception. Moreover, because most state judicial officers lack any knowledge or comprehension regarding the social, cultural, or political relations that tribal members maintain with their communities, these judicial officers should not be permitted to

<sup>1</sup>To its credit, the South Dakota Supreme Court subsequently disavowed the validity of this judicially-created exception.

render subjective determinations regarding how "Indian" a child really is. Well-established federal case law recognizes that the determination of who is and is not a member of an Indian nation properly lies solely within the purview of that Indian nation. The application of the "existing Indian family doctrine" in an ICWA case challenges tribal sovereignty and goes to the very heart of tribal identity. The right to define who is and is not a member of the community is central to Indian nation's existence as independent political communities. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978). Individual from without the community, particularly those who historically have been hostile to Indian culture, should not be permitted to impose any Indian nations their own notions of who is a political, cultural, or social member of our nations.

The very existence of this state-created exception to a federal law speaks volumes to the resistance that some states continue to mount to the enforcement of the ICWA. It is troubling to USET that Congress has not yet seen fit to address this violation through legislative amendments. It is our deepest concern that if Congress *fails* to correct this state-initiated infringement on federal law (and tribal sovereignty), these state courts--and others in the future--will use Congress' inaction to support a conclusion that the doctrine does not violate either the express terms of the federal law or Congress' policies and intent regarding the enactment of that law.

The development of the "existing Indian family doctrine" is all-too-reminiscent of Washington State's refusal to honor and enforce a federal court decree which allocated the fisheries among the treaty and non-treaty fisheries almost twenty years ago. As the United States Ninth Circuit Court of Appeals noted, "[e]xcept for some desegregation cases [citations

omitted], the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." United States v. Washington, 573 F.2d. 1118, 1126 (9th Cir. 1978), affirmed, Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). Similarly, the implementation of the "existing Indian family doctrine" is a clear refusal by those state courts which adhere to it to follow the mandates of a federal law which Congress specifically enacted to remedy egregious state practices regarding Indian child welfare decisions. Accordingly, the USET request that this Congress address this effort to frustrate a federal law by amending the ICWA and prohibiting the use of the "existing Indian family doctrine." Failure to do otherwise will perpetuate protracted controversies that use of the doctrine continues to engender, ultimately harming the children, families, and communities that are the very heart of these ICWA cases. History has demonstrated that this harm will affect not only those children, necessarily struggle to regain their identity--and their footing in this world.

#### CONCLUSION

In conclusion, the USET support the amendments offered by Congressmen Young and Miller. However, the Indian nations that comprise the USET urge these Committees to include an additional amendment that will eviscerate the "existing Indian family doctrine" and protect our children. Thank you for this opportunity to present our views.

#### STATEMENT OF RAY HALBRITTER NATION REPRESENTATIVE, ONEIDA INDIAN NATION

PREPARED FOR A JOINT HEARING ON PROPOSED AMENDMENTS TO THE INDIAN CHILD WELFARE ACT OF 1978 BEFORE THE HOUSE RESOURCES COMMITTEE AND THE SENATE COMMITTEE ON INDIAN AFFAIRS

Members of the House Resources Committee, and members of the Senate Committee on Indian Affairs. I am Ray Halbritter, Nation Representative of the Oneida Indian Nation. I am writing to you on behalf of the Oneida Indian Nation regarding H.R. 1082, which Representatives Don Young and George Miller introduced on March 13, 1997 to amend the Indian Child Welfare Act of 1978 ("ICWA"). We urge you to adopt the amendments offered by Representatives Young and Miller. Nonetheless, we are concerned that the proposed amendments fail to address one critical issue that threatens Indian children with increasing frequency throughout the country. Accordingly, the Oneida Indian Nation would prefer that you include an additional amendment to the ICWA, as explained below.

Congress enacted the ICWA almost two decades ago in an effort to assist Indian nations in regaining control over welfare decisions concerning their children. After conducting hearings over a period of ten years, Congress concluded that abusive, state and private child welfare practices had decimated tribal communities--with devastating effects upon those Indian children who were, ultimately, deprived of their cultures by being placed in non-Indian foster and adoptive homes. Recognizing that ethnocentric attitudes by child welfare advocates had resulted in a genocidal phenomenon, Congress enacted a statutory scheme which recognized the primacy of the tribal role in child welfare decisions regarding tribal children. The ICWA imposed upon state courts, and state and private agencies, federal standards that govern both the removal of Indian children from their parents and the

placement of those children in homes outside of their parent's care. Congress concluded that the ICWA's provisions were in the best interest of Indian children, and that imposition of these statutory requirements on state child welfare proceedings would help promote the stability and security of Indian families and communities.

The ICWA has greatly benefitted Indian nations, Indian children, and Indian families since its enactment almost twenty years ago, in spite of the negative publicity and public controversy that it has recently engendered. The ICWA has helped Indian people by encouraging--if not requiring--state agencies and judicial officers to understand and recognize the importance that an Indian child's culture should--and must--play in custody and welfare decisions regarding that child. By strengthening our Indian nations' involvement in child welfare matters affecting our children, the Act has helped facilitate culturally appropriate upbringing for many Indian children. This ultimately benefits not only Indian children and their families and communities, but state governments and their taxpayers, as well: it is axiomatic that children who grow up fully imbued with, and conversant in, their cultural heritage and identity bring more stability to their communities, and cause a concomitant decrease in the need for state social welfare services. In addition, increasing numbers of Indian nations now provide substantially improved child welfare and family support services, as well as judicial services, to their children and communities as a direct result of the ICWA.

Unfortunately, because not all adoption agencies and state judicial officers appreciate the immense benefit that the ICWA has provided to our numerous and diverse communities, controversy regarding the implementation of the ICWA has erupted between Congress, Indian nations, and the private adoption industry. Congressmen Young and Miller have reintroduced

ICWA amendments in an effort to quell that controversy. We support these amendments as an effort to "fine-tune" the ICWA.

We believe, however, that the amendments are seriously flawed in that they fail to address a problem that deeply affects tribal sovereignty and tribal identity, a problem that calls into question the very notion of who is an "Indian child." While section 1903 of the ICWA defines the term "Indian child" clearly and unequivocally, numerous state courts have taken it upon themselves to re-define that term through a judicially-created exception to the ICWA that has become known as the "existing Indian family doctrine." These courts have openly demonstrated their hostility to the ICWA by refusing to enforce its mandates in those cases where the judicial officer subjectively determines that the Indian child has not maintained significant social, cultural or political relations with their "tribal" communities. The states of Alabama, California, Kansas, Louisiana, Missouri, Oklahoma, South Dakota, and Washington have applied this doctrine in numerous cases as recently as this year.

The "existing Indian family doctrine" effectively eviscerates the mandates of the ICWA--based upon nothing more than the individual whim of the presiding judicial officer applying the doctrine. The Act contains no language which would permit a state court to enforce such an exception. Moreover, because most state judicial officers lack any knowledge or comprehension regarding the social, cultural, or political relations that tribal members maintain with their communities, these judicial officers should not be permitted to render subjective determinations regarding how "Indian" a child really is. Well-established

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<sup>1</sup>To its credit, the South Dakota Supreme Court subsequently disavowed the validity of this judicially-created exception.

federal case law recognizes that the determination of who is and is not a member of an Indian nation properly lies solely within the purview of that Indian nation. The application of the "existing Indian family doctrine" in an ICWA case challenges tribal sovereignty and goes to the very heart of tribal identity. The right to define who is and is not a member of the community is central to Indian nation's existence as independent political communities. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978). Individuals from without the community, particularly those who historically have been hostile to Indian culture, should not be permitted to impose any Indian nations their own notions of who is a political, cultural, or social member of our nations.

It is our deepest concern that if Congress *fails* to correct this state-initiated infringement on federal law (and tribal sovereignty), these state courts--and others in the future--will use Congress' inaction to support a conclusion that the doctrine does not violate either the express terms of the federal law or Congress' policies and intent regarding the enactment of that law. The implementation of the "existing Indian family doctrine" is a clear refusal by those state courts which adhere to it to follow the mandates of a federal law which Congress specifically enacted to remedy egregious state practices regarding Indian child welfare decisions. Accordingly, the Oneida Indian Nation requests that this Congress address this effort to frustrate a federal law by amending the ICWA and prohibiting the use of the "existing Indian family doctrine." Failure to do otherwise will perpetuate protracted controversies that use of the doctrine continues to engender, ultimately harming the children, families, and communities that are the very heart of these ICWA cases. History has

demonstrated that this harm will affect not only those children, necessarily struggle to regain their identity--and their footing in this world.

#### CONCLUSION

In conclusion, the Oneida Indian Nation supports the amendments offered by Congressmen Young and Miller. However, we urge these Committees to include an additional amendment that will remove the "existing Indian family doctrine" and protect our children. Thank you for this opportunity to present our views.

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The Lac Vieux Desert Band of Lake Superior Chippewa under their constitution established very specific criteria for eligibility for tribal enrollment. Every federally recognized Indian Tribal Government operates under an individual tribally relevant constitution, which identifies enrollment criteria for that specific Band or Tribe. This is one of the tenants of tribal sovereignty. Tribal enrollment criteria protects Indian people and Indian children.

The Indian Child Welfare Act passed in 1988 by Congress represents many years of struggle by tribal and non-tribal persons and entities to effectively create a document which offers sovereign protection to Indian children, Indian families and Indian tribes. The Indian Child Welfare Act was born of a great need for families and tribes to stem the loss of Indian children to non-Indian families. Indian children are citizens of a sovereign Tribal government and citizens of the United States, this is a unique status which affords them protection under treaty.

Adjustments and amendments to the Indian Child Welfare Act need to be very carefully studied and not taken lightly. Careful study of Indian history will support the need for strong legislation to uphold tribal sovereignty.

The Lac Vieux Desert Band of Lake Superior Chippewa is in support of the two amendment packages which will be the focus of the June 1997 hearings in regards to the Indian Child Welfare Act, H.R. 1082 co-sponsored by Chairman Don Young and George Miller and S. 569 co-sponsored by Senators John McCain, Ben Nighthorse Campbell, Pete Domenici, and Byron Dorgan represent a diverse coalition reaching consensus to continue protection of Indian children. We are asking you to listen carefully to all testimony and remember the treaty obligations and the unique sovereign status of Indian tribes.





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TESTIMONY OF  
THE NATIONAL INDIAN CHILD WELFARE ASSOCIATION

REGARDING PROPOSED AMENDMENTS TO  
THE INDIAN CHILD WELFARE ACT:  
S. 569 AND H.R. 1082

PRESENTED TO THE SENATE COMMITTEE ON INDIAN AFFAIRS  
AND HOUSE RESOURCES COMMITTEE

JUNE 18, 1997

To the Chairmen and members of the both Committees, thank you for the opportunity to present this testimony on behalf of the National Indian Child Welfare Association that is based in Portland, Oregon. Our comments will focus on our view that the Indian Child Welfare Act (ICWA) has worked successfully for the vast majority of Indian children, families, and tribes. Where there is a need for improvements the appropriate solutions should reflect a measured, reasonable approach that considers the original purpose of the ICWA, and the needs of Indian children, families, tribes, and prospective adoptive parents. We believe that the amendments contained in S. 569 and H.R. 1082 that were developed by the tribes, the National Indian Child Welfare Association, and the National Congress of American Indians, with input from the American Academy of Adoption Attorneys, represents such an approach. These ICWA amendments are supported by our organization because of their balanced approach to helping protect Indian children and provide increased certainty for those involved in the process of adoption. Our testimony will provide background on the Indian Child Welfare Act and identify the reasons we believe Congress should support S. 569 and H.R. 1082.

National Indian Child Welfare Association (NICWA): The National Indian Child Welfare Association provides a broad range of services to tribes, Indian organizations, states and federal agencies, and private social service agencies throughout the United States. These services are not direct client services such as counseling or case management, but instead help strengthen the programs that directly serve Indian children and families. NICWA services include: 1) professional training for tribal and urban Indian social service professionals; 2) consultation on social service program development; 3) facilitating child abuse prevention efforts in tribal communities; 4) analysis and dissemination of public policy information that impacts Indian children and families; and 5) helping state, federal and private agencies improve the effectiveness of their services to Indian people. Our organization maintains a strong network in Indian country by working closely with the National Congress of American Indians and tribal governments from across the United States.

INDIAN CHILDREN AND FEDERAL POLICY

In 1819, the United States Government established the Civilization Fund, the first federal policy to directly affect Indian children. It provided grants to private agencies, primarily churches, to establish programs to "civilize the Indian." In a report to Congress in 1867, the commissioner of Indian services declared that the only successful way to deal with the "Indian problem" was to separate the Indian children completely from their tribes. In support of this policy, both the government and private institutions developed large mission boarding schools for Indian children that were characterized by military type discipline. Many of these institutions housed more than a thousand students ranging in age from three to thirteen. Throughout the remainder of the nineteenth century, boarding schools became more oppressive. In 1880, for instance, a written policy made it illegal to use any native language in a federal boarding school. In 1910, bonuses were used to encourage boarding school workers to take leaves of absence and secure as many students as possible from surrounding reservations. These "kid snatchers" received no guidelines regarding the means they could use. Congress addressed this issue by declaring: "And it shall be unlawful for any Indian agent or other employee to induce, by withholding rations or by other improper means, the parents or next of kin of any Indian child to consent to the removal of any Indian child beyond the limits of any reservation." In addition to boarding schools, other federal

practices encouraged moving Indian children away from their families and communities. In 1884, the "placing out" system placed numerous Indian children on farms in the East and Midwest in order to learn the "values of work and the benefits of civilization."

Federal policy continued throughout the twentieth century with assimilation being the key focus in the Boarding Schools up until the 1950's. The passage of Public Law 280 in 1953 represented the culmination of almost a century old federal policy of assimilation. Its ultimate goal was to terminate the very existence of all Indian tribes. This ultimate assimilation policy was reflected in the child welfare policies of this period.

Throughout the 1950 and 60s, the adoption of Indian children into non-Indian homes, primarily within the private sector, was widespread. In 1959, the Child Welfare League of America, the standard-setting body for child welfare agencies, in cooperation with the Bureau of Indian Affairs, initiated the Indian Adoption Project. In the first year of this project, 395 Indian children were placed for adoption with non-Indian families in eastern metropolitan areas.

Little attention was paid, either by the Bureau of Indian Affairs or the states, to providing services on reservations that would strengthen and maintain Indian families. As late as 1972, David Fanshel wrote in *Far From the Reservation* that the practice of removing Indian children from their homes and placing them in non-Indian homes for adoption was a desirable option. Fanshel points out in the same book, however, that the removal of Indian children from their families and communities may well be seen as the "ultimate indignity to endure."

Fanshel's speculation bore out the truth of the matter. A 1976 study by the Association on American Indian Affairs found that 25 to 35 percent of all Indian Children were being placed in out-of-home care. Eighty-five percent of those children were being placed in non-Indian homes or institutions. In a response to the overwhelming evidence from Indian communities that the loss of their children meant the destruction of Indian culture, Congress passed the Indian Child Welfare Act of 1978.

#### THE INDIAN CHILD WELFARE ACT

The unique legal relationship that exists between the United States government and Indian people made it possible for Congress to adopt this national policy. Because of their sovereign nation status, Indian tribes are nations within a nation. The Constitution of the United States provides that "Congress shall have power to regulate commerce with Indian tribes." Through this and other constitutional authority, Congress has plenary power over Indian affairs, including the protection and preservation of tribes and their resources. Finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," Congress passed the Indian Child Welfare Act.

The Act, designed to protect Indian families, and thus the integrity of Indian culture, has two primary provisions. First, it sets up requirements and standards for child-placing agencies to follow in the placement of Indian children. It requires, among other things, providing remedial, culturally appropriate services for Indian families before a placement occurs; notifying tribes regarding the placement of Indian children and, when placement must occur, it sets out

preferences for the placement of these children. The placement preferences start with members of the child's family, Indian or non-Indian, then other members of the child's tribe and lastly other Indian families. Both tribes and state courts have the ability to place Indian children with non-Indian families and often do when appropriate.

The Act also provides tribes with the ability to intervene in child custody proceedings, which results in greater participation from extended family members in many cases. Additionally, the Act recognized existing Indian tribal authority on the reservation and extended that authority to non-reservation Indian children when state courts transfer jurisdiction to tribal courts. A result of the Act has been the development and implementation of tribal juvenile codes, juvenile courts tribal standards, and child welfare services. Today, almost every Indian tribe provides a range of child welfare services to their member children.

#### INDIAN FAMILIES ARE THE LIFEBLOOD OF INDIAN COMMUNITIES

The importance of Indian families and their extended family networks in tribal culture has been well documented, especially during hearings for the Indian Child Welfare Act:

[T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family...The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing.

[House Report 95-1386, 95th Congress, 2nd Session (July 24, 1978) at 10, 20.]

The strength of tribal culture comes from the agreement by members of who they are as a tribe and the value system that supports their tribal culture. This membership views family in a very broad sense, understanding the importance of all members in helping raise children and promote the well-being of the tribe. When an Indian child is born, it is a time of celebration, not just for the immediate family, but for the extended family and other tribal members as well. Tribal members, whether they live on the reservation or a thousand miles away, are aware of this time for celebration and feel the common connection of this event. Family and culture are synonymous for Indian people and any changes in tribal membership or family will mean changes in culture and the viability of that culture for all members.

Acknowledging these family and community values leads to an appreciation of what it means to a tribe to lose even one child. Today, with a number of small tribes facing what can only be described as an precarious future and possibly even extinction, it becomes even more important to nurture the connections between Indian children and their tribal community.

#### TRIBAL MEMBERSHIP

Formal tribal membership determinations often do not happen prior to or at birth. Most tribes require a variety of information to be collected after the birth of the child before the membership process can even be initiated. The process itself can take anywhere from one month to several

months depending on the accuracy of information provided, the number of tribal membership requests needing review, and the timing of the next tribal council or membership committee meeting.

The determination of tribal membership does not happen overnight and for good reasons. With the romanticism of Indian culture that began in the 1960's many non-Indian people have made claims to Indian heritage and the services or benefits that come with membership. By necessity, tribes have had to become careful in screening membership so that limited tribal services, such as health care, are available for those tribal members who qualify for them. This means that membership determinations can take time and because of limited resources to support this process, many tribes have times when enrollment applications are not accepted. The closing of the enrollment process is not of great concern to many tribes, because membership is still extended to tribal members, even if they have not completed a formal enrollment process. In addition, some tribes view enrollment lists as secondary to determinations of membership based on their intimate knowledge of what families and individuals are members of the tribe.

For those Indian families that are experiencing difficulties in trying to meet their basic needs, formal membership procedures may be a low priority. Because membership is assumed by many tribal members and the tribe under tribal traditions and customs, focusing on formalizing membership status during these stressful times would not seem necessary to many Indian people. Unlike other governments that use paper documents such as birth certificates as the primary means of establishing membership, tribes have long used and will continue to use their customary and traditional practices.

Enrollment does not equal membership in many situations. Many tribes, especially small tribes, do not have updated enrollment lists for a variety of reasons. One reason is the forced dispersion of the Indian population as a result of failed federal policies, such as the Boarding School, Termination and Relocation eras. During these periods Indian communities were broken apart by the forced removal of large numbers of children, while large numbers of adult Indian people were separated from their families involuntarily. The legacies of these policies are still visible in Indian Country today, as adult Indian people live in isolation from their families and communities, many not knowing their families or heritage. Tribes struggle to regain these lost connections, but are many times not successful until years and sometimes decades have passed in these Indian peoples' lives. Stories abound in Indian Country of adult Indian people finding their families or connections to tribes that they never knew existed and the pain and grieving that they have lived with for many years because of their lost identity. In some cases, these people will never be given the opportunity to regain that sense of heritage and know their family.

#### ANSWERS TO QUESTIONS REGARDING THE ICWA

1) Was the ICWA intended to provide protections to Indian children and families living off the reservation?

Yes. When Congress began hearings on the ICWA prior to 1978, it was found that the children most vulnerable to unnecessary removals and institutionalization were those Indian children that lived off the reservation. At the time of passage of the ICWA, 25% - 35% of all Indian children

were being unnecessarily removed from their homes and isolated from their natural families and communities. Those living off-reservation were particularly vulnerable to unnecessary removal because of their distance from tribal agencies and courts which had critical knowledge and experience to provide in a child custody proceeding. The legislative history of the ICWA and current body of federal case law makes clear that Congress intended to make ICWA protections available to all Indian children who are members of a federally-recognized tribes regardless of their place of residency.

2) Does the ICWA mandate that Indian children only be placed with Indian families?

No. The ICWA only provides preferences in the placement of Indian children with the first preference being family members - Indian or non-Indian. Furthermore, the ICWA provides state courts with the ability to alter the placement preferences upon a finding of good cause and have often done this. Furthermore, a large number of tribal child welfare programs in the United States have placed and will continue to place Indian children with non-Indian foster care or adoptive families when appropriate. It is important to understand that the process used in making placement decisions regarding any child will ultimately determine how well a child's needs are met. If the process is exclusionary and does not include all of the important parties, the placement becomes at risk of being disrupted or harmful to the child. Inclusion of all parties - extended family members, birth parents, tribe, and prospective foster or adoptive parents - is the most successful strategy and should be a part of every placement decision. This is the standard of practice that the ICWA establishes and when used properly almost never results in a disrupted placement.

3) Why should a tribe be allowed to intervene in a voluntary adoption proceeding between a consenting natural parent and a prospective adoptive couple?

As many states and tribes have found in their child welfare practice, many times natural parent(s) who are thinking about giving their children up for adoption have not clearly thought this decision through and may not be aware of opportunities to place the child with other family members. These parents are often very young and not yet mature in their thinking, but are nonetheless trying to deal with the tremendous stress of an unexpected pregnancy or other crisis in their immediate family. This was the case in a number of adoptions that were identified in the Congressional Record last year where young Indian parents, some that were not even 18 years of age, were being counseled by adoption attorneys to avoid involving their extended families in decisions to adopt out their children. Regrettably, these parents were then faced with a very tough decision, one that has lifelong consequences, with little, if any, balanced information on alternatives to placing the child outside the natural family.

Situations like these where young Indian parents are only provided one way out of their dilemma do not meet the best interests of anyone, particularly the child. Allowing tribes to be a part of the adoption process enables extended family members in the community to be notified of a potential adoption of their grandchild, niece or nephew and be afforded the chance to discuss a possible placement in their family before it is too late.

In addition, tribes can provide assistance in locating appropriate homes for Indian children needing out of home placements. Many states and private adoption agencies find themselves with a shortage of qualified Indian adoptive homes and can benefit from the pool of homes that tribes may have available. As an example, in the state of Washington, the Yakama tribe has a pool of Indian foster care and adoptive homes, which they have allowed the state Division of Social and Health Services to have access to. This agreement enables the agency facilitating the adoption to find the very best home for that child without unnecessary delays.

4) Is the ICWA a barrier to the timely placement of Indian children in foster care or adoptive homes?

No. In fact, since the passage of the ICWA, hundreds of thousands of Indian children have been successfully placed in both loving foster care and adoptive homes; both Indian and non-Indian. The ICWA has been a bright ray of hope for the vast majority of Indian children by helping them be reunified with their families and finding new homes when there are no natural family placements available. Tribal child welfare programs, which play a pivotal role in this accomplishment, have been increasingly successful in recruiting and maintaining foster care and adoptive homes within and outside of their reservation boundaries, making it possible for tribes to place Indian children even more quickly than states and private agencies in many cases. In many cases, state and private child placing agencies look to tribal child welfare programs to assist them in developing quality foster care and adoptive homes for Indian children.

A 1988 study on the status of the Indian Child Welfare Act revealed that tribal involvement in the placement of Indian children has resulted in, 1) Indian children being reunified more often with their natural families than with state or Bureau of Indian Affairs programs; and 2) shorter stays for Indian children in substitute care (i.e. foster care) than with state or Bureau of Indian Affairs programs. These successes are not surprising given the continued growth and sophistication of tribal child welfare programs in the United States. Many of these programs are now offering a full range of child welfare services independently or in collaboration with private and state child welfare agencies.

5) Are the protections available to Indian children in the ICWA still necessary today?

Yes. While the ICWA has certainly helped to reduce the chances that Indian children will not be unnecessarily removed from their homes, families and communities, there are still too many individuals and agencies involved in the unlawful placement of children; especially Indian children. It is not an exaggeration to say that every year over a thousand Indian children who are eligible for and need the protections of the ICWA are being denied these fundamental rights to have access to their family and culture. This means that one or more of the following violations of the ICWA is usually occurring:

- Tribes and extended family members are not being notified when a member child is being considered for an out of home placement.
- Qualified Indian families, often time's relatives of the Indian child, are not being given consideration as a placement resource for the child.

- Child welfare agencies working with Indian families who are experiencing difficulties are not making active and reasonable efforts to provide rehabilitative services to the family, thereby precluding any chance of the child being able to return home.
  - State courts, without good cause, are refusing to transfer jurisdiction of child custody proceedings to tribal courts of which Indian children are members.
  - Individuals or agencies are choosing to thwart the law by counseling young Indian families to not disclose their native heritage as a way to avoid the application of the ICWA or simply are refusing to take the necessary steps to confirm or deny whether the ICWA applies in a case.
- 6) Does the ICWA provide any flexibility for state courts to make individualized decisions in adoption cases?

Yes. A state court has the discretion to place an Indian child outside the placement preferences in the ICWA if it finds good cause to the contrary. While an Indian tribe may seek transfer of jurisdiction to tribal court of an off-reservation case, either birth parent may object to the transfer which has the effect of preventing such a transfer. Moreover, even where a parent does not object, a state court may deny transfer of jurisdiction to a tribal court.

7) Can the ICWA be used to disrupt an adoption proceeding at almost anytime?

No. If the jurisdictional and intervention provisions, and the procedures for consent to adoption in the ICWA are followed, no adoption may be disturbed once it is finalized unless there is fraud or duress in the initial consent. Even when there is fraud or duress, a challenge can be brought only two years after an adoption decree is final. A search of reported court decisions involving Indian adoptions where the ICWA was involved found only 30 cases since 1978 where adoptions were disrupted because of court disputes. Thus, where the ICWA is complied with initially, there is little threat that an adoption will be overturned.

8) Is there any relationship between the application of the ICWA and abortion rates among Indian women?

No. Recently, allegations were made by the National Right to Life Committee based on suggestions by the National Council for Adoption that the application of the ICWA may have the effect of encouraging abortion in Indian women. To date, no credible data has been produced that supports this allegation or shows a relationship between the application of the ICWA and abortions. In fact, not only do most tribes have traditional teachings regarding the special gift of life, but available data shows that Indian women have one of the lowest rates of abortion of any ethnic group. Abortion rates for Indian women have either stayed constant or declined since the inception of the ICWA in areas where data is available. The Alan Guttmacher Institute which does extensive data collection, research and public policy analysis in the area of reproductive health stated the following in a letter to Congressman Don Young dated April 15th.

"We have read the proposed legislation (H.R. 1082) carefully and cannot imagine how the proposed amendments to the Indian Child Welfare Act (ICWA), or the 1978 legislation, could in any way have an impact on the abortion rate of the Indian population."

**S. 569 AND H.R. 1082 WILL PROTECT THE BEST INTERESTS OF INDIAN CHILDREN AND PROVIDE CERTAINTY FOR POTENTIAL ADOPTIVE FAMILIES**

The amendments in S. 569 and H.R. 1082 were carefully developed in a year long process by tribal leaders and experts in the field of adoption and foster care of Indian children with input from representatives of the American Academy of Adoption Attorneys. In addition, other prominent organizations involved in adoption and foster care issues affecting children have also come forward to express their support for these bills. These organizations include: Child Welfare League of America, North American Council on Adoptable Children, American Humane Association, Catholic Charities, and the American Psychological Association.

This effort by the tribes signifies their willingness to address the specific concerns of those who feel that ICWA has flaws in some areas. But just as important, the amendments meaningfully address the concerns raised about ICWA in a way that can provide more security for potential adoptive parents and still allow for meaningful participation of extended family members and tribes when appropriate. The following is a description of the key provisions in S. 569 and H.R. 1082.

**1. Notice to Indian Tribes of Voluntary Proceedings**

Provides for notice to tribes in voluntary adoptions, termination of parental rights, and foster care proceedings. Also clarifies what should be included in notices to tribes of these proceedings. Providing timely and adequate notice to tribes will serve to ensure a more appropriate and permanent placement decision for the Indian child. When tribes and extended family members are allowed to be part of a placement decision the risk for disruption is significantly decreased. With proper notice, tribes can make informed decisions on whether the child is a member and whether or not they have an interest to participate in the placement decision. Notice also helps to expand the pool of potential adoptive parents because frequently the tribe knows of extended family members and other quality adoptive homes that are unknown to the individual or agency facilitating the adoption.

**2. Timeline for Intervention in Voluntary Cases**

Provides for a window of 90 days for tribes to intervene after notice of a voluntary adoptive placement or 30 days after notice of a voluntary adoption proceeding whichever is later. If a tribe does not intervene within these timelines after proper notice, they can not come back and later intervene.

Timely placements of children, whether they be Indian or non-Indian, are a concern of everyone. It is in no one's interest to let children languish in foster care or institutions when there is an appropriate adoptive placement available. Understanding this, tribes came together to adopt language that will place an appropriate timeline on their ability to intervene in voluntary adoptive proceedings involving their children.

Historically, tribes and extended family members interests were almost never given any consideration in these sensitive proceedings. They often only found out about adoptions of their children months and sometimes years after deals had been cut. With proper notice, tribes can

make informed decisions regarding their interest in a child and help facilitate a timely and successful adoptive placement.

**3. Criminal Sanctions to Discourage Fraudulent Practices**

Provides criminal sanctions for individuals or agencies which knowingly misrepresent whether a child is Indian to avoid application of the Indian Child Welfare Act. The vast majority of disrupted adoptions involving Indian children happen as a result of unethical and illegal behavior on the part of the individual or agency facilitating the adoption. In the now infamous "Rost" adoption case, the natural father was counseled to avoid disclosing he was Indian in order to avoid application of the ICWA, after which the adoption attorney falsified adoption papers that asked for the natural father's ethnicity. This is just one example amongst many where a number of innocent people, as well as the adoption itself, were exposed to unnecessary risks for the purposes of making life a little easier for the person facilitating the adoption.

**4. Limits for Withdrawal of Consent to Adopt**

Limits the length of time within which birth parents can withdraw their consent to adoption to six months after notice to the tribe. Provides more certainty that adoptions involving Indian children will not be disrupted by placing time limits on the natural parents ability to revoke their consent to adopt. Furthermore, it brings federal law pertaining to the adoption of Indian children more in line with applicable state laws by avoiding unlimited timelines on when consent to adoption can be revoked.

**5. State Court Option to Allow Open Adoptions**

Allows state courts to provide open adoptions of Indian children where state law prohibits them. Some state courts prohibit biological family members from maintaining contact with the child, even when the adoptive parents agree. This provision provides another tool in a state court adoption proceeding to avoid protracted litigation and ensure children with access to their natural family and culture when deemed appropriate. However, state courts will still have full discretion as to whether this option is utilized.

**6. Clarifying Ward of Tribal Court**

Clarifies tribal court's authority to declare children wards of the tribal court, much like state courts do. Clarifies that once a tribal court takes control of an on-reservation child or a child transferred to them by a state court that the tribal court retains control. Ensures that tribal courts will not unilaterally reach out and take control over a child whose permanent home is off-reservation.

**7. Informing Indian Parents of Their Rights Under the ICWA**

Provides that attorneys and public and private agencies must inform Indian parents of their rights and their children's rights under the ICWA. This provision will ensure that Indian parents are informed up front and able to make balanced decisions on the adoption or foster care placement of their children. This will help avoid unnecessary litigation due to natural parents making uninformed decisions that they may wish to change later.



### 8. Tribal Membership Certification

Any motion to intervene in an adoption proceeding by a tribe shall be accompanied by certification of the child's membership or eligibility for membership in a particular tribe. This provision will help ensure that there is no question as to whether a child is Indian under the ICWA and that tribal membership determinations are not arbitrarily made.

#### THE SUCCESS OF ICWA IN HUMAN TERMS

I want to tell you in human terms what the Indian Child Welfare Act means to Indian families. Recently a 32 year-old Indian mother in Oakland, California, Prisella Packineau, rediscovered her Indian heritage. She was the child of a Navajo mother and a Mandan-Hidatsa father. When Prisella was only eighteen months old, her mother became mentally ill while living in the Phoenix area. Because her mother was unable to care for her Prisella was placed with a non-Indian foster family and never returned to her mother or extended family. She never even knew she had an Indian family or relatives. Her non-Indian family forbid her to speak of her Indian heritage and passed it off as something that was not important.

Years later, while battling depression and anxiety about her lost identity Prisella developed a substance abuse problem and her own children were placed in substitute care. But this time there was an Indian Child Welfare Act and a social worker who knew how to implement it. Even though Prisella had been enrolled in the Navajo Nation at birth, because of her placement in a non-Indian family at such a young age, no one had bothered to inform or help her enroll her own children. Fortunately, the social worker notified the Navajo tribe who moved to enroll Prisella's children and help find a placement with her extended family.

Upon visiting the home of one of Prisella's aunts, the social worker found pictures of the Prisella at eighteen months of age still on the wall. The aunt told of the families grief and the frustration at not being able to find this child whom they had helped raise as an infant. They told of not being able to find information to know where Prisella might be or if she was even alive. The years of not knowing where their loved one had disappeared to had left a definite mark on this family.

The tribe working with the mother's maternal aunt asked that the children be placed with her while the mother sought treatment for her substance abuse problem. As a result of the Indian Child Welfare Act and the good work of the tribe and Prisella's social worker, the children were placed with Prisella's aunt and are doing beautifully in this home on the Navajo reservation.

Today, Prisella has been reunited with her Navajo family and will very soon be celebrating three years of sobriety. She also knows she has a biological father who is still living, whom she was told by her earlier caseworker had passed away, and hopes someday to meet him as well. She is a much happier, self-confident person today, while her children have found a loving home with their extended family. As Prisella puts it, "I am able to give my children today what I did not get - a strong sense of who they are as Indian people. I am still trying to find what was lost to me long ago and it is very, very hard. I am trying to fill the hole in my heart."

This story is not an uncommon one in Indian Country. As an organization that works with tribal child welfare programs on a daily basis we hear many accounts of children and adults who have been lost to their extended families and culture, in most cases because of poorly thought out federal policies and misguided efforts to "help" Indian children. This illustrates the most important reasons why efforts to change the Indian Child Welfare Act should be carefully developed and why it would be a grave mistake to weaken it in any way.

#### CONCLUSION

The Indian Child Welfare Act has provided much needed protection and hope to thousands of Indian children since its enactment. What many people do not know is that this law has also given Indian communities hope for a better future. It is not uncommon to find Indian people in communities all across the country that have either found their own identity because of the ICWA or have a family member that was reunited because of the ICWA. These collective experiences which are shared every day provide the healing that is needed for Indian communities ravaged by federal policies that were designed to isolate and assimilate Indian people. In many of these cases, the discovery of their lost identity has enabled them to fill an emptiness inside themselves and find support and understanding they never had. This is the ICWA that we know, and when allowed to work properly, provides security and certainty in Indian children's lives.

We ask you to support passage of S. 569 and H.R. 1082. We believe they will continue the positive contributions to the health and safety of Indian children, while also providing the certainty prospective adoptive parents need. This balanced approach is the kind that makes everyone a winner and achieves what everyone says they want, which is in the best interests of the child. Thank you for serious consideration of this testimony and request.



## Spokane Tribe of Indians

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CENTURY OF SURVIVAL  
1881 - 1981

STATEMENT OF  
THE SPOKANE TRIBE OF INDIANS  
Regarding proposed amendments to  
The Indian Child Welfare Act: H.R. 1082 and S. 569  
Submitted to the Senate Committee on Indian Affairs  
and House Resources Committee

The United States Government has long recognized the sovereignty of Indian Tribes, and Congress' unique obligation toward Indians. Congress enacted the Indian Child Welfare Act (hereinafter referred to as "ICWA" or "Act") in 1978 pursuant to that obligation due to the incredibly large number of Indian children being removed from their families, and being placed in non-Indian homes by child welfare agencies. The Act is based on the political relationship between Indian Tribes and the United States, and not on Indians as a race. See Section 1901(3) of ICWA, "the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." See also Morton v. Mancari, 417 U.S. 535 (1974) (upholding BIA Indian preference hiring and promotion policy because Indian status is political as opposed to racial).

The requirements placed on child welfare agencies in handling Indian child custody proceedings under the Act has made a real difference to tribes throughout the United States. Over the last several years alone, the Spokane Tribe has been able to provide culturally appropriate advice, cultural resources, placement resources, and a tribal connection to over 25 of our children involved in state child custody proceedings, and our tribal court has taken

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jurisdiction of 11 of those children. These are children who may have been lost to our tribe had it not been for the Indian Child Welfare Act.

For the reasons stated, ICWA has been of great value to our tribe. However, we recognize that some changes to the Act are needed. Included in our statement are comments regarding H.R. 1082 and S. 569, and two stories illustrating the difference ICWA has made to our people.

### I. COMMENTS TO H.R. 1082 AND S. 569

H.R. 1082 and S. 569 maintain the original intent of ICWA and provide a reasonable solution to the need of prospective adoptive parents to ensure greater certainty with Indian adoptions. Therefore, the Spokane Tribe supports H.R. 1082, and S.569, the identical bills to amend the Indian Child Welfare Act, with the following changes.

**Section 1913(e)(2)(A)(I) should be changed to require that notice be provided not later than 30 days after foster care placement as opposed to the stated 100 days.** Allowing notice to follow a placement by over three months will allow attachment and bonding to take place with a foster family, and cause unnecessary trauma to the child if a more appropriate home is found through the tribe. Requiring notice to be provided to tribes as soon as possible, with a maximum limit of 30 days after placement will allow states to utilize tribal knowledge and resources to the benefit of the child as soon as possible.

**Sanctions or penalties should be added to Section 1913(h) for failure to comply with court ordered visitation or contact by the birth family, or tribe.** As it now stands, a birth

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family, or tribe may approve of a particular adoption because of a continued contact agreement, and after the adoption is final, the adoptive family will be able to avoid the agreement without fear of having the adoption decree set aside. The effect will be to discourage birth families and tribes from entering into, or approving voluntary adoptions at the outset.

**Alternative and additional penalties should be added to Section 1924.** The Committees might consider sanctions against any agency, whether public or private, for violations of the section. The sanctions could include loss of federal funds, for example. States could be required to suspend licenses for agencies that are found to violate the section or to require bonds for violators. States might also be required to include ICWA compliance procedures in examination of licensing proceedings for employees of agencies who are going to work with foster care or adoption cases.

**Language should be added specifically rejecting the "existing Indian family exception."** Many states have read an exception into ICWA, holding the Act inapplicable where they do not find an "existing Indian family." *E.g.*, Matter of Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982); In re Crews, 825 P.2d 305 (Wash. 1992). The court in In re Crews, held that ICWA did not apply where "an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe; and neither the parents nor their families have resided or plan to reside within a tribal reservation." *Id.* at 310.

The ICWA sets forth specific criteria for its application. There must be a child custody proceeding as defined under Section 1903(1), and an Indian child as defined by Section 1903(4) as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an

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Indian tribe." The United States Supreme Court in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 42 (1989) concluded that ICWA applies when these conditions are met:

There are approximately 510 recognized tribes within the United States. David H. Getches, et al., Federal Indian Law Cases and Materials 8 (3d ed. 1993). Each of these tribes has a unique cultural setting. In addition, approximately half of the United States Indian population does not live on or adjacent to an Indian reservation. *Id.* at 15. There are many reasons why Indian people and families may not live as the majority society expects a "typical" Indian family to live. Government policies such as the Relocation Act, and the various Termination Acts, pre-ICWA State child welfare policies of Indian child removal, as well as limited job opportunities on reservations have encouraged or forced Indian people to leave reservations and relocate in urban settings.

In enacting ICWA, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and ... the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." Section 1901(3). There is no reference to any sort of requirement of an identifiable cultural setting. To the contrary, Section 1901(5) of the ICWA itself states that States "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." It is absolutely impossible for a state to determine which families are "Indian families" for purposes of falling under the ICWA requirements. Just because a particular family does not live the way states expect Indian people to live, does not mean that the family ceases to be an Indian family. This is for tribes alone to determine.

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By attempting to determine who is an Indian and who is not for purposes of ICWA application through the imposition of an existing Indian family exception, the states are infringing on the exclusive rights of tribes to determine their own membership and perpetuating a problem that the ICWA has sought to rectify. States need specific direction from the Act that this is unacceptable.

## II. STORIES ILLUSTRATING THE IMPORTANCE OF ICWA

The Spokane Tribe has two stories that it would like to share with the Committees. The first is about the lives of two Spokane tribal members who were victims of the pre-ICWA state child welfare policies. The second story is about a young girl who was brought into the state system and how ICWA helped to insure her best interests were met.

### A. Pre-ICWA

Georgia and Geneva are 38, and 39 years old. They were taken from their grandparents and placed in an orphanage when they were only 3 and 4 years old, before there was an Indian Child Welfare Act. After a year at the orphanage, Georgia went to live with a foster family where she was taught to eat properly, to behave, and to go to church. Georgia moved to a second foster family where she was told she was being kept for the money. She was physically and verbally abused, and molested by her foster brother when she was six years old. This was the age that Georgia stopped talking. Her third grade teacher told her that she would always be "stupid" and "would not learn." She hated the color of her skin.

Georgia later moved to Marie's home, a non-Indian woman who lived on an Indian

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reservation for two months, and looked like Georgia's grandmother. Marie was a teacher and tried to interest Georgia in her Indian culture.

It was some time later before Georgia discovered she was a Spokane Indian. Georgia had thought she was a "Chewelah Indian" because she knew that was where she was born. Chewelah is a town located a few miles from the Spokane Reservation. "I didn't want to be Spokane Indian - I hated it! I thought Indians were what I had seen on TV! I was scared about the Indians."

Georgia had been told by foster families that her parents were dead. Marie told her they were still alive, and Georgia located her birth mother and began to write to her. They met in 1977, and Georgia learned that she was also Coeur d'Alene and Salish/Kootenai.

According to Georgia, she was "messed up for a lot of years... Finally, I came back to the [reservation] and stayed. It has taken 34 years to accept myself as being Indian...I know when I have kids, they won't be far from their cultures. Today I can honestly say I am happy to be Spokane Indian."

Geneva went from foster home to foster home when she left the orphanage. She had no one try to interest her in her culture. Today, the sisters are in communication, but they do not talk about what happened to them. Geneva to this day does not like being Indian, and she now has a daughter that does not like being Indian either.

### B. Post-ICWA

Child A is 6 years old. She was removed from her parents' care, found to be a dependent child, and made a ward of the State Court when she was 4 years old because her mother had left her with a babysitter and had not returned for her. A's father is a member of the Spokane Tribe,

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however has not played an active role in his daughter's life. Both parents have substance abuse problems. At the time of placement by the State, A was not enrolled because her parents had not submitted proper documentation to the Tribe. Pursuant to the Indian Child Welfare Act, the state notified the Spokane Tribe. The Spokane Tribe intervened in the matter, and was immediately able to provide the state with a list of family members for potential placement and visitation resources, provided important family history, and made recommendations to assist the court with services for the family, including cultural resources for the child, and gathered paperwork necessary for enrollment, so that A would be eligible for the benefits of being an enrolled tribal member.

She was placed in a foster home on the west coast to be close to her mother while her mother was trying to straighten her life out. While the Tribe had hoped that the parents would engage in services and reunite with the child, they had not done so, and it became apparent that the parents were not in a position in their lives where this would happen. The Spokane Tribe brought the circumstances to the Tribe's Child Welfare Advisory Committee. The Tribe and the State Department of Children and Family Services decided that it was in the best interest of the minor child to be placed with her paternal grandparents who live on the Spokane Reservation. The Spokane Tribe also petitioned to transfer jurisdiction to the Spokane Tribal Court. The Tribe did petition and obtained jurisdiction over her case.

A is now placed with relatives who have loved and cared for her since her birth. She is surrounded by aunts, uncles, cousins and grandparents. She is being raised by family members who teach her the Spokane Indian ways, and to feel good about being Indian. She is frequently seen at Tribal events, dancing, playing with cousins, and other friends. She is part of our

SPOKANE TRIBE STATEMENT - 7

community.

Had it not been for the Indian Child Welfare Act requiring notification to the Spokane Tribe, and allowing intervention in the proceedings, the State may never have inquired as to whether A was Indian in the first place, and since the State did not have contact with A's father, the State would not have known that the Tribe or the Spokane Indian side of her family existed as a resource. Child A may have been lost to the Spokane Tribe and her Spokane Tribal family in much the same way as Georgia and Geneva, and may never have obtained confidence in her Indian identity.

There is a big difference in the outcome of these two situations because of the ICWA. While A is not yet a grown woman, she is already proud to be an Indian, and has a strong sense of identity. Because the Spokane Tribe has many stories like A's, showing the difference that ICWA has made, the Spokane Tribe has a strong hope for a better future for our people.

### III. CONCLUSION

ICWA has had a strong positive impact on the lives of Indian people, and on the health of Indian Tribes. We ask you to support the passage of S. 569 and H.R. 1082 with the changes listed above, and we ask specifically that the Committee keep in mind while considering amendments to the Indian Child Welfare Act that each and every one of our people mean the world to us, and that it is the absolute right of every Indian child to be an Indian.

The Spokane Tribe thanks the committee for taking the time to consider the Tribe's input and recommendations.

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### TESTIMONY OF REPRESENTATIVE TODD TIAHRT

Chairman Campbell, I am grateful for the opportunity to submit testimony to the Senate Committee on Indian Affairs regarding S. 569, the "Indian Child Welfare Act Amendments of 1997". I commend you for your leadership in holding this hearing and your endeavor to improve the lives of Native American children, birth parents and adoptive parents.

The purpose of my testimony is to communicate one strong central point to the Committee - I am opposed to S. 569, the Indian Child Welfare Amendments of 1997, as a means of improving ICWA on behalf of Native Americans. Furthermore, I am deeply concerned about the unintended consequences which would occur in the event of its passage.

The current problem caused by the ICWA is related to the ICWA's overreach and consequential violation of the constitutional rights of Native Americans. The solution to this overreach is not to expand the jurisdiction of ICWA but to restrict it.

Please consider the following conclusions regarding the current jurisdiction of the ICWA as written by Christine D. Bakeis in her law review article *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*. (Notre Dame Journal of Law, Ethics & Public Policy Vol 10 Issue No.2, 1996)

"To live under the American Constitution is the greatest political privilege that was ever accorded to the human race.' One of the promises of the American Constitution is that states will not enforce any law that abridges a citizen's privileges. The American Constitution also guarantees that states will not 'deprive any Person of life, liberty, or property, without due process of law.' The American constitution applies to 'all persons born or naturalized in the United States,' including American Indians. ....

The ICWA purportedly concerns itself with the well-being of Indian tribes and children. Application of the ICWA, however, is denying parents of Indian children the privilege of living under the Constitution.

.....Despite the American Constitution's promises, the ICWA requires states to treat parents of children with Indian blood differently than they treat other parents. Parents of children with Indian blood are not afforded the privilege of selecting their child's adoptive parents. Likewise they are not necessarily given a right to remain anonymous in an adoption proceeding."

Currently, ICWA is being applied to Americans solely on the basis of their race not on the basis of a willful connection to a tribe. The result - two groups of people are denied full protection of the law: Native American birth-parents and Native American children. A Native American birth parent has less freedom than other Americans to choose the adoptive parents for their child. Second, the Native American child's relationship to an adoptive parent is less secure.

Unfortunately, S.569 does not prevent application of the ICWA to a child or birth-parent based solely on his or her race. S.569 in fact strengthens the reach of the act beyond individuals who have a willful connection to a tribe. Following are the primary concerns I have regarding S.569:

- S. 569 would not restore the freedoms which are unintentionally infringed upon by the ICWA
- S. 569 would extend to Native American tribes complex rights of notice regarding child custody proceedings involving children and birthparents who have no willful connection to a tribe.
- S. 569 would expand the authority of ICWA to encompass **criminal penalties**. If any party other than the birth-parent concealed the fact that a child or birth parent was of any degree of Native American ancestry that individual (e.g. adoptive parent) could be imprisoned for a year.
- Although S. 569 *would* require a tribe to respond within a proscribed time in order to participate in or conduct the child custody proceeding, the bill states that failure on the part of the tribe to fulfill this obligation does not waive the rights of anyone else under ICWA. Therefore, this provision does not provide certainty. Any tribal member or any other tribe from whom the child may be descended could still **threaten the permanency of a birth-parent's decision and a child's adoptive placement**.
- Although S. 569 would establish a two year limit on the ability to overturn a decree of adoption, this two year time limit only applies to a birth-parent's ability to withdraw consent to the adoption. Therefore, if any other violation of the act occurs an adoption decree could still be invalidated beyond the two year period.

For these reasons, I cannot support S.569, and instead support the legislation introduced by Representative Deborah Pryce last year, H.R. 3275 - (104th Congress), in combination with my bill, the Voluntary Adoption Protection Act, H.R. 3156 - (104th Congress), which I am reintroducing today.

These two bills would address the overexpansive jurisdictional problem of the ICWA by restricting application of the Act to birth parents who have a political, social or cultural connection to a tribe (H.R. 3275) and restrict application of the ICWA to instances of involuntary child custody proceedings (H.R. 3156).

Please find enclosed with my written testimony a copy of the law journal article by Christine D. Bakeis referenced earlier, and a copy of my legislation introduced in the 104th Congress, H.R. 3156.

Once again, Mr. Chairman, thank you for giving me the opportunity to provide the Committee with this written testimony.

104TH CONGRESS  
2D SESSION

# H. R. 3156

To amend the Indian Child Welfare Act of 1978 to exempt voluntary child custody proceedings from coverage under that Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 22, 1996

Mr. TIAHRT introduced the following bill; which was referred to the Committee on Resources

## A BILL

To amend the Indian Child Welfare Act of 1978 to exempt voluntary child custody proceedings from coverage under that Act; and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Voluntary Adoption  
5 Protection Act".

6 **SEC. 2. FINDINGS AND POLICY.**

7 (a) FINDINGS.—Section 2 of the Indian Child Wel-  
8 fare Act of 1978 (25 U.S.C. 1901) is amended—

9 (1) in paragraph (3), by inserting before the  
10 semicolon at the end the following: "and who would

1 be subject to involuntary removal from the Indian  
2 community”;

3 (2) in paragraph (4)—

4 (A) by inserting “involuntary” before “re-  
5 moval”; and

6 (B) by striking “nontribal public and pri-  
7 vate” and inserting in lieu thereof “public”;  
8 and

9 (3) in paragraph (5), by inserting before the pe-  
10 riod at the end the following: “in the course of invol-  
11 untary termination of parental rights”.

12 (b) POLICY.—Section 3 of the Indian Child Welfare  
13 Act of 1978 (25 U.S.C. 1902) is amended by inserting  
14 “involuntary” before “removal”.

15 **SEC. 3. DEFINITIONS.**

16 Section 3 of the Indian Child Welfare Act of 1978  
17 (25 U.S.C. 1903) is amended by adding at the end the  
18 following:

19 “(13) ‘involuntary’, with respect to a child cus-  
20 tody proceeding, means the absence of a written con-  
21 sent by a parent or legal guardian (other than a  
22 tribal court) of the Indian child.”

23 **SEC. 4. CHILD CUSTODY PROCEEDINGS.**

24 (a) JURISDICTION.—Section 101 of the Indian Child  
25 Welfare Act of 1978 (25 U.S.C. 1911) is amended—

1 (1) in subsection (a), by inserting “involuntary”  
2 before “child custody proceeding”;

3 (2) in subsection (b)—

4 (A) by inserting “involuntary” before “fos-  
5 ter care placement”; and

6 (B) by inserting “involuntary” before “ter-  
7 mination of parental rights”; and

8 (3) in subsection (c)—

9 (A) by inserting “involuntary” before “fos-  
10 ter care placement”; and

11 (B) by inserting “involuntary” before “ter-  
12 mination of parental rights”.

13 (b) COURT PROCEEDINGS.—Section 102 of the In-  
14 dian Child Welfare Act of 1978 (25 U.S.C. 1912) is  
15 amended—

16 (1) in subsection (a)—

17 (A) by inserting “involuntary” before “fos-  
18 ter care placement” each place it appears; and

19 (B) by inserting “involuntary” before “ter-  
20 mination of parental rights” each place it ap-  
21 pears;

22 (2) in subsection (b)—

23 (A) by inserting “involuntary” before “re-  
24 moval”;

(B) by inserting "involuntary" before

"placement"; and

(C) by inserting "involuntary" before "termination of parental rights";

(3) in subsection (e)—

(A) by striking "a foster care placement" and inserting in lieu thereof "an involuntary foster care placement"; and

(B) by inserting "involuntary" before "termination of parental rights";

(4) in subsection (d)—

(A) by striking "a foster care placement" and inserting in lieu thereof "an involuntary foster care placement"; and

(B) by inserting "involuntary" before "termination of parental rights";

(5) in subsection (e), by inserting "involuntary" before "foster care placement"; and

(6) in subsection (f), by inserting "involuntary" before "termination of parental rights".

(c) VOLUNTARY TERMINATION OF PARENTAL RIGHTS.—Section 103 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1913) is amended to read as follows:

"SEC. 103. (a) Upon written consent by a parent or legal guardian (other than a tribal court) of an Indian

child to a voluntary child custody proceeding, this title shall thereafter not apply to any child custody proceeding involving the Indian child, and this Act shall thereafter not be the basis for determining jurisdiction over any child custody proceeding involving the Indian child.

"(b) For the purposes of subsection (a), written consent is irrevocable."

(d) PETITION TO INVALIDATE ACTION.—Section 104 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1914) is amended—

(1) by inserting "involuntary" before "foster care placement";

(2) by inserting "involuntary" before "termination of parental rights"; and

(3) by striking "101, 102, and 103" and inserting in lieu thereof "101 and 102".

(e) ADOPTIVE PLACEMENT.—Section 105 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1915) is amended—

(1) in subsection (a), by inserting "involuntary" before "adoptive placement";

(2) in subsection (b)—

(A) by inserting "involuntary" before "foster care" each place it appears; and

(B) by inserting "involuntary" before "preadoptive placement" each place it appears; and

(3) in subsection (c)—

(A) by striking "a placement" and inserting "an involuntary placement"; and

(B) by striking "the placement" and inserting "the involuntary placement" each place it appears.

(f) PETITION FOR RETURN OF CUSTODY.—Section 106 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1916) is amended—

(1) in subsection (a)—

(A) by inserting "involuntary" before "adoption"; and

(B) by striking "foster care, preadoptive, or adoptive placement" and inserting in lieu thereof "involuntary foster care, involuntary preadoptive, or involuntary adoptive placement"; and

(2) in subsection (b) by striking "further";

(g) INFORMATION TO ADOPTED CHILD.—Section 107 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1917) is amended by inserting "involuntary" before "adoptive".

(h) IMPROPER REMOVAL OF CHILD.—Section 110 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1920) is amended—

(1) by striking "an Indian child custody proceeding" and inserting "an involuntary Indian child custody proceeding" in lieu thereof; and

(2) by striking "removed the child" and inserting in lieu thereof "removed an Indian child".

(i) PROTECTION OF PARENTAL RIGHTS.—Section 111 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1921) is amended by inserting "involuntary" before "child custody proceeding".

**SEC. 5. EFFECTIVE DATE.**

The amendments made by this Act shall take effect as of January 1, 1992. Such amendments shall not apply with respect to any permanent placement of an Indian child for adoption occurring before the date of the enactment of this Act.



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modest is that it does not challenge any deeply entrenched constitutional doctrines; its implementation requires no sweeping and unlikely emendations in our constitutional thinking. Unlike Fitzgerald's, my proposal involves an unfolding of the implications of traditional liberal theory, as stated by Mill, not the jettisoning of it. It retains faith in a version of the rule of law and supposes an ability to test, in the usual way, substantive state and federal laws regarding children for their constitutionality. Unlike Minow's, my proposal does not suggest that the proper objects of our concern might be something other than the individual, or challenge the notion that the Constitution parcels out only "negative," never "positive," rights. Unlike Woodhouse's, my proposal does not suggest any divergence from the principles of equality that liberalism at its best endorses. At the same time, unlike a thesis of "rugged" individualism my proposal would not have us set aside the moral obligations we have toward children, or have us, in Fitzgerald's words, "abandon [children] bereft of adult guidance, to foolish choices regretted in later life."<sup>185</sup> Since many choices that a child might make will not involve fundamental interests, and since many choices will involve interests that, while fundamental, do not evidently benefit the child, we cannot even anticipate a deluge of children's rights claims in the federal courts. Most importantly, my proposal would protect children's interests in the family, and would provide a basis for challenging state actions that treat children as less than fully human. The deep need parents have for their children is equalled only by the deep and demonstrable need children have for those whom they take to be "parents." The insult to the child, when the state intercedes to breach their strongest affiliations, is just as great as the insult to any adult.

In *Bowers v. Hardwick*, Justice Blackmun referred to the "fundamental interest all individuals have in controlling the nature of their intimate associations with others"<sup>186</sup>. What I have tried to do here is to argue that there is no reason in the world not to understand this principle, properly restricted, to apply to children.

<sup>185</sup> Fitzgerald, *Maturity*, *supra* note 8, at 33.

<sup>186</sup> *Bowers v. Hardwick*, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting).

## THE INDIAN CHILD WELFARE ACT OF 1978: VIOLATING PERSONAL RIGHTS FOR THE SAKE OF THE TRIBE

CHRISTINE D. BAKES\*

### I. INTRODUCTION

"To live under the American Constitution is the greatest political privilege that was ever accorded to the human race."<sup>1</sup> One of the promises of the American Constitution is that states will not enforce any law that abridges a citizen's privileges.<sup>2</sup> The American Constitution also guarantees that states will not "deprive any person of life, liberty, or property, without due process of law."<sup>3</sup> The American Constitution applies to "[a]ll persons born or naturalized in the United States,"<sup>4</sup> including American Indians.

In the late seventies, the United States' Congress began investigating child custody proceedings involving Indian children. These investigations culminated in Congress enacting the Indian Child Welfare Act of 1978 (ICWA).<sup>5</sup> The ICWA purportedly concerns itself with the well-being of Indian tribes and children. Application of the ICWA, however, is denying parents of Indian children the privilege of living under the Constitution.

In the United States, parents enjoy certain rights concerning the upbringing of their children.<sup>6</sup> Despite the American Constitution's promises, the ICWA requires states to treat parents of children with Indian blood differently than they treat other parents. Parents of children with Indian blood are not afforded the privilege of selecting their child's adoptive parents.<sup>7</sup> Likewise

\* Associate, Kasdorf, Lewis & Swiedik, S.C.; J.D., with honors Order of the Coif, 1994, Drake University Law School. Former Law Clerk to the Honorable Marsha K. Ternus, Iowa Supreme Court.

1. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 65 (Suzy Platt ed. 1989) (attributed to Calvin Coolidge, the White House, Dec. 12, 1924).

2. U.S. CONST. amend. XIV, § 1.

3. *Id.*

4. *Id.*

5. 25 U.S.C. §§ 1901-1963 (1994).

6. See *infra* notes 121-39 and accompanying text.

7. See *infra* notes 140-57 and accompanying text.

they are not necessarily given a right to remain anonymous in an adoption proceeding.<sup>8</sup> Thus, when Congress enacted the ICWA it took away personal liberties of men and women who have children with Indian blood.

The ICWA also demonstrates Congress' lack of respect for parents of Indian children. In fact, one of the best examples of such disrespect is the only ICWA case decided by the United States Supreme Court.<sup>9</sup> In *Mississippi Band of Choctaw Indians v. Holyfield*, unwed parents who were expecting twins decided it would be in the children's best interests to give them up for adoption. The parents selected the Holyfields as the family they wanted to adopt and raise their children.<sup>10</sup> Before the twins' birth the mother arranged to have them at the Gulfport Memorial Hospital, some two hundred miles away from the reservation.<sup>11</sup> After the twins' birth, the parents consented to the adoption, and an adoption decree was entered in the state court.<sup>12</sup>

Two months later, however, the Indian tribe to which both parents belonged moved the court to vacate the adoption decree on the ground that under the ICWA exclusive jurisdiction was vested in the tribal court.<sup>13</sup> The trial court, respecting the great lengths that the twins' parents had gone to ensure that their children were born off the reservation and adopted by non-Indian parents, denied the tribe's motion.<sup>14</sup> The Supreme Court, on the other hand, disregarded the parents' wishes and found that "[tribal jurisdiction under [the ICWA] was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves."<sup>15</sup> The court further illustrated its disrespect for the parents' choice by stating that "[p]ermitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would . . . nullify the purpose the ICWA was intended to accomplish."<sup>16</sup> This display

8. See *infra* notes 158-75 and accompanying text.

9. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

10. *Id.* at 37.

11. *Id.*

12. *Id.* at 37-38.

13. *Id.* at 38.

14. *In re B.B.*, 511 So. 2d 918, 921 (Miss. 1987), *rev'd sub nom. Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

15. *Holyfield*, 490 U.S. at 49.

16. *Id.* at 52.

trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.<sup>21</sup>

The ICWA is premised on the government's recognition of Indian tribes as sovereign governments. As such, the tribes have a vital interest in deciding whether Indian children should be separated from their families. The ICWA presumes that protecting the Indian child's relationship to the tribe is in the child's best interest.<sup>22</sup>

Under the ICWA, the tribe has, with a few exceptions,<sup>23</sup> exclusive jurisdiction over child custody proceedings where an Indian child is residing or is domiciled on the reservation.<sup>24</sup> Also, even when an Indian child is not residing or domiciled on a reservation, the tribe still has a right to participate in any state court action.<sup>25</sup> In either case, parental rights may not be easily terminated. However, when they are, section 1915 of the ICWA addresses the adoptive placement of Indian children and provides that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."<sup>26</sup>

The ICWA provides that an "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian

21. *Id.* § 1901.

22. See *id.* § 1902; *Chester County Dep't of Soc. Servs. v. Coleman*, 372 S.E.2d 912, 914 (S.C. Ct. App. 1988), *rev'd*, 399 S.E.2d 773 (S.C. 1990), *cert. denied*, 500 U.S. 918 (1991).

23. The ICWA excludes from its coverage custody pursuant to divorce and placements based upon criminal acts committed by juveniles. 25 U.S.C. § 1903(1) (1994).

24. *Id.* § 1911(a).

25. *Id.* § 1911(b).

26. *Id.* § 1915(a).

of disrespect for parents' wishes is not only disheartening, but unconstitutional.

This Article begins by considering some of the historical events that prompted Congress to enact the ICWA. Next, the Article examines whether the ICWA is accomplishing its purpose as stated by Congress. The Article then criticizes the ICWA as a violation of several persons' equal protection rights. The Article then argues that even if the ICWA is constitutional, because it is being applied inconsistently, congressional or judicial direction is needed. Finally, the Article offers a proposal to amend the existing law so that it will achieve the purpose for which it was enacted, without violating personal rights.

## II. HISTORICAL BACKGROUND OF THE ICWA

Native Americans have a lengthy history of experiencing problems in preserving their cultural heritage.<sup>17</sup> Some believe that a policy of destroying Indian culture and tribal integrity, by removing Indian children from their families and tribal settings, was set even before the country became a nation.<sup>18</sup> In the nineteenth century, sending Indian children away to distant boarding schools to "civilize" and educate them was customary in this country. In this century, an even greater problem is the large number of Indian children that are removed from their homes for purposes of foster care and adoption.<sup>19</sup>

In 1978, after extended hearings over a number of years, Congress responded to the recommendations of the American Indian Review Commission and enacted the ICWA.<sup>20</sup> Congress made the following findings which formed the basis for the enactment of the ICWA:

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest as

17. Culture includes more than artifacts, language, and history. It also includes the members of a tribe. Thus, as the size of the tribe dwindles its culture is threatened.

18. See Manuel P. Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51 (1979); Edward L. Thompson, *Protecting Abused Children: A Judge's Perspective on Public Law Deprived Child Proceedings and the Impact of the Indian Child Welfare Act*, 15 AM. INDIAN L. REV. 1, 10 (1990).

19. Studies done in 1969 and 1974 indicated that in states with large Indian populations twenty-five to thirty-five percent of all Indian children were separated from their families and placed in foster homes or institutions. H.R. REP. NO. 1386, 95th Cong., 2d Sess., at 9 (1978).

20. 25 U.S.C. §§ 1901-1963 (1994).

tribe.<sup>27</sup> Using this definition a child need not be a part of a traditional Indian family to come within the reach of the ICWA. In fact, the child does not even have to be residing with his or her parent who is a member of an Indian tribe. This definition is so broadly framed that children who do not even know of their Indian ancestry can be subject to the rules of the ICWA.

## III. IS THE ICWA SERVING ITS PURPOSE?

One author has described the ICWA as standards designed to protect culturally differing child rearing practices.<sup>28</sup> In its official declaration of policy, Congress declares:

[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes.<sup>29</sup>

One of the purposes of the ICWA is arguably to fulfill the policy of this Nation. This Part questions whether the ICWA is promoting the policy of this Nation or working against it.

### A. Is the ICWA in the Children's Best Interests?

"[I]t is the policy of this Nation to protect the best interests of Indian children."<sup>30</sup> Although the ICWA has arguably aided in the maintenance of numerous Indian families, the ICWA does not necessarily "protect the best interests" of all Indian children. "The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest."<sup>31</sup> All children, regardless of their race, deserve to be protected from abusive parents. Although it would ignore reality to suggest that ethnic and racial prejudices have been eliminated, such prejudices are impermissible considerations for removal of a child from a parent,<sup>32</sup> and should not be a permissible consideration for placement of a child either.

Although some claim that "placement of an Indian child in a non-Indian home is likely to result in severe psychological

27. *Id.* § 1903(4).

28. David Null, Note, *In re Junious M.: The California Application of the Indian Child Welfare Act*, 8 J. JUV. L. 74, 74 (1984).

29. 25 U.S.C. § 1902 (1994) (emphasis added).

30. *Id.*

31. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

32. *Id.*

harm,<sup>53</sup> others disagree. Psychiatrists who testified at the congressional hearings claimed that Indian children were being immersed in white culture without an opportunity to develop a vital Indian identity.<sup>54</sup> Testimony indicated that the lack of Indian identity creates serious problems during adolescence, because this is when Indian children begin experiencing racial discrimination and dating taboos.<sup>55</sup> This viewpoint has been adopted by at least one justice in a reported opinion.<sup>56</sup> Although this may be true, a lack of reliable data on interracial adoptions makes predictions regarding the potential harms to Indian children speculative at best.<sup>57</sup> Furthermore, there are others who argue that placement of an Indian child in a non-Indian home is not harmful to the child.

Professor Elizabeth Bartholet reviewed studies undertaken to assess how well transracial adoptions work from the adoptee's viewpoint.<sup>58</sup> The studies assessed the adoptees' adjustment, self-esteem, racial identity, and integration into the adoptive family as well as the community.<sup>59</sup> She found that the research shows with

astounding uniformity . . . transracial adoption [is] working well from the viewpoint of the children and the adoptive families involved. The children are doing well in terms of such factors as achievement, adjustment, and self-esteem. They seem fully integrated in their families and communities yet have developed strong senses of racial identity. They are doing well as compared to minority chil-

53. Robert J. McCarthy, *The Indian Child Welfare Act: In the Best Interests of the Child and Tribe*, 27 *C. F. F. REV.* 864, 870 (1995).

54. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs on Problems that American Indian Families Face in Raising Their Children and How these Problems Are Affected by Federal Action or Inaction*, 93d Cong., 2d Sess. 45, 46 (1974) (statement of Dr. Joseph Westermeyer, Dept. of Psychiatry, University of Minnesota).

55. *Id.*

56. See *In re Baby Boy D.*, 742 P.2d 1059, 1075 (Okla., 1985) (Kauger, J., concurring in part, dissenting in part) (finding that separation of Indian children from their Indian culture robs them of their cultural heritage and is detrimental to their later development), *cert. denied*, 484 U.S. 1072 (1988).

57. Margaret Howard, *Transracial Adoptions: Analysis of the Best Interests Standard*, 59 *NOTRE DAME L. REV.* 503, 535-36 (1984).

58. See Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 *U. PA. L. REV.* 1163 (1991). Although Bartholet's article deals primarily with black interracial adoptions, its findings are applicable here as well.

59. *Id.*

## 2. Adoptive Placement Preferences

The ICWA states a clear preference for placing children with Indian blood with Indian families. Specifically, section 1915(a) states:

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.<sup>69</sup>

Because of these special requirements, "caseworkers and attorneys are sometimes reluctant to accept surrenders of, or terminate parental rights to, an Indian child."<sup>70</sup> Often, this results in Indian children languishing in foster care without permanency, planning, or adoption.<sup>71</sup> Furthermore, when employing placement preferences of the ICWA, courts may be forced to overlook the child's best interests.

In *In re S.E.G.*,<sup>72</sup> the foster parents of three Indian children petitioned to adopt them. The foster parents were not Indians.<sup>73</sup> The trial court found that the children had bonded with the foster parents and needed stability in their lives.<sup>74</sup> The trial court held that because the children needed stability in their lives and an Indian adoptive home was not available, good cause to deviate from the preferences expressed in the ICWA existed.<sup>75</sup>

The Minnesota Supreme Court disagreed. The supreme court found that good cause to place the children in a manner inconsistent with the ICWA had not been established and ordered the children to remain in foster care.<sup>76</sup> Thus, although a family who was willing to adopt all three siblings existed, the children were forced to remain in foster care simply because they were Indian children. Although such a result may be in the best interests of the tribe, it is not in the children's best interests. When two sets of parents who are willing to adopt Indian children exist, and one set is an Indian couple, it may be in the children's best interests to follow the preferences established by the ICWA. However, when, after a diligent search, a willing Indian

69. 25 U.S.C. § 1915(a) (1994).

70. Debra Ratterman Baker, *Indian Child Welfare Act*, 15 *CHILDREN'S LEGAL RTS. J.* 23, 28 (1995).

71. *Id.*

72. 521 N.W.2d 357 (Minn. 1994), *cert. denied*, 115 S. Ct. 935 (1995).

73. *Id.* at 359.

74. *Id.* at 360.

75. *Id.* at 361.

76. *Id.* at 366.

dren adopted irracially and minority children raised by their biological parents.<sup>70</sup>

Bartholet's views are also supported by Kim Forde-Mazrui, David Fanshel, and Joseph Westermeyer.<sup>41</sup> Forde-Mazrui questioned the wisdom of racial-matching policies and concluded that "ignoring race when placing a [minority] child . . . would avoid the concrete harms of current policies without subjecting the child to substantiated risks."<sup>42</sup> Fanshel's research suggests that Indian children raised in non-Indian homes develop normally in the cognitive and emotional areas.<sup>43</sup> Finally, Westermeyer's investigation revealed that Indian children raised in non-Indian homes had secure Indian cultural identities when they had relationships with other Indian children.<sup>44</sup> These results suggest that although leaving a child with his or her natural parents is normally preferable, Indian children can develop normally in non-Indian homes. Thus, claims that placement of Indian children in non-Indian homes is damaging to their well-being<sup>45</sup> may need to be re-examined. Regardless of which camp is correct, the ICWA is clearly harming Indian children in other ways. One such example is the heightened standard of proof required by the ICWA.

### 1. Standard of Proof

In litigation, parties must take into account the margin of error in fact-finding that is always present.<sup>46</sup> "Standard of proof" functions to instruct the fact-finder as to the degree of confidence society has decided the fact-finder should have in the correctness of its conclusions for the particular adjudication.<sup>47</sup> In proceedings to terminate parental rights, the Supreme Court has held that before a state may sever the parent-child relationship, the due process clause of the Fourteenth Amendment requires

40. *Id.* at 1209.

41. Michele K. Bennett, Comment, *Native American Children: Caught In the Web of the Indian Child Welfare Act*, 16 *HAMLIN L. REV.* 953, 971 (1993); Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Bicultural Children*, 92 *MICH. L. REV.* 925 (1994); Joseph Westermeyer, *The Apple Syndrome in Minnesota: A Complication of Racial-Ethnic Discontinuity*, 10 *J. OPERATIONAL PSYCHOL.* 134 (1979).

42. Forde-Mazrui, *supra* note 41, at 955.

43. Bennett, *supra* note 41, at 971.

44. Westermeyer, *supra* note 41, at 137-39.

45. See *supra* note 33 and accompanying text.

46. *In re Winship*, 397 U.S. 958, 964 (1970) (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)).

47. *Santosky v. Kramer*, 455 U.S. 745, 754-55 (1982).

family cannot be located, the children should not be forced to wait in parentless limbo for the sake of the tribe.

Another example of a court enforcing the ICWA without considering the children's best interests is *Mississippi Band of Choctaw Indians v. Holyfield*.<sup>77</sup> As discussed in Part I, the United States Supreme Court, without considering the parents' wishes or the children's best interests, strictly interpreted the ICWA to give the tribe exclusive jurisdiction regarding placement of the twins.<sup>78</sup> The Court did not consider the fact that at the time of its decision, the twins had been in the Holyfields' custody for over two years. Although the tribal court eventually exercised good wisdom and allowed the Holyfields to adopt the twins,<sup>79</sup> the fact remains that the Supreme Court applied the ICWA without any consideration for the bonding that had occurred between the twins and the Holyfields or the children's need for stability.

Furthermore, the argument that the placement preferences of the ICWA do not allow for consideration of the children's best interests is also supported by the large number of courts creating in Part V.D.3 of this Article, many courts are disregarding the ICWA's clear placement mandates using the good cause exception. Such a phenomenon clearly indicates that the children's needs and interests must be considered.

Although Congress declared that our Nation's policy is "to protect the best interests of Indian children,"<sup>80</sup> the requirements of the ICWA work against, rather than toward the promotion of this policy. The heightened standard of proof that the ICWA forces courts to apply when deciding a termination case may conceivably be forcing Indian children to experience more abuse and neglect. Even if these children are removed from the abusive setting in a timely manner, the standards of the ICWA require them to remain in a state of parentless limbo longer than other children in the same situation. Such outcomes are clearly not promoting Congress' goal of protecting Indian children. Furthermore, the ICWA is likewise ineffective in aiding tribes

77. 490 U.S. 30 (1989). See *supra* notes 9-16 and accompanying text.

78. *Holyfield*, 490 U.S. at 52.

79. Marcia Coyle, *After the Gospel Comes Down*, *NAT'L L.J.*, Feb. 25, 1991, at 1, 24.

80. See *supra* notes 262-305 and accompanying text.

81. 25 U.S.C. § 1902 (1994).

## B. Is the ICWA Being Used by and Aiding Tribes?

According to Robert J. McCarthy, director of the Indian Law Unit of Idaho Legal Aid Services, the ICWA is not having the impact Congress desired.<sup>82</sup> McCarthy reported that according to the Bureau of Indian Affairs:

[T]he ICWA [has] not reduced the flow of Indian children into foster or adoptive homes. In fact, while the number of children of all races in substitute care decreased in the 1980s, the number of Indian children in care increased by 25 percent. . . . Although 63 percent of all Indian child foster-placements are in homes in which at least one parent is Indian, less than half of placements made under state jurisdiction are in Indian homes.<sup>83</sup>

Although this may be true, one must ask if these statistics are in part the result of the tribe's failure to get involved. The ICWA provides that:

An Indian tribe shall have jurisdiction exclusive as to any State over 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. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.<sup>84</sup>

It also provides that in "any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child . . . the Indian child's tribe [has] a right to intervene at any point."<sup>85</sup> Furthermore, the ICWA orders State courts to transfer foster care placement and termination of parental rights cases involving Indian children not domiciled or residing on an Indian reservation to tribal court absent one of the following situations: (1) "good cause" to the contrary; (2) objection by either parent; or (3) "declination by the tribal court of such tribe."<sup>86</sup> Thus, tribes are provided ample means of getting involved in cases involving Indian children. Despite this fact, tribes often fail to get involved.

82. See McCarthy, *supra* note 33.

83. *Id.* at 864.

84. 25 U.S.C. § 1911(a) (1994).

85. *Id.* § 1911(c).

86. *Id.* § 1911(b).

In a surprisingly high number of reported cases, although the tribe was given notice, the tribe chose not to intervene.<sup>87</sup> If, as Congress stated, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,"<sup>88</sup> why are such a high number of tribes not getting involved? Although one could understand a tribe's hesitation to get involved in jurisdictions clearly recognizing the existing Indian family exception,<sup>89</sup> a majority of the cases where tribes failed to get involved are from jurisdictions clearly rejecting the existing Indian family exception.

For example, in *In re Bird Head*,<sup>90</sup> the trial court notified the Oglala Sioux Tribe's prosecutor that one of its children was involved in a neglected and dependent proceeding.<sup>91</sup> On the date of the adjudicatory hearing, no one appeared on the tribe's behalf.<sup>92</sup> Despite this fact, the trial court found that the child involved was an Indian child and continued the matter to allow the child's tribe to request a transfer of jurisdiction to tribal court.<sup>93</sup> Although someone from the tribe did file a petition for a change of venue, a tribal representative did not show up to argue the petition at the hearing.<sup>94</sup> Throughout the trial level proceedings and the appeals, the tribe failed to appeal the court's decision to retain jurisdiction.<sup>95</sup>

87. *In re Stierwalt*, 546 N.E.2d 44 (Ill. App. Ct. 1989), *appeal denied*, 550 N.E.2d 564 (Ill. 1990); *In re D.S.*, 577 N.E.2d 572, 575 (Ind. 1991); *In re B.M.*, 532 N.W.2d 504, 505 (Iowa Ct. App. 1995); *In re S.M.*, 508 N.W.2d 732, 733 n.1 (Iowa Ct. App. 1993); *In re L.N.W.*, 457 N.W.2d 17, 18 n.2 (Iowa Ct. App. 1990); *In re H.D.*, 729 P.2d 1234, 1235 (Kan. Ct. App. 1986); *In re Johanson*, 402 N.W.2d 118, 119 n.1 (Mich. Ct. App. 1985); *In re C.H.*, 437 S.W.2d 947, 951 (Mo. Ct. App. 1992); *In re M.E.M.*, 795 P.2d 212, 213 (Mont. 1986); *In re R.W.*, 509 N.W.2d 237, 239 (Neb. Ct. App. 1993); *In re Bird Head*, 331 N.W.2d 785, 785 (Neb. 1983); *B.R.T. v. Exec. Director of the Soc. Serv. Bd.*, 391 N.W.2d 594, 595 (N.D. 1986); *In re Child of Indian Heritage*, 529 A.2d 1009, 1013 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 543 A.2d 925 (N.J. 1988); *In re R.N.*, 757 P.2d 1593, 1335 (N.M. Ct. App. 1988); *In re S.C.*, 833 P.2d 1249, 1251 (Okla. 1992); *In re Baby Boy D.*, 742 P.2d 1059 (Okla. 1985), *cert denied*, 484 U.S. 1072 (1985); *In re K.L.R.F.*, 515 A.2d 38 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987); *In re Beade*, 462 N.W.2d 485, 488 (S.D. 1990); *In re B.R.B.*, 351 N.W.2d 283, 284 (S.D. 1986).

88. 25 U.S.C. § 1901(3) (1994).

89. See *infra* notes 179-207 and accompanying text.

90. 331 N.W.2d 785 (Neb. 1983).

91. *Id.* at 787.

92. *Id.* at 788.

93. *Id.*

94. *Id.*

95. *Id.*

The same lack of interest is exhibited in *In re Maricopa County Juvenile Action No. JS-8287*.<sup>96</sup> In *Maricopa County*, the trial court notified the Pueblo Indian tribe that one of its children was involved in a dependency case.<sup>97</sup> The tribe did not get involved.<sup>98</sup> The court, however, continued to notify the tribe of all proceedings that took place over the next two years.<sup>99</sup> The tribe remained uninvolved. Once the foster parents petitioned to adopt the child, however, the tribe suddenly had an interest in the child.<sup>100</sup> The tribe disregarded the fact that the child had bonded with the foster-adoptive family during the two years that she had been with them, and petitioned the court to transfer jurisdiction of the proceeding to the tribal court.<sup>101</sup> If this child was such a "valuable resource," why did the tribe wait for over two years before getting involved in her life? At least one commentator blames tardy and sporadic tribal participation in state court ICWA proceedings on tribes' limited financial and technical resources.<sup>102</sup> Others imply that a lack of comprehensive training for both state and tribal social workers is partially to blame.<sup>103</sup>

Also, when tribes do get involved they do not always assert the ICWA's clear placement preferences. For example, after taking the case all the way to the United States Supreme Court, the tribal court involved in the *Holyfield* case allowed the non-Indian mother to adopt the twins.<sup>104</sup> Similarly, the tribe responsible for crossing several state lines to gain custody of the Keetso child<sup>105</sup> eventually awarded permanent custody to the non-Indian parents.<sup>106</sup> Although such decisions show the tribes' ability to recognize the importance of a child's bonding to those who care for it, these cases also reveal the tribes' willingness to release their "valuable resources."

96. 828 P.2d 1245 (Ariz. Ct. App. 1991).

97. *Id.* at 1246.

98. *Id.* ("[T]he Pueblo still was considering petitioning for transfer to tribal court . . ." (emphasis added)).

99. *Id.*

100. *Id.* at 1246-47.

101. *Id.* at 1250.

102. Patrice Kunesh, *Building Strong, Stable Indian Communities Through the Indian Child Welfare Act*, 27 CLEARINGHOUSE REV. 753, 757 (1993).

103. Joseph A. Myers et al., *Adoption of Native American Children and the Indian Child Welfare Act*, 18 ST. CT. J. 17, 25 (1994).

104. Coyle, *supra* note 79, at 24.

105. See *infra* notes 140-47 and accompanying text.

106. Todd J. Gilman, *Baby Given to Couple by Navajo Court*, L.A. TIMES, Sept. 1, 1988, § 1, at 25.

Finally, although tribal utilization of the ICWA is unclear, one thing is clear: the ICWA is not aiding tribes.<sup>107</sup> Alaska is the only state that has reported the number of adoptions and out-of-home placements since the enactment of the ICWA. Out-of-home placements of Alaska Native children, who are considered Indian children under the ICWA, "have significantly increased since the passage of the ICWA."<sup>108</sup> The testimony of the spokesperson for Alaska Federation of Natives is illustrative:

In 1987, 8 years after the passage of the Indian Child Welfare Act, the problems which the Act tried to rectify have worsened in the State of Alaska. The 1976 survey done by the Association on American Indian Affairs which ultimately led to the enactment of the Indian Child Welfare Act found that there was an estimated 393 Alaska Native children in State and Federal out-of-home placement. In 1986 that figure has risen to 1,010, which represents a 256-percent increase. During the same period of time, the total population of Alaska Native children increased by only 18 percent.

As the figures indicate, the removal of our children from our homes and culture continues at a rate that far exceeds our population. The problems in Alaska continue to worsen for Native children.<sup>109</sup>

Although no other states have reported the number of Indian adoptions since the passage of the ICWA, it is doubtful that it is achieving the desired effect.

## IV. EQUAL PROTECTION VIOLATIONS

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>110</sup>

107. Myers et al., *supra* note 103, at 25.

108. *Id.*

109. *Oversight Hearings on the Indian Child Welfare Act: Hearing Before the U.S. Senate Select Committee on Indian Affairs*, 100th Cong., 1st Sess. 10 (1987).

110. U.S. CONST. amend. XIV, § 1.

The Fourteenth Amendment was adopted to protect the rights of individuals against classifications based on race.<sup>111</sup> The United States Supreme Court has stated that "[c]lassifying persons according to their race is more likely to reflect racial prejudices than legitimate public concerns; the race, not the person, dictates the category."<sup>112</sup> This statement appropriately describes the ICWA because the blood ties, or race of the child, dictates whether the ICWA applies. The ICWA does not consider whether a child with the appropriate amount of Indian blood is living with an Indian parent. Likewise, the ICWA does not consider whether the child is living, or has ever lived on an Indian reservation, or in an Indian community. The sole guiding factor is race. Thus, the ICWA can not be reconciled with the Fourteenth Amendment's guiding principle.

As early as 1879 this country recognized that a person born with Indian blood could avoid the reach of the federal Indian power by severing his or her tribal ties and assimilating into society.<sup>113</sup> In *United States v. Crook*, twenty-five Ponca Indians filed a writ of habeas corpus seeking release from their confinement on a reservation.<sup>114</sup> The court found that an Indian had a "God-given right to withdraw from his tribe and forever live away from a reservation."<sup>115</sup> Although this case it, as though it had no further existence.<sup>116</sup> Although this case has never been overruled, persons with Indian blood no longer have the right to act as though they have never belonged to a tribe.

In 1978, Congress, by enacting the ICWA, went against past Supreme Court decisions<sup>117</sup> and did specifically what the Constitution prohibits States from doing. Whereas States are not permitted to treat citizens differently, Congress disregarded the Fourteenth Amendment and enacted the ICWA, authorizing all States to treat parents of children with Indian blood differently. By so doing, Congress is effectively denying these parents their

111. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." (citation omitted)).

112. *Id.*  
113. See *United States v. Crook*, 25 F. Cas. 695 (CCD Neb. 1879) (No. 14,891).

114. *Id.*  
115. *Id.* at 699.  
116. See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that Virginia statute preventing marriages between persons solely on the basis of racial classifications could not stand); *Hernandez v. Texas*, 347 U.S. 475 (1954) (striking down a Texas law which discriminated against Mexican-Americans in jury selection); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (striking down a West Virginia law that only permitted white males to serve as jurors).

Likewise, the United States has traditionally upheld parents' rights to control the future of their children.<sup>123</sup>

The philosophical basis for parental rights have been described by one commentator as follows:

Discovery of the order natural to the family and natural to civil society depends on a prior discovery of the nature of man and its essential properties. We are morally free about many things with the social order; for example, we are free about who we will marry, which society we shall live in, and who will govern our societies, as well as a host of other things. But there are other matters about which we are not morally free, and these have to be determined by an adequate study of the nature of each of the social bodies: the domestic and political societies most notably.

Those who wish to impose an order based on the arbitrary decision of some minority, or even some majority, threaten the peace and freedom of every member of civil society. Above all, under such a social order, a few might temporarily find human happiness, but most members would discover what earlier civilizations found to their great regret, namely, that to live counter to that order best established by nature alone involves enormous costs in human terms.

The enemies of the domestic society demand conformity whereby each person becomes an individual citizen existing solely for the sake of the welfare of the political group to which the family belongs. Although these enemies see the domestic unit standing in their way, human offspring need the family. They ought to be reared in love of the goods most fitting to their natures as persons since, as such, they have a value of their own and not as mere individuals disposable for the good of the social whole.

Of what does education of the young consist? It is movement towards the acquisition of the intellectual and

TRADITIONAL LIBERTIES 13-29 (Stephen M. Kranson & Robert J. D'Agostino eds., 1988).

123. Thompson, *supra* note 18, at 5 ("Parents have a natural and fundamental interest in the care, custody, and control of their children. Derived from common law, the care, custody, and control of one's child is a fundamental interest protected by . . . the United States and Oklahoma Constitutions"); Stan Watts, Note, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Interests of Children, Families, and Tribes*, 63 S. CAL. L. REV. 213, 247 (1989) ("Parents have the authority to make many important decisions affecting their children . . . [H]istorically this parental power has been virtually unconstrained . . .").

"liberty" and "property"<sup>117</sup> rights without the process afforded to all other citizens. This continues today despite the Supreme Court's statement in 1981 that "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."<sup>118</sup>

The modern rule controlling equal protection analysis of national legislation on Indian affairs was set out by the Court in *Morton v. Mancari*.<sup>119</sup> In *Morton*, the articulated standard was close to a rational basis test:

As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government we cannot say that Congress' classification violates due process.<sup>120</sup>

The ICWA violates the standard set forth by the Court in at least two ways which are discussed below. However, before examining how parental rights are being violated by the ICWA, it is important to understand what rights parents have in regard to their children generally.

#### A. Parental Rights

##### 1. Background of Parents' Rights Historically

Constitutional law scholar Gerald Gunther has written that the Supreme Court has "occasionally protected aspects of liberty even though they were not explicitly designated in the Constitution."<sup>121</sup> One of these rights is parental rights. Throughout most of history parents have been given a right to raise their child as they see fit. In Europe,

when one was either a Catholic or a Jew . . . St. Thomas argue[d] that: it would be an injustice to Jews if their children were to be baptized against their will, since they would lose their rights of parental authority over their children as soon as they were Christians.<sup>122</sup>

117. Although the Author does not believe that children should be treated as property, their treatment in this country is similar to property in some respects.

118. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1982); 417 U.S. 535 (1974).

119. *United States v. Antelope*, 430 U.S. 611 (1977); the *Id.* at 555. Since *United States v. Antelope*, 130 U.S. 611 (1977), the Court has not decided any significant Indian equal protection cases.

120. *Id.* at 555. Since *United States v. Antelope*, 130 U.S. 611 (1977), the Court has not decided any significant Indian equal protection cases.

121. GERALD GUNTHER, CONSTITUTIONAL LAW 492 (12th ed. 1991).

122. Raphael T. Waters, *THE BASIS FOR THE TRADITIONAL RIGHTS AND RESPONSIBILITIES OF PARENTS IN PARENTAL RIGHTS: THE CONTEMPORARY ASSAULT ON*

moral virtues so that the child may become all that he ought to be and capable of all that he ought to do. The parents alone are sufficient guardians of this for their own child. Therefore, they alone have inalienable rights to develop that child to the perfection of full humanity.<sup>124</sup>

Based upon these beliefs, the Constitutional Framers, without explicitly mentioning parental rights, implicitly deemed parents to have rights concerning their children's upbringing when they drafted the Constitution.<sup>125</sup> Scholars all agree that "matters touching on natural parent-child relationships . . . are fundamental liberty and privacy interests protected by the Fourteenth Amendment."<sup>126</sup> This is evidenced by the fact that courts have long recognized "a constitutionally protected parental right to care and custody of children under the Fourteenth Amendment."<sup>127</sup> Courts have gone so far as to state: "The right to direct the upbringing of one's child 'is one of the most basic of all civil liberties.'"<sup>128</sup>

More specifically, this country has consistently upheld parents' rights to direct their children's education and religion, as well as their right to discipline their child.<sup>129</sup> The United States Supreme Court has frequently emphasized that parents' rights to control their children's futures have been deemed "essential," "basic civil rights of man" and "[r]ights far more precious than property rights."<sup>130</sup>

In 1923, the Supreme Court first held that a parent has a right to control his or her child's education.<sup>131</sup> Two years later, the Court reaffirmed this stance by stating that parents have a

124. Waters, *supra* note 122, at 87-88.  
125. Thomas J. Marten, *Parental Rights and the Life Issues*, in PARENTAL RIGHTS: THE CONTEMPORARY ASSAULT ON TRADITIONAL LIBERTIES *supra* note 122, at 44, 51.

126. Marian L. Faupel, *The 'Baby Jessica Case' and the Claimed Conflict Between Children's and Parents' Rights*, 40 WYOMING L. REV. 285, 289 (1994). See also GUNTHER, *supra* note 121, at 492; Marten, *supra* note 125 at 54; Thompson, *supra* note 18, at 5.

127. Marten, *supra* note 125, at 54.  
128. *In re K.L.J.*, 813 P.2d 276, 279 (Alaska 1991) (quoting Flores v. Flores, 598 P.2d 893, 895 (Alaska 1979)).

129. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (upholding parents right to educate their children); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding Amish parents' right to educate their children according to their religious beliefs); RESTATEMENT (SECOND) OF TORTS § 147 (1965) ("A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education").

130. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted).

131. See *Meyer*, 262 U.S. at 400.

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liberty right "to direct the upbringing and education of children under their control."<sup>152</sup> In *Pierce* the Court balanced the right of parents to educate and raise their children against the state's interest in a homogeneous population, and found the parents' rights were more vital.<sup>153</sup> The Court stated that a "child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>154</sup> The Court again reaffirmed parents' right to control their child's future in *Wisconsin v. Yoder*.<sup>155</sup> In *Yoder* the Court found that "[t]o be sure, the power of the parent . . . may be subject to limitation . . . if it appears that parental decision will jeopardize the health or safety of the child,"<sup>156</sup> but permitted Amish families to remove their children from formal education after the eighth grade. Finally, American parents are also given a liberty right to discipline their children as they see fit.<sup>157</sup>

Parents maintain most of these rights even when they give their child up for adoption. In *Dickens v. Ernesto*, the New York Court of Appeals upheld a statute which allowed parents to express their preference that their child be raised in the religion of their choice, even though they were giving the child up for adoption.<sup>158</sup> The court found that a statute which granted birth parents the right to specify the religious affiliation of prospective adoptive parents did not violate the United States or New York Constitutions.<sup>159</sup>

152. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

153. *Id.*

154. *Id.* at 535.

155. 406 U.S. 205 (1972).

156. *Id.* at 233-34.

157. RESTATEMENT (SECOND) OF TORTS § 147 (1965). Obviously, this discipline must be reasonable and must not harm the child. What is reasonable is determined by each state's law.

158. *Dickens v. Ernesto*, 281 N.E.2d 153 (N.Y. (giving considerable weight to the wishes of the natural parents), cert. dismissed, 407 U.S. 917 (1972)).

159. *Id.* at 156-57. New York is not the only state that considers the birth parents' wishes regarding the religious affiliation of the adopting parents. Illinois, Maryland, Massachusetts, and Ohio have also considered the birth parents' wishes when making adoption decisions. See *Cooper v. Hinrichs*, 140 N.E.2d 293 (Ill. 1957) (considering natural parents' wishes regarding the religious upbringing of their child); *Frantum v. Dep't of Pub. Welfare*, 133 A.2d 408 (Md.) (refusing to grant adoption where Catholic birth mother expressed desire for child to be raised a Catholic and child was placed with a Lutheran family), cert. denied, 355 U.S. 882 (1957); *Purinton v. Jamrock*, 80 N.E. 802 (Mass. 1907) (considering natural parents' wishes regarding the religious upbringing of their child); *In re Doe*, 167 N.E.2d 396 (Ohio Juv. Ct. 1956) (same).

believes the baby is in the custody of a Navajo social worker, but does not know exactly where.<sup>145</sup>

The Navajo tribe never permitted the Pitts to adopt the Keetso baby, despite the natural mother's desire for them to do so.<sup>146</sup> Unfortunately, this scenario is not an isolated one.<sup>147</sup> The Keetso case is just one example of how Indian parents are not allowed to exercise the same rights as every other citizen of this country. If Patricia Keetso was not an Indian, such action would have never been permitted and the Pitts would have adopted her baby, as she desired.

For example, in *Kasper v. Nordfelt*, the Utah Court of Appeals held that a mother's choice to place her child with an adoption agency should not be disregarded simply because the paternal grandparents want to raise the child.<sup>148</sup> In *Kasper*, the court found that:

Although the *Wilson* court opined that under some circumstances family relationships might be of such a nature that [grandparents'] application to adopt should be given consideration, . . . we do not find such a circumstance here, where the only living parent of the child deliberately and thoughtfully decided to place the child for adoption with an agency, and not with the paternal grandparents. We think the integrity of such a decision, involving a critically important parental right, must be preserved, not only for the stability and well-being of the child, but also for the protection of the adoption process and its purposes.<sup>149</sup>

Other courts across the nation have made rulings consistent with *Kasper* when faced with a similar situation.<sup>150</sup>

145. *Id.*

146. *Navajo Baby is Home For Good in San Jose*, S.F. CHRON., Apr. 24, 1988, at B3.

147. The attorney for the Navajos claimed the Navajo Nation is involved in seventy-five similar cases throughout the country. Smith, *supra* note 140, at A1.

148. *Kasper v. Nordfelt*, 815 P.2d 747, 749 (Utah Ct. App. 1991).

149. *Id.* at 747.

150. *Hays v. Watkins*, 205 S.E.2d 556, 557 (Ga. Ct. App. 1982) (holding that grandparents do not have a right to intervene in adoption proceeding where at least one natural parent is alive and has consented); *In re Benavidez*, 367 N.E.2d 971, 974 (Ill. App. Ct. 1977) (finding that wishes of mother giving consent to nonrelative adoption should "legitimately be taken into account" because grandparents have no legal right to be preferred over adoptive parents); *In re B.B.M.*, 514 N.W.2d 425, 429 (Iowa 1994) (allowing grandparents to intervene where parents have voluntarily placed their child for an independent adoption . . . would be to "elevate the grandparents' interests above the interests of the parents"); *Christian Placement Serv. v.*

When Congress enacted the ICWA it not only gave Indian tribes broader power to control the removal of its children, but also took away personal liberties of men and women who have a child with Indian blood. Thus, Congress effectively created two classes of parents: parents of children with Indian blood and all other parents. Under current law, a parent's rights vary depending upon the class to which they belong.

## 2. Examples of How Parents of Indian Children Rights Vary from Everyone Else's Rights

### a. Selection of Adoptive Parents

In today's media hyped world, all Americans are aware of the fact that birth parents may choose the parents who will adopt and raise their child. Depending on the circumstances, it is not uncommon for the adoptive parents to pay for the birth mother's medical expenses and be present while she is giving birth. Although the right to choose who will adopt and raise a child is not a right enunciated in the Constitution, it is one that all Americans take for granted. It is also, unfortunately, a right which the ICWA took away from parents of children with Indian blood.

In 1987 Ms. Patricia Keetso, a Navajo woman, decided to give up her child for adoption.<sup>140</sup> She answered an advertisement in an Arizona newspaper and met the prospective adoptive couple, Mr. and Mrs. Richard Pitts.<sup>141</sup> After staying with the Pitts for several months, Keetso formed a close bond with the adoptive couple.<sup>142</sup> Mrs. Pitts even coached Keetso during labor and was present when the baby was delivered.<sup>143</sup>

Some time after the child's birth, tribal authorities contacted the child's grandmother who was living on a reservation.<sup>144</sup> According to a newspaper account:

Keetso [the grandmother] said that tribal authorities had frightened her . . . into helping them spirit 8-month-old Allyssa Kristian Keetso from her natural mother, Patricia Keetso, and from the baby's would-be adoptive parents, Cheryl and Rick Pitts. . . . Keetso and tribal authorities took possession of the baby during a televised airport drama. . . . After they arrived in Arizona for a child custody hearing, the grandmother said that tribal authorities took the child away from her on Friday. Keetso said she

140. Joan Smith, *It Was a Setup*, S.F. CHRON., Apr. 17, 1988, at A1.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

In the Keetso case, Kathy Youngbear, a representative of the American Indian Center, argued that the Navajo tribe had the right to the return of the child:

While Anglo culture holds parental rights sacred, Indians also value the rights of the extended family and the tribe. The Indian Child Welfare Act allows the tribe to intervene in adoption cases even against a mother's wishes. . . . The reporting has been through the eyes of a white couple whose poor baby is being taken away from them. In actuality it should be from an Indian woman's point of view: this baby's rights as a Navajo baby, a Navajo tribal member and a Navajo woman. These Indian kids are our future leaders.<sup>151</sup>

What Youngbear, and many supporters of the ICWA fail to recognize is that by common law, all Americans, regardless of their cultural background, have certain parental rights;<sup>152</sup> rights which the ICWA has effectively taken away from parents of Indian children.<sup>153</sup> Although Youngbear correctly argued that the Keetso case should have been viewed from an Indian woman's point of view, she missed the point. Both Youngbear and the Navajo tribe completely disregarded Keetso's wishes. Keetso was not forced to put her baby up for adoption and she did not make a rash decision to do so. Keetso made a thoughtful and deliberate choice to place her child with a non-Indian family. Under the ICWA, however, her wishes meant nothing. Therefore, the Navajo tribe did not have to consider, let alone honor, her decision to remove the child from the Indian culture.

American law states that a parent has the right to determine what is best for their child, and the community does not have a right to question that decision if the child is not directly harmed by it.<sup>154</sup> The Supreme Court has found that legislation dealing with Indians does not violate equal protection principles so "long as the special treatment can be tied rationally to the fulfillment

*Gordon*, 697 P.2d 148, 155 (N.M. Ct. App. 1985) (holding that grandmother may not intervene where only living parent had consented to adoption through an agency); *In re Peter L.*, 453 N.E.2d 480, 482 (N.Y. 1983) (finding that recognizing right of grandmother to adopt grandchild where mother voluntarily surrendered the child to an agency for adoption would undermine the mother's decision).

151. Smith, *supra* note 140 at A1.

152. See *supra* notes 121-39 and accompanying text.

153. "Tribal jurisdiction under [the ICWA] was not meant to be defeated by the actions of individual members of the tribe. . . . Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989).

154. See generally *supra* notes 121-39 and accompanying text.



of Congress' unique obligation toward the Indians.<sup>155</sup> Congress enacted the ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."<sup>156</sup> At least one court has acknowledged that the ICWA "is an intrusion on [a] mother's ability to determine what is in the best interests of her child."<sup>157</sup> Because this intrusion can not be rationally tied to protecting the best interests of the child nor preserving the Indian family, the ICWA is unconstitutional.

#### b. Anonymity

Although adoption is more prevalent and accepted today than it was in the past, giving a child up for adoption remains a rather taboo topic in the American society. This fact is recognized by permitting birth mothers and fathers to remain anonymous until the child turns eighteen. Furthermore, an ever-increasing number of teenage girls are faced with unplanned pregnancies. In such a situation, courts have recognized that not all teens can turn to their families.<sup>158</sup> When Congress enacted the ICWA it chose to disregard this fact. Under the ICWA, parents of children with Indian blood can be forced to tell their families of the birth to ensure compliance with the ICWA's placement preferences. An example of this is *In re Baby Girl Doe*.<sup>159</sup>

In *Baby Girl Doe*, the Montana Supreme Court held that a tribe's right to enforce statutory preferences for adoptive placement of an Indian child prevailed over the mother's statutorily recognized interest in anonymity.<sup>160</sup> In *Baby Girl Doe*, the baby girl's mother expressed her intention to relinquish her parental rights shortly after the birth.<sup>161</sup> After the statutorily required period of time, the mother filed an affidavit waiving all parental rights and consenting to an adoption without further notice.<sup>162</sup> In her affidavit, the mother indicated that she had been advised of the ICWA, "but for privacy reasons wished to remain anonymous and requested that the court not contact her family or

155. *Morton v Mancari*, 417 U.S. 555 (1974).

156. 25 U.S.C. § 1902 (1994).

157. *In re Child of Indian Heritage*, 543 A.2d 925, 930 (N.J. 1988).

158. See, e.g., *Bellotti v Baird*, 443 U.S. 622 (1979) (holding unconstitutional a Massachusetts statute that required either parental or court consent before a minor may have an abortion).

159. 865 P.2d 1090 (Mont. 1993).

160. *Id.* at 1095.

161. *Id.* at 1090. The mother did not have a specific family picked to adopt her daughter, but clearly expressed her intent to give her daughter to the Department of Family Services for adoptive placement. *Id.*

162. *Id.* at 1091.

parents' request for anonymity would be honored—Indian parents' request should also be.

The ICWA permits tribes and courts to blatantly disregard a natural parent's deliberate and thoughtful decision to have their child adopted by a specific family of their choice. Even more frightening is the fact that under the ICWA courts and tribes can disregard a parent's conscious decision not to have their child raised in the same social setting to which they belong. Economically poor parents would likely be applauded if they placed their child for adoption with a financially stable, educated family in hopes of giving the child what they could not. The ICWA does not allow parents of children with Indian blood to do the same. Parents of children with Indian blood can not decide that they do not want their child to grow up on a reservation and place their child for adoption off of a reservation without the tribe's consent.<sup>174</sup> Courts have found that parents have certain constitutional rights regarding the upbringing of their children. One of these rights is the right to anonymously place the child for adoption with the family of their choice.<sup>175</sup> Because the ICWA effectively eliminates those rights for a specific class, parents of children with Indian blood, without any rational tie to Congress' obligation to the Indians, the ICWA is unconstitutional. Furthermore, and more importantly, the ICWA is violating the rights of the innocent children involved.

#### B. Neglected and Abused Indian Children

The race classification created by the ICWA is harming Indian children in two ways. First, as previously discussed in Part III A.1. of this Article, most states use "clear and convincing evidence" as their standard of proof in termination of parental rights cases. The ICWA, however, uses the "beyond a reasonable doubt" standard of proof in termination of parental rights cases. This elevated standard of proof is potentially causing Indian children to endure more neglect and abuse for the sake of their tribe's future.

Furthermore, once this heightened standard of proof has been satisfied, Indian children may be forced to remain in an abusive setting longer than children of other racial backgrounds because of concern regarding the mixing of children with parents — be they foster or adoptive — of a different race. As previously discussed in Part III A. of this Article, experts disagree on

174. *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30, 52 (1989).

175. *Kasper v. Norifelt*, 815 P.2d 747, 747 (Utah Ct. App. 1991).

Tribe concerning placement.<sup>163</sup> The district court concluded that the mother's relinquishment was knowingly and freely given and that the temporary order for protective services should remain in effect until the child was placed for adoption.<sup>164</sup> The court also notified the Chippewa Cree Tribe that a child eligible for enrollment had been placed for adoption.<sup>165</sup>

The Tribe moved to intervene and requested information regarding the identity of the mother and her family.<sup>166</sup> Because the Tribe's request conflicted with the mother's request for anonymity, the court ordered a hearing.<sup>167</sup> After considering both parties' arguments the court concluded that the mother's right to anonymity outweighed the Tribe's interest in enforcing the statutory preferences for adoption.<sup>168</sup>

The Tribe appealed this order.<sup>169</sup> The Montana Supreme Court, relying on *Holyfield*, stated that the principle purposes of the ICWA were to "promote the stability and security of Indian tribes by preventing further loss of their children."<sup>170</sup> Therefore, the court found that giving "primary importance to the mother's request for anonymity would defeat the Tribe's right to meaningful intervention and possibly defeat application of the clear preference provided by statute for placement of [the child] with a member of her extended family."<sup>171</sup>

This case is yet another example of how the ICWA permits a tribe to completely disregard the parents' wishes and constitutional rights.<sup>172</sup> Americans would be outraged if all parents were forced to give up their right to privacy in this situation. Unplanned pregnancies remain such a taboo topic in this country that in most states, even minors are permitted to have an abortion without their parents knowing.<sup>173</sup> Yet, because of the ICWA, the mother in *Baby Girl Doe* could have been forced to have her family find out not only that she was pregnant but that she had given birth and given the child up for adoption. All other American

163. *Id.* The mother also appeared in court and averred the same. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1092.

168. *Id.*

169. *Id.*

170. *Id.* at 1095.

171. *Id.*

172. See generally *Roe v. Wade*, 410 U.S. 113, 153 (1973) (A woman's right to privacy was clearly set forth by Justice Blackmun in *Roe v. Wade* when he stated that the right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy.")

173. See generally *Bellotti v. Baird*, 443 U.S. 622 (1979).

the question of whether placement of Indian children in non-Indian homes is harmful to their mental well-being. Regardless of what experts think, the fact is that the ICWA mandates that:

In any foster care . . . placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with-

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.<sup>176</sup>

Thus, when it becomes clear that a child should no longer remain in an abusive setting, the child will either remain in that setting until a placement which satisfies the mandates of the ICWA is available, or be moved from one foster care setting to another when a placement which satisfies the ICWA is open. Both options are equally unpalatable.

The United States Supreme Court has held that children should not be subjected to adverse legal discrimination because of factors beyond their control.<sup>177</sup> The race of a child's parents and the culture into which a child is born is clearly a factor beyond a child's control. The high standard imposed by the ICWA is denying Indian children equal protection under the law. Thus, the ICWA is arguably violating the rights of parents and children. However, even if the Supreme Court were to somehow justify the classifications and unequal treatment of the ICWA, the Court would have to recognize and deal with the inconsistent application of the Act.

#### V. IS THE ICWA BEING APPLIED CONSISTENTLY?

C. Steven Hager, a staff attorney with Oklahoma Indian Legal Services, wrote that "[i]f *Holyfield* stands for anything, it is that the states cannot create their own definitions for the ICWA."<sup>178</sup> Six years after *Holyfield*, the only Supreme Court opinion to address the law set forth in the ICWA, state courts have

176. 25 U.S.C. § 1915(b) (1994).

177. *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968) (holding discrimination against illegitimate children unconstitutional).

178. C. Steven Hager, *Prodigal Son: The "Existing Indian Family" Exception to the Indian Child Welfare Act*, 27 CLEARINGHOUSE REV. 874, 878 (1993) (citing *Holyfield*, 490 U.S. at 42-54).

continued creating their own definitions for several of the terms contained in the ICWA. This is significant for two reasons. First, it indicates that the ICWA is not being applied consistently. Second, it signifies that the language of the ICWA is anything but clear, and the inconsistent application will continue until the United States Supreme Court rules on emerging definitions, or Congress amends the ICWA with more explicit definitions.

#### A. The Existing Family Exception

In 1982, the Supreme Court of Kansas created what is commonly known as the existing Indian family exception.<sup>179</sup> Baby Boy L. was the illegitimate son of a non-Indian mother, and a five-eighths Kiowa Indian father, Carmon Perciado.<sup>180</sup> On the day of Baby Boy L.'s birth, his mother executed a consent to adoption which was limited to the adoptive parents named therein.<sup>181</sup> On the same day, the adoptive parents filed a petition for adoption.<sup>182</sup> The court granted the adoptive parents temporary custody of Baby Boy L. and served notice of the adoption proceeding on Perciado at the Kansas State Industrial Reformatory.<sup>183</sup> Perciado answered the adoption petition requesting that he be found a fit parent, that his parental rights not be severed, and that he be given permanent custody of his son.<sup>184</sup>

At trial, the court found that because Perciado was an enrolled member of the Kiowa Tribe, the ICWA might apply.<sup>185</sup> Therefore, the court continued the trial to allow notice to be provided to the Kiowa Tribe.<sup>186</sup> The Kiowa Tribe responded by filing petitions to intervene, to change temporary custody, and to transfer jurisdiction.<sup>187</sup> The Kiowa Tribe also enrolled Baby Boy L. as a member of the tribe against the express wishes of his mother.<sup>188</sup> After finding that the ICWA did not apply, and that Perciado was an unfit parent, the trial court granted the adoption of Baby Boy L. to the adoptive parents.<sup>189</sup>

179. *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982), *aff'd sub nom. Kiowa Tribe v. Lewis*, 777 F.2d 587 (10th Cir. 1985); *cert. denied*, 479 U.S. 872 (1986).

180. *Id.* at 172.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 173.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 173-74.

tion today. In fact, after *Holyfield*, some states changed their prior holdings to recognize the existing family exception which it had previously rejected.<sup>197</sup>

For example, prior to *Holyfield* the Washington Court of Appeals rejected the existing family exception.<sup>198</sup> In 1992, however, the Washington Supreme Court refused to apply the ICWA absent an existing Indian family.<sup>199</sup> In *Crews*, a mother who had Indian bloodlines, but was not a member of a tribe, voluntarily gave her child up for adoption.<sup>200</sup> After the adoption was final, the mother sought to become a member of the Choctaw Nation for the express purpose of invoking the ICWA to secure her child's return.<sup>201</sup> The Washington Supreme Court found that an "Indian family" did not exist at the time the mother surrendered the child for adoption because she was not a member of a recognized tribe at that time.<sup>202</sup> Therefore, the concurrence noted, the child was not an "Indian child" under the Act at the time of adoption.<sup>203</sup> Although the Washington Supreme Court stated that its holding in *Crews* is limited to "the narrow circumstances presented by the facts of this case," the fact remains that the court is willing to use the exception in certain situations.<sup>204</sup> Washington is just one of the states that has refused to apply the ICWA absent an existing Indian family. As it currently stands, Alabama, California, Kansas, Louisiana, Missouri, and Oklahoma also recognize the existing Indian family exception to the ICWA.<sup>205</sup> Thus, the Supreme Court's decision in *Holyfield* did not decrease the number of states applying the existing Indian family exception to the ICWA.

Until the Supreme Court or Congress decides whether the ICWA was meant to apply to children who are not a part of an existing Indian family, states will continue to apply the ICWA discordantly. Unfortunately, it does not appear that either the

197. Both California and Washington rejected the existing family exception before *Holyfield*, but currently accept it. See *infra* notes 198-205 and accompanying text.

198. *In re S.B.R.*, 719 P.2d at 154.

199. *In re Crews*, 825 P.2d 305, 307 (Wash. 1992).

200. *Id.*

201. *Id.*

202. *Id.* at 310.

203. *Id.* at 312-13 (Andersen, J., concurring).

204. *Id.* at 311.

205. See *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re Lindsay C.*, 280 Cal. Rptr. 194 (Cal. Ct. App. 1991); *In re Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982); *Barby v. Daurat*, 578 So. 2d 1013 (La. Ct. App.), *cert. denied*, 578 So. 2d 136 (La. 1991); *In re S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re S.C.*, 833 P.2d 1249 1254-55 (Okla. 1992).

The Supreme Court of Kansas affirmed the trial court's conclusion that the ICWA did not apply to this case.<sup>190</sup> In making its decision, the Kansas Supreme Court considered the legislative history and the language of the ICWA.<sup>191</sup> The court found that Congress intended to maintain existing family relationships and concluded that Congress did not intend to "dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother."<sup>192</sup> The court found that the underlying thread which runs throughout the ICWA is the concern with the removal of Indian children from an existing family unit and the resultant breakup of the Indian family.<sup>193</sup> Since the Kansas Supreme Court's holding in *Baby Boy L.*, other states have considered its reasoning with varying degrees of support.

Prior to the Supreme Court's decision in *Holyfield*, nine state appellate courts considered using the reasoning set forth by the Kansas Supreme Court in *Baby Boy L.*<sup>194</sup> Of the nine, four adopted the existing family exception and five rejected it.<sup>195</sup> Although *Holyfield* purportedly implicitly overruled the existing Indian family exception,<sup>196</sup> states continue to apply the excep-

190. *Id.* at 174.

191. *Id.* at 175 (citing 25 U.S.C. §§ 1901(4), 1911(a), 1912(e)-(f), 1914 1916(b), 1920, 1922 (1978)).

192. *Id.*

193. *Id.*

194. The jurisdictions rejecting the reasoning of *Baby Boy L.* do so mainly because of their belief that the plain meaning of the statute does not require the exception. See *In re N.S.*, 474 N.W.2d 96, 101 n.6 (S.D. 1991) (Sabers, J., concurring) ("There is simply no statutory requirement for [a child] to have been born into an Indian home or an Indian community in order to come within the provisions of [the] ICWA, however much one might believe 25 U.S.C. § 1903(4) should have been written that way. No amount of probing into what Congress 'intended' can alter what Congress said, in plain English. . . ."). Others have found that a mother and child constitute an "Indian family." *In re D.S.*, 577 N.E.2d 572, 574 (Ind. 1991).

195. Indiana, Missouri, Oklahoma, and South Dakota adopted the existing family exception. See *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989); *In re S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re Baby Boy D.*, 742 P.2d 1059, 1064 (Okla. 1985), *cert. denied*, 484 U.S. 1072 (1988); *Claymore v. Serr*, 405 N.W.2d 650 (S.D. 1987). Arizona, California, New Jersey, Utah, and Washington rejected the existing family exception. See *In re Cocino County Juvenile Action No. J10175*, 736 P.2d 529 (Ariz. Ct. App. 1987); *In re Junious M.*, 193 Cal. Rptr. 40 (Cal. Ct. App. 1983); *In re Child of Indian Heritage*, 545 A.2d 925 (N.J. 1988); *In re Holloway*, 732 P.2d 962 (Utah 1986); *In re S.B.R.*, 719 P.2d 154 (Wash. Ct. App. 1986).

196. Hager, *supra* note 178, at 882.

Supreme Court or Congress will resolve the issue of the existing Indian family exception to the ICWA anytime soon. In June of 1993, a child's would-be adoptive parents appealed to the Supreme Court suggesting that a division existed in the states regarding the existing Indian family exception and asking the Court to rule on the validity of the exception.<sup>206</sup> The Court, however, declined to grant certiorari.<sup>207</sup> Thus, a person's rights, or lack thereof, will continue to vary, depending on which state is interpreting *Holyfield's* application to the ICWA.

#### B. Determining when the Right to Revoke Voluntary Consent to Termination of Parental Rights and Adoption Ends

The ICWA provides:

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.<sup>208</sup>

This section of the ICWA has been interpreted in two very distinct ways. Some courts find that termination and adoption proceedings are two distinct proceedings; therefore when a final decree of termination is entered, the parent is not entitled to revoke their consent before the adoption decree is entered.<sup>209</sup> Other jurisdictions, however, permit that parents of an Indian child may revoke their consent at any time prior to the final adoption decree, whether or not a final decree of termination exists.<sup>210</sup>

The majority of the jurisdictions addressing this issue have held that a parent's right to withdraw their voluntary consent expires when the final order terminating parental rights is

206. *Swenson v. Oglala Sioux Tribe*, 62 U.S.L.W. 3119 (U.S. June 14 1993) (No. 93-18) (petition for cert. filed).

207. *Swenson v. Oglala Sioux Tribe*, 114 S. Ct. 173 (1993).

208. 25 U.S.C. § 1913(c) (1994).

209. *In re J.R.S.*, 690 P.2d 10 (Alaska 1984); *In re Kiogima*, 472 N.W.2d 13 (Mich. Ct. App. 1991), *cert. denied*, 502 U.S. 1064 (1992); *B.R.T. v. Exec. Director of Soc. Servs. Bd.*, 891 N.W.2d 594, 599 (N.D. 1986); *In re Crews*, 825 P.2d 305, 311 (Wash. 1992).

210. *In re Pima County Juvenile Action No. S-903*, 635 P.2d 187 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *In re K.L.R.F.*, 515 A.2d 33 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987).

entered.<sup>211</sup> In *Kiogima*, the mother of three Indian children contacted DSS and told them that she wanted to release her children for adoption.<sup>212</sup> Four days later, at a hearing held to execute a release of her parental rights, the mother appeared with her attorney and signed the release.<sup>213</sup> A final order terminating the mother's parental rights was entered the same day.<sup>214</sup> Before the order was entered, however, the court informed the mother that "she had a right to request a rehearing within [twenty] days or to appeal within [twenty-one] days after an order was entered terminating her parental rights."<sup>215</sup> Over six months later, the mother petitioned the court to set aside the order of termination, arguing that pursuant to the ICWA she had an unqualified right to revoke her release at any time prior to adoption.<sup>216</sup> The Michigan Court of Appeals adopted the reasoning of the supreme courts of Alaska and Nebraska and held that the mother's right to withdraw her consent expired twenty-one days after the final order terminating her rights was entered.<sup>217</sup> The court quoted with approval, the Alaska Supreme Court's explanation that section 1913(c) applies to two types of consent: "a consent to termination of parental rights or a consent to adoptive placement."<sup>218</sup> The court went on to say that:

A consent to termination may be withdrawn at any time before a final decree of termination is entered; a consent to adoption at anytime before a final decree of adoption. If Congress had intended consents to termination to be revocable at any time before entry of a final decree of adoption, the words "as the case may be" would not appear in the statute.<sup>219</sup>

A minority of jurisdictions disagree with the Alaska Supreme Court's line of reasoning.<sup>220</sup> For example, in *In re K.L.R.F.*, the

211. Five states have addressed this issue: Alaska, Arizona, Michigan, North Dakota and Pennsylvania. Of the five, three have held that a parent's right to withdraw their voluntary consent expires when the final order terminating parental rights is entered. *In re J.R.S.*, 690 P.2d at 10; *In re Kiogima*, 472 N.W.2d at 13; *B.R.T.*, 391 N.W.2d at 599.

212. *In re Kiogima*, 472 N.W.2d at 13.

213. *Id.*

214. *Id.*

215. *Id.* at 14.

216. *Id.* at 13-14.

217. *Id.* at 15-16.

218. *Id.* at 15 (quoting *In re J.R.S.*, 690 P.2d 10, 13 (Alaska 1984)).

219. *In re J.R.S.*, 690 P.2d at 14.

220. *In re Pima County Juvenile Action No. S-903*, 685 P.2d 187 (Ariz. Ct. App. 1981), cert. denied, 455 U.S. 1007 (1982); *In re K.L.R.F.*, 515 A.2d 33 (Pa. Super. Ct. 1986), appeal dismissed 533 A.2d 708 (Pa. 1987).

court found that because Pennsylvania law "establishes that consent to adoption may be withdrawn at any time before the entry of the final decree of adoption,"<sup>221</sup> the mother could withdraw her consent even though her parental rights had already been terminated. The Pennsylvania court approvingly quoted the Arizona Court of Appeals' statement that "[w]hen an Indian child within the purview of the Act is involved, adoption agencies and prospective adoptive parents must be held to assume the risk that a parent such as appellant might change her mind before the adoption is finalized."<sup>222</sup>

The two interpretations of section 1913(c) are creating unnecessary stress for all parties involved in an adoption proceeding regarding an Indian child. The prospective adoptive parents are forced to wait in nervous anticipation, praying that the natural parent who consented to termination of their parental rights will not revoke their consent before a final adoption decree is ordered. At the same time, in a different state, a natural parent may be heartbroken upon discovering that when they consented to termination of their parental rights they effectively consented to the adoption—despite the ICWA's promise of the right to withdraw their consent "for any reason" prior to the entry of a final decree of adoption. Until the Supreme Court rules on the propriety of the two distinct interpretations of section 1913(c), adoptive parents, natural parents, and the children involved will continue to suffer from the variance. Such a result is unwarranted.

### C. Determining who is an Indian

Before the terms of the ICWA will be applied, the child whose placement is at issue must be an "Indian child." The ICWA does not apply merely because the children are "Indian."<sup>223</sup> The ICWA applies only when there is evidence establishing that the child is an "Indian child" as defined in the act.<sup>224</sup> An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."<sup>225</sup>

221. 515 A.2d at 37.

222. *Id.* at 38 (quoting *In re Pima County Juvenile Action No. S-903*, 685 P.2d at 192).

223. *In re Starwalt*, 546 N.E.2d 44, 47 (Ill. App. Ct. 1989), appeal denied 550 N.E.2d 44 (Ill. 1990).

224. *Id.* at 48.

225. 25 U.S.C. § 1903(4) (1994).

The ICWA, however, contains no definition of membership in an Indian tribe.

Under the ICWA each Indian tribe has sole authority to determine its membership criteria, and to decide who meets those criteria.<sup>226</sup> Formal membership requirements differ from tribe to tribe, as does each tribe's method of keeping track of its own membership.<sup>227</sup> For example, the Yankton Sioux Tribe requires applicants be one-fourth Indian and of that one-fourth, one must be one-eighth Yankton Sioux.<sup>228</sup> Furthermore, the remaining one-eighth must be Indian blood of a federally recognized tribe.<sup>229</sup> Thus, when a woman whose father was a full-blooded Ponca Indian and whose mother was one-half Yankton Sioux and one-half Caucasian, attempted to enroll her children (whose father was Caucasian), the Yankton Sioux rejected the application because the Ponca tribe had been dissolved and therefore her children did not meet the tribe's blood requirements.<sup>230</sup>

Tribes may also have various methods of keeping track of their members. There is no one method of proving tribal membership. Thus, courts are permitted to make this determination as they see fit. The Guidelines, however, state that

[e]nrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but is not the only means nor is it necessarily determinative.<sup>231</sup>

Despite the Guidelines, some jurisdictions implicitly require enrollment,<sup>232</sup> while others do not.<sup>233</sup> Some courts accept testimony of a representative of the tribal government as probative

226. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978); *In re B.W.*, 454 N.W.2d 437, 446 (Minn. Ct. App. 1990) ("It is essential to the purposes of the ICWA to allow appropriate tribal authority to determine these matters according to tribal law, customs and mores best known to them.")

227. *Martinez*, 436 U.S. at 72 n.32.

228. *In re J.L.M.*, 451 N.W.2d 377, 384 (Neb. 1990).

229. *Id.* at 385.

230. *Id.* at 384-85.

231. Guidelines, *supra* note 52, at 67, 586.

232. *In re Baby Boy W.*, 831 P.2d 643, 647 (Okla. 1992); *In re Quinn*, 881 P.2d 795, 801 (Or. 1994) (finding that the child was not an Indian child because neither father nor child was an enrolled member of an Indian tribe when the mother consented to the child's adoption); *In re Hunter*, 888 P.2d 124, 125-26 (Or. Ct. App. 1995) (same); *In re B.R.B.*, 381 N.W.2d 283, 284 (S.D. 1986) (refusing to accept mother's claim that she was a member of the Cheyenne River Sioux Tribe).

evidence of membership.<sup>234</sup> Others reject affidavits stating that a person is a member of the tribe.<sup>235</sup> For example, some courts require an unwed Indian father to acknowledge and establish paternity before declaring the child an Indian child. In *In re Maricopa County Juvenile Action No. A-25525*,<sup>236</sup> the Caucasian mother was uncertain of the paternity of her child, but told the adoption agency that it might be the child of an Indian.<sup>237</sup> Edmund Jackson, an Indian tribe member, was contacted and told that he could be the baby's father.<sup>238</sup> Jackson went to see the baby but did not acknowledge paternity.<sup>239</sup> The adoption agency later filed a petition to terminate Jackson's parental rights alleging Jackson had abandoned the child.<sup>240</sup> The petition was granted.<sup>241</sup>

Over a year later, Jackson's tribe moved to intervene in the adoption proceeding.<sup>242</sup> The tribe alleged that the court had failed to comply with the ICWA placement preferences, claiming that the child was an Indian child.<sup>243</sup> Six days later Jackson acknowledged his paternity of the child.<sup>244</sup> The trial court found that the tribe's, as well as the father's, interest came too late, and concluded that good cause to deviate from the ICWA placement preferences existed because the child had been with the adoptive mother for almost three years.<sup>245</sup>

On appeal, the Arizona Court of Appeals first questioned whether the baby was an Indian child.<sup>246</sup> The court found that the trial court should not have applied the ICWA unless evidence established that the child was indeed an Indian child.<sup>247</sup> The court held that because the ICWA's definition of "parent" does

233. *In re Baby Boy Doe*, 849 P.2d 925, 930 (Idaho) ("There is no requirement that a tribe must make a conclusive determination of a child's eligibility for membership in the tribe as proof that the child is an Indian child."), cert. denied *sub nom* Swenson v. Oglala Sioux Tribe, 114 S. Ct. 173 (1993).

234. *In re J.L.M.*, 451 N.W.2d at 387; *In re Angus*, 655 P.2d 208, 212 (Or. Ct. App. 1982), cert. denied, 464 U.S. 830 (1983).

235. *In re Quinn*, 881 P.2d at 801.

236. 667 P.2d 228 (Ariz. Ct. App. 1983).

237. *Id.* at 230.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 231.

245. *Id.*

246. *Id.* at 232.

247. *Id.* at 232-33.

not include unwed fathers who fail to acknowledge and establish paternity, the trial court should not have applied the ICWA.<sup>248</sup>

This same line of reasoning has been used in other states as well.<sup>249</sup> For example, in *In re Baby Boy D.*, a seventeen-year-old non-Indian female was pregnant with a nineteen-year-old Indian male's child.<sup>250</sup> The male knew that the female was pregnant with his child but did not make any effort to assist the mother in any way.<sup>251</sup> The mother told the father that she intended to give the baby up for adoption, and the father did not object.<sup>252</sup> Two months after the child was born, however, the father filed suit claiming his rights should not have been terminated under the ICWA.<sup>253</sup>

The court found that although the father was a registered Indian, the child was not an Indian child because the father had not acknowledged or attempted to establish paternity.<sup>254</sup> Thus, in Arizona and Oklahoma, having a child with Indian blood is meaningless until and unless the father acknowledges paternity.<sup>255</sup>

On the other hand, some jurisdictions have found that regardless of any acknowledgement of paternity, if a child has Indian blood, it is an Indian child under the ICWA.<sup>256</sup> In *In re N.S.*, the father never acknowledged paternity in any way, but because the mother told the court that the baby's father was one-fourth Indian, the court found that N.S. was an Indian child.<sup>257</sup>

Courts are also inconsistent in decisions regarding when a parent must enroll in an Indian tribe to invoke the ICWA. In *In re H.D.*,<sup>258</sup> the mother did not apply for tribal membership until a court date for termination of her parental rights had been set. Although the tribe did enroll her as a member, this enrollment occurred after the court had terminated her parental rights.<sup>259</sup>

248. *Id.*  
 249. S.A. v. E.J.P., 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990); *In re Child of Indian Heritage*, 529 A.2d 1009, 1014 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 542 A.2d 925 (N.J. 1988); *In re Baby Boy D.*, 742 P.2d 1059, 1064 (Okla. 1985), *cert. denied*, 484 U.S. 1072 (1988).  
 250. *In re Baby Boy D.*, 742 P.2d at 1061.  
 251. *Id.*  
 252. *Id.*  
 253. *Id.*  
 254. *Id.* at 1064.  
 255. *Id.*; *In re Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228, 232-33 (Ariz. Ct. App. 1983).  
 256. See *In re N.S.*, 474 N.W.2d 96, 98-99 (S.D. 1991).  
 257. *Id.* at 99.  
 258. 729 P.2d 1234, 1237 (Kan. Ct. App. 1986).  
 259. *Id.*

surprisingly, courts across the nation are applying different standards when making a "good cause" determination. State courts are also reaching opposite results in cases that are virtually identical factually. Thus, whether "good cause" to deviate exists may be less than a factual decision depending on the jurisdiction hearing the case.

#### 1. Standard of Proof in Making a "Good Cause" Determination

The ICWA is silent regarding the standard of proof courts should apply when making a "good cause" determination. Thus courts are forced to resolve the issue by attempting to discern legislative intent.<sup>264</sup> Traditionally, legislative silence on standard of proof is viewed as an intention that the preponderance of the evidence standard should be applied.<sup>265</sup> The only case to squarely address this issue, however, chose not to apply the preponderance of the evidence standard.<sup>266</sup> Instead, the Minnesota Court of Appeals found that "good cause" to deviate from adoption placement preferences of the ICWA need only be proven by clear and convincing evidence.<sup>267</sup> However, other jurisdictions have, without discussing their reasons for so doing, applied the preponderance of the evidence standard to a "good cause" finding.<sup>268</sup>

#### 2. "Good Cause" not to Transfer Jurisdiction

The core of the ICWA is its jurisdictional provisions over child custody proceedings.<sup>269</sup> Indian tribes have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled on the tribe's reservation.<sup>270</sup> In cases where the child does not reside on the reservation, however, the state court exercises concurrent jurisdiction with the tribal court.<sup>271</sup> Nevertheless, the ICWA grants Indian tribes the

264. *Stadman v. Sec. & Exch. Comm'n.*, 450 U.S. 91, 95-96 & n.10 (1981).

265. *Cf. Grogan v. Garner*, 498 U.S. 279, 286 (1991) (preponderance of the evidence standard applied when Congress is silent, unless "particular important individual interests or rights are at stake" (quoting *Herman & MacClean v. Huddleston*, 459 U.S. 375, 389-90 (1983))).

266. *In re S.E.C.*, 507 N.W.2d 872, 878 (Minn. Ct. App. 1993), *rev'd on other grounds*, 521 N.W.2d 557 (Minn. 1994), *cert. denied*, 115 S. Ct. 935 (1995).

267. *Id.*

268. *In re N.P.S.*, 868 P.2d 934, 935 (Alaska 1994).

269. *In re J.L.P.*, 870 P.2d 1252, 1256 (Colo. Ct. App. 1994).

270. 25 U.S.C. § 1911(a) (1994).

271. *Id.* Once a petition to transfer to tribal court is filed, the state court should hold a hearing on the petition. *In re G.L.O.C.*, 668 P.2d 235, 236-38

Nonetheless, on appeal, the court found that the children were indeed Indian children to whom the ICWA applied even though their mother was not an enrolled member of the tribe when the case was heard.<sup>260</sup> In contrast, in *In re Johanson*,<sup>261</sup> when the mother enrolled herself and her son in the Cherokee nation after the order terminating her parental rights was entered, the court held that the fact that the child had "Indian heritage" during the proceedings did not qualify him as an Indian child under the ICWA.

Once again, application of the ICWA relies not on objective factors, but on each state's subjective interpretation of it. Deciding who is an Indian, a decision which should be simple, varies depending only on the jurisdiction deciding the case. Such a result is clearly unconstitutional. However, until Congress, or the Supreme Court, produces some guidelines as to what is or is not necessary to establish eligibility for tribal membership, due process rights will continue to be violated.

#### D. Determining when "Good Cause" to Deviate from the ICWA Exists

The ICWA provides that:

In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe.<sup>262</sup>

It also provides that:

In any [foster care, preadoptive placement, or] adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.<sup>263</sup>

The ICWA does not define the term "good cause." Therefore, courts are permitted to look to other sources for guidance in making the "good cause" determination. What constitutes "good cause" is unique to the individual facts of each case. Not

260. *Id.* at 1241.

261. 402 N.W.2d 13, 16 (Mich. Ct. App. 1986).

262. 25 U.S.C. § 1911(b) (1994) (emphasis added).

263. *Id.* § 1915(a) (emphasis added). Subsection (b) enumerates four placement preferences to be given "in the absence of good cause to the contrary" when foster care or preadoptive care is at issue. *Id.* § 1915(b).

privilege of presumptive jurisdiction over nondomiciliary Indian children<sup>272</sup> and provides a procedure for transferring cases from state court to tribal court.<sup>273</sup> Once a petition to transfer jurisdiction to the tribal court has been received, the state court must transfer the case unless (1) the tribal court declines transfer, (2) either parent objects to the transfer, or (3) the court finds there is "good cause" to retain the case.<sup>274</sup> Because the ICWA is silent regarding the meaning of "good cause" as it is used in section 1911(b), courts are free to make their own decisions.

The Guidelines provide that "good cause" exists if the Indian child's tribe does not have a tribal court as defined by the ICWA.<sup>275</sup> "Good cause" also exists, under the Guidelines, when the state court proceeding is at an advanced state.<sup>276</sup> Furthermore, "good cause" exists when an Indian child over the age of twelve objects to the transfer.<sup>277</sup> Finally, the Guidelines provide that "good cause" exists when an Indian child is over the age of five, the child's parents are unavailable, and the child has had little or no contact with his or her tribe.<sup>278</sup>

Courts also turn to the ICWA's legislative history when deciding if "good cause" exists. The ICWA's legislative history indicates that the "good cause" exception was formulated to allow state courts to apply a "modified doctrine of *forum non conveniens*"<sup>279</sup> Thus, state courts are permitted to decide whether the tribal court is a less convenient forum. Courts across the United States often use the doctrine of *forum non conveniens* to find good cause not to transfer a case to tribal court.<sup>280</sup> When making a good cause determination based on *forum non conveniens* considerations, courts sometimes consider, "the practical

(Mont. 1983). At the hearing, the party opposing the transfer has the burden of establishing that good cause not to transfer exists. See 25 U.S.C. § 1911(b) (1994).

272. 25 U.S.C. § 1911(b) (1994); *In re T.R.M.*, 489 N.E.2d 156, 158 (Ind. Ct. App. 1986) ("[P]urpose of Congress in the ICWA is clear that questions concerning the adoption of and termination of parental rights to Indian children must be deferred to tribal determination . . ."). *rev'd*, 525 N.E.2d 298 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989).

273. 25 U.S.C. § 1911(b) (1994).

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. H.R. Rep. No. 1386, 95th Cong., 2d Sess., at 21 (1978).

280. See, e.g., *In re J.R.H.*, 358 N.W.2d 311 (Iowa 1984); *In re J.W.*, 529 N.W.2d 657, 661 (Iowa Ct. App. 1995); *In re Baby Boy L.*, 643 P.2d 168, 178 (Kan. 1982); *In re Birdhead*, 331 N.W.2d 785, 790 (Neb. 1983); *In re R.N.*, 757 P.2d 1333, 1335 (N.M. Ct. App. 1988); *In re N.L.*, 754 P.2d 863 (Okla. 1988).

factors that make trial of a case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining the attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process.<sup>281</sup>

In *In re N.L.*,<sup>282</sup> a mother was attempting to transfer the proceedings from the state court of Okmulgee County, Oklahoma, to the tribal court which was located in Kay County, Oklahoma.<sup>283</sup> The mother was residing in Oklahoma County, Oklahoma, but all of the necessary witnesses—and the child were residing in Okmulgee County.<sup>284</sup> The court found that the presence of the witnesses and the child in Okmulgee County constituted "good cause" to deny the transfer to the tribal court.<sup>285</sup>

State courts have also created their own definitions of what constitutes "good cause." Although the United States Supreme Court has stated that "[i]t is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interests of the Tribe,"<sup>286</sup> at least two state courts continue to use the "best interests of the child" test in finding good cause not to transfer jurisdiction to a tribal court.<sup>287</sup> On the other hand, two other states have clearly rejected applying the "best interest of the child" standard when making good cause to transfer decisions.<sup>288</sup> Arizona and South Carolina have found that "good cause" exists when a tribe does not have a mechanism for handling child custody matters.<sup>289</sup> South Carolina has also stated that "good cause" exists when there is evidence establishing that removing the children "would be disruptive and detrimental to their best interests."<sup>290</sup> Still

281 *In re E.N.*, 757 P.2d at 1336.  
 282 754 P.2d at 863.  
 283 *Id.*  
 284 *Id.*  
 285 *Id.*  
 286. *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30, 49 (1989).  
 287 *In re Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991); *In re I.S.*, 801 P.2d 77, 80 (Mont. 1990).  
 288 500 U.S. 917 (1991).  
 289 *In re Armell*, 550 N.E.2d 1060, 1065-66 (Ill. App. Ct.), *appeal denied*, 555 N.E.2d 374 (Ill.), *cert. denied*, 498 U.S. 940 (1990); *In re C.E.H.*, 837 S.W.2d 947, 954 (Mo. Ct. App. 1992).  
 290 *In re Pima County Juvenile Action No. S-903*, 635 P.2d 187 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Chester County Dep't of Soc. Servs. v. Coleman*, 372 S.E.2d 912, 914 (S.C. Ct. App. 1988), *rev'd*, 399 S.E.2d 773 (S.C. 1990), *cert. denied*, 500 U.S. 918 (1991).  
 291 *Chester County*, 372 S.E.2d at 915. In *Chester County*, the children lived in South Carolina, but the tribal court seeking jurisdiction was located in South Dakota. *Id.* at 913.

example, some courts have also considered factors such as "the best interests of the child, the wishes of the biological parents, . . . the child's ties to the tribe,"<sup>297</sup> the child's need for stability,<sup>298</sup> the child's bonds to the foster parent or preadoptive family,<sup>299</sup> and "the child's ability to make any cultural adjustments necessitated by a particular placement."<sup>300</sup> Other courts reject these factors.<sup>301</sup>

Although the Guidelines clearly state that good cause not to follow the order of preference dictated in section 1915 may be based on parental preference, courts hesitate to find good cause based solely on parental preference. For example, in *In re F.H.*,<sup>302</sup> the mother made it clear that she wanted a non-Indian couple to adopt her child, not a member of her tribe.<sup>303</sup> Despite this fact, the court found it necessary to list three other reasons that good cause had been established as if to say the mother's preference was not enough.<sup>304</sup> The court even went so far as to say that "[g]iven the possibility of a placement with a relative in [the tribe], this case presented a close question."<sup>305</sup>

A "good cause" determination depends more on the court deciding the case than it does on the facts of the case. Until Congress defines "good cause" or adopts the Guidelines' definition as law, courts will be free to determine "good cause" based on anything they perceive to be relevant. Such a result is an injustice to all involved.

VI. CONCLUSIONS

The ICWA was enacted to prevent the breakup of Indian families and tribes. The ICWA is not serving the purpose for which it was enacted. Worse, it is infringing upon the rights of two groups of people: parents of Indian children and abused

297 *In re F.H.*, 851 P.2d at 1363-64.  
 298 *In re S.E.C.*, 521 N.W.2d at 368.  
 299 *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989); *In re C.W.*, 479 N.W.2d 106, 117 (Neb. 1992). ("[T]ransfer to the tribe and the inevitable grief over losing their psychological parents would compromise the children's ability to benefit from that culture . . .").  
 300 *In re M.*, 832 P.2d at 522.  
 301 *In re S.E.C.*, 521 N.W.2d at 362 ("[A] finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child's best interest").  
 302 851 P.2d 1361, 1365 (Alaska 1993).  
 303 *Id.*  
 304 *Id.* The Alaska Supreme Court repeated this act in 1994 when both the child and the mother clearly expressed their preference for a non-Indian to adopt the child. *In re N.P.S.*, 868 P.2d 934, 937-39 (Alaska 1994).  
 305 *In re F.H.*, 851 P.2d at 1365.

other jurisdictions refuse to find "good cause" even when the child is in the state's jurisdiction at the parents' request.<sup>291</sup> Arizona, New Mexico, and Utah, have held that when a child is born on a reservation, the reservation retains jurisdiction even if the child was voluntarily taken off the reservation for adoption, and Arizona and California have found that "good cause" exists when a tribe waits an unreasonable amount of time before intervening.<sup>295</sup>

3. "Good Cause" to Deviate from Foster Care and Adoptive Placement Preferences

The ICWA is also silent regarding the definition of "good cause" as it is used in section 1915(a) and (b). Thus, courts are permitted to make their own decisions. Some find guidance in the Guidelines which provide that in adoptive proceedings, a determination of "good cause" not to follow the order of preference mandated in the ICWA shall be based on any one or more of the following considerations:

- (i) The request of the biological parents or the child when the child is of sufficient age.
- (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
- (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.<sup>294</sup>

However, the Guidelines are not regulations and therefore are neither controlling or binding on a state court's decision.<sup>295</sup> Thus, courts do not always follow them and have even added several other factors to their determination of "good cause."<sup>296</sup> For

291 *In re Pima County Juvenile Action No. S-903*, 635 P.2d at 187; *In re Baby Child*, 700 P.2d 198, 200 (N.M. Ct. App. 1985); *In re Holloway*, 732 P.2d 962 (Utah 1986).  
 292 *In re Pima County Juvenile Action No. S-903*, 635 P.2d at 187; *In re Baby Child*, 700 P.2d at 200; *In re Holloway*, 732 P.2d at 970-71.  
 293 *In re Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1247 (Ariz. Ct. App. 1991); *In re Robert T.*, 246 Cal. Rptr. 168, 174 (Cal. Ct. App. 1988).  
 294 Guidelines, *supra* note 52, at 67,594.  
 295 *Id.* at 67,584 (conceding that the Guidelines "are not published as regulations because they are not intended to have binding legislative effect").  
 296 *See In re F.H.*, 851 P.2d 1361, 1363-64 (Alaska 1993); *In re J.R.H.*, 358 N.W.2d 311, 321-22 (Iowa 1984); *In re S.E.G.*, 507 N.W.2d 872, 879-80 (Minn. Ct. App. 1993), *rev'd on other grounds*, 521 N.W.2d 357 (Minn. 1994), *cert. denied*, 115 S. Ct. 935 (1995); *In re M.*, 832 P.2d 518, 522 (Wash. Ct. App. 1992).

and neglected Indian children. Although the preference given to tribes in the ICWA may be reasonably and rationally designed to promote tribal self-government, it does not excuse the violations of personal protections. Until the Supreme Court rules on this issue, however, the equal protection violations will continue. Even if the Court were to find that the ICWA is constitutional, more law is needed to ensure that it is being applied consistently in every state.

As it stands, the outcome of a case involving an "Indian child" depends not on the facts of the case, but rather the state in which the case is being heard. Several states refuse to apply the ICWA when there is not an "existing Indian family." States also determine when the right to revoke voluntary consent to an adoption ends, by considering state law instead of federal law. Furthermore, a state's determination of who is an "Indian" does not rely on the ICWA, but on factors adopted in each state. Finally, all states create their own definitions of "good cause." Such inconsistent application of the ICWA is not beneficial to tribes, parents, or children and should be stopped.

Several things can be done to ensure that the goals of the ICWA are achieved and at the same time all persons' rights are respected. First, Congress should enact an amendment which requires the ICWA only be applied to those children who are part of an existing Indian family. Such an amendment would do two things. First, it would ensure that parents of children with Indian blood do not have their constitutional rights violated. Second, it would ensure that the heightened standard of proof is only applied to those children who are living on a reservation or in a traditional Indian home.

Congress could also improve the ICWA by amending section 1915(a), which provides that adoptive placement preferences apply to all adoption proceedings involving an Indian child.<sup>306</sup> Section 1915(a) could be strengthened by amending it so that it would only apply in two situations. First, it should apply to all adoption proceedings where the child has been removed by the state from an existing Indian family. Second, it should apply whenever a parent of an Indian child elects. Such an amendment would ensure that Congress' goals are met and guarantee that parents who wish to choose adoptive parents outside the ICWA's preferences have the right to do so. It would also remove the parental anonymity problems.

Congress could further enhance the ICWA by enacting the part of the Guidelines that deals with methods of determining

306 25 U.S.C. § 1915(a) (1994).

tribal membership.<sup>307</sup> By making the Guidelines law, Congress could ensure that all courts are respecting a given tribe's method of keeping track of their members. This would in turn secure equal treatment regardless of the state court hearing the case.

Finally, Congress could ameliorate the ICWA by providing a specific list of what does and does not constitute "good cause to the contrary"<sup>308</sup> and what standard of proof should be used when making such a determination. Such a list would, of course, not be exhaustive, but would provide a good basis for ensuring that courts are addressing similar issues in a consistent manner. Thus, parents of children with Indian blood would not need to guess as to how their state court would react to a given set of facts.

As it currently stands, the ICWA is not having the impact Congress desired.<sup>309</sup> This is likely to continue until Congressional amendments or Supreme Court interpretation is given. Thus, action is needed not only to achieve Congressional goals but, more importantly, to ensure its constitutionality.

307 Guidelines, *supra* note 52, at 67,586.  
308 "Good cause to the contrary" is used in 25 U.S.C. §§ 1911(b), 1915(a)-(b) (1994), of the ICWA.  
309 See *supra* notes 82-83 and accompanying text.

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HOUSE RESOURCES COMMITTEE  
HEARING ON LEGISLATION  
TO AMEND THE INDIAN CHILD WELFARE ACT  
S. 569 AND H.R. 1082  
JUNE 18, 1997

STATEMENT ON BEHALF OF THE  
ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.  
SISSETON, SOUTH DAKOTA  
SUBMITTED TO THE  
SENATE COMMITTEE ON INDIAN AFFAIRS  
AND

## ESSAY

HOMOSEXUAL MARRIAGE AND THE MYTH OF  
TOLERANCE: IS CARDINAL O'CONNOR A  
"HOMOPHOBE"?

RICHARD F. DUNCAN\*

## I. INTRODUCTION

In a 1993 law review article, Professor Larry Yackle peered into a crystal ball and told our collective fortune.<sup>1</sup> He declared that "American society is now absorbed in yet another great civil rights movement, this one on behalf of gay, lesbian, and ambisexual citizens, which will lead ineluctably to the elimination of legal burdens on the basis of sexual orientation."<sup>2</sup> Thus, Yackle confidently predicted the reordering of society along lines advocated by homosexual activists, a world in which the gay legislative agenda has been fully implemented. In this America-to-be, same-sex marriages — the ultimate priority of the homosexual political agenda<sup>3</sup> — will be fully recognized and supported by government.

Yackle's utopia may strike some readers as a tolerant place, a land guided by the principle "live and let live." But that would be a serious misreading of both Yackle and the world of his hopes and visions. In his land of milk and honey, of peace, love and gay

\* Sherman S. Welpton, Jr., Professor of Law University of Nebraska College of Law (rduncan@unlinfo.unl.edu). I wish to thank Lynn Wardle, Steve McFarland, Kelly Duncan, Charlie Rice, and my cyberspace colleagues on the ReligionLaw discussion group. This Essay is dedicated to my children, Casey, Joshua, Rebecca, Joy, and Hannah Grace—never trade your birthright for a bowl of red pottage.

1. Larry W. Yackle, *Parading Ourselves: Freedom Of Speech At The Feast Of St. Patrick* 73 B.U. L. Rev. 791 (1993).

2. *Id.* at 791.

3. Andrew Sullivan calls access to marriage "the critical measure necessary for full gay equality." Andrew Sullivan, *The Politics of Homosexuality*, NEW REPUBLIC, May 10, 1993, at 24, 37. See also ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 185 (1995) [hereinafter SULLIVAN, VIRTUALLY NORMAL] (stating that homosexual marriage is "the only reform that truly matters").



## I. Introduction

Chairmen Campbell and Young and members of the Senate Committee on Indian Affairs and House Resources Committee. The Association on American Indian Affairs, Inc. (AAIA) is a national non-profit citizens' organization headquartered in South Dakota, with a field office in California. Its mission is the preservation and enhancement of the rights and culture of American Indians and Alaska Natives. The policies of the Association are formulated by a Board of Directors, all of whom are Native Americans.

The Association began its active involvement in Indian child welfare issues in 1967 and for many years was the only national organization active in confronting the crisis in Indian Child Welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of the Indian Child Welfare Act (ICWA) and, at the request of Congress, AAIA was closely involved in the drafting of the Act in 1978. Since that time, the Association has continued to work with tribes in implementing the Act including the negotiation of tribal-state agreements and legal assistance in contested cases.

The ICWA was enacted in response to a tragedy that was taking place within the Indian community. Enormous numbers of Indian children had been removed from their families and tribal communities without just cause. The Indian Child Welfare Act was landmark bipartisan legislation which, although it has been imperfectly implemented in some places, has provided vital protection to Indian children, families and tribes. It has formalized the authority and role of tribes in the Indian child welfare process. It has forced greater efforts and more painstaking analysis by agencies and courts before removing Indian children from their homes. It has provided procedural protection to families and tribes to prevent arbitrary removals of children. It has required recognition by agencies and courts alike that an Indian child has a vital interest in retaining a connection with his or her Indian heritage. Each year thousands of child custody and adoption proceedings take place in which the Indian Child Welfare Act is applied.

## II. Background:

### Why the Indian Child Welfare Act of 1978 became law.

#### A. The problem

As the United States Supreme Court explained in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (hereinafter Holyfield), the ICWA "was the product of rising concern in the mid-1970s over the consequences to Indian children, Indian families and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." Id. at 32. The evidence presented before Congress revealed that "25-35% of

Indian children had been separated from their families and placed in foster homes, adoptive homes or institutions." Id.

Studies by the Association on American Indian Affairs, commissioned by Congress, reported that Indian children were placed in foster care far more frequently than non-Indian children. This was true of all 19 states surveyed with Indian placement rates ranging from 2.4 times the non-Indian rate in New Mexico to 22.4 times the non-Indian rate in South Dakota. "The Indian Child Welfare Act of 1977", Hearings on S. 1214 before the Select Committee on Indian Affairs, United States Senate, 95th Cong., 1st Sess. (August 4, 1977), at 539 (hereinafter "Senate 1977 Hearing"). The percentage of Indian children placed in non-Indian foster homes in those states that reported this information ranged from 53% in Wyoming to 97% in New York.

Moreover, "[t]he adoption rate of Indian children was eight times that of non-Indian children [and] [a]pproximately 90% of the Indian placements were in non-Indian homes." Holyfield, supra, 490 U.S. at 33. All but one of the states surveyed also had a greater rate of Indian children placed for adoption than was the case for non-Indians. The Indian adoption rate in the most extreme case -- the State of Washington -- was 18.8 times the non-Indian rate. Senate 1977 Hearing, supra, at 539. The percentage of Indian children placed in non-Indian adoptive homes ranged from 69% in Washington to 97% in Minnesota. Id. at 537-603.

Congress found that this extraordinary and unwarranted rate of placement in out-of-home non-Indian households was not in the best interests of Indian tribes, families and children. See Holyfield, supra, 490 U.S. at 49-50 (The ICWA is concerned about both the "impact on the tribes themselves of the large numbers of children adopted by non-Indians ... [and] the detrimental impact on the children themselves of such placements outside their culture.")

In the case of Indian tribes, the Court specifically found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children...", 25 U.S.C. 1901(3). This concern was also expressly reflected in the floor statements of "the principal sponsor in the House, Rep. Morris Udall ('Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy'), and its minority sponsor, Rep. Robert Lagomarsino ('This bill is directed at conditions which... threaten ... the future of American Indian tribes...')." Holyfield, supra, 490 U.S. at 34, n.3 (citations omitted).

As the Holyfield case likewise recognized, Congress was also very concerned about "the placement of Indian children in non-Indian homes... based in part on evidence of the detrimental impact on the children themselves of such placement outside their culture". 490 U.S. at 49-50. Testimony at congressional hearings

was replete with examples of Indian children placed in non-Indian homes and later suffering from debilitating identity crises when they reached adolescence. This phenomenon occurred even when the children had few memories of living as part of an Indian community. For example, in testimony submitted by the American Academy of Child Psychiatry, it was stated that:

There is much clinical evidence to suggest that these Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough they are cared for by devoted and well intentioned foster or adoptive parents. Nonetheless, particularly in adolescence, they are subject to ethnic confusion and a pervasive sense of abandonment with its attendant multiple ramifications. Senate 1977 Hearing, supra, at 114.

See also the testimony of Dr. Joseph Westermeyer, a University of Minnesota social psychiatrist, concerning patients that he had treated, cited in Holyfield, supra, 490 U.S. at 33, n.1

[T]hey were raised with a white cultural and social identity. They are raised in a white home. They attended, predominantly white schools, and in almost all cases, attended a church that was predominantly white, and really came to understand very little about Indian culture, Indian behavior, and had virtually no viable Indian identity. They can recall such things as seeing cowboys and Indians on TV and feeling that Indians were a historical figure but were not a viable contemporary social group.

Then during adolescence, they found that society was not to grant them the white identity that they had. They began to find this out in a number of ways. For example, a universal experience was that when they began to date white children, the parents of the white youngsters were against this, and there were pressures among white children from the parents not to date these children...

The other experience was derogatory name calling in relation to their racial identity...

[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did.

AAIA has frequently received inquiries from troubled Indian adolescents and adults who were placed outside of their communities as children and are seeking to reconnect with their tribes. Excerpts from one letter, reprinted in AAIA's newsletter, Indian Affairs, No. 124 (Summer/Fall 1991) at 4-5, illustrate the experiences of these children:

Because of our youth it wasn't obvious to us that we were missing anything in our lives, but as time passed and we began school comments were made at us that aroused our suspicions of

something not being right...Neighborhood children would ask "what are you?", "who are you?...[When I] was informed that...[my brother and I] were Indians...[a]bsolute shock and confusion dominated our every thought...Burdened with the ignorance of our culture and with the hopeless change of immediate enlightenment we proceeded to identify ourselves to our observant neighbors who immediately showed their ignorance with abusive name calling, offensive gestures and demeaning remarks. We lived through these times but not without emotional trauma on our hearts and minds that we carry to this day...The emotional and psychological pain of my childhood experience cannot be imagined...

In addition, Congress heard considerable testimony on the importance of the extended family in Indian culture. As the House Interior and Insular Affairs Committee Report explained:

[T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family...The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childbearing.

[House Report 95-1386, 95th Cong., 2d. Sess. (July 24, 1978) at 10, 20.]

As an example, in the Choctaw language which is still widely spoken, the words for mother and father are extended to the father's sisters and mother's brothers respectively, as well as to sons of paternal great uncles, grandsons of paternal great-great uncles, uncles by marriage on the mother's side, daughters of maternal great aunts, granddaughters of maternal great-great aunts and other relatives as well. Swanton, John R., Source Material for the Social and Ceremonial Life of the Choctaw Indians, Smithsonian Bulletin No. 103 (1931) at 87. This is indicative of the fact that, traditionally, responsibility for raising a Choctaw child has been shared by many of the child's relatives.

Thus, Congress had before it evidence that in most Indian cultures, a child is considered part of a larger extended family and that placement of a child outside that family is a loss felt by the entire family.

Congress determined that a large part of the cause for this Indian child welfare crisis which was devastating Indian tribes, children and families rested with State agencies and courts. Congress found that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through

administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5). See also statements by Rep. Morris Udall, House sponsor of the ICWA, cited in Holyfield, supra, 490 U.S. at 45, n.18, to the effect that "'state courts and agencies and their procedures share a large part of the responsibility' for crisis threatening 'the future and integrity of Indian tribes and Indian families.'" and Rep. Robert Lagomarsino, Republican co-sponsor of the ICWA who stated, in explaining his support for the ICWA, that "[g]enerally there are no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agents." 124 Cong.Rec. H 12849 (Oct. 14, 1978). The result of this systemic failure was summarized in the House Report as follows:

- (1)...many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.
- (2) The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law...Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments.
- (3)...agencies established to place children have an incentive to find children to place [most notably Indian children not protected by the system].

[House Report 95-1386, supra, at 10-12.]

#### B. Congress' Conclusions and Solutions

As a result of the testimony that it heard and the findings that it made, Congress enacted the Indian Child Welfare Act, 25 U.S.C. 1901 et seq. As was stated in Holyfield, supra, 490 U.S. at 37, 50, n.24

'The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected'...[and] 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society'. (emphasis added, citations omitted)

See also 25 U.S.C. 1902 which states that the purposes of the Act are to "protect the best interests of Indian children and to promote the stability and security of Indian tribes..."

The primary mechanism utilized by Congress to ensure the preservation of that child-tribal relationship was to "curtail state authority", Holyfield, supra, 490 U.S. at 45, n.17, and to strengthen tribal authority over child welfare matters. As the Holyfield court noted, "It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-a-vis state authorities..." Id. at 44-45. Accordingly, the ICWA includes a number of provisions recognizing and strengthening the tribal role in making decisions about Indian children. See e.g.

- 25 U.S.C. 1911(a) (exclusive tribal jurisdiction over Indian children resident or domiciled on the reservation);
- 25 U.S.C. 1911(b) (transfer of off-reservation state court proceedings to tribal court);
- 25 U.S.C. 1911(c) (recognizing the right of Indian tribes to intervene in all state court child custody proceedings involving children who are members or eligible for membership in the tribe);
- 25 U.S.C. 1911(d) (requiring state courts to accord tribal court judgments full faith and credit);
- 25 U.S.C. 1912(a) (requiring notice to Indian tribes by state courts in involuntary child custody proceedings);
- 25 U.S.C. 1914 (providing Indian tribes with the right to challenge state placements that do not conform with the Act's requirements in federal court);
- 25 U.S.C. 1915(c) (recognizing, as a matter of federal law, tribally-established placement preferences for state placements of off-reservation Indian children);
- 25 U.S.C. 1915(e) (recognizing right of Indian tribes to obtain state records pertaining to the placement of Indian children); and
- 25 U.S.C. 1919 (authorizing tribal-state Indian child welfare agreements).

Moreover, the ICWA includes a number of other provisions, in addition to the provisions described above, which are designed to keep Indian families intact and directly or indirectly to protect the relationship between the tribe and those individuals eligible

for membership in the tribe. See, e.g.,

- 25 U.S.C. 1912(e) and (f) (establishing substantive standards for involuntary foster care placement of an Indian child or termination of an Indian parent's parental rights which exceed those provided under state law);

- 25 U.S.C. 1915(a) (requiring that adoptive placements of Indian children under state law be made preferentially with the child's extended family, other members of the Indian child's tribe or other Indian families, in that order, absent good cause to the contrary);

- 25 U.S.C. 1915(b) (requiring that foster care placements of Indian children under state law be made preferentially with the child's extended family, a tribally-licensed foster home, an Indian foster home licensed by a non-Indian entity or a tribally-approved or Indian-operated facility, in that order, absent good cause to the contrary);

- 25 U.S.C. 1915(d) (requiring that the cultural and social standards of the Indian community must be applied by the state court when it applies the placement preferences); and

- 25 U.S.C. 1917 (providing adult Indian adoptees with the right to access their adoption records for the purpose of establishing their Indian tribal membership).

Many of the sections of the ICWA and a major part of the problem which Congress sought to address involved involuntary removals of children from their families and tribal communities and placement of such children into both foster care and adoptive placements. See, e.g., 25 U.S.C. 1912. However, it is also clear that "voluntary" adoptions of Indian children were likewise of great concern to Congress based upon the evidence it had heard. As the United States Supreme Court specifically found, the tribe and the child have an interest in maintaining ties independent of the natural parents' interests and, thus, "Congress determined to subject such [voluntary] placements to the ICWA's jurisdiction and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." Id. at 49-53. As explained in In re Adoption of Child of Indian Heritage, 543 A.2d. 925, 931-933 (N. J. 1988), a case cited approvingly by the Holyfield court at 490 U.S. at 51:

The effect on both the tribe and the Indian child of the placement of the child in a non-Indian setting is the same, whether or not the placement was voluntary. Furthermore, the economic factors that led Congress to provide safeguards against induced voluntary relinquishments to state agencies are equally implicated in private placement adoptions... Finally, while an unwed mother might have a legitimate

and genuine interest in placing her child for adoption outside of an Indian environment, if she believes such a placement is in the child's best interests, consideration must also be given to...Congress' belief that, whenever possible, it is in an Indian child's best interests to maintain a relationship with his or her tribe.

[543 A.2d at 932]

See also House Report No. 95-1386, supra, at 11 (recognizing that many "voluntary" consents are not truly voluntary).

Thus, the ICWA specifically prohibits relinquishment of an Indian child for adoption for at least ten days after birth. 25 U.S.C. 1913(a). Moreover, such consents must be executed before a court of competent jurisdiction and a Court taking a voluntary consent to the termination of parental rights must determine that the consequences of the consent "were fully understood by the parent or Indian custodian", including, if necessary, the use of an interpreter to explain the consequences of the consent in the parent's native language. 25 U.S.C. 1913(a). This is to ensure that voluntary relinquishments are truly voluntary.

Moreover, the jurisdictional provisions in 25 U.S.C. 1911(a) and (b) are fully applicable to voluntary proceedings. Thus, only the tribal court, and not the State court, is a "court of competent jurisdiction" for the purposes of taking a consent to the termination of parental rights when the child is a reservation resident or domiciliary or a ward of the court. Holyfield, 490 U.S. at 52, n. 26. In addition, tribes are provided with the right to intervene in voluntary proceedings, 25 U.S.C. 1911(c), and the placement preferences in 25 U.S.C. 1915 apply to voluntary proceedings. The collective intent of these sections was to ensure "that Indian child welfare determinations [including adoptive placements] are not based on 'a white, middle-class standard, which, in many cases, forecloses placement with (an) Indian family.'" Holyfield, supra, 490 U.S. at (1602). 25 U.S.C. 1914.<sup>1</sup>

<sup>1</sup> The description of the provisions of the ICWA included herein is based upon the most widely accepted interpretations of what these provisions mean both in practice and as applied by the courts. It is true that there may be individual cases that have interpreted a given section differently than may be described in this testimony. Because it would be far beyond the scope of this testimony to provide an exhaustive analysis of what the courts have done with every section of the ICWA, I have limited my analysis to the summary form in the text of my testimony. However, should any testimony be submitted which raises questions which the Committee would like to have answered, I would be happy to provide such additional legal analysis as would be desired.

Thus, based upon the compelling testimony that it heard, Congress enacted the ICWA in order to (1) provide for procedural and substantive protection for Indian children and families and (2) recognize and formalize a substantial role for Indian tribes in cases involving involuntary and voluntary child custody proceedings, whether on or off reservation.

III. S. 569 and H.R. 1082

A fair and reasonable approach to refining the ICWA

During the last few years, a very small number of "high profile" voluntary adoption cases have come to the attention of Congress. These cases involved adoptive placements with mostly non-Indian families that were challenged sometime after placement occurred by Indian tribes or natural parents who invoked the protections of the ICWA. These cases resulted in extended court proceedings which caused great distress to all concerned -- the child, adoptive parents, natural nuclear and/or extended family and the Indian tribe. Even though AAIA would emphasize that such cases constitute a very small number of the overall cases decided under ICWA each year, AAIA agrees that it would be desirable to reduce the number of such cases even further if this is possible.

However, it is essential that any effort to address these cases do so in the context of the continued recognition of the essential role of Indian tribes in ICWA proceedings -- not only because of tribal sovereignty issues, but also because it is in the best interests of Indian children. Thus, Congress must continue to resist efforts to respond to these contentious adoption cases by weakening the ability of Indian tribes to invoke the ICWA.

Rather, we urge Congress to embrace the approach incorporated in S. 569 and H.R. 1082. These bills are the result of a year-long process which began in June 1995 with a dialogue between attorneys and representatives from tribes, Indian organizations and adoption attorney organizations. Out of that dialogue, a consensus emerged as to how these troublesome cases might be addressed. At the National Congress of American Indians (NCAI) Mid-Year convention last June, tribal representatives from across the nation considered the consensus bill developed by this working group, as well as other draft bills, including a modification of the consensus bill developed by the Aberdeen Area Tribes at a meeting in Pierre, South Dakota. After two days of intense discussions, NCAI prepared and approved an ICWA amendments bill for introduction in Congress.

This NCAI-bill became the basis for S. 1962, introduced by Senator John McCain and H.R. 3828, introduced by Rep. Don Young in 1996. These bills, which have now become S. 569 and H.R. 1082 in the 105th Congress, would:

- Require notice to Indian tribes in all voluntary proceedings.

- Require that if a Tribe is to intervene in voluntary termination proceedings, it must do so within 30 days of receiving notice in the case of voluntary termination of parental rights and within 90 days of receiving notice in the case of a particular adoptive placement.
- Limit parents' rights to withdraw consent to an adoption to 6 months after relinquishment of the child or 30 days after the filing of an adoption petition, whichever is later; if an adoption is finalized before 6 months, that would also end the period during which consent may be revoked.
- Provide for criminal sanctions for anyone who assists a person to lie about their Indian ancestry for the purposes of applying the ICWA.
- Allow state courts to enter enforceable orders providing for visitation or continued contact between tribes, natural parents, extended family and an adopted child.
- Require attorneys, public and private agencies to inform Indian parents of their rights under ICWA.
- Require that tribes certify that a child is a member or eligible for membership in the tribe when the tribe intervenes in a child custody proceeding.
- Clarify tribal court authority to declare children wards of the tribal court.

The changes to ICWA proposed by S. 569 and H.R. 1082 would improve the voluntary adoption process for all concerned -- Indian children, tribes and families, as well as adoptive parents. This is true for several reasons.

First, providing notice to Indian tribes will address one of the major causes of the difficult legal custody disputes that have arisen in the voluntary adoption context. Because the ICWA does not currently include a specific notice requirement to Indian tribes in the case of voluntary adoptions, Indian tribes frequently do not learn of such adoptions until some time after the initial placement has been made. Particularly in the case of an off-reservation birth to an unwed mother -- a common circumstance in these cases -- there may be a significant delay in such information becoming known within the tribal community. Thus, even where an Indian tribe acts promptly upon learning of the placement, a situation may have developed where the child has already spent a significant amount of time in the adoptive placement before the tribe has intervened.

Providing tribes with prompt notice in all cases will

facilitate a prompt tribal response when the tribe believes that a particular placement would be in the child's best interest. Notice will help to enhance the possibility that Indian children placed for adoption by their natural parents will be expeditiously placed in good homes, while at the same time ensuring that children are not removed from their extended families and tribes in cases where such permanent homes are available within their extended families or tribal communities. Couples that may have been identified as prospective adoptive parents will know before placement (or within a very short time thereafter) whether a member of the child's family or tribe has an interest in adopting the child, thereby lessening the risk that a child will be transferred to a new placement after an extended time in an initial placement. AAIA would respectfully submit that those who would oppose such notice are not really concerned about ensuring good homes for Indian children. Rather they are simply seeking to find available adoptable children for non-Indian adoptive parents. Congress has an obligation to enhance the possibility that Indian children who need placements are placed in good homes as soon as possible; it does not have the obligation to ensure that all persons wanting to adopt are able to get a child without regard to that child's future connection with his or her heritage and natural family. At present, several states have explicitly recognized and successfully implemented a requirement that notice be provided in voluntary proceedings. See, e.g., Wash. Rev. Code Ann. 13.34.245(3), (5); 26.33.090(2); 26.33.110(2); 26.33.240(1) (West Supp. 1989); Minn. Stat. Ann. 257.352 (2), (3); 257.353(2), (3) (West Supp. 1989); Okla. 10 O.S. 1991, section 40.1 (as amended in 1994); Mich. Court Rules 5.980(A). Moreover, in other states, it appears to be standard practice to notify tribes of voluntary proceedings. See, e.g., B.R.T. v. Executive Director of the Social Services Board of North Dakota, 391 N.W.2d 594, 595 (N.D. 1986); In re Adoption of Halloway, 732 P.2d 962, 963 (Utah 1986). Thus, notice to Indian tribes in voluntary proceedings is entirely feasible and desirable.

At the same time, under these bills, if a tribe does not take action within a specified period of time, the tribe will be barred from intervention. Prospective adoptive parents and children will know the time frames that are applicable when the placement is made and will have assurance that the adoption can go forward without later action by the tribe which may disrupt the adoption. The time limits on parental withdrawal of consent serve the same purpose in terms of a parental challenge post-placement. Thus, prospective adoptive parents' fears that placements will be disrupted at some unknown point in the future, which may have a chilling effect upon adoptions, should be alleviated by this bill. The potential for a child to be transferred from an adoptive placement after an extended period of time in that placement should also be minimized.

Likewise, requiring that parents be informed of their rights under ICWA should decrease the number of disrupted placements. Providing natural parents with this information increases the

chances that a parent will fully consider his or her placement options at the very beginning of the process. The combination of notice to the tribe and full information to natural parents will help to ensure that a young, vulnerable Indian parent has the balanced information available which that parent needs to make an informed decision. When only an adoption attorney or agency is involved with a young parent considering adoption, there is a substantial likelihood that extended family options will not be explored. Ensuring that parents have full information from the outset will help to lessen the number of later disputes which arise because the parent was confused and unclear of the possible options that were available to her when she placed the child for adoption.

The possibility of open adoption as an option in all proceedings, another part of these bills, may also facilitate harmonious placements of children and avoid conflict in some cases. State courts do not always have authority currently to recognize open adoptions, even where the parties have reached an agreement.

In addition, the amendments provide more assurance that all parties will "play by the rules". The criminal sanctions will discourage corrupt attorneys and others from subverting the ICWA. There is considerable anecdotal evidence that natural parents are often told by adoption attorneys and agencies that they should not reveal that the child is of Indian heritage in order to avoid the application of the Indian Child Welfare Act. Such deceptions have been the cause of a number of hotly contested cases which occurred because of the initial incorrect determination that the ICWA should not be applied to the child in question.

Similarly, the provisions dealing with tribal certification of membership and tribal court wardships are a measured effort to provide assurances to other parties that tribes are following a specified set of rules as well. The certification requirement is designed to ensure that tribes are following the membership rules which they have established. The wardship section clarifies the applicable jurisdictional framework which governs tribal court wardships.

Thus, although there are other provisions which AAIA would like to see in an ICWA bill ideally -- such as a provision disavowing the "existing Indian family exception" -- AAIA is very supportive of enactment of the bill in its current form because it believes that this is a carefully crafted consensus bill that will improve the application of the ICWA in the voluntary adoption context to the benefit of Indian children, families and tribes, as well as adoptive parents. It believes that the amendments will advance the valid goals of decreasing the number of extended court disputes which will arise under the ICWA and ensuring the best possible permanent placements for Indian children, while continuing to recognize that tribal involvement with Indian children is in their best interest. AAIA urges you to enact this legislation.



ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.:SUPPLEMENTAL TESTIMONY FOR THE RECORD OF THE  
JUNE 18, 1997 JOINT HOUSE-SENATE HEARING ON S. 569 AND H.R. 1082

Chairmen Campbell, Young and members of the Senate Committee on Indian Affairs and House Resources Committee. The Association on American Indian Affairs, Inc. (AAIA), a national non-profit citizens' organization headquartered in South Dakota, previously submitted testimony in regard to S. 569 and H.R. 1082 for the June 18, 1997 hearing record. It would like to submit this supplemental testimony for the record to respond to the legislative proposal offered by Rep. Deborah Pryce (R-Ohio) in her testimony before the Committees on June 18, 1997. Rep. Pryce's approach -- ICWA does not apply unless "at least one parent maintains significant social, cultural, or political ties to the tribe of which either parent is a member" -- is anti-family, destructive of tribal sovereignty, would cause enormous litigation and delay permanent placements, and is probably unconstitutional.

Currently, although a few courts have adopted the so-called "existing Indian family exception", see Matter of Adoption of Baby Boy L, 643 P.2d 168 (Kan. 1982) wherein the test was first recognized, most courts have held that the application of the Indian Child Welfare Act itself is dependent upon the presence of two elements: (1) a state court "child custody proceeding" as that term is defined in 25 U.S.C. 1903(1), and (2) an "Indian child" as that term is defined in 25 U.S.C. 1903(4), as the subject of the proceeding. See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 42 (1989); In re the Custody of S.B.R., 719 P.2d 154, 155-156 (Wash. Ct. App. 1986); Matter of Krefft, 384 N.W.2d 843, 845 (Mich. Ct. App. 1986); Matter of Appeal in Maricopa County, 667 P.2d 228, 231 (Ariz. Ct. App. 1982); A.B.M. v. M.H., 651 P.2d 1170 (Alaska Sup. Ct. 1982), cert. den., sub nom Hunter v. Maxie, 461 U.S. 914 (1983); In the Matter of the Adoption of a Child with Indian Heritage, 111 N.J. 155 (1988). "Indian child" is defined under the ICWA to mean "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. 1903(4).

The Pryce proposal would narrow the coverage of the Act significantly by reclassifying many children currently considered to be Indian as non-Indian for the purposes of the Act. It would exclude from the Act children whose parents do not (in the opinion of a state court or agency) maintain a significant social, cultural or political affiliation with an Indian tribe notwithstanding that they are members. By excluding such children, the Pryce proposal directly undercuts the ICWA in very substantial ways.

A. The Pryce proposal is anti-family.

The ICWA recognized the vital importance of the extended family in Indian society. Yet, the main impact of Rep. Pryce's

proposal is to make a child's relationship with his or her extended family legally irrelevant and readily terminated. Under the arbitrary Pryce test to determine which children are covered by ICWA -- whether a parent has a social, cultural or political affiliation with an Indian tribe at the time of the child custody proceeding -- it does not matter if all of the child's grandparents, aunts, uncles and cousins are actively involved with both the child and the tribe. If the child's parents are not involved at the time of the proceeding, ICWA does not apply to that child. If the ICWA is not applied, the main impact is to deprive the extended family of the right to be considered as preferred placements for the child. For a Congress that has actively sought to promote pro-family policies, it would be particularly indefensible to so discount the role of Indian grandparents and extended family members, particularly in view of the fact that the role of the extended family in Indian society is so critical.

Indeed, the value of maintaining relationships between an Indian child and his or her grandparents or other relatives does not become unimportant by reason of a parent's alienation from his or her tribe. Indian parents who place their children for adoption or become involved with the child welfare system may very well be alienated from their culture. However, this does not mean that continued alienation is in the best interests of their children. The empirical evidence is that maintaining extended family and tribal relationships is in the child's best interests. It is for these reasons, among others, that organizations like the American Psychological Association and National Association of Social Workers opposed Rep. Pryce's proposal in the last Congress.

B. The Pryce proposal would inappropriately condition the application of ICWA upon state judgments of "Indianness", rather than tribal determinations of membership pursuant to their inherent sovereignty.

A primary purpose of the ICWA was to curtail state authority over Indian children in state proceedings because state insensitivity to Indian cultural values had led to massive numbers of these children being placed outside of their homes. In direct contravention of this intent, the Pryce proposal would restore enormous power to state social workers and courts to once again make their own determinations about Indian culture which will be determinative in deciding whether ICWA applies. Even if affiliation were to be viewed as a valid test, there is no reason to believe that state agencies and judges generally will have the experience and sensitivity to evaluate tribal identity. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) which recognized the "vast gulf between tribal traditions and those with which...courts are more intimately familiar."

There is no valid reason to substitute the judgment of a state court judge in regard to a child's "Indianness" for the tribe's

judgment based upon its own membership rules. It is a well settled principle that Indian tribes have the authority to define their membership and that this authority is integral to the survival of tribes and the exercise of their sovereignty. Santa Clara Pueblo v. Martinez, *supra*, 436 U.S. at 72 n.32.

C. The Pryce proposal would not achieve its stated purposes.

1. The adoption process would not be simplified.

The standard for coverage of the ICWA in the Pryce proposal -- maintenance of a "significant social, political or cultural affiliation" with the tribe -- is not defined. What is social, cultural or political affiliation? What evidence proves or disproves such affiliation? What level of affiliation is significant? It is likely that the meaning of every word in this test would be litigated repeatedly and that the Pryce proposal would cause an enormous increase in litigation and not a decrease.

2. State agencies and court would be overwhelmed by implementation of the new standard.

Because Rep. Pryce's proposal would apparently affect the application of ICWA in involuntary foster care and termination of parental rights cases in addition to voluntary adoptions, her proposal would require the reevaluation of thousands of child welfare cases across the country to determine whether a parent of the child maintained significant social, cultural or political ties with the tribe. This will place an enormous burden upon state social services agencies and courts, thereby delaying permanent placements. Indeed, the Attorney Generals of four Western states -- New Mexico, Oregon, Washington and Nevada -- strongly opposed a similar proposal in the last Congress.

3. Rep. Pryce's proposal goes far beyond adoption cases involving children of "limited" Indian ancestry which gave rise to the legislation

a. It will exclude bona fide Indian children

The imposition of a "parental/tribal affiliation test" would exclude many bona fide Indian children and parents from the Act. The "affiliation" test would exclude even full-blooded Indians whose extended family is fully involved in tribal affairs and whose parents may have previously been closely connected with their tribe if, at the time of the proceeding, the child's parents happen to be alienated from their tribe(s) in the view of a state court judge.

b. It applies to involuntary dependency proceedings

Even though the only "problem" cases cited by Rep. Pryce are

voluntary adoption cases, there is every indication that she intends her proposal to apply to involuntary dependency cases as well as adoption cases. Depriving troubled Indian families of the support and assistance of their tribes in the involuntary context would be particularly devastating. There are many examples where troubled alienated individuals have been "saved" when they reunited with their tribe and tribal community through the application of the ICWA. For no apparent reason, Rep. Pryce would prevent the tribe from making these positive interventions in the future by depriving coverage of the Act in an involuntary proceeding where the parent lacks a significant affiliation with the tribe at the time of the proceeding. Moreover, as noted, applying this standard to involuntary proceedings is likely to overwhelm and disrupt existing state systems and a number of State Attorney Generals opposed a similar proposal in the last Congress.

4. It is a fallacy that the Pryce proposal will free up Indian children "languishing" in foster care for adoption

The basic situation in terms of Indian children is not similar to that of other minority children such as has given rise to the Multi-Ethnic Placement Act recently passed by Congress, P.L. 103-382. There are not large numbers of Indian children languishing in foster care because of inadequate numbers of Indian families available to adopt these children. In the "disputed" cases which have been cited by Rep. Pryce, there have (by definition) been family and tribal members eager to adopt these children. Moreover, tribes can normally find placements for their children when given the opportunity. This is what the ICWA is all about -- in essence, it prevents discrimination against Indian people in the placement of their own children.

D. The Pryce proposal is probably unconstitutional.

The Pryce proposal would replace a bright line political test -- membership in an Indian tribe as the linchpin for the coverage of the Act -- with a multi-faceted test that transforms the classification into more of a racial identification test, than a political test! This not only intrudes upon tribal sovereignty, but may be unconstitutional since the legitimacy of Indian-specific legislation rests upon the fact that such legislation is based upon a political classification and not a racial classification. See, e.g., Morton v. Mancari, 417 U.S. 535 (1974).

CONCLUSION

The Senate Committee on Indian Affairs and House Resources Committee should reject the legislative proposal advanced by Rep. Pryce at the June 18 hearing.

Tanana Tribal Council  
HEALTH AND SOCIAL SERVICES  
Box 130  
Tanana, Alaska 99777  
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(907) 366-7195 FAX

Ben Nighthorse Campbell, Chairman  
Senate Select Committee on Indian Affairs  
SR-380 Russell Senate office Building  
Washington D.C. 20510-0605

Dear Senator Campbell:

The Indian Child Welfare Act is regarded by this Tribe as one of the most important pieces of Indian legislation ever enacted and we've watched with some concern as amendments have been proposed. The amendments as currently drafted appear to consider the concerns of non-tribal people while strongly affirming the responsibility of tribal governments to protect the children of the tribe. The amendments seem to us to be well-balanced. What continues to concern us is that in Alaska there is not a universal understanding or agreement about how ICWA applies to Alaska tribes. It would be beneficial to all concerned if language was added that makes it clear that Alaska tribes are the same as all other tribes with regard to ICWA.

Tanana is a small Athabascan Indian tribe located at the confluence of the Yukon and Tanana rivers approximately one hundred and fifty air miles from Fairbanks. Like many remote Alaska Native villages, child welfare in Tanana has always been the responsibility of the Tribal government. Although P.L.280 imposes concurrent jurisdiction in civil issues, the reality is that the State actually lacks the financial resources and infrastructure to provide the most basic services, including police, judicial, and social services, in the many remote Alaska Native communities. The State has never been able to provide even minimal child protective and related family services in Tanana; such services have been provided by the Tribal government. In 1978 the Tribe formalized traditional child protective practices through the creation of a Tribal Court ordinance. A Codification of Children's Ordinances of the Tribe was compiled and formally adopted; ordinances and regulations for the licensure of Tribal foster homes put in place. The Tribe focuses on intervention and prevention. The Tribal social services staff utilizes extended family support systems and Tribal foster care. Tribal foster care has been provided to more than fifty children since 1984 at no cost to the State of Alaska.

ICWA compelled states, including Alaska, to recognize the unique responsibilities that tribal governments have with regard to the well-being of tribal children. As a result, the Tanana Tribal Council and the State of Alaska entered into a State/Tribal ICWA Agreement in 1988. This agreement allows the Tribe and the State of Alaska Division of Family Services to coordinate services and work together on ICWA and family reunification issues. With this agreement, the tribal social services office has been able to share information, successfully intervene, and create family reunification plans to prevent the breakup of Indian families. Tribal social workers have even provided emergency child protection services for non-tribal children who are living in this community when State social workers have been too busy to travel to the village. Unfortunately, such agreements between tribes and the State are rare in Alaska, and not universally understood or even known about by all State social workers.

The issue is further clouded by the adversarial stance taken by factions within the State government with regard to Indian tribes in Alaska; some social workers are unsure as to whether

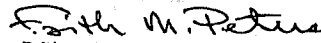
or not these jurisdictional disputes also apply to ICWA. In the eyes of the Tribe, the issues are not the same. The jurisdiction exercised by the tribe to protect our children is based on the codification of children's ordinances of the Tribe, which defines ICWA jurisdiction in terms of tribal citizenship. Members of this tribe sometimes leave the village and move to urban areas for employment or education or other reasons. Often this move is temporary or seasonal, with families returning to live in the village while maintaining close ties with the village. Tribal citizenship is no more lost when a tribal member moves to Fairbanks, than US citizenship is lost if a US citizen moves temporarily to France. Nor is the tribal government relieved of the responsibility for the well-being of that tribal member, particularly if the tribal member is a child. If ICWA is interpreted by State agencies in Alaska (as it has been from time to time) to allow tribes jurisdiction only when a child is actually domiciled in a village, the ability of the tribe to protect its children is impacted. These instances create a diversion in terms of financial resources and staff focus as tribes are forced to utilize the legal system to reaffirm the tribal responsibility for Indian children under ICWA.

We are very concerned that the issue of protecting Alaska Native children will be lost or put on hold until other Indian jurisdictional issues are resolved in Alaska. This need not happen if language is included in the amendments to ICWA that make it clear that Alaska tribes are the same as any other tribe in the matter of Indian Child Welfare.

Tribal participation is vital to child protection in Alaska, and language that will allow State and the tribes to focus their energies and scarce resources on the children rather than on litigation and dissent is necessary. Please consider this in light of the amendment process.

Sincerely yours,

  
Carla Klogster Bonney, Director  
Tribal Health and Social Services Office

  
Faith M. Peters, President  
Tanana Tribal Council

## Amendment

The Indian Child Welfare Act is hereby amended by adding the following new section at the end thereof:

"Notwithstanding any other provision of law, the provisions of 25 U.S.C. 1911(b) shall apply to any Alaska Native village to the same extent, and in the same manner, as that provision applies to any other Indian Tribe."

## Report Language

This amendment is intended to clarify the law with respect to the application of the Indian Child Welfare Act in Alaska. It specifies that section 1911(b), which provides for what is known as "referral jurisdiction," applies currently to all Alaska Native villages in the same manner as it does to all other Indian tribes. Section 1911(b) establishes a form of concurrent jurisdiction for tribes and states, a jurisdiction that is available under the Act for all federally recognized tribes including "Alaska Native villages," as noted in section 1903(8) of the Act. The amendment makes clear that application of section 1911(b) to Alaska Native villages does not require that the villages invoke the reassumption provision of section 1918 of the Act - which applies to tribes seeking to reassume exclusive jurisdiction under 1911(a). The amendment is in conformity with the 1991 ruling of the United States Court of Appeals for the Ninth Circuit in the case of *Native Village v. Alaska*, 944 F.2d 548 (9th Cir. 1991).



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 29, 1997

Honorable Ben Nighthorse Campbell  
Chairman  
Committee on Indian Affairs  
U.S. Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for the opportunity to provide the views of the Department of Justice on S. 569, and its companion bill H.R. 1082, which would amend the Indian Child Welfare Act of 1978.

As the United States has rarely been party to litigation under the statute, the Department of Justice's experience with the Indian Child Welfare Act, 25 U.S.C. 1901 *et seq.* ("ICWA") is limited. However, we have reviewed the bill in light of our experience with civil and criminal enforcement, the United States' commitment to supporting tribal self-government, and basic principles of statutory construction. We hope the following comments will be helpful to the Committee in considering the bill.

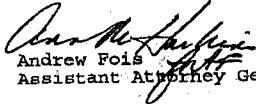
The Department supports S. 569, H.R. 1082, and the important purposes of ICWA to promote the best interests of Indian children and the stability and security of Indian tribes and families. We support the companion bills because they would clarify ICWA's application to voluntary proceedings, establish some deadlines to provide certainty and reduce delay in custody proceedings, and strengthen federal enforcement tools to ensure compliance with the statute in the first instance. Also, the provisions for adequate and timely notice to Indian tribes and Indian parents in S. 569 and H.R. 1082 would increase the likelihood of informed decision-making by parties to the adoption or foster placement.

The provisions in the proposed legislation amend ICWA in a manner that is both respectful of tribal self-government and conducive to certainty and timeliness in voluntary adoptions of Indian children. We understand that S. 569, and its companion bill H.R. 1082, reflect a carefully crafted agreement between Indian tribes and adoption attorneys designed to make Indian child adoption and custody proceedings more fair, swift, and certain.

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We appreciate the efforts that you, Chairman Young, and your respective Committees have made to propose amendments to strengthen ICWA. If we may be of additional assistance, please do not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

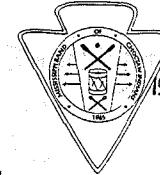
Sincerely,

  
Andrew Foia  
Assistant Attorney General

cc: Senator Daniel Inouye  
Vice Chairman

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MISSISSIPPI BAND OF CHOCTAW INDIANS



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July 7, 1997

Honorable Ben Nighthorse Campbell  
Chairman  
Senate Committee on Indian Affairs  
Washington, DC 20510-6450


Dear Senator Campbell:

I am writing to thank you for your kind invitation to testify before the Senate Committee on Indian Affairs on S.569, the amendments to the Indian Child Welfare Act. Unfortunately, tribal matters prohibited my travel to Washington at that time.

However, had I testified, I would have reiterated, in the strongest possible terms, my support for S.569. Last year, Indian Country, as a whole, was consumed by the emotionally charged and terribly difficult matter of Indian child adoptions. My own tribe, in the *Holyfield* case, was forced to confront the issue and, having secured a U.S. Supreme Court ruling granting jurisdiction to the tribe, made what we then — and continue to do so — believed to be in the best interest of the children who are members of our tribe. It was precisely because of this experience that I believe the terms of S.569 will, to the degree that we can, best protect the futures of Indian children, their birth and adoptive parents, and their tribes.

I am grateful for your support of this legislation and for your leadership in moving it forward for consideration in this Congress.

Sincerely,

  
Phillip Martin  
Tribal Chief

PM:tim

c: Senator Thad Cochran  
Senator Trent Lott

"CHOCTAW SELF-DETERMINATION"

FRANK H. MURKOWSKI  
ALASKA  
COMMITTEES:  
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August 6, 1997

Governor Tony Knowles  
State of Alaska  
P.O. Box 110001  
Juneau, AK 99811

Dear Governor Knowles:

On July 30 the Senate Indian Affairs committee marked up and passed out of committee S. 569, a bill to amend the Indian Child Welfare Act (ICWA) of 1978. I voted for passage of the bill out of committee. I did not offer at this time the enclosed amendment language to the bill, which some Alaskan attorneys brought to my attention. As you know, upon my request for the State's position last year, John Katz sent me a letter in which he wrote that the State "did not oppose" a substantially similar amendment. Martha Stewart of your office today informed my staff that the State has now taken a slightly more affirmative position, namely, if I would like to offer the language, then the State would support my efforts. As usual, Martha gave us a prompt response, and I and my staff appreciate her conscientious work.

Before I can consider whether to offer the enclosed language as an amendment to the bill when the full Senate takes it up for consideration, I need to know the State's position on the language. The language would effectively nullify three Alaska Supreme Court cases on the issue of jurisdiction of Indian Child Welfare Act cases in Alaska. As the legislation may have great impact on Alaska Native children and the people, mostly Alaskans, that are most interested in their well-being, I do not think it is appropriate for me to offer the amendment without having an informed position from the State.

I would like to know if you want me to offer the enclosed language. I would of course also like to know if you support S.569, with or without this proposed language. In addition, I would like an explanation of the procedure for adoption and child custody proceedings of Alaska Native children in Alaska, and how they are affected by the Indian Child Welfare Act of 1978. Can the actions of social service workers determine the court of jurisdiction over these cases? Does the answer to this question depend on whether the child or social worker is in a rural or urban area? What criteria causes an Alaska Native child to be covered by this act? How does the split in the decisions of the Alaska Supreme Court and federal courts affect the application of ICWA in Alaska? Does this judicial split cause hardships for some adoption and child custody cases? Would the addition of the enclosed language to the bill alleviate the hardships, if they do exist? Has the State taken any actions, such as cooperative agreements with Native villages and their councils, that have facilitated the application of ICWA in Alaska, in ways that may not be apparent from simply reading the Act? Lastly, please feel free to provide me with additional information that will help me to evaluate the potential impact of the proposed language on S.569.

In sum, I would like to have a substantive position on the amendment to ICWA. It is in the best interest of Alaska Native children and the State of Alaska to have this dialogue before the Senate and Congress acts on this important legislation.

Thank you for your immediate attention to this matter.

Sincerely,

  
Frank H. Murkowski  
United States Senator

cc: The Honorable Ben Nighthorse Campbell  
The Honorable Daniel Inouye



## Amendment

The Indian Child Welfare Act is hereby amended by adding the following new section at the end thereof:

"Notwithstanding any other provision of law, the provisions of 25 U.S.C. 1911(b) shall apply to any tribe which became subject to state jurisdiction pursuant to the Act of August 15, 1953, to the same extent, and in the same manner, as that provision applies to any other Indian Tribe."

## Report Language

This amendment is intended to clarify the law with respect to the application of the Indian Child Welfare Act to tribes in states covered by Public Law 83-280. It specifies that section 1911(b), which provides for what is known as "referral jurisdiction," applies to all such tribes in the same manner as it does to Indian tribes in other states. Section 1911(b) establishes a form of concurrent jurisdiction for tribes and states, a jurisdiction that is available under the Act for all federally recognized tribes. The amendment makes clear that application of section 1911(b)'s referral jurisdiction does not require that a "P.L. 280" tribe first invoke the reassumption provision of section 1918 (which applies to tribes seeking to reassume exclusive jurisdiction under 1911(a)). The amendment is in conformity with the rulings of the courts of appeals in the Eighth and Ninth Circuits, see, *Walker v. Rushing*, 898 F.2d 672 (8th Cir. 1990); *Village v. State*, 944 F.2d 548 (9th Cir. 1991).

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July 2, 1997

Chairman Ben Nighthorse Campbell  
Senate Indian Affairs Committee  
838 Senate Hart Office Building  
Washington, DC 20510

Dear Chairman Campbell:

We are pleased to provide this statement for the record of the Joint Hearing with the House Committee on Resources on H.R. 1082 and S. 569, bills which would amend the Indian Child Welfare Act of 1978.

First of all, we are concerned that, apart from Rep. Pryce, the public witnesses invited to appear before you at the Joint Hearing were all in favor of the proposed legislation. In fact, the National Council For Adoption went so far as to request the opportunity to offer testimony both verbally and in writing but was refused. With all due respect, we do not believe that a truly democratic process was used and that therefore the legislative history for these bills is less useful than it should have been. In effect, one side of the debate was denied the forum of the Joint Hearing to present its views. It is one thing to differ and quite another to deny others the opportunity to present their views. Not just the public but the members of both Committees have the right to hear all sides on the important and complex issues which are contained in this legislation. We also wish to point out that this same approach was taken by the Senate in its hearing last year: apart from Members of Congress, the only witnesses the Committee allowed to testify were those that supported the legislation.

Secondly, nothing that appears in this statement for the record can have the potential educational impact of oral testimony, and the give and take that usually accompanies such testimony. By that, I mean that the representatives of the media who were present at the hearing were, with the exception of Rep. Pryce's testimony and comments, not allowed to judge for themselves if the other side of the debate had anything worthwhile to offer. The general public will not be reading the printed record of the Joint Hearing, when it is published.

The reason we wish to make a point about the exclusion of witnesses who oppose these bills is that in the recent hearing it was claimed that the adoption community and adoption attorneys endorse H.R. 1082 and S. 569. The truth is that some of those in the

adoption community and some adoption attorneys endorse these bills. Merely because an organization's Board has endorsed legislation does not mean that every member of that organization has endorsed it. Indeed, it is our contention that the minority of attorneys who are concerned with adoption matters specifically and family law generally endorse these bills. The majority of attorneys not only disapprove of these bills, they would prefer that ICWA itself be repealed. As for adoption agencies, this very diverse group of organizations does not take a common stand on any issue. We do state that the majority of private, not-for-profit agencies are opposed to these two bills. The Congress should be clear, therefore, that a minority of the adoption community supports these bills and the majority opposes these bills.

Finally, here are some brief comments outlining some of our concerns with the legislation.

First, we wish to associate ourselves with two of the comments made by Rep. Pryce. She said that in her opinion, as someone who had been a sitting judge, that the legislation was very complicated and complex. She also said that she believed the legislation, if it becomes law, will lead to a great deal of litigation. Specifically, she said the legislation will make a lot of business for a lot of lawyers, and make a lot of lawyers rich.

Second, we wish to add that two of the major concerns we had with last year's legislation, as it passed the Senate, are still present. The legislation would put into federal law, for the first time, a court-enforceable right of visitation for the birth parents, the extended family and the tribe. The legislation would also codify the expansion of ICWA to cover all voluntary adoptions.

In terms of the court-enforced visitation provision, as the hearings last year and this make clear, the intention is to encourage more bargaining between tribes and birth parents and prospective adoptive parents and their attorneys. This bargaining is certain to lead to more delays, as tribes resist the clear mandates of state courts and make the child the pawn. Indeed, we heard last year and this from the attorney for the Rost twins that such a provision would, in her view, have allowed her to construct a settlement of her case. And the reason given for the court-enforced visitation? The tribes do not trust the Rost family. We ask: what sort of environment is going to be established for those children, or any child, if the atmosphere is so poisoned by distrust that one of the parties insists on a court-ordered enforcement of visitation? Doesn't this sound hauntingly like the kind of child custody battles, the unfortunate and destructive tugs-of-war that take place between parents in divorce cases? Why import into federal law the litigious atmosphere of divorce child custody battles?

The fact is that if and when the possibility of court-enforced visitation is made possible, tribes – and at times, birth parents – will routinely insist on these arrangements.

It is important to clarify that these agreements, which change the very nature of adoption, are many steps beyond what we understand to be "open adoption." The various forms of "open adoption," which range from one time face-to-face meetings to agreements for ongoing communication through a third party, sometimes with exchange of identifying information, are quite different from the kind of ongoing access that would be codified in federal law under these bills.

Portraying our opposition to this "co-parenting" provision as somehow a reflection of views against "open adoption" – as has been done by some supporters of the legislation – is a distortion.

The bill would require notice to the tribe or tribes of all voluntary adoptions involving a child who may qualify for tribal membership. The fact that this is not presently a requirement reflects the intent of Congress when the law was originally enacted: voluntary adoptions were not ICWA's concern. After all, by what stretch of the imagination could an individual, say a pregnant woman who has no Native American blood quantum or other connection of any kind to any tribe, somehow come under the sway of a tribal court simply because the male who impregnated her had some small blood quantum of Native American heritage? Indeed, the very concept that a U.S. citizen, whether Native American or not, living on a reservation or not, could somehow be forced to submit her plan for her child's adoption to a tribal court, as if the tribe somehow "owned" her child, is repugnant to most U.S. citizens.

At the time ICWA passed, the focus was involuntary placements of Indian children – children about whom there was no debate as to whether they were Indian – who lived on reservations and who were involuntarily removed from their Indian families. The kind of case that ICWA was meant to address was recounted last year in the statement by Russell D. Mason, Sr., Chairman, Three Affiliated Tribes. On page 2 of his testimony, he talked about "...non-Indian social workers [who] arrived in a station wagon..." to take away an Indian grandmother's four grandchildren. Later, just before ICWA passed "...the non-Indian social workers took her newborn son right from the hospital."

The injustice of the case described by Mr. Mason, however often it may have happened, is what led the Congress to pass ICWA nearly 20 years ago. Now, the injustice has been flipped 180 degrees.

Now, in the name of tribal sovereignty, a woman who is non-Indian and who wants to voluntarily place her child for adoption would have to give the tribe or tribes notice – even if the father of the baby approved of her adoption plan. Where once, there may have been non-Indian courts ruling unjustly and involuntarily separating children from their parents, now it is Indian courts which wish to have the power to intervene in the lives of non-Indian women.

Make no mistake about it. When Sen. Inouye talks about an adoption of a child from China taking place according to the laws of China, that certainly makes sense because both of the biological parents of the child reside in China and are citizens of China. No such parallel can be drawn in many cases that we have seen in recent years. In particular, when the pregnant woman is not a member of a tribe and is in no way a "citizen" of that "government", how can it be argued that the United States should hand over her child's fate – and in many instances, her own peace of mind – to another "government."

Imagine what the response would be if someone were to suggest that fully separate and sovereign governments that border the United States, such as Canada or Mexico, were to claim that any child sired by one of their citizens could only be adopted if Canada or Mexico's courts agreed.

In last year's hearing before the Senate Committee on Indian Affairs, the scope of the problem was laid out in the testimony of Jack Trope, speaking on behalf of the Association on American Indian Affairs. On page 15 of his written statement, he put the Indian population at 2 million. Sen. Campbell said that 15 million claimed Indian ancestry. That means, taken together, that 17 million U.S. citizens are officially recognized or claim Indian ancestry. Many others may actually have Indian ancestry they are unaware of.

At least those 17 million need to be taken into consideration when voluntary adoptions are contemplated. We estimate that the total pool of potential people covered under the expanded sway of ICWA is 25 million, or about 10 percent of the population. At the very least, this means that notice will have to be given to the tribes in perhaps 10 percent of the voluntary, non-relative adoptions each year. That is at least 3,000 and may be 5,000 cases. And, to be safe, if there is any doubt about the ancestry of one of the birth parents, notice may be given when neither has any Indian blood quantum. A huge number of adoptions would lose their confidentiality through this transmission of information to the tribes. This is a sure prescription for massive, expensive growth of the BIA and tribal bureaucracies – growth that will entail new delays and new budget outlays.

A major issue was made in the hearing about the concerns raised by those organizations which describe themselves as "pro-life," and who objected to last year's proposal on the grounds that it would increase the likelihood that women would choose abortion. The thinking was that, faced with the choice of placing one's baby with the family (or attorney, or agency) of their choice or turning the case over to a tribal court, with the possibility that the child might be adopted by someone the mother does not approve, many women will choose to abort.

The argument made in the hearing this year, echoing statements made by Committee staff, was that "Indian women do not abort." So far as it goes, that comment may be pertinent, but it does not speak to the issue of what non-Indian women who are impregnated by Indian men will do. If one can estimate that at least some significant

portion of the pregnancies involve non-Indian women, and certainly the data suggest that this is so, then what of the abortion decisions of those women? Those in the pro-life organizations who question the impact of ICWA on abortion have a very valid point, in our view, especially as regards non-Indian women.

There are many other aspects of the legislation that one could comment on, but let us conclude with just one: the impact of the delays built into the proposed legislation. The legislation gives tribes a specific deadline to meet – a deadline that the witness for the Navaho Nation, Thomas E. Atcity, favoring the legislation said, in this year's hearings, that they felt they would be unable to meet. He asked for 90 days, not 30. At a time when the Congress and the Administration is, in other discussions, talking about moving quickly to assure permanence to children, how is 90 days in foster care a step forward, even if all the other objections we and others have to this legislation were met?

Rather than pass this legislation, which we strongly oppose, we suggest that the Congress enact H.R. 1957, sponsored by Rep. Tiahrt and with Rep. Pryce as co-sponsor. We have not yet had the opportunity to review legislation which Rep. Pryce told the Joint Hearing she planned to introduce, so we cannot state whether we will endorse it or not.

Thank you for considering our views. The organizations and individuals whose names appear below join in opposing H.R. 1082 and S. 569.

Sincerely,

AARON BRITVAN, CO-CHAIR, ADOPTION COMMITTEE OF THE NEW YORK  
STATE BAR ASSOCIATION\*  
CHRISTIAN COALITION  
HEAR MY VOICE, PROTECTING OUR NATION'S CHILDREN  
INTERNATIONAL CONCERNS FOR CHILDREN  
kidsHelp! FOUNDATION  
NATIONAL COALITION TO END RACISM IN AMERICA'S CHILD CARE  
SYSTEM  
NATIONAL COUNCIL FOR ADOPTION  
RITA SIMON, AMERICAN UNIVERSITY\*

\* individual affiliations are for identification purposes only and do not necessarily represent endorsement by the organizations or institutions with which they are affiliated.

# The Alan Guttmacher Institute

New York and Washington



A Not-for-Profit Corporation  
for Reproductive Health  
Research, Policy Analysis  
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Member of Executive Committee  
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April 15, 1997

The Honorable Don Young  
Committee on Resources  
House of Representatives  
Washington, DC 20515

Dear Chairman Young:

The Alan Guttmacher Institute (AGI) conducts periodic surveys of medical providers of abortion services nationwide and these surveys are acknowledged in the Statistical Abstracts of the United States as producing the most complete count of abortions performed throughout the country. These surveys complement the abortion data collection efforts of the Centers for Disease Control and Prevention (CDC) which depend primarily on reports from the 45 states that compile such information. These reports vary in their detail and completeness, but they often contain information—such as data on race and ethnicity—not routinely collected by AGI. We do have a file of such reports, which we made available to Ben Hirsch who came to us with questions similar to those posed in your letter.

We have read the proposed legislation carefully and cannot imagine how the proposed amendments to the Indian Child Welfare Act (ICWA), or the 1978 legislation, could in any way have an impact on the abortion rate of the Indian population. It would be extremely difficult and time-consuming to do the kind of statistical analysis which the Committee desires, and, in our judgment, such an analysis would not likely prove reliable in terms of the impact of the 1978 ICWA.

One factor is that mentioned above, namely, that abortion data by ethnicity are collected at the state level, with five states (Alaska, California, Iowa, New Hampshire and Oklahoma) not collecting abortion data at all. Another is that the data, when available, may be incomplete and insufficient to differentiate between Native Americans in the general population and those living on tribal lands. It should also be kept in mind that there may be

fluctuations in rates of abortion from year to year as there are for many other vital statistics.

Finally, the availability of abortion services in the years following the initial passage of the 1976 Hyde Amendment prohibiting the use of public funds to pay for abortion (but enjoined by the courts until 1980) would have fluctuated during the period and probably affected the abortion rate. Of course, to this day it serves to curtail the abortion rate of women who are dependent for their medical care on Indian health facilities and, to a lesser degree, of those Native American women in the general population who are otherwise eligible for Medicaid.

For all the reasons above, we regret that we are unable to meet your request as we do not feel that we could defend our estimates with any degree of confidence. Perhaps the CDC might come to a different conclusion.

Sincerely,

Jeannie I. Rosoff  
President



AMERICAN  
PSYCHOLOGICAL  
ASSOCIATION

May 8, 1997

The Honorable John McCain  
United States Senate  
241 Russell Senate Office Building  
Washington, D.C. 20510

Dear Senator McCain:

On behalf of the 151,000 members and affiliates of the American Psychological Association (APA), I am writing to express our support for the legislation that you have introduced with your colleagues, Senators Campbell, Domenici, and Dorgan, to amend the Indian Child Welfare Act of 1978 (ICWA), S. 569.

As psychologists, we understand the need for children to grow and develop in loving homes and supportive communities. Among Indian people, the history of extended child-rearing responsibilities among many members of the community provides a natural means of safeguarding the well-being of children. Unfortunately, federal government policies prior to the enactment of ICWA in 1978 undermined traditional child rearing practices of Indian people. We applaud your legislation for reinforcing the original intent of the ICWA -- to protect Indian children and families and formalize a substantial role for Indian tribes in cases involving child custody proceedings -- while ensuring fairness and swift action in custody and adoption cases involving Indian children.

Prior to passage of the ICWA, Indian children were twelve to eighteen times more likely than non-Indian children to be placed in out-of-home care, with 85 percent of those children placed in non-Indian homes. Passage of the original ICWA in 1978 represented a milestone in the federal government's recognition that policies must be enacted to protect and preserve the Indian family and its culture. Since that time, many Indian tribes have developed child welfare programs that draw upon traditional practices and natural helping mechanisms. These systems will be enhanced by policies that strengthen tribal authority over Indian child welfare programs.

Many of the controversial cases surrounding the adoption of Indian children appear to have developed as a result of poor or non-existent enforcement of ICWA provisions. Provisions of your legislation, including criminal sanctions to deter fraudulent efforts to hide a child's Indian heritage, early notification to an Indian tribe by a party seeking to place an Indian child in an adoptive situation, and court certification that the attorney or adoption agency facilitating the adoption has informed the Indian child's birth parents of their placement options and other provisions of ICWA, offer substantial improvements to enforce the letter and spirit of ICWA.

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The APA supports this legislation without revisions or weakening amendments. Should you require any additional information or assistance in planning hearings regarding this bill, please do not hesitate to contact me.

Sincerely,

Henry Tomes, Ph.D.  
Executive Director,  
Public Interest Directorate

cc: Senate Indian Affairs Committee

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June 18, 1997

The Honorable Ben Nighthorse Campbell  
Chairman, Senate Committee on Indian Affairs  
U. S. Senate  
Washington, DC 20510

Dear Senator Campbell:

I am writing to you and all the members of the Senate Committee on Indian Affairs because of the keen feelings drawn from experience in regard to the adoption of Indian children. I realize that few Americans have any idea of how the various Indian tribes fit into the organization of society in the United States. The fact that they are tribal has a decided influence on their life and attitude toward adoption. While many members of Congress seem to be of the opinion that a couple of any culture should have the right to adopt children of any other culture, the facts of life do not support such thought.

The letter written by Douglas Johnson, Legislative Director of the National Right to Life Committee, on August 1, 1996 is a case in point. Quoting the National Council for Adoption, he writes about S. 1962, the number of the bill introduced in the 104th Congress,

"If S. 1962 becomes law, it would be the end of voluntary adoption of children with any hint of Indian ancestry. No prudent agency or attorney is going to expose themselves to the risk of criminal prosecution under the bill because one or more of the over 500 tribes may consider a child to be Indian for the purpose of the ICWA - each tribe having its own unpublished and ever-changing definition of membership and secret membership rolls."

The last reference in the quotation above about "unpublished and ever-changing definition of membership and secret membership rolls" is an exaggeration. Requirements of membership vary from tribe to tribe, but only tribes can determine who is a member of that tribe. Tribes are governments who have signed solemn treaties with another government, the United States of America. Pretending that tribes are make believe structures that change from day to day is part of the reason Indian tribes are not given the courtesy that they deserve. Secret membership rolls only adds to the insult that tribal governments have to endure and in this case in regard to their children who are cherished and loved by them.

We should look at the American Indian Tribes and the Indian Child Welfare Act Amendment. We call groups of Indians Tribes, but we could as easily and correctly speak of them as Nations, Pueblos, Communities and Governments. Whatever word we chose can easily fit our understanding of the unity that members of tribes sought. They had a unity which exceeds by far anything that we have in our communities today. From the Indian's viewpoint the term tribe is not a term with barbarous meaning. Because they did not have much in the way of material possessions, they looked to the strength of their unity as a great sustaining power for them. They were a small group of people surrounded by many hostile neighbors. We must remember that while we use the term "American Indian" for the more than five hundred tribes in the U.S.A. today, they did not look upon themselves and their neighbors as a unified organization of nations.

Today many persons who are not Indian tend to look down on the term "tribe". "Tribe" carries the suggestion of a few members, organized as a community to care for its own. That phrase "a community to care for its own" is a good phrase. Often, we do not think of a "tribe" in such terms, but fundamentally that is what they are. The fact that they were nations of several hundred did not detract from their purpose of unification. Before the founding of the United States of America as a nation, western European nations entered into treaties with Tribes of American Indians. After the United States was established, it signed treaties with Tribes because it recognized those Tribes as sovereign nations fully capable of signing terms of agreement with any other nation. Tribes interacted with all national communities on an international scale.

In fact in the Constitution of the United States of America in Article Six we read: "The Constitution, and the laws of the United States which are made in pursuance thereof; and all the Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and every Judge of every State shall be bound thereby, any Thing in the Constitution or the Laws of the State to the Contrary notwithstanding." This nation recognizes that its treaties with the Tribes are THE SUPREME LAW OF THE LAND. This nation signed solemn treaties with the Tribes. We are bound to recognize what our Fathers have signed. We need to understand the nature of "Tribes" if we are to appreciate that to which we have agreed.

Because we are so large a nation, with almost 250,000,000 members, we do not realize what a tribe is. A tribe in contrast to the United States is a gathering of a few hundred people into a government that supported itself while surrounded by so many other governments. To put power on the very first level of support they had the extended family. Such a relationship could be counted in many ways, but that of the Sioux is a good example. It is a family structure in which all the brothers of the birth-father are called



FATHER, and all the sisters of the birth-mother are called MOTHER. There was no other addition to this title. A mother and all her sisters were called MOTHER, and a father and all his brothers were called FATHER. The term "cousin" was not used in the first generation. What is commonly called cousin in modern culture were referred to as brother and sister. So a child had many more brothers and sisters than is common in our families today.

Sisters of the father were called Aunt, and brothers of the mother were called Uncle. The child grew up with a group of mothers and a group of fathers. In fact because of this the child never faced the possibility of becoming an orphan. There were always Fathers and Mothers to care for him or her. That family pattern comes down to my time. I recall as a teacher when a child would seek to go on a shopping excursion with his mother and get an excuse to be absent from his teacher and then would go with the Aunt. Later when the teacher realized that he had gone with the person he or she would call Aunt, she would accuse the child of lying to her. He was not lying, he was being true to his culture. The fact that the teacher used a different scheme of naming relatives than the Indian boy did not seem to matter. But it gave the Indian boy the appearance of being untruthful. Grant that the child was intelligent enough to recognize that it would be simpler to refer to her as "Mother" rather than "Aunt" as the teacher called her, it really was not a case of lying.

For the Indian child the term "Mother" was the title of affection that he used to describe the sisters of his birth-mother. He used it honestly. But for the most part the teachers of the Indian child did not take enough time to learn the terms for his closest relatives. If she had heard of this culture, she would probably refer to it as some antiquated idea, but it was not antiquate. It was real. It right at the heart of his relationships.

There have been statements made that most Indian mothers would seek abortions if this bill S. 545 becomes the law of the land. Such talk is utter nonsense. It indicates how those who support such an idea do not understand S. 545. On the reservations the extended family still exist even though we are almost at the end of this millennium. Savage attacks on the naming of the closest members of a person's family is one of that last things we need. It is uncivilized for any of us to be so conceited that we think our way of naming family member is the ONLY way that exists. If we do not understand the diversity of cultures to appreciate the way of the Indian then it is better for us to be quiet until we do have some grasp of the tribal way of life.

If we would only pause and think about it, we would see that this naming of relatives is no different than that of the Jews in the time of Christ. Often from the various references to persons in scripture we recognize that somehow it does not work out. Of

course not, if we name relatives as we do in the late twentieth century when they named relatives as Jews did at the start of the Christian period. One has to respect the rights of cultures to name their relatives.

To give this respect to individual Indians, one has to have a long association with Tribes or else have a deep understanding of them that will allow you to realize that they have different values than you have and it is not your to force values on them.

To take a case from today's society, I know of an Indian mother who had her child taken from her by the state because she is an alcoholic person. She recognized that she would abandon the child, but she did not want to have the child removed from the Tribe or the extended family. She urged her cousin, as modern society names relatives, to apply for the care of her child which in the Indian was also her "cousin's" child. The needs of the tribe were fulfilled. They did not lose a child. The state probably did not realize it, but it used modern terminology and named one of the child's mothers as its mother in the language of today. Actually the birth-mother did not have a violent change in her relationship to the child. Cultures are so varied, yet when we do not see what they contain, they can totally escape our understanding.

When the Indian Child Welfare Act was signed into law in 1978, three out of four children who were placed for adoption were adopted into non-Indian families. The parents were good, honest people. In their culture they were beyond any complaint. However, if they had adopted a full blood child or a child who had the appearance of an Indian, when this child got to the Junior High level of his or her education, he became curious about himself. What did it mean to be an Indian? Who am I? What were my true parents like? These questions became so disturbing that often his or her grades would begin to fall, he or she would begin to drink, sometimes there would be an absence from home for days at a time. The adopted child would be told not to worry about such thing that he or she was loved by the adoptive parents. But the child would continue to worry. That was natural.

Sometimes because of the drinking, crimes were committed and the adopted child. As these instances increased, the adoptive parents sometimes became impatient with the child. When the adoptive parents stayed faithful to the child, it was at a great price. Somehow they knew that more was expected of them than they had provided. But they were confused, since they had so little to give the child in way of information about Indian ancestry. In the sense of the Greeks, it was a true tragedy. Neither was to blame. The Indian child wanted to know. The adoptive parents had no information to give.

As a priest I have advised non-Indian prospective parents to

forgo their desire to adopt Indian children because I could see this very problem lying ahead as the child grew older. It is not fair to the child to place him or her in a position in which there can be no answer to the questions the child would ask as it grew older. The child would be haunted by wanting to know. The prospective parents through no fault of their would have no answers. Tragedy awaited all family members

Tragedy because culture has the color of water. Whatever it reflects is its color at that moment. For each of us as we are born into a culture, that culture from the start of our lives gives meaning to all we do. We do not realize that there other cultures different from ours. We do not realize that other people from other cultures have different approaches to the basic characteristics of life. We are distinguished by our cultures, and often we tend to believe that our culture is right and all the other people are wrong. We must work hard and study deeply to come to an understanding of how deeply we individually are affected by the culture of our lives. As a matter of fact, Anthropology which is the study of cultures, began as a formal course of study only a little more than 150 years ago. It is younger than we are as a nation.

We speak of savages and barbarians, not because we know people to be such creatures, but because we know that somehow they act differently than we do. They have a different approach to life. They have a scheme of life that does not fit into our way of living. Sometimes we can recognize that people of other cultures have some basic sense of the same values that we have. Allow me to recall a story that has been handed down for generations of a pioneering family and its encounter with Indians. One evening these settlers notice a small group of Indians approach. They were terrified, but decided they would be friendly. So with gestures since neither spoke the others tongue, they had they sit down and fed them. When they finished eating, the Indians smiled and left. The family was relieved to have come so close to the Indians and to still be alive. Several days later, however, they saw the Indians return. This time they brought two deer that they had killed. These they left with the settler family. They were grateful and they showed it. The white settlers did not know that generosity was the prime characteristic of this tribe, but they knew that the deer were in exchange for the meal they had received.

The non-Indian adoptive parents are much like the settlers in this true account. They had no idea of how a tribe might list the possible characteristics of its life. That "generosity" should be at the very top of the list would amaze them, but it shows how close we are to other cultures when like them we do not list "generosity" as the top quality of our lives. This is something that most adoptive parents would not understand about the American Indian. They could not pass this information on to their "Indian Child.

Those who somehow see the passage of this Act as a certainty of abortions by Indian women do not have the knowledge that we need to associate with Indian people. As culture is the color of water, they assume that all cultures are the same. They should read the psychologist Eric Ericksons' account of life among the Oglala Sioux of Pine Ridge, S.D. He speaks of the child being lovingly carried until birth by his mother who recognizes in the child that another member of the tribe is to be born. She awaits his coming with love. (How tragic that so many mothers can not have that experience, but have to turn to abortion to be rid of the child.) How tragic that many who do not understand the cultures of Indians, are not able to distinguish the sentiments of expectant Indian mothers from those of the dominant culture of this country.

There is an Indian term that is translated into English as "Precious Child" and is used frequently in regard to children. Children are precious. When we look at the family structure of the Indian and see that whole generation of cousins became for them brothers and sisters and the whole evil that they see in abortion, we can only recognize the high level of love they bestowed on children. Modern America with its notions of abortion do not fit into the Indians view of life. American women may reluctantly accept abortion. Indian women have no place for it in their scheme of life. Even the current law fits into the Indian's view by allowing one, whom we call cousin but for them is a brother or sister and to the child a mother and father, to adopt that child and simply allow a transfer of care to that one whom in the Indian way is already mother.

To say as we quote above, "no prudent agency or attorney is going to expose themselves to the risk of criminal prosecution under the bill" is to use sledge hammers to strike at mosquitos. This bill sets time limits to the right of tribes to assert their rights in instances of adoption. Mothers who have moved away from tribal values are not the subject of tribal care in this bill. This bill is for the benefit of Indians who are proud of their values and wish to cling to them even when for one reason or another they must place a child for adoption.

I join with all Indian Tribes and agencies who support them in recommending the passage of this Bill S. 569 for the protection of American Indian children. Thank you for this consideration.

Sincerely yours,

Ted Zuern, S.J.  
Legislative Director



UNITED SOUTH AND EASTERN TRIBES, INC.  
711 Stewarts Ferry Pike • Suite 100 • Nashville, TN 37214  
Telephone: (615) 872-7900 • Fax: (615) 872-7417

November 21, 1997

The Honorable Ben Nighthorse Campbell, Chairman  
Committee on Indian Affairs  
838 Hart Senate Office Building  
Washington, D.C. 20510

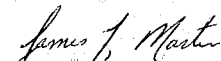
Dear Senator Campbell:

The United South and Eastern Tribes, Inc. (USET) is an inter-tribal organization that represents Governments of twenty-three Tribes located in the states of Texas, Louisiana, Mississippi, Alabama, Florida, North Carolina, South Carolina, New York, Connecticut, Rhode Island, Massachusetts and Maine.

The Board of Directors, at its Annual Board of Directors Meeting held in Philadelphia, Mississippi on October 30, 1997, passed Resolution USET 98:02. This resolution titled "Support for ICWA Amendments: H.R. 1082 and S. 569" is attached for reference.

The USET Board of Directors endorses the tribally initiated amendments to the ICWA as proposed in H.R. 1082 and S.569 and calls upon the 105th Congress to enact this legislation. The USET Board of Directors also calls upon Congress to review the "existing Indian family" interpretation of ICWA and consider future legislation that would apply ICWA to all "Indian children" as that term is defined in ICWA. Should you have any questions feel free to contact my office.

Sincerely,

  
James T. Martin  
Executive Director

JTM/ar  
Enclosures

cc: Secretary Bruce Babbitt, DOI  
Honorable Don Young, Chairman of Committee on Resources

"Because there is strength in Unity"

1314



UNITED SOUTH AND EASTERN TRIBES, INC.

Resolution No. USET 98:02

**SUPPORT FOR ICWA AMENDMENTS: H.R. 1082 AND S. 569**

- WHEREAS**, the United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-three (23) federally recognized tribes; and
- WHEREAS**, the actions taken by the USET Board of Directors officially represent the intentions of each member tribe, as the Board of Directors is comprised of delegates from the member tribes leadership; and
- WHEREAS**, the USET Board of Directors is dedicated and committed to the needs of its tribes and members to the goal of preserving the sovereignty, inherent rights, integrity, and stability of our Indian children and families; and
- WHEREAS**, the *Indian Child Welfare Act of 1978* [ICWA] was designed in consultation with Tribes and was enacted to support Tribes in the protection of their children from unjust removal and to strengthen their families; and
- WHEREAS**, the 104th Congress, the House of Representatives, in Title III of the *Adoption and Stability Act of 1996*, passed amendments to ICWA which would have seriously limited the ability of Indian Tribes to participate in foster care and adoption decision-making affecting their children; and
- WHEREAS**, various members of both the House and Senate continue to advocate for either complete repeal of the ICWA or other legislation that would seriously limit Tribal involvement in foster care and adoption proceedings affecting their children; and
- WHEREAS**, the USET Board of Directors at their Semi-Annual Meeting in Bangor, ME on June 21, 1996 considered and endorsed alternative amendments to ICWA [see Resolution 96:34] which were the result of a one-year process of discussion between Tribal representatives, the National Congress of American Indians and the American Academy of Adoption Attorneys; and
- WHEREAS**, those "amendments" have been introduced in the 105th Congress by Congressmen Young and Miller as H.R. 1082 and Senators McCain, Campbell, Domenici and Dorgan as S. 569; and

WHEREAS, H.R. 1082 and S.569, drafted by Tribes and Indian organizations in consultation with representatives of leading adoption attorney organizations, include the following elements:

- Requires notice to Indian Tribes and extended family members, as defined by the respective Tribe receiving notice, in all voluntary child custody proceedings.
- Provides for criminal sanctions for anyone who assists a person to conceal their Indian ancestry for the purpose of avoiding the application of the ICWA.
- Authorizes state courts to enter orders allowing for continuing contact between Tribes and their children who were adopted.
- Provides for certain provisions placing time limits on the Tribal and extended family right to intervene in voluntary child custody proceedings and the right of unwed fathers to acknowledge paternity, and
- Mandates that the judge in a termination of parental rights or adoption proceeding assure that the parents of an Indian child have been informed of their ICWA rights; and

WHEREAS, Courts in several states have interpreted the ICWA as not applying to Indian children who have not been in the custody of an "existing Indian family"; and


WHEREAS, this State Court concept of "existing Indian family" removes many Indian children from the protection of ICWA and from any relationship with their Tribes and for this reason is universally opposed by Tribes; therefore, be it

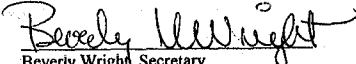
**RESOLVED**, the USET Board of Directors again endorses the above mentioned tribally initiated amendments to the ICWA as proposed in H.R. 1082 and S. 569 and calls upon the 105th Congress to enact this legislation; be it further

**RESOLVED**, that the USET Board of Directors call upon the Congress to review the "existing Indian family" interpretation of ICWA and consider future legislation that would apply ICWA to all "Indian children" as that term is defined in ICWA.

#### CERTIFICATION

This resolution was duly approved at the USET Annual Meeting, at which a quorum was present in Philadelphia, Mississippi on Thursday, October 30, 1997.

  
Keller George, President  
United South and Eastern Tribes, Inc.

  
Beverly Wright, Secretary  
United South and Eastern Tribes, Inc.



UNITED SOUTH AND EASTERN TRIBES, INC.  
711Stewarts Ferry Pike • Suite 100 • Nashville, TN 37214  
Telephone: (615) 872-7900 • Fax: (615) 872-7417

UNITED SOUTH AND EASTERN TRIBES, INC.

Resolution No. 05/95-11LA

#### OPPOSITION TO INDIAN CHILD WELFARE ACT AMENDMENTS

WHEREAS, the United South and Eastern Tribes, Incorporated (USET), is an inter-tribal organization comprised of twenty-one (21) federally recognized tribes; and

WHEREAS, the actions taken by the USET Board of Directors officially represent the intentions of each member tribe, as the Board of Directors is comprised of delegates from the member tribes leadership; and

WHEREAS, the USET Board of Directors is firmly committed to the goal of protecting the sovereignty of Indian tribes and safeguarding the status and integrity of tribal custom and culture by assuring that the integrity and stability of Indian families is not threatened by legislation designed to erode, manipulate or eliminate the stability of Indian families; and

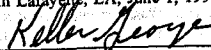
WHEREAS, the USET Board of Directors is opposed to changes in the Indian Child Welfare Act of 1978, by the proposed changes as outlined in H.R. 1448 which does not reflect the wishes of Indian people, but does instead reflect the wishes and desires of outside groups and entities who are attempting to control Indian people and families; and

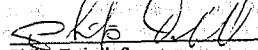
WHEREAS, the USET Board of Directors feels that the proposed amendments to the Indian Child Welfare Act of 1978, as outlined in H.R. 1448 would be detrimental to the sovereignty and sanctity of Indian people and their inherent right to protect and strengthen the integrity of Indian families,

**NOW, THEREFORE BE IT RESOLVED** that the USET Board of Directors opposes any changes to the Indian Child Welfare Act of 1978 unless such changes are proposed and submitted by the majority of federally recognized Indian tribes.

#### CERTIFICATION

This resolution was duly passed at the Board of Directors meeting at which a quorum was present, in Lafayette, LA, June 1, 1995.

  
Keller George, President  
United South and Eastern Tribes, Inc.

  
Philip Tarbell, Secretary  
United South and Eastern Tribes, Inc.



THE  
NAVAJO  
NATION

ALBERT A. HALE  
PRESIDENT

June 19, 1997

THOMAS E. ATCITY  
VICE PRESIDENT

Honorable Ben Nighthorse Campbell, Chairman  
Senate Indian Affairs Committee  
U.S. Senate  
Washington, D.C. 20510

Dear Chairman Campbell,

On behalf of the Navajo people, I am writing to express our strong opinions regarding the Indian Child Welfare Act amendments of 1997. The ICWA plays a very important role in the life of the Navajo Nation's most precious resource, our Navajo children. We wish to emphasize three areas to ensure the ICWA is implemented correctly by states and that the child protection systems within Indian nations are equipped to protect Indian children. The three areas not addressed in Senate Bill 569: (1) the clarification of voluntary placements and termination, and the time lines within which a tribe intervenes in state proceedings; (2) the inclusion of Title IV-E funding and/or language; and (3) the judicially-created exception in state courts. First, the Navajo Nation supports S. 569, sponsored by Senator John McCain, on the condition of clarification of two major items: voluntary placements and voluntary termination and the time lines within which a tribe may intervene in a state court proceeding:

S. 569 proposes a new Section 1913 (c) and (d) that requires the Indian child's tribe must receive notice of the proceeding, and that the notice must contain information to allow the Indian child's tribe to verify application of the ICWA. While the proposal adds language to make fraudulent misrepresentation a crime, there is no requirement that the information contained in the Section 1913 (d) notice be compiled in good faith. It is of critical importance that a good faith investigation be made into the information required by the Section 1913 (d) and forwarded to the tribe.

The proposed Section 1913 (e) set forth timeliness within which a tribe may intervene in a state proceeding is not clear. The 30-day time line present difficulties in determining enrollment eligibility of Indian children due to the time it takes to find the determination of ICWA applicability, finding local counsel, case staffing, and contract approvals. Clarifying language directing that the notice of intent to intervene only requires a simple statement which the tribe's ICWA program is needed to prevent ICWA from being deprived of any meaning.

The Navajo Nation is also concerned about the term "certification" as used in the addendum may be used to impose an artificial barrier in some jurisdictions. It is possible that some states may act officiously by requiring that a particular state form be used to meet state evidentiary standards. While the proposed amendment can be read to mean that this certification is a tribal certification, language clarifying that it is a tribal certification which is required, without the need for further evidentiary authentication could greatly minimize the opportunity for later misunderstandings.

Whatever changes may be proposed to the Indian Child Welfare Act, it is important to remember that the ICWA was not only enacted to preserve American Indian Tribes' most precious resources-its members, but also to prevent the type of alienation experienced by Indian children who were adopted by non-Indian families before ICWA was adopted. During infancy and in early childhood, an Indian child may adapt to and be accepted by a non-Indian family. However, later many of these children face difficulties in self-identification and adaption. What may have started out as a "good" intention becomes detrimental to the child. While much has been said about children and parents, both natural and adoptive, it is extremely critical to be mindful of the long-term effects of depriving Indian children of their heritage.

The Navajo Nation, subject to the above issues, believe that the proposed amendments will help clarify the ICWA.

Second, the Navajo Nation is concerned with the current provisions of Title IV-E of the Social Security Act, Foster Care and Assistance. It is an open-ended entitlement program providing federal funds to states for foster care and adoption assistance programs since 1980. However, it has only been available to states through matching funds to support foster care and adoption services. While this funding was intended to serve all eligible children in the United States, the legislation lacked a provision to cover a class of children (Indian children) living in tribal areas. The statute overlooked tribal governments and children placed by tribal courts in receiving the entitlement. This issue has negatively impacted the ability of Indian children to secure a sense of permanency after being removed from their homes, especially since adoption programs are under funded.

To receive Title IV-E money, a tribe must also enter into agreements with states, with a state "passing through these funds" to the tribe. Currently, only 50 of the federally recognized tribes receive any Title IV-E funding which does not include administrative, training or data systems funding. Therefore, the Navajo Nation recommends direct funding rather than tribes entering into agreements with states.

Presently, many unsubsidized care homes are established within Indian Nations to avoid leaving children in harmful situations. These unsubsidized homes were indicative of the good will of a family in the community who will commit their personal resources, time and home to foster care, legal guardianship, or preadoptive placement for a child. A vast majority of these families find that this is stressful and sometimes unworkable after a period of time, especially when considering the numbers of Indian families on tribal lands who live in or close to poverty. With direct funding, Indian tribes would be able to keep these families closer together rather than placing them in off reservation, non-Indian homes. Also, the numbers of Indian foster and adoptive homes would rise due to basic maintenance payments and support services that Title IV-E would guarantee providers. This would essentially begin to establish permanency for Indian children.

The Navajo Nation requests your direct assistance on this important issue and the opportunity to correct this glaring inequity. We recommend that if direct Title IV-E funding is not possible to the Navajo Nation, then the Title IV-E language be included in this legislation, requiring the following: (1) a provision requiring states to serve tribes rather than a tribal-state agreement; and (2) applying penalties as in P.L. 103-382, Multiethnic Placement Act, should discrimination occur.

Finally, the Navajo Nation is also concerned about recent developments in state courts where judges have ruled out that ICWA does not apply because the Indian child had not lived in an "Indian environment" or the Indian parents had not maintained "significant ties" to their Indian nation. In essence, these state courts are ruling on whether the Indian child and Indian parents were members of an Indian nation. Federal law and United States Supreme Court decisions has consistently recognized the fundamental right of Indian nations to determine membership. It is inappropriate for state courts to make determinations on whether ICWA applies to an Indian child by inquiring into whether the Indian child or Indian parents are really "Indians". ICWA does not authorize this type of inquiry which should lie with the Indian tribes. The Navajo Nation recommends additional amendments be incorporated to halt this practice of state courts. Otherwise, ICWA will be undermined and implemented incorrectly by states.

The Navajo Nation supports S. 569 with our recommendations. If you have additional questions or need further assistance, please contact Sharon Clahchischilly, Legislative Associate, at the Navajo Nation Washington office at (202) 775-0393.

Sincerely,

Ralph Bennett, Jr.  
Navajo Nation Council Delegate  
Chapter/s: Red Lake and Saymill

xc: files



THE  
NAVAJO  
NATION

1997 JUN 30 AM 8:21

ALBERT A. HALE  
PRESIDENT

June 19, 1997

THOMAS E. ATCITTY  
VICE PRESIDENT

Honorable Ben Nighthorse Campbell, Chairman  
Senate Indian Affairs Committee  
U.S. Senate  
Washington, D.C. 20510

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Whatever changes may be proposed to the Indian Child Welfare Act, it is important to remember that the ICWA was not only enacted to preserve American Indian Tribes' most precious resources-its members, but also to prevent the type of alienation experienced by Indian children who were adopted by non-Indian families before ICWA was adopted. During infancy and in early childhood, an Indian child may adapt to and be accepted by a non-Indian family. However, later many of these children face difficulties in self-identification and adaption. What may have started out as a "good" intention becomes detrimental to the child. While much has been said about children and parents, both natural and adoptive, it is extremely critical to be mindful of the long-term effects of depriving Indian children of their heritage.

The Navajo Nation, subject to the above issues, believe that the proposed amendments will help clarify the ICWA.

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Finally, the Navajo Nation is also concerned about recent developments in state courts where judges have ruled out that ICWA does not apply because the Indian child had not lived in an "Indian environment" or the Indian parents had not maintained "significant ties" to their Indian nation. In essence, these state courts are ruling on whether the Indian child and Indian parents were members of an Indian nation. Federal law and United States Supreme Court decisions has consistently recognized the fundamental right of Indian nations to determine membership. It is inappropriate for state courts to make determinations on whether ICWA applies to an Indian child by inquiring into whether the Indian child or Indian parents are really "Indians". ICWA does not authorize this type of inquiry which should lie with the Indian tribes. The Navajo Nation recommends additional amendments be incorporated to halt this practice of state courts. Otherwise, ICWA will be undermined and implemented incorrectly by states.

The Navajo Nation supports S. 569 with our recommendations. If you have additional questions or need further assistance, please contact Sharon Clahchischilly, Legislative Associate, at the Navajo Nation Washington office at (202) 775-0393.

Sincerely,

  
Genevieve Jackson  
Navajo Nation Council Delegate  
Chapter/s: Shiprock

cc: files





THE  
NAVAJO  
NATION

1997 JUN 30 AM 8:21

ALBERT A. HALE  
PRESIDENT

June 19, 1997

THOMAS E. ATCITTY  
VICE PRESIDENT

Honorable Ben Nighthorse Campbell, Chairman  
Senate Indian Affairs Committee  
U.S. Senate  
Washington, D.C. 20510

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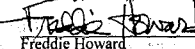
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Sincerely,

  
Freddie Howard

Navajo Nation Council Delegate  
Chapter/s: Birdsprings and Tolani Lake

xc: files



THE  
NAVAJO  
NATION

ALBERT A. HALE  
PRESIDENT

June 19, 1997

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VICE PRESIDENT

Honorable Ben Nighthorse Campbell, Chairman  
Senate Indian Affairs Committee  
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Sincerely,

*Lewis H. Begay*  
Lewis H. Begay  
Navajo Nation Council Delegate  
Chapter/s: Chilchiltah

cc: files



THE  
NAVAJO  
NATION

1997 JUN 30 AM 8:21

ALBERT A. HALE  
PRESIDENT

June 19, 1997

THOMAS E. ATCITTY  
VICE PRESIDENT

Honorable Ben Nighthorse Campbell, Chairman  
Senate Indian Affairs Committee  
U.S. Senate  
Washington, D.C. 20510

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Sincerely,

  
Albert Lee  
Navajo Nation Council Delegate  
Chapter/s: Two Grey Hills

cc: files



THE  
NAVAJO  
NATION

1997 JUN 30 AM 8:20

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PRESIDENT

June 19, 1997

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VICE PRESIDENT

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*Charlie C. Billy*  
Charlie Billy  
Navajo Nation Council Delegate  
Chapter/s: Chilchinbeto and Kayenta

cc: files



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NAVAJO  
NATION

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PRESIDENT

June 19, 1997

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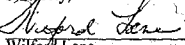
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Wilford Lane  
Navajo Nation Council Delegate  
Chapter/s: LeChee

xc: files



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NAVAJO  
NATION

1997 JUN 30 AM 8 21

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June 19, 1997

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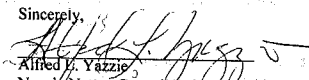
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Alfred E. Yazzie  
Navajo Nation Council Delegate  
Chapter/s: Rough Rock

xc: files





THE  
NAVAJO  
NATION

ALBERT A. HALE  
PRESIDENT

June 19, 1997

THOMAS E. ATCITT  
VICE PRESIDENT

Honorable Ben Nighthorse Campbell, Chairman  
Senate Indian Affairs Committee  
U.S. Senate  
Washington, D.C. 20510

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
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Sincerely,

  
James Bilagody  
Navajo Nation Council Delegate  
Chapter/s: Coalmine Mesa and Tuba City

xc: files



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Sincerely,

David Laughter

Navajo Nation Council Delegate

Chapter/s: Inscription House and Navajo Mountain

xc: files



THE  
NAVAJO  
NATION

1997 JUL 24 PM 3:36

ALBERT A. HALE  
PRESIDENT

June 19, 1997

THOMAS E. ATCITTY  
VICE PRESIDENT

Honorable Ben Nighthorse Campbell, Chairman  
Senate Indian Affairs Committee  
U.S. Senate  
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Sincerely,

*Leslie Dele*

Leslie Dele  
Navajo Nation Council Delegate  
Chapter/s: Tonalea

xc: files



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NAVAJO  
NATION

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PRESIDENT

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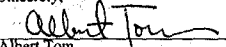
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Albert Tom  
Navajo Nation Council Delegate  
Chapter/s: Klagetoh and Wide Ruins

xc: files



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Finally, the Navajo Nation is also concerned about recent developments in state courts where judges have ruled out that ICWA does not apply because the Indian child had not lived in an "Indian environment" or the Indian parents had not maintained "significant ties" to their Indian nation. In essence, these state courts are ruling on whether the Indian child and Indian parents were members of an Indian nation. Federal law and United States Supreme Court decisions has consistently recognized the fundamental right of Indian nations to determine membership. It is inappropriate for state courts to make determinations on whether ICWA applies to an Indian child by inquiring into whether the Indian child or Indian parents are really "Indians". ICWA does not authorize this type of inquiry which should lie with the Indian tribes. The Navajo Nation recommends additional amendments be incorporated to halt this practice of state courts. Otherwise, ICWA will be undermined and implemented incorrectly by states.

The Navajo Nation supports S. 569 with our recommendations. If you have additional questions or need further assistance, please contact Sharon Clahchischilly, Legislative Associate, at the Navajo Nation Washington office at (202) 775-0393.

Sincerely,

Rex Morris, Jr.

Navajo Nation Council Delegate  
Chapter/s: Coyote Canyon and Tohatchi

xc: files



THE  
NAVAJO  
NATION

ALBERT A. HALE  
PRESIDENT

June 19, 1997

THOMAS E. ATCITTY  
VICE PRESIDENT

Honorable Ben Nighthorse Campbell, Chairman  
Senate Indian Affairs Committee  
U.S. Senate  
Washington, D.C. 20510

Dear Chairman Campbell,

On behalf of the Navajo people, I am writing to express our strong opinions regarding the Indian Child Welfare Act amendments of 1997. The ICWA plays a very important role in the life of the Navajo Nation's most precious resource, our Navajo children. We wish to emphasize three areas to ensure the ICWA is implemented correctly by states and that the child protection systems within Indian nations are equipped to protect Indian children. The three areas not addressed in Senate Bill 569; (1) the clarification of voluntary placements and termination, and the time lines within which a tribe intervenes in state proceedings; (2) the inclusion of Title IV-E funding and/or language; and (3) the judicially-created exception in state courts. First, the Navajo Nation supports S. 569, sponsored by Senator John McCain, on the condition of clarification of two major items: voluntary placements and voluntary termination and the time lines within which a tribe may intervene in a state court proceeding:

S. 569 proposes a new Section 1913 (c) and (d) that requires the Indian child's tribe must receive notice of the proceeding, and that the notice must contain information to allow the Indian child's tribe to verify application of the ICWA. While the proposal adds language to make fraudulent misrepresentation a crime, there is no requirement that the information contained in the Section 1913 (d) notice be compiled in good faith. It is of critical importance that a good faith investigation be made into the information required by the Section 1913 (d) and forwarded to the tribe.

The proposed Section 1913 (e) set forth timeliness within which a tribe may intervene in a state proceeding is not clear. The 30-day time line present difficulties in determining enrollment eligibility of Indian children due to the time it takes to find the determination of ICWA applicability, finding local counsel, case staffing, and contract approvals. Clarifying language directing that the notice of intent to intervene only requires a simple statement which the tribe's ICWA program is needed to prevent ICWA from being deprived of any meaning.

The Navajo Nation is also concerned about the term "certification" as used in the addendum may be used to impose an artificial barrier in some jurisdictions. It is possible that some states may act officiously by requiring that a particular state form be used to meet state evidentiary standards. While the proposed amendment can be read to mean that this certification is a tribal certification, language clarifying that it is a tribal certification which is required, without the need for further evidentiary authentication could greatly minimize the opportunity for later misunderstandings.

Whatever changes may be proposed to the Indian Child Welfare Act, it is important to remember that the ICWA was not only enacted to preserve American Indian Tribes' most precious resources-its members, but also to prevent the type of alienation experienced by Indian children who were adopted by non-Indian families before ICWA was adopted. During infancy and in early childhood, an Indian child may adapt to and be accepted by a non-Indian family. However, later many of these children face difficulties in self-identification and adaption. What may have started out as a "good" intention becomes detrimental to the child. While much has been said about children and parents, both natural and adoptive, it is extremely critical to be mindful of the long-term effects of depriving Indian children of their heritage.

The Navajo Nation, subject to the above issues, believe that the proposed amendments will help clarify the ICWA.

Second, the Navajo Nation is concerned with the current provisions of Title IV-E of the Social Security Act, Foster Care and Assistance. It is an open-ended entitlement program providing federal funds to states for foster care and adoption assistance programs since 1980. However, it has only been available to states through matching funds to support foster care and adoption services. While this funding was intended to serve all eligible children in the United States, the legislation lacked a provision to cover a class of children (Indian children) living in tribal areas. The statute overlooked tribal governments and children placed by tribal courts in receiving the entitlement. This issue has negatively impacted the ability of Indian children to secure a sense of permanency after being removed from their homes, especially since adoption programs are under funded.

To receive Title IV-E money, a tribe must also enter into agreements with states, with a state "passing through these funds" to the tribe. Currently, only 50 of the federally recognized tribes receive any Title IV-E funding which does not include administrative, training or data systems funding. Therefore, the Navajo Nation recommends direct funding rather than tribes entering into agreements with states.

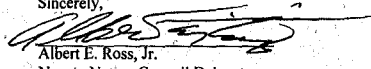
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Sincerely,

  
Albert E. Ross, Jr.  
Navajo Nation Council Delegate  
Chapter/s: St. Michaels

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