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.

NAVAJO NATION WASHINGTON OFFICE

ALBERT A. HALE
PRESIDENT

THOMAS E. ATCITTY
VICE-PRESIDENT

MARTIN AVERY, ESQ.
EXECUTIVE DIRECTOR

1101 17TH STREET, N.W., SUITE 250
WASHINGTON, D.C. 20036
Telephone (202) 775-0893
Facsimile (202) 775-8075

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 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, 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 Untied 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 no-cost 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.

National Congress of American Indians

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James Hardin
Lumbee Tribe

Executive Director
JoAnn K. Chase
Mandan, Hidatsa & Arikara

2010 Massachusetts Ave., NW
Second Floor
Washington, DC 20036
202.466.7767
202.466.7797 *fax/mdc*

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.[1]

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 gaiashkibos appeared before the House Native American and Insular Affairs Subcommittee and testified in strong opposition to proposed ICWA amendments[2], 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

[1] 25 U.S.C. §§ 1901-63 (1978).

[2] 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*.[3] 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. [4]

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

[3] 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.

[4] *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. [5]

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." [6] 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. [7] 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*,[8] "[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."

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[5] *See* 25 U.S.C. Sec. 1901(2), (3).

[6] H. Rep. 1386, 95th Congress, 2d Sess. 9; hereafter the "House Report."

[7] House Report at 9.

[8] 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.[9] 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 both 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

[9] 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[10] 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

[10] 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 the 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 ad within the time frames required by section 1913(c).

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*,[11] 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

[11] 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.[12]

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.

[12] *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.[13]

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.

[13] 25 U.S.C. § 1903(4) (1978).

National Congress of American Indians

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Executive Director
JoAnn K. Chase
Mandan, Hidatsa & Arikara

2010 Massachusetts Ave., NW
Second Floor
Washington, DC 20036
202.466.7767
202.466.7797 *facsimile*

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:

Juana 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
P.O. BOX 33053
WASHINGTON, D.C. 20033-0053
(202) 832-2222

PLEASE REPLY TO:
Law Office of Jane A. Gorman
513 East First Street Second Floor
Tustin, CA 92780-3340
(714) 731-3600
Fax (714) 731-7760

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

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 devasting 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."[1] 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

[1]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 State 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 devasting 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,[1] 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

[1]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.

Lac Vieux Desert Band of Lake Superior Chippewa Tribal Government
P.O. Box 249, Choate Road • Watersmeet, Michigan 49969
906-358-4577 • Fax: 906-358-4785

Executive Officers:
John C. McGeshick, Sr., Tribal Chairman
Richard McGeshick, Sr., Vice Chairman
Rose Williams, Secretary
Harvey White, Treasurer

Council Members:
John C. McGeshick, Jr.
James Williams, Jr.
Michael Hazen, Sr.
Delores Williams
Helen Smith

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.

NATIONAL
INDIAN
CHILD
WELFARE
ASSOCIATION

3611 SW Hood St.
Suite 201
Portland, OR 97201
Phone
503.222.4044
Fax
503.222.4007

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. It's 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 the 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.