

AMENDMENTS TO THE INDIAN CHILD WELFARE
ACT

DUPLICATE

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

TO PROVIDE CONSTRUCTIVE DIALOG ON HOW TO IMPROVE THE
INDIAN CHILD WELFARE ACT

JUNE 26, 1996
WASHINGTON, DC



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AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

WEDNESDAY, JUNE 26, 1996

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:58 a.m. in room 216, Senate Hart Building, Hon. John McCain [chairman of the committee] presiding.

Present: Senators McCain, Inouye, Campbell, Thomas, Gorton, and Dorgan.

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. I want to apologize for the delay in beginning this very important hearing. As I hope most of our visitors and witnesses know, we had a vote on the floor of the Senate.

I want to welcome all the witnesses, some of whom have traveled a great distance to testify.

At the outset, let me say that the issue of Indian child welfare stirs our deepest emotions. Nothing is more sacred than our children, but what I hope to hear from each witness today is not passionate polemics but constructive dialogue on how the Indian Child Welfare Act of 1978 can be improved to better serve the best interests of Indian children without trampling on tribal sovereignty and eroding fundamental principles of Federal Indian law.

Last week, our committee struck the provisions of title III of H.R. 3286 which the House had passed last month by a narrow margin after extended debate. We deleted that controversial title because of our serious concern about the breadths of its language and the fundamental changes it would make to the government-to-government relations between the United States and Indian tribes.

Title III has been strenuously opposed by virtually every tribal government in the Nation and by the Justice and Interior Departments. At the same time, I believe that some of the problems identified by the proponents of title III are legitimate. Adoptive families seek certainty, speed and stability throughout the adoption process. They don't want surprises that threaten to take away from them a child they have loved and cared for after they have followed the law.

There is no doubt in my mind that in the case of an Indian child, there are additional interests that must be taken into account during an adoption placement process, but these interests, as provided

for in ICWA, must serve the best interest of the Indian child and those best interests are best served by certainty, speed and stability in making adoptive placements with the participation of Indian tribes.

My point is this. These concerns can be addressed far more narrowly than the way they are addressed in title III. They can be addressed in ways that preserve fundamental principles of tribal sovereignty by recognizing the appropriate role of tribal governments.

After we hear from a panel of various members of the House and Senate who have asked to testify and from two administration witnesses, the committee will hear from representatives of tribal governments and of the adoption community who have worked together for more than a year to develop compromise language that each community can support.

As with all compromises, I'm sure each side would prefer language that is better for them. I imagine the Indian tribes would rather not have any amendments at all and that the adoption community would rather have the House passed amendments be the law of the land.

On behalf of the Indian children and their parents, both biological and adoptive, I want to extend my personal thanks to each of you who have led the way to a compromise in which both sides and, most importantly, Indian children are the winners.

I'm especially grateful for the position taken by the Indian tribes and particularly for the leadership of the National Congress of American Indians and the National Indian Child Welfare Association. Your efforts to reach out to the adoption community, even as the debate was becoming increasingly sharp on both sides, has made all the difference.

Likewise, we are all indebted to the reasonableness and fair-minded approach taken by adoption advocates.

The compromise appears to provide the adoption community with the certainty, speed and stability it seeks and the tribal community with the protections of tribal sovereignty it seeks. Because it seems to be a delicately-balanced package, at the conclusion of this hearing, I expect we will be able to ask our colleagues to join us in moving this compromise language without substantial changes as quickly as possible through the Senate and the House in the coming weeks.

Let me say that if we reach this compromise with the agreement of my partner, the vice chairman, I would like to move it as a free-standing bill and also if this compromise is agreeable to all parties, as an amendment to reinsert it as title III if the bill moves through the Senate as planned, in other words, I would like to move it in the most expeditious fashion.

Again, that is based on the premise that all parties would agree to this compromise.

Senator Inouye, I understand you want to wait on your statement?

Senator INOUE. Yes.

The CHAIRMAN. Senator Campbell.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S.
SENATOR FROM COLORADO

Senator CAMPBELL. Thank you, Mr. Chairman.

I'd like to make just a few comments and observations on the draft amendment to the Indian Child Welfare Act and certainly I appreciate your efforts in trying to develop a proposal that will accommodate all concerns of the affected parties.

Over the past year, there's been a considerable amount of controversy, as you know, surrounding the implementation and the scope of the Indian Child Welfare Act, often inflammatory and often very impassioned, as you alluded to. As a result, there have been legislative proposals introduced in this Congress in an attempt to clarify the scope of the act.

Most recently, the provisions of title III of the House-passed Adoption, Promotion and Stability Act, H.R. 3286, sought to define the applicability of the ICWA to child custody proceedings involving a child whose parents do not maintain an affiliation with their respective tribal communities.

When title III came before this committee last week, I was supportive of the committee's action to strike those provisions. It was my understanding that title III provisions would essentially transfer jurisdiction over child custody proceedings involving a child not residing on a reservation from the tribal courts to the State courts.

One of the reasons ICWA was first enacted by the Congress in 1978 was the fact that non-Indian institutions, including State courts, do not completely understand the unique culture and tribal relationships and therefore, should not be independently responsible for child custody decisions involving Indian children.

In addition, reverting determinations of tribal membership and enrollment back to the State courts, I believe, infringes on the most basic rights of tribal self-determination.

Another concern I had too was because of my own experience, if you will indulge me for a moment, Mr. Chairman. As I think back to my own childhood which was probably uncommon in those days for Indian children or Indian mixed-blood children, I was raised in California many miles from the Northern Cheyenne Reservation in Montana. Where I was born and raised, my sister too, was not in our control as my father had moved away from the reservation at an early age. However, the fact that we weren't raised on the reservation did not take away from our cultural identity or our affiliation with the tribe.

During my childhood, I spent some time, as you know, in an orphanage and in foster care homes and I don't believe that was uncommon at the time. I was fortunate enough to be reunited with my family but had I been placed up for adoption and provisions such as those included in title III were in place at the time, both my father and I may not have been considered enrolled members of the Northern Cheyenne Tribe due to our separation from the reservation community.

While I understand the concerns of the proponents seeking to amend ICWA, I also have concerns that these recent proposals do not provide an equitable remedy for both Indian and non-Indian families. I briefly reviewed the compromise legislation which will be discussed today and certainly, it's a step in the right direction.

It's my understanding that these amendments are the result of the coordinate work of representatives from both the tribal and adoption communities. It is this kind of effort that will produce amendments to ICWA which are not only equitable to all parties involved, but will clarify the adoption process involving Indian children. I look forward to these hearings.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Campbell. As always, you bring an insight into this issue which is of incredible value.

Senator Thomas.

Senator THOMAS. I'll hold off, Mr. Chairman.

The CHAIRMAN. Thank you.

The vice chairman has chosen to hold off on his opening statement as well until after we hear from the panelists.

I'm not exactly clear how to proceed except perhaps, Senator Glenn, if you would like to begin and then perhaps Congressman Solomon. In order of seniority, I guess is the usual standard of procedure. Certainly age as well, which means you, Senator Glenn.

STATEMENT OF HON. JOHN GLENN, U.S. SENATOR FROM OHIO

Senator GLENN. You're always so considerate, Mr. Chairman. [Laughter.]

Thank you, Mr. Chairman. I appreciate the opportunity to testify before the Committee on Indian Affairs regarding revisions to the Indian Child Welfare Act [ICWA].

As you and members of the committee know, I've introduced S. 764, the Indian Child Welfare Improvement Act. The bill addresses a very narrow change in the existing application of ICWA during adoption proceedings. Some of these same concerns are reflected in Representative Pryce's bill in the House, H.R. 1440, which she will address later. It's a companion piece. They are not identical, but they deal with similar matters.

Since my bill was introduced in May 1995, a little over 1 year ago, the Committee on Indian Affairs has received a series of amendments to ICWA developed by a number of tribal groups and others. These amendments are known as the Tulsa Agreement. They deal with several issues critical to the application of ICWA to child custody proceedings, including notice to Indian tribes for voluntary adoptions, time lines for tribal intervention in voluntary cases, criminal sanctions to discourage fraudulent practices in Indian adoption, and a mandate that attorneys and adoption agencies must inform Indian parents of their rights under ICWA.

I commend the development of this document which addresses existing flaws in the application of ICWA. I believe that this alternative approach to refining ICWA preserves the participation of tribal interests while offering greater certainty for potential adoptive families.

Mr. Chairman, the legislation that I introduced last year was a direct response to a situation that developed involving a family in Columbus, OH, the Rost family. They received custody of twin baby girls in the State of California in November 1993 following the voluntary relinquishment of parental rights by both birth parents. The biological father did not disclose his Native American heritage

in response to a very specific question on the relinquishment document.

In February 1994, the birth father informed his mother of the pending adoption of the twins and 2 months later in April 1994, the birth father's mother then on her own enrolled herself, the birth father and the twins with the Pomo Indian Tribe in California. The adoption agency was then notified that the adoption could not be finalized without a determination of the applicability of ICWA.

My interest in reforming ICWA is to ensure that the law could not be applied retroactively in child custody proceedings. I have no intention to weaken ICWA protections, to narrow the designation of individuals as members of an Indian tribe, or to change any tribe's ability to determine its membership or what constitutes that membership.

My sole intention is to require that ICWA cannot be retroactively applied. To this end, my office has met with the National Congress of American Indians, the National Indian Child Welfare Association, and other tribal representatives to resolve this issue.

Mr. Chairman, all I'm saying is that once a voluntary, legal agreement has been entered into, I don't believe it's in the best interest of the child for this proceeding to be disrupted because of the retroactive application of ICWA. To allow this retroactive application could have a harmful impact on the child.

I know the chairman and other members of the committee share my overriding concern in ensuring the best interest of the children awaiting placement is what we concentrate on. The chairman already mentioned that, the interest of the child.

As I said earlier, I believe the Tulsa Agreement is a very significant step in resolving certain issues pertaining to application of ICWA and child custody procedures. I look forward to working to incorporate language addressing the problems of retroactive application with those involved in the Tulsa agreement.

I appreciate the committee's work in this matter and the opportunity to testify on my views.

Mr. Chairman, the scope of my legislation is deliberately narrow, very narrow to maintain ICWA's purpose while preventing disruption in the placement and adoption of children in cases where ICWA is retroactively applied. I know what a mess that caused in this Rost case in Columbus, and it was a mess. They've been back and forth in the courts, tried to take the kids away and take them back again and back and forth all because the original birth parents had denied any Indian connection whatsoever, then later on the mother enrolls them and it really created a legal quagmire.

So Mr. Chairman, I hope we're acting in the best interest of the children and that's my principal concern.

Thank you.

The CHAIRMAN. Thank you very much, Senator Glenn.

I appreciate your continued involvement and consultation with the committee on this issue. I also appreciate the importance that you place on this issue.

I know that you have to be at another committee hearing and I appreciate your being here.

Thank you again, Senator Glenn.

Now we will turn to the second oldest, I believe, Congressman Solomon. We're glad to have you with us. Thank you for joining us.

**STATEMENT OF HON. GERALD SOLOMON, U.S.
REPRESENTATIVE FROM NEW YORK**

Mr. SOLOMON. Thank you, Chairman McCain and Senators Inouye, Campbell, and Thomas. We appreciate very much your allowing us to come over today and testify in this other body over here which is going to be extremely busy in the coming weeks.

I want to thank you for the opportunity to testify today on the reform of the Indian Child Welfare Act. I too want to apologize because I have to leave directly after my testimony to try to arrange the floor schedule for the rest of the week so that we can leave town with you all at the end of the week.

Mr. Chairman, it is indeed unfortunate that some of our sociologists and social workers negatively portray adoption and adoption families and that is so very sad. It is up to those of us with personal experience of adoption to relay its importance to the formation of our children and the strengthening of our families.

I'm here today because I have always been a strong supporter of adoption and the generosity of families who have sought to make homes for children who, for whatever reason, were not able to be raised by their biological parents. I, like my good friend Senator Campbell, am one of those.

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

For those reasons, Mr. Chairman, I wholeheartedly support the recent adoption legislation in the House. This bill makes adoption an option for families of all income levels by offering a \$5,000 tax credit while also streamlining the process for interracial cases.

This groundbreaking legislation will decrease the backlog of children in foster care and help find caring homes for all children, not just those that are in foster care today but those in the future as well.

This legislation is extremely important in reforming adoption regulations in the limited legislative schedule we have remaining. We must finish work on this bill to allow for the soonest relief for American families. I am here today to also offer my full support for reform of the Indian Child Welfare Act to add to this adoption legislation.

The Indian Child Welfare Act was passed, as you know, Mr. Chairman, in 1978 in response to a terrible problem within the Indian community, the high numbers of Indian children being placed in foster care and the breakup of many Indian families because of the unwarranted removal of their children by nontribal, public and private agencies, and that was a reaction and a badly needed reaction to a problem. This was clearly an unjust situation that needed to be corrected in order to protect the sanctity of the Native American family.

Though this act was meant to remedy this situation, the reality is that the act has been detrimental in some cases. There are loop-

holes, there are people that have fallen through the net. The problem that the act was created to correct, namely the inordinate number of Indian children in foster care has actually risen since its enactment because of the increased authority the act can give an Indian tribe.

There have been cases of parents, which you've heard some here today, being blocked from adopting children because the Indian Child Welfare Act allows retroactive tribal registration even after the biological parents have given up all legal rights to the child. This committee is discussing today compromise legislation to amend the Act to respond to many of those concerns.

This compromise between the tribal governments and the adoptive community represents is, I think, a very strong step in the right direction in reforming that act. I am encouraged that portions of this language will limit the length of time for tribes to contest adoption while also facilitating voluntary agreements between Indian families or tribes and non-Indian adoptive families.

However, I and many of my colleagues are concerned that this language, while commendable, will not address cases where the adoptive child is retroactively registered in an Indian tribe. With future negotiations in the adoption legislation between the House and the Senate, these concerns can hopefully be rectified.

This legislation is extremely important to the families of this country, Indian and non-Indian. Adoption plays a vital role in strengthening the family unit and protecting the values of this great Nation. We must remember that the best interest of the children must be paramount in all child custody proceedings. Congress must work diligently to remove these barriers to adoption and provide a sense of security to adoptive parents and children that their adoptions will be permanent.

For this reason, Mr. Chairman, I hope the chairman will continue to pursue and pass reform legislation that you have before you. This window of opportunity cannot be missed in the final weeks of this legislative session.

Let me assure you that if there is an agreed-to, negotiated compromise that I, as the chairman of the Rules Committee that controls the flow of legislation in the House assisted by my right arm, a member of my Rules Committee, Deborah Pryce here, we will do everything in our power in the 27 legislative days left to try to get through 85 major priority items of which I consider this to be one. We will do everything we can to assist you in getting this legislation signed into law.

Mr. Chairman and members, I really want to thank you for your leadership and your effort. I know all of you are sincere. Let's get this done and see if we can't help people that truly need to be helped.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Chairman.

Before you leave, I appreciate very much that commitment if we can get an overall agreement. I believe that we could do the same thing over on this side if we can get everybody to agree. I very much appreciate your pledge of cooperation and I do recognize how heavy the schedule is.

When you said you were going to try to get out by the end of the week, is that tomorrow?

Mr. SOLOMON. That's Thursday. If things go right, Mr. Chairman, we will be out of here by Thursday at 6 p.m.

The CHAIRMAN. Thank you very much, Mr. Chairman. That's encouraging to note.

Thank you for being here.

Mr. SOLOMON. Thank you, so much.

The CHAIRMAN. Congressman Geren, welcome.

**STATEMENT OF HON. PETER GEREN, U.S. REPRESENTATIVE
FROM TEXAS**

Mr. GEREN. Thank you, Mr. Chairman.

I appreciate very much the opportunity to be here today and to testify on an issue that is very close to my heart. I'm the parent of two adopted children and have a very strong interest in the resolution of this issue.

I do appreciate the chance to be here and the leadership that Senator Glenn and Congresswoman Pryce and many of you have shown on this issue. I thank you for this opportunity to testify.

You have heard and you will hear from many representatives and members of Native American tribes and I certainly appreciate and respect their concerns.

The Indian Child Welfare Act was enacted to address the very real and serious problem affecting the families and culture of Native Americans. Unfortunately, the remedy that has been created by the Indian Child Welfare Act has led to its own abuses and, I believe, injustices.

The act, as currently enforced, has created uncertainty and, in many cases, heartbreak in the adoption community. It is unreasonable for the adoption of a child, a child with no cultural ties and with remote Indian ancestry, an adoption that is consented to by the birth parents, approved by lawful State authorities chosen by the birth parents who are U.S. citizens to be interrupted by any third party, even a sovereign nation such as a Native American or a European nation.

The Pryce language that is included in the Adoption, Promotion and Stability Act passed by the House preserves the goals of ICWA but eliminates the potential for injustice and abuse. Pryce respects the personal rights of those intimately involved in the adoption decision.

Under Pryce, jurisdiction and intervention rights of Indian tribes are based, not just on the blood ancestry of the child, as under ICWA, but also on the involvement of a biological parent in the cultural life of an Indian tribe.

Pryce recognizes the legitimate role of Native American tribes in child custody proceedings involving children where at least one of the child's biological parents is of Indian descent and where a birth parent maintains, by his or her choice, a significant social, cultural or political affiliation with a tribe.

It allows birth parents, U.S. citizens who have chosen not to establish ties with their ancestral nations, to make the decision they believe is in the best interest of their child. This change makes the

Indian Child Welfare Act more reflective of its original intent and it respects the rights of American citizens.

Last, the Pryce language prohibits a birth parent from asserting tribal membership—Mr. Solomon and Senator Glenn both discussed this retroactive issue. Once the adoption is complete, it ought to be respected by all parties. This change provides certainty for adoptive parents and prevents distant relatives or tribes from asserting custody over children sometimes years after an adoption has been completed.

I've had an opportunity to examine the preliminary language proposed as a compromise and I do think it's a step in the right direction, but it falls short of the reform we must have if we're going to make this act truly respectful of the rights of the people involved in this very difficult situation.

It's progress but it does not address the underlying problem with ICWA. It does not give the birth parents the freedom to make the decision they believe is in the best interest of their biological child. The tribe still has standing in consensual adoption cases to dictate how these children will be placed.

If a mother and father are American citizens and choose to subject themselves to the laws of one of our 50 States, our Federal law must respect that decision. What right is a more fundamental human right than the right of a biological mother and a biological father to act in what they believe is the best interest of their biological child? No ancestor, certainly no great grandparent, whether he's Navajo or German, should be able to deny that American citizen that fundamental right.

Second, the language does not address the retroactivity issue. In order for any reform of ICWA to be meaningful, it must place prohibitions on the assertion of tribal membership after adoption has been completed under applicable State and United States law.

The *Rost* case is a painful and poignant example of the injustice of the current retroactivity provisions. After the *Rost* children lawfully were placed for adoption, the grandmother enrolled the children and the biological father in the Pomo tribe. This action of retroactive membership was asserted to destroy a living family.

We must respect and honor the laws and rights of Native American tribes but we also must honor the God given, human rights of every person who is a citizen of the United States of America. Our country is built on the principle that our citizens are free of the claims of ancestral nations, whatever ancestral nation they choose to leave behind.

Neither the hand beyond the grave, nor a great grandparent who is a citizen of another sovereign nation has a claim on the present and future of those who hold the privilege of American citizenship. It should not matter if that ancestor is German, Navajo, British, or South African.

We talk about ICWA as applying to Indian children. Well, Mr. Chairman, I suggest that other parties ought to lawfully be included in the decision of who is an Indian child. Is a child that is 1/32 of Indian blood an Indian child if the birth parents, the birth grandparents, the birth great grandparents have chosen to not affiliate, have chosen to forsake that tribal membership.

An example that points up the problem is if a boy and a girl, 14 years old, were born in Fort Worth, TX, their parents were born in Fort Worth, TX, if they happen to have an unplanned pregnancy, this young girl, her parents, the parents of this mother and this father are faced with this situation.

If there is a grandparent that happens to have Indian blood, this girl, faced with the most difficult decision of her life, cannot work with her mother and father and decide to place that child in an adopting and loving home in Fort Worth, TX so she can have some relationship with that child, they can't make the decision they think is in the best interest of the child.

It's possible that because a grandparent happened to have some Indian blood, that this girl is going to be faced with the decision of keeping the baby which she may not be financially able to do, placing it for adoption and losing it to California or wherever or having an abortion. Those options that confront this child under these circumstances.

That girl, that American citizen, her parents ought to be able to make the decision that's in the best interest of that child. No third party, no sovereign nation of whatever sort should be able to reach in and get involved in that decision. That ought to be a fundamental right in the United States of America for every American citizen, regardless of their ancestry.

The way this act has been applied, the potential for its application denies that fundamental right for American citizens.

Mr. Chairman, I respectfully disagree that the compromise that has been worked out addressed that fundamental problem with the enforcement of the act.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Congressman, and thank you for being here.

We do disagree, we disagree strongly, and I must say, in all due respect, when we lump German, Navajo, British, and South Africans all together as you do in the conclusion of your statement, it shows to me a fundamental misunderstanding of Indian tribes, their relationship with the Federal Government and American society, but we will continue to try to work for a reasonable agreement, hopefully one that you can agree to.

From your statement, you probably will not, but there are a lot of people who are making a good faith effort to resolve this issue. We also understand the history of what happened to Native American children for a long time in the history of this country and it's a regrettable and black chapter in the history of this country. So we are trying to balance all those interests and will continue to do so.

We respect your views and appreciate the passion that you bring to the issue.

Thank you very much.

Mr. Chairman, go ahead, please.

Mr. YOUNG. I know these people have been sitting here but I have another meeting to chair at 11 a.m. that's very, very important. I'll ask permission.

The CHAIRMAN. The other witnesses are more than happy because they fear retribution as you know?

Proceed, Mr. Chairman. It's very nice to have you back and it's wonderful to see your again.

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

Mr. YOUNG. Mr. Chairman, as one who used to sit on my committee, you know full good and well that I don't use that tactic. [Laughter.]

Thank you again and I submit my statement for the written record.

I am chairman of the Resources Committee that has jurisdiction over American Indians. I want to thank my colleagues in the Senate for allowing me to testify on Title III of H.R. 3286.

I oppose very strongly the inclusion of Title III in H.R. 3286. The full committee, on a bipartisan consensus, voted unanimously—I want to stress that—to strike title III out of the bill. However, the House Rules Committee chose to reinstate that title in an omnibus adoption bill. When it was considered on the House floor, it was a very close vote. By five votes, that provision was adopted.

H.R. 3286 is intended to promote family values, avoid prolonged and unnecessary litigation in adoption, get away from race-based tests in child placement decisions. I support families but title III of the bill is anti-Indian family legislation and fails to accomplish all three of these goals.

The bill was introduced without consultation with Alaskan Natives and the American Indian tribes. Very frankly, I was very, very concerned at this important issue. Without the understanding of the history, Mr. Chairman, I'm glad you mentioned the history, of where we are and how we got there, that's the most important thing.

I understand that Congresswoman Pryce's introduction of this bill and understand Congressman Geren's interest in this and Congressman Solomon's interest, but we did have a hearing earlier on in 1995 and everyone who appeared before that committee opposed the inclusion of that provision in the bill.

I would also like to suggest the National Congress of American Indians met the last week of June to discuss the working draft document of ICWA and very frankly, I think we're very nearly where we want to be. I do think the compromise has made great strides forward.

Very frankly, Mr. Chairman, I think the *Rost* case is an example of how things can go wrong, but let us not look upon this whole act as one case. Let's say this was a bad case which have never happened. There was a lawyer who I think was incompetent and that has to be stressed. Let's not forget the thousands and hundreds of thousands of Indian children that previously were excluded from their tribes by actions of certain individuals and adopted out.

It was a form of a brain drain, it was a form of a genocide that we no longer will acknowledge in American society today, moving young people, infants away from their mothers and fathers without their say so, and putting them into families that had no connection with the tribes or their culture.

I voted for ICWA and I know you did, Mr. Chairman. I think everybody in this room—maybe Ben Campbell didn't, he wasn't here at that time—voted for ICWA. Overall, the act has worked. What we have to do is address some of the problems. I think the compromise has addressed those problems and I'd strongly suggest we continue to work together and reach the solution.

I do not approve of what happened in the House. I'm sure the Senate also does not approve. What we have to do now is to work to solve this problem. If we don't reach that conclusion, then we're faced with what we have today. I hope that we will work together and solve that problem.

Mr. Chairman, I want to thank you and the members of this committee. Understand that there is a distinct difference between the American Indians and the relationship between the Congress and the tribes. We forget that in the Congress. On the floor of the House, I heard people talking about citizenship, I heard people talk about the comparisons to Hispanics or African Americans. There isn't that similarity. This is a trust relationship and only the Congress can act together with the tribes. That is our responsibility.

When we shirk that responsibility, which we just did also recently in an amendment that allowed the States to impose taxes upon tribes, that is only the authority of the United States Congress. That is our responsibility; that is our trust relationship between those nations, the tribal nations, and the Congress. We must not forget that.

For those that would like to upset this concept and this agreement we've had over the years, I beg them to study the history of where we were, how we've broken our word, how, in fact, we've not implemented what we agreed to. Let's not do that today in modern society. I think that would be a travesty of justice.

There are some cases—I have a case in Alaska that just tears my heart out under ICWA, but I would also suggest respectfully that is rare and far between and we will solve those type cases, I believe, with the compromise.

I thank you, Mr. Chairman and members of the committee.

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

[Applause.]

The CHAIRMAN. Mr. Chairman, I want to thank you for that—please, I would remind the audience that you are guests here and we don't have displays in a hearing. It's not appropriate to do so and I understand the strongly-held feelings on both sides of this issue, but we really can't do that and I would appreciate there not be any further displays. I thank you for your courtesy.

Mr. Chairman, I thank you for a very eloquent statement. Those of us who are getting a little older and frankly with the guidance and leadership of Mo Udall on these issues, I think have an appreciation for these issues. It really is our obligation to, if I may say in all due respect, provide that knowledge and experience on Native American issues to newer members of the Congress who understandably have not had the kind of involvement that we have had over the years.

At the same time, I want to emphasize Congressman Geren, we do respect your views and we appreciate them. I believe our mis-

sion is to try and reach consensus and compromise. I thank you Chairman Young for your efforts in that direction.

Senator CAMPBELL. Mr. Chairman, I also thank my colleague from the House, Don Young, and remind him in front of the witnesses here today that for 5 years, he's owed me a handmade trapper sled with genuine baleen runners that his father-in-law was making for me. [Laughter.]

With that, nice to see you here, Don.

The CHAIRMAN. You never know what happens when you're going to be a witness. [Laughter.]

Mr. YOUNG. Mr. Chairman, in all due respect, we're on Indian time and it takes a little while. [Laughter.]

The CHAIRMAN. Congressman Geren, did you want to make a comment?

Mr. GEREN. Can I ask a question because I appreciate what you just said that there are those of you who have been involved in these issues for a long time.

The CHAIRMAN. Sure.

Mr. GEREN. I can tell you with the utmost sincerity, I do not understand a law that says this 14-year-old girl in Fort Worth, TX can have an abortion and the Indian tribe has no say so in whether she does that; can keep the baby and the Indian tribe has no say so in how she raises that child; but if she wants to place the child for adoption across the street with her godparents who could provide a loving home for that child, the Indian tribe can block that. I really don't understand that. It seems like an incredible anomaly. Maybe that's just the product of the sausage-making of legislation.

She can have an abortion, she can keep it, but she can't place it in across the street so she can look after it and be a part of its life as it grows up. It's not realistic for this 14-year-old girl to move to California.

Could you explain to me the history of this act that would justify forcing a 14-year-old girl into that type of a difficult decision?

The CHAIRMAN. The tribe cannot block it, Congressman Geren. The tribe can be involved as any governmental agency can be involved. This compromise that we're working out I think would resolve that problem. I know of no way the tribe can block that adoption. As an enrolled tribal member, the law is that the tribe can be involved in that decision.

Go ahead, Mr. Vice Chairman.

Senator INOUYE. If I may respond to that, most respectfully, every sovereign country, whether it be South Africa or China or England, France or Ireland, has very clear and distinct laws affecting membership or citizenship.

If I wanted to adopt a child in France or in China, or any one of these countries, it would have to be done subject to the laws of that country. I may have all the money in the world and I can provide the finest lifestyle for this child and the natural biological parents may agree with that, but if that nation says no, you may not adopt this child unless we want to go to war, that's the nature of sovereignty.

Oftentimes laws that are enacted by sovereign nations may not fit in our lifestyle but we have to live with that. That's part of sovereignty.

In order to understand the problem before us, I think two things must be reviewed very carefully. One is the history that Chairman Young and Chairman McCain have alluded to, and the other is the concept of sovereignty which I realize may be at times rather difficult for my fellow Americans to understand because the Indians live as our neighbors, but they are sovereigns, sir.

The CHAIRMAN. Could I ask Senator Campbell to respond?

Senator CAMPBELL. It's a complicated thing but I think that there is a fundamental misunderstanding about Indian culture. You have to remember, my friend, Congressman Geren, that their law, if I can use that word, goes back thousands of years before there was any what is commonly called white man's law. Their law is based on religious values primarily and not settled in what we call white man's courts.

It's the only culture I know, in fact, Mr. Chairman, where you can have several fathers and several mothers all at the same time. In Indian culture, you can have a biological father and mother, but you can have an adopted father and mother or mothers, several, or several adopted families at the same time. Those traditional ways of adopting are really just a joint agreement between the person that's being adopted and the person that wants to adopt them. In a case with a youngster, they announce they want to take that youngster as a son or as a daughter.

Within the Indian culture, that holds up with the respect of an adoption that any law would hold on the outside. So they are treated exactly as a family member once that so-called adoption is made but they don't need a certificate and they don't need a document. It's just an agreement between people. It literally lasts a lifetime.

I have another mother that is not my biological mother. A lady whose children who were about my age on the reservation, one of them died and his name was Ben, the same as mine, and when that son died, his mother asked me if she could take me as a son to help relieve her grief. This has been years ago. I agreed to that, so I immediately inherited about one dozen other brothers and a sisters and a new mother, but within the Indian culture that's based on religious beliefs, it's absolutely as solid as some document filed in a court of law.

I think that because of that kind of complete misunderstanding, we often try to apply non-Indian logic and non-Indian systems of laws to a culture that never did recognize them and, in many cases, doesn't now and in fact. Sometimes our own religious beliefs come in conflict with those laws. I think it's difficult perhaps for non-Indian people to understand how the heck you can have two or three mothers and fathers and it's certainly difficult for traditional Indian people to understand how somebody that has nothing to do with their culture can arbitrarily make a law that overrules your religious beliefs.

It's an extremely complicated thing and I think that very often it just goes right on by you. You just wouldn't understand it or see it unless you were very close to Indian people or reservation people.

Mr. GEREN. That was helpful to me and if I could just respond real briefly to Senator Inouye.

The one difference I would suggest about the application of this law that would differ from your analogy with China perhaps, if a

person is a Chinese citizen, forsakes Chinese citizenship, moves to the United States and gets American citizenship, no matter what China tries to dictate to that person who is now an American citizen, we ignore those dictates from China.

Once that person becomes a U.S. citizen, he or she has all the protections and the rights of any American citizen. That in no way denigrates the sovereignty of China; it just respects the sovereignty of the United States and the choice of that individual to assume all the responsibilities, privileges and rights of American citizenship.

The CHAIRMAN. Congressman Geren, let me commend to your reading the statement by the Honorable Seth Waxman who is the next witness here who is going to testify and from his written statement, he says,

Since the formation of our Union, the United States has recognized that Indian tribes have the authority to govern their members and their territory. In *Cherokee v. Georgia*, the United States has entered into hundreds of treaties and agreements with Indian tribes, pledging protection for Indian tribes and securing the tribe's right to the highest and best of form of self-government.

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

Congressman Geren, you can disagree with the Justice Department's interpretation and this committee's traditional role and the clause in the Constitution that gives the Congress the unique responsibility concerning relations with Indian tribes, but there is nothing clearer than the statement by the Justice Department, and you are free to disagree with that, but that's the fundamental principle upon which the Congress and this Government has conducted its relations with Indian tribes.

In my view, we need to modify ICWA, but we cannot violate this fundamental principle which has guided my behavior, that of the vice chairman and those of us who understand the Constitution of the United States and our unique obligations to Indian tribes which understandably most Americans do not.

Mr. GEREN. I don't argue that Congress doesn't have the right to do what ICWA has done; I'm arguing that it's not good policy.

You've indulged me and I appreciate very much the chance to interact with you. You all have worked with this much longer than I.

The CHAIRMAN. Thank you very much.

Congressman Faleomavaega, it's nice to see to see you back and thank you for being with us this morning.

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

Mr. FALEOMAVAEGA. Mr. Chairman, since the gentlelady from Ohio is much more attractive and good-looking than I, I would defer to her.

The CHAIRMAN. I was going to sort of let her bat cleanup here but if it's okay with you.

Ms. PRYCE. Go right ahead. I think we're going by age. [Laughter.]

Mr. FALEOMAVAEGA. Mr. Chairman, a couple of observations in the dialog and I certainly would like to reinforce the statement made by my good friend Senator Campbell.

A classic example is myself. When I was born, my grandparents raised me. Literally, I didn't even know who my parents were, but at some point later in my life, I knew who my parents were and I ended up with 50 uncles and 100 cousins and 1,000 relatives, the fact of the extended family system that Indian culture has is exactly the same that we also have in our culture that even though I may have a cousin who is tenth removed, genealogically, as far as I'm concerned, he's my first cousin.

This is the reason why all the NFL football players who are of Samoan ancestry are my cousins. [Laughter.]

For the record, also the fact that we have 20 Samoans who play for the NFL and three made all-pro this year, so it's nice to have cousins around that do well and I know for a fact, many don't even know that they're Samoans.

With that note, Mr. Chairman, I'd also note the fact that Indian tribes are the only ethnic group that is expressly stated under the provisions of the Federal Constitution that this Government is to deal with them, not French Americans, not Chinese Americans, not Black Americans, but that Indian tribes as specifically stated under the Federal Constitution, that Congress does have that trust responsibility toward them and I think this is the reason why we are here this morning.

Mr. Chairman, thank you for the opportunity to appear before the committee this morning. I know that we're all in need of being in three places at once this morning, so I will necessarily make my statement short. Please do not take my brevity to mean that the issue I am addressing is not of concern to me.

Indian issues are of particular importance to me and any action by the Congress which would harm Indian children certainly gets my attention as I'm sure this intent and the spirit of my colleagues on both sides of the aisle feel very much about the needs of Indian children.

Today, we do have a philosophical disagreement on the provisions of title III of the bill. I want to speak in opposition to any efforts to amend the Indian Child Welfare Act which would limit the review of tribal governments over members of their tribes, particularly concerning the adoption of tribal members.

In 1978, Congress passed the Indian Child Welfare Act to stop the hemorrhage of Indian children being separated from their families. This Act was passed after long and careful deliberations over years, Mr. Chairman. Hearings were held, drafts were circulated and questions were asked.

Last month, the House passed legislation which would greatly reduce the influence tribal governments would have over the adoption of members of their tribes. The House did so without even a comprehensive hearing.

Mr. Chairman, the legislation considered by the House was not even referred to the Committee on Resources, the committee of jurisdiction on Indian Affairs in the House until the last minute. The referral was only for six days and within that period, the commit-

tee both Republicans and Democrats alike rejected the method and language used in the bill.

House legislation would require that a child's significant cultural, social and political contacts with a tribe determine his or her Indianness instead of tribal membership. It ignores the important role of the extended family in Indian culture and would lead to increased litigation.

It's important to note that the Indian Child Welfare Act does not require that Indian children be adopted by Indians. Other races are permitted to adopt Indian children. This was not a racist act, Mr. Chairman, but rather, the purpose of the Act was to ensure the cultural differences between Indians and other cultures were fairly taken into consideration in adoption proceedings. This is an important point which I do not believe has been brought out during the recent public debate.

Let me cite an example. In 1995, twin baby boys from the Salish-Kootenai Tribes of the Flathead Reservation in Montana were placed with a non-Indian couple in Montana. Though understandably frightened by the scores of horror stories they had heard, the parents and their adoption attorney rightfully followed ICWA and notified the tribe of their intention to adopt.

The paternal grandfather of the adoptive children desperately wanted to maintain contact with the twins, especially since his only child, the birth father, had been killed in a car accident.

The tribe not only consented to the adoption of the children by their non-Indian grandparents but it took the extra step of helping with a creative arrangement that allows the children to maintain a connection with their Indian family while being raised by their white grandparents. Books, pictures, art work and traditional writings done by the twins' biological family members have followed and the adoptive parents have welcomed the twins Indian heritage with respect and gratitude. This is the attitude, Mr. Chairman, that I think we should all adopt as Congress considers any change to this crucial piece of legislation.

The Indian Child Welfare Act was enacted because there were serious problems with the adoptions of Indian children. The outrages prompted the passage of the Act were numerous. Prior to its enactment, the rate of adoption of Indian children was wildly disproportionate to the adoption rate of non-Indian children. Indian children in Montana were being adopted at a per capita rate 13 times that of non-Indian children; in South Dakota, 16 times the per capita rate of non-Indian children; and in Minnesota, at 5 times the rate of non-Indian children.

The act's principal sponsor and my good friend, Congressman Mo Udall, said during the floor debate, "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and as a people are being placed in jeopardy."

I realize there are problems with the Indian Child Welfare Act. I know that one problem is with adoption attorneys who pressure parents—note this, Mr. Chairman—who pressure parents not to acknowledge their Indian heritage on adoption forms. I also know that there have only been problems with less than one-half of one percent of the total number of Indian adoptions since the act was

passed. This small problem does not warrant the shotgun approach proposed by the House.

The fact of the matter is that Indian child adoptions laws have been on the statute books since 1978, a 15 to 20-year period and I cannot believe for a second that these adoption attorneys were not aware of the Federal statutes that provide the guidelines and the process to adopt Indian children.

I also believe that there seems to be, by implication, a question as to the integrity of the tribal courts. Perhaps non-Indian clients who want to adopt Indian children purposely want to avoid tribal courts and not give the tribal courts an opportunity and a chance to provide fair judgment and assessment in adoption cases.

I strongly objected to the language as passed by the House on this issue and I continue to object very much. I respectfully urge the members of the committee to also reject the language.

I might also add as a suggestion that perhaps in the process of our negotiations with the NCAI and other tribal organizations specifically, I endorsed and supported amendments that would specify time limits for tribal intervention and for withdrawal of parent consent for termination of parental rights. These are steps in the right direction and an indication of a good faith manner in which the tribes have approached this serious problem.

I urge my colleagues in the Senate to look seriously at these recommendations and suggestions which could be a way that we could find common ground or agreement, not only to meet the serious needs addressed by my good friend, the gentlelady from Ohio and her colleagues, but certainly to maintain the integrity of the adoption process for our Indian children.

Thank you, Mr. Chairman.

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

The CHAIRMAN. Thank you very much, Mr. Faleomavaega.

Let me just point out that the adoption attorneys have been working with the committee and with the Indian tribes and I think have played a very constructive role. I appreciate their efforts.

Congresswoman Pryce, let me just say that I appreciate the communications you've had with my office, I appreciate your deep concern over this issue. I know how difficult and emotional this issue has been for you and your job is to make sure that the best interests of your constituents are represented and I'm very grateful that you would take a deep and abiding interest in this issue. I thank you for the many contributions you've made and I look forward to continuing to work with you as we try to resolve this.

Thank you very much and welcome before the committee.

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

Ms. PRYCE. Thank you very much, Senator. It's an honor for me to be here in front of you and the other distinguished members of your committee.

Mr. FALEOMAVAEGA. Will you yield?

Ms. PRYCE. Certainly.

Mr. FALEOMAVAEGA. Mr. Chairman, I apologize. Chairman Young and I have a Puerto Rican bill pending before the committee and I must leave.

The CHAIRMAN. Thank you for joining us.

Ms. PRYCE. I'm very, very grateful for the opportunity to be here today and I'll summarize to the extent that I can if I can have consent to put my full statement in the record and any extraneous material.

The CHAIRMAN. Without objection.

Ms. PRYCE. I come to you today encouraged by the movement toward needed reform of the Indian Child Welfare Act. Let me begin by saying that I believe the ICWA was well-intended legislation and I continue to support its original intended objectives. It has done much good, it has corrected many problems, all of which I knew nothing of before I started on this trail. It has been an amazing learning process for me.

However, today an overly broad interpretation of the ICWA by many courts has gone far beyond the protection and preservation of Indian families and Native American heritage. Mr. Chairman and gentlemen of the committee, children in adoptive homes have faced the horrifying possibility of being removed from the only parents and homes they have ever known, even under circumstances where their natural parents were not enrolled members of a tribe, never resided on a reservation, never had any meaningful contact with a tribe or Indian culture, where a primary cultural heritage other than Native American voluntarily relinquished their parental rights and even some chose the couple they wanted to raise their child.

It is the application of ICWA in these cases that concerns me and which serves to discourage potential adoptive parents from pursuing adoption. As passed by the House, Title III would prevent disruption in adoption of children whose parents have no significant affiliation with a tribe. That is true.

All I can say is if a child's birth family maintain no affiliation with the Indian culture or tribe to begin with, that child was not going to be raised in a setting which would reflect the "unique values of Indian culture" to begin with.

As an aside, I would just urge this committee, and I didn't really know where to place this in my remarks but I think from what I have learned over the course of the last year, I would urge the committee to give due consideration to European Americans, African Americans, Asian Americans, Spanish Americans, Hispanic American heritages, all different heritages of children in addition to their Native American heritage rather than ignoring all other ethnic and racial backgrounds in determining when ICWA should apply, particularly under circumstances where there's no affiliation with a tribe and in situations where the child's blood relationship is attenuated.

I think a continued disregard for all these other heritages, in my mind, will no doubt lead to the eventual demise of ICWA and with it, all the good things that ICWA is doing. That's just an aside and I felt it incumbent upon me to say that.

Back to the proposal that is before you today, I believe it contains many, many worthy objectives and provisions, but I fear it fails to address some of the issues and current problems with ICWA which led to the introduction and passage of Title III by the House.

First, let me focus on what I feel is positive about the National Congress' proposal. I agree that parents of Native American descent wanting to place their children for adoption should be apprized of all available placement options and especially the application of this Act. I also understand the importance of notification to the tribes and although the requirements set down before us in this draft are more cumbersome and complex than I would like, I do believe that they will cut down on future interventions. So that is movement definitely in the right direction.

Further, you may be assured that I in no way condone unscrupulous or unethical conduct of attorneys in any capacity under any circumstances.

Finally, allowing for visitation agreements between adoptive families, birth parents and their tribes may serve to decrease the likelihood of disruptions while enabling children to maintain the desired ties to their culture and their heritage and I think that is something that we all would like to see.

However, I have some serious reservations about what is not addressed in the draft. I see problems associated with the required notification when a biological parent chooses not to disclose the Native American ancestry of the child or if that biological parent is not aware of it.

Any amendment to this Act, I believe must afford protection to adoptive parents and children in those instances where there was no reasonable way of knowing that a Native American heritage was present. I think that's a minor thing, but I think it is a very important one.

Also, the proposal does not address the issue of retroactive membership and we have talked about that already at length today. I don't believe Congress could have intended that legitimate, voluntary adoptions be reversed as the result of birth parents joining or being enrolled by another in a tribe after the relinquishment of parental rights, the placement of children in loving homes, and the commencement of adoption proceedings.

Even those of us, and I am an adoptive parent, who are adoptive parents can't begin to imagine the heartbreak associated with the loss of a child under some of these circumstances. Who among us could even pretend to understand the horror and pain felt by a child of tender years being removed from the only parents and family he or she has ever known.

Mr. Chairman, so many of these issues are ones of fundamental fairness and recognition of basic human rights of all people. Children are not chattels nor are they the personal property of an Indian tribe, their birth parents or their adoptive parents. They are individuals who have unique, fundamental rights and needs. Above all, they have the right to permanency and a loving, nurturing family environment providing them stability and security. They should have all these rights irrespective of their race as do all other American children.

I understand and appreciate that this proposal is continually evolving and that further changes have been suggested. I'm very hopeful that is the case. I sincerely appreciate the efforts of all the tribes and the individuals who have participated in discussions and

negotiates leading to the proposal offered by the National Congress of American Indians.

I look forward to continuing to work with them and with you and your committee. I remain most hopeful that we can achieve a consensus regarding ICWA reform.

There are so many problems we don't know how to fix, but I think we have a pretty good handle on how these can be fixed. I think it's our responsibility to do it during this Congress. I respectfully ask the committee to act on this and focus on language that will truly address the problems at hand.

Once again, I thank you for the privilege of being able to testify.

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

The CHAIRMAN. Thank you very much, Ms. Pryce, and I appreciate again your continued involvement and leadership.

I want to thank you and all the other witnesses. Congressman Geren, thank you for being here.

Anyone have any questions?

[No response.]

The CHAIRMAN. Thank you very much.

Ms. PRYCE. Thank you.

Mr. GEREN. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Inouye, would you like to make your statement at this time?

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

Senator INOUE. Mr. Chairman, I thank you for this opportunity to reserve this time.

The matter before us is of grave and critical concern to Indian country. I believe the testimony later on will give weight to that.

Like all of my colleagues on this panel, I commend those who have introduced these measures for their noble intent. I do not question their intention, they intended very well and only good. But like most well-intentioned measures concerning Indian country, this measure did not involve the wisdom of Indian country. It was a measure that was conceived and made in Washington for Indian country. I hope we will learn as time progresses that the best laws are those laws that originate in Indian country.

As a result of this title III, my office has received literally tons of letters from Indian leaders throughout this land. If I may, Mr. Chairman, just to paraphrase some of their concerns, these tribal leaders strongly oppose these amendments because "They seriously undermine the sovereign authority of tribal governments and their efforts to preserve Indian families." They oppose these amendments because "They directly infringe upon one of the most important aspects of tribal sovereignty, the power to determine tribal membership." They oppose these amendments because "They authorize State courts to review tribal membership practices and procedures as part of a child custody proceeding and to render judgment as to tribal membership that may be in conflict with the membership determination of tribal governments. These amendments dramatically alter the definition of persons covered under the Indian Child Welfare Act.

They oppose these amendments because "They remove tribal governments from any role in determining both child custody arrangements and tribal membership for purposes of the Indian Child Welfare Act." These leaders feel that these measures are clearly inconsistent with the well-established Federal policy which for over one quarter of a century has consistently recognized and reaffirmed the inherent sovereignty of tribal governments and the right of those governments to determine tribal membership.

The Supreme Court underscored the tribe's right to define its own membership in the case of *Santa Clara Pueblo v. Martinez* when it observed that "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."

Mr. Chairman, most respectfully, I believe that to better understand and appreciate the deep concerns of Indian country, a brief review of the history of the matter before us may help because the removal of Indian children from their families and tribal communities has deep roots in this country. It is nothing new.

From the very beginning of our history as a Nation, deliberate attempts and efforts by Europeans to civilize and christianize the inhabitants of this country were directed at Indian children. As early as 1609, it was suggested that Indian children be taken from their families and placed in schools to be educated. Tribal resistance to efforts to remove Indian children from their communities was evident as early as 1744 when a tribal leader declined an invitation by colonists to educate their Indian boys at the College of William and Mary.

As early as the 18th century, missionaries intent upon christianizing Indians according to their standards established boarding schools in an effort to isolate Indian children from their traditional surroundings. This was done with noble intentions.

These early attempts at educating Indian children were, for the most part, a failure and caused many children to become ill, languish in despair and ultimately perish.

Later in 1819, the Congress enacted a law which established a civilization fund for the education of Indians. This fund was turned over to religious and mission groups and was used to establish mission schools for the education of Indian children.

In the late 1840's, the Federal Government and private mission groups combined efforts to launch the first Indian board school system and the first non-mission Federal boarding school was started in 1860. Richard Henry Pratt, the founder of the Carlisle Indian School and considered to be the father of Indian education, believed that in order to transform a people, you must start with their children. This attitude was also expressed by the Federal Superintendent of Indian Schools in 1885 when describing his duty to transform an Indian child into a member of a new social order.

As a result of this ideology, Indian children were taken from their grieving parents and kept away from them for many, many years. These children were typically punished for speaking their own language and cleansed of all traces of their Indianness. By the end of the 19th century, the pattern of forcibly removing Indian children from reservations and sending them to faraway boarding schools had become so pervasive that the Congress enacted legisla-

tion in 1895 which made it a crime to induce Indian parents by compulsory means to consent to their children's removal from the reservations. However, there is no evidence that this law enacted to prevent the forcible removal of Indian children by agents of the Department of Indian Affairs was ever enforced.

The earliest reported case that involved an Indian child custody proceeding and illustrated the tensions that existed between tribal and State jurisdictions was in the *Laalapuckachee* case decided in 1899. This case involved an Indian girl whose State-appointed, non-Indian guardian forced her to attend a school far way from her reservation. The Indian agent for the Sac and Fox Tribes of Iowa had obtained legal guardianship for all of the children from an Iowa State Court and removed them from their homes.

The parents succeeded in their habeas corpus petitions for the release of their children. The Iowa Federal District Court concluded that only courts of the United States could determine the custody of an Indian child who resides on a reservation and whose tribal relations have not been severed.

In sum, I believe it is very clear that for hundreds of years, Indian children have been the innocent victims of a cultural war waged against them by those who later immigrated here. The issue is clearly demonstrated, I believe, that the idea of separating Indian children from their tribal communities is deeply embedded in the fabric of American society.

These attitudes have also served to promote the removal of Indian children from their homes and place them in adoptive homes. The adoption of Indian children became popular at a time when there was a decline in healthy white children available for adoption. Religious groups also encouraged their members to become foster and adoptive parents to Indian children. The Latter Day Saints Placement Program removed as many as 2,000 Hopi and Navajo children every year from their reservations placing them in Mormon homes throughout the country.

In the early 1970's, the erosion of Indian family life received extensive publicity. Surveys that were conducted in 1969 and 1974 by the Association of American Indian Affairs disclosed the shocking disparity in placement rates for Indian and non-Indian children. These surveys revealed that over 25 to 35 percent of all Indian children were separated from their families and placed in foster homes, adoptive homes or institutions. In some areas of the country, the problem was even worse with one in every four Indian children under the age of one being adopted.

This study clearly demonstrated that over the years, Indian children have been unnecessarily removed from their families, clans and tribal communities and placed in mission and Federal boarding schools, non-Indian adoptive families, and foster homes and institutions.

State courts and social service agencies have severed the ties of thousands of Indian children from their families and tribal communities through the use of unwritten policies that gave an automatic preference to middle-class, non-Indian homes and institutions in adoption, foster care and child custody proceedings.

The Indian Child Welfare Act, the Act before us, was a reform measure enacted by Congress in 1978 to combat "The wholesale

separation of Indian children from their families and tribal communities." With the passage of this act, Federal law required that preference be given to Indian families and Indian foster care and group homes in the placement of Indian children by State and private social agencies. The act authorized an Indian tribe to intervene on behalf of a child in court proceedings that involved child custody matters and the placement of Indian children.

When the Congress passed the Indian Child Welfare Act, it made a commitment to protect Indian children by officially proclaiming—I believe we should remember this quotation,

There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest as trustee in protecting Indian children who are members of or are eligible for membership in an Indian tribe.

As a result of the passage of the Indian Child Welfare Act and the subsequent use of Indian Child Welfare Act as a Federal remedy, the removal of Indian children from their families is not as widespread as in the past and has motivated courts and agencies to place greater numbers of Indian children into Indian homes. Social workers and court personnel are slowly becoming better trained and educated in working with Indian children, their families and the Indian Child Welfare Act.

Nevertheless, there continues to be many shortfalls that plague the implementation of the act such as inadequate Federal assistance, the small number of lawyers and judges who are knowledgeable about this act, the inertia of State social service bureaucracies and their insensitivity to traditional Indian cultures, the uncertainty about the degree to which the Act preempts State laws, the lack of funds to attack the underlying social and economic problems that pervade many Indian communities and compel outsiders to believe that they must rescue Indian children, and the parents of Indian children who attempt to evade the act.

Despite these shortcomings, the Indian Child Welfare Act serves as a real hope and promise to Indian people striving to retain their heritage and pride in a pluralistic society. The law was enacted by Congress to secure a long, overdue protection for Indian children. Tribal leaders have been resisting the removal of their children for over 2½ centuries for each time an Indian child is taken from their ranks, their very existence as a culturally distinct people is diminished and this Nation's first Americans are threatened to the point of extinction.

I believe it is time that we in Washington hear from Indian country on this matter that is of such critical importance to their efforts to preserve Indian families. After all, it is their children that will be affected by any amendment to this act.

Mr. Chairman, I thank you very much for providing me this opportunity to relate what I consider to be a rather bleak chapter in American history that still concerns, understandably, Indian people and Indian country.

Senator CAMPBELL. Mr. Chairman, may I compliment my colleague, Senator Inouye, for that very eloquent statement. My dad was in a boarding school in those days and I remember hearing the stories of forced assimilation, of beating them for speaking their language, of cutting their hair. I guess the closest thing I could call

that was sort of a cultural cleansing which was ethnic cleansing without the blood I suppose. They didn't kill them but certainly they killed many of their spirits, their traditions, their religions, their beliefs, their pride in many cases, and I just have to say that I think Indian people have every right to be scared to death of a complete reversal of the Indian Child Welfare Act because of that.

During the times that the Senator mentioned, a lot of the youngsters were what is termed simply lost in the Indian culture. I guess that's why there is, according to the Bureau, something like 1.3 million enrolled American Indians but according to anthropologists backed up by census figures, there's about 15 million Americans who claim Indian ancestry. So I think that disparity speaks to how many of those youngsters actually did lose their tribal identity.

I thank the Senator from Hawaii for that very fine statement.

The CHAIRMAN. Thank you very much, Senator Campbell.

Next we will hear from Seth Waxman, Associate Deputy Attorney General, U.S. Department of Justice and Ada Deer, Assistant Secretary for Indian Affairs, BIA.

Welcome back to both witnesses, we appreciate you being here. As you know, it's the custom of the committee to ask you to deliver your statement in whatever way you feel most effective. Your complete statement, of course, will be made part of the record.

Welcome, Mr. Waxman. It's good to see you again. Thank you for being here. Before you begin your statement, did I misquote you? Mr. WAXMAN. I don't know. It was quite eloquent. I hope that I said what you read. [Laughter.]

The CHAIRMAN. Thank you. Would you care to go first, sir.

STATEMENT OF HON. SETH WAXMAN, ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. WAXMAN. I'd be pleased to go first.

Thank you, Mr. Chairman, Mr. Vice Chairman, and other members of the committee for inviting the Department of Justice to present its views on proposals to amend the Indian Child Welfare Act.

I want to say, sitting here and having had the opportunity to listen to the panel before me that, although I have had the pleasure and the honor of testifying before many committees in this House and the other, testifying before this committee is a unique pleasure for me. I tell the Attorney General it's more like attending a seminar for me, I always learn much more after I leave here than I felt I knew when I came in. I was greatly educated by the comments of both the members of the committee and the previous panel.

Mr. CHAIRMAN AND MR. Vice Chairman, the Justice Department supports the right of Indian tribes to self-government and recognizes the important needs of Indian children for caring families and nurturing homes. We understand that the proposals under consideration, particularly those of the National Congress of American Indians, represent an effort to reach consensus among adoption attorneys and tribal representatives.

In considering amendments to ICWA, Congress should be mindful of ICWA's important purposes and tribal rights of self-government. The Justice Department supports the committee's action of June 19, 1996 that eliminated Title III of the Adoption, Promotion

and Stability Act of 1996. Although the Department otherwise strongly supports H.R. 3286, we believe title III would interfere unnecessarily with tribal self-government in matters of tribal membership and potentially complicate rather than streamline the adoptive placement of Indian children.

The Department of Justice has only a limited role in the implementation of ICWA, so our knowledge of how and how well ICWA works is premised largely on the reports of the Departments of the Interior and Health and Human Services. They report that the act generally works well, particularly when the affected parties are apprised of their statutory rights and duties and its provisions are applied in a timely manner.

We believe that many of the proposals developed by NCAI, tribal attorneys and adoption attorneys move the debate in the right direction. These amendments would clarify ICWA, provide deadlines to reduce delay in custody proceedings, and strengthen Federal enforcement tools to promote compliance with ICWA in the first instance.

My longer, written testimony includes some preliminary comments on the draft proposals and we would be pleased to assist the committee in developing concrete proposals that are both respectful of tribal self-government and promote timeliness and certainty in voluntary adoptions of Indian children.

Under ICWA, courts are able to tailor foster care and adoptive placements of Indian children to meet the best interests of children, families and tribes. We understand that the vast majority of these cases are adjudicated without significant problems.

Recently, however, the application of ICWA to a relatively small number of voluntary adoption cases has evoked intense debate, both in this house and the other house of Congress. Generally, in these cases, Indian parents or a tribe alleging that ICWA was not complied with or was evaded seek to recover custody of the Indian children.

The tragedy in these situations arises from the length of time consumed by the legal proceedings. Delay causes anguish and disruption and one's heart goes out to all the parents and perspective parents and, especially to the children who find themselves caught in the center.

It's important to reiterate, however, that these problematic cases are not indicative of the manner in which ICWA operates in the vast majority of circumstances. Further, many of these cases would either not have arisen or would not have been so problematic if ICWA's dictates had been complied with at the outset of the adoption process.

For example, among the cases prominently cited for the need to amend ICWA is the adoption that provided the factual predicate for the *In re Bridget Rost* decision in the California Court of Appeals. I know you've already heard about the *Rost* case from the previous panel and I understand that the *Rost* attorney will also be testifying later today.

In that case, twin girls of Indian descent were placed with a non-Indian family when their biological parents relinquished them to an adoption agency. The biological parents and the interested tribe subsequently challenged the adoption and the ensuing protracted

litigation has disrupted the lives of all those who have been involved in the dispute.

Had ICWA been complied with at the outset, however, most of the delay and quite possibly the litigation itself would have been avoided. The biological parents would have been required to wait 10 days after birth to relinquish their rights and when they did so, they would have been instructed by a judge as to their rights under the statute and the consequences of their waiver of those rights. None of this occurred and that created the problem. *Bridget R.*, therefore, signals a need to fine tune ICWA's mechanisms to provide incentives that ICWA be complied with early on in the adoption process.

Many supporters of title III, focusing solely on *Bridget R.* and other unusual cases, assume that ICWA's application to these cases will produce a particular outcome, namely the removal of children from non-Indian adoptive parents. The facts of the very case addressed in the Supreme Court's seminal and only decision on ICWA, the *Holyfield* case, demonstrate that this assumption is mistaken.

In *Holyfield*, 3 years after a State court had issued an adoption order placing Indian children domiciled on the reservation with a non-Indian family, the Supreme Court reversed the order, holding that the tribal court had exclusive jurisdiction over the case. The court noted that "Had the mandate of the ICWA been followed at the outset, much potential anguish might have been avoided." The court deferred to the "experience, wisdom and compassion of the tribal court to fashion an appropriate remedy."

Following transfer of the case to the tribal court, the tribal court in that case determined that it was in the children's best interest to remain in the current placement with Vivian Holyfield, the non-Indian adoptive parent, but in order to preserve the link between the children and the tribe, the court made arrangements for continued contact with extended family members and the tribe.

As *Holyfield* demonstrates, ICWA does not resolve the ultimate issue of who should have custody of a particular Indian child. Rather, it allows courts to make that decision on a case-by-case basis taking into account the best interest of the child.

The Department of Justice opposes the title III amendments to ICWA as passed by the House because they would interfere with tribal self-government and undercut tribal court jurisdiction. As Senator Inouye previously noted, the Supreme Court held in *Santa Clara Pueblo v. Martinez*,

The power to determine tribal membership is a fundamental aspect of tribal self-government, akin to the power of the United States to determine citizenship. Tribal membership is thus a matter of tribal law which should be determined by tribal court institutions and other tribal government institutions.

As Congress recognized, "States have often failed to recognize the essential tribal relations of Indian people", and we've heard from other members of the panel today and from the previous panel specific examples of instances in which that occurred.

Title III's proposal to establish a system wherein Federal statutory protections turn not on tribal government determinations of tribal membership, but on a tribal member's degree of "social, cultural or political affiliation with an Indian tribe" is contrary to the

recognized rights of tribal self-government. To the extent Title III authorizes State courts to make these determinations, it further undermines tribal self-government and the objectives of ICWA.

Moreover, title III grafts onto ICWA a subjective and open-ended test that, if anything, will increase the quantum of litigation. The existing trigger for ICWA, tribal membership and eligibility for tribal membership, is readily discernible by inquiry into the relevant tribal government.

In contrast, the social, cultural or political affiliation test incorporates subjective criteria more likely to create additional litigation with attendant delays in the adoptive placement of Indian children than to streamline adoptive placement.

Mr. Chairman, Mr. Vice Chairman, we hope today's hearing will promote consensus on proposals to amend ICWA in a manner that is both respectful of tribal self-government and conducive to certainty and timeliness in voluntary adoptions of Indian children. We appreciate the efforts that you—the Chairman, the Vice Chairman and the whole committee—are making in this area to foster dialog consistent with the government-to-government relations between the United States and Indian tribes.

Thank you and I would be pleased to try and answer any questions the committee has.

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

The CHAIRMAN. Thank you very much.

Welcome back, Ada.

STATEMENT OF HON. ADA E. DEER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Ms. DEER. Thank you very much, and good morning, Mr. Chairman and Mr. Vice Chairman.

I'm pleased to be here to present the Department of the Interior's views on the proposed amendments to the Indian Child Welfare Act of 1978. I will summarize my written testimony for the record and ask that my written statement be entered into the record in its entirety.

The CHAIRMAN. Without objection.

Ms. DEER. I want to mention that Rosetta White Mountain will submit a moving and personal account which relates her adoptive experience and her efforts to trace her roots and finally make her journey home to reconnect with her family and tribe. The ICWA was enacted to prevent similar situations like Ms. White Mountain's from occurring to future generations of Indian children.

First, I want to thank you, Mr. Chairman and Mr. Vice Chairman, and members of the committee, for your commitment to Indians and for having the House passed amendment removed from H.R. 3286 during the markup last Wednesday. Again, I want to thank both of you for your very eloquent and informative statements today.

The strongest premise of ICWA is the premise that an Indian child's tribe is in a better position than a Federal or State court to make decisions or judgments on matters involving the relationships of an Indian child to his or her tribe. The clear intent of Con-

gress was to defer to Indian tribes on issues of cultural and social values as they relate to child rearing.

In the case of my tribe, the Menominee Tribe of Wisconsin, the application of the act has had a profound impact on the tribe and its future, especially when you recognize that a new generation of tribal members will assume the mantle of leadership for the 21st century. Let me say that I'm a social worker and that these matters are very close to my heart.

Since enactment of ICWA, my tribe has intervened in no less than 920 off-reservation child custody actions. This alarming number represents 12.1 percent of the entire membership of the tribe or roughly, 37 percent of the members under the age of 18. It is important to recognize that the Menominee Tribe only asserted jurisdiction in less than one-half of these cases. Their compelling motivation is always the welfare of the child.

My example illustrates an important distinction between a tribe's right to intervene in a case and a tribe's discretion to transfer a case to tribal court jurisdiction. Tribal decisions to intervene in involuntary State-child custody proceedings have enabled tribes to access the official records of the proceeding which, in turn, further enabled them to monitor case plans being developed and implemented on behalf of their tribal children.

Tribes have the right to determine their own membership. The right stems from the nature of tribes as political entities with sovereign powers. A tribe's power over its membership includes establishing the membership requirements, the procedures for enrollment and the benefits that go with membership.

Because the United States has a government-to-government relationship with Indian tribes, the Department of the Interior is committed to the protection of their sovereign status, including the preservation of tribal identity and the determination of Indian tribal membership as it relates to voluntary child custody proceedings under ICWA.

Tribes came together at the NCAI mid-year conference in Tulsa, OK earlier this month and developed a consensus-based legislative alternative to the proposed amendments of ICWA. We support the tribal governments' efforts to revise the existing ICWA. The tribal amendments will clarify the applicability of ICWA to voluntary child custody matters so that there are no ambiguities or uncertainty in the handling of these cases.

This administration will work tirelessly to ensure that tribal sovereignty will not be sacrificed, especially the right of tribal government to determine tribal membership and the right of tribal courts to determine internal tribal relations. We must prevail on this issue for sovereignty's sake and for the sake of our children.

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

The CHAIRMAN. Thank you very much. Thank you for a very strong statement.

Mr. Waxman, would certain provisions of title III as passed by the House be open to constitutional challenge, especially for example, the part on Indian descent, might be challenged under the *Aderand* case? In other words, giving jurisdiction to State courts over tribal issues, wouldn't that be open to constitutional challenge, in your view?

Mr. WAXMAN. We don't think that it would. We think that although for the policy reasons that I've articulated orally here today and at some greater length in my written testimony, it's not the conclusion of the Justice Department that inclusion of Title III, any or all provisions of title III, would violate the Constitution.

While we believe that title III would undermine tribal sovereignty and this is inconsistent with the premise that Indian tribes are best situated to determine what's best for their own children, Congress does have, we believe, the authority to limit ICWA's application in cases where a child, for example, is not domiciled on a reservation, to instances where an Indian parent has a significant social, cultural or political affiliation with other tribes.

Our very, very strong and unequivocal opposition to title III is not based on our understanding of the Constitution.

The CHAIRMAN. Thank you very much.

Senator Inouye.

Senator INOUE. Thank you very much.

In your prepared statement, Mr. Waxman, I believe you addressed a concern put forth by Senator Glenn and others on the retroactive nature of this act. Could you advise this committee as to what circumstances may bring about an overturning of the *Rost* judgment?

Mr. WAXMAN. I'll try. The issue that Senator Glenn raised with respect to retroactivity and retroactive application for tribal membership is one that I think is very, very difficult and is very fact sensitive. Before making any kind of evaluation, I personally, and I know the Department of Justice generally, would need to see the specific retroactivity provisions in order to be able to make a judgment as to whether they were appropriate, legal or constitutional.

It's interesting, I think Senator Glenn and many of the other members of the previous panel used the *Rost* case as an example of the ills of permitting retroactive membership in a tribe. I didn't participate in the *Rost* case and unfortunately because I need to go testify at another Senate hearing that is going on right now, I'll have to leave after I finish testifying, so I won't be able to hear the testimony of the *Rost* family attorney, but my reading of that case suggests to me that retroactivity really isn't at issue in the case because under the rules of the particular tribe to which the birth father had lineal descent, he was considered under the tribe's pre-1973 rules to be a member of the tribe even though the tribe subsequently changed its rules to require affirmative enrollment.

I realize this is a long-winded and confusing answer. I think the short answer is, we would like to review very carefully specific language that would adjust what many people call retroactivity and retroactive applications to make sure that they were consistent with the way in which the wide diversity of Indian tribes define membership.

Senator INOUE. Mr. Waxman, I'm looking over the statement of yours and I quote,

At the entry of a final adoption decree, a collateral action may be maintained only on the grounds of fraud or duress within two years of the decree unless a longer period is provided for by State law.

Am I to interpret this that if we can find fraud or duress, you can have a retroactive application?

Mr. WAXMAN. I don't have my written statement in front of me, but the fraud or duress provisions I believe are found in Section 19.13 of Title 25 which provides that after there is entry of a final decree of adoption, a parent may withdraw consent on the grounds that parent's consent was obtained through fraud or duress and thereby petition the court to vacate the decree.

Senator INOUE. So you can do this anytime after the issuance of the decree?

Mr. WAXMAN. Under ICWA, that is right and there are similar provisions in State laws. I'm not an adoption attorney, I never was an adoption attorney and I don't consider myself to be a student of child custody law, but my understanding is that provisions exist in many, if not most, if not all, States with respect to custody.

If I could just take the opportunity in answering your question, Senator, to answer the question that the Congressman from Texas had raised with respect to his hypothetical: ICWA defines an Indian child to be,

An unmarried person who is under age 18 and either (a) a member of an Indian tribe, or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

The hypothetical that the Congressman was raising was, a child born of two parents who want to put the child up for an open, non-Indian adoption but the child has a grandparent with some minimal degree of Indian blood that might or might not qualify that person to be or become a member of a tribe and what an injustice it appears, in the Congressman's mind, to be that the tribe could intervene and seek to block the otherwise consensual adoption.

I think the best answer, the shortest answer to that problem is that it is not a problem. In real life, it is not a problem because if two parents, either one or both of which have Indian blood, don't want to have an adoption that is subject to the provisions of ICWA, they can take themselves and their child out of ICWA by simply renouncing their membership in the tribe, in which case ICWA wouldn't apply. If that happened in the hypothetical case raised by the Congressman, there would be no argument, I believe, that ICWA would apply.

The situation he's addressing is, the extraordinarily unusual situation in which one or both parents want to maintain their membership and affiliation with a tribe, but want to have an adoption that does not take account of ICWA. In those instances, this Congress has concluded, and rightly so, that the interests of the tribe are such that it should be given notice and a say.

Senator INOUE. Thank you very much.

May I ask Secretary Deer, you have given us an illustration. Is there any other illustration you can point out of the impact of ICWA?

Ms. DEER. Of course each tribe has its unique experience. In my preparation for this session, I became aware of the situation with the Cherokee Tribe. Last year, the Cherokee Tribe received 5,528 ICWA notices. They sought transfer of jurisdiction but intervened in only 96 cases and sought jurisdiction of 15 cases to the tribal court. Only 12 notices out of those 5,528 were complied with fully under ICWA. So you can see that's a very startling situation.

Senator INOUE. These are recent statistics?

Ms. DEER. Yes.

Senator INOUYE. Thank you.

The CHAIRMAN. Thank you very much. I thank the witnesses. Next, we will hear from Deborah Doxtator, chairwoman of the Oneida Tribal Council and Mary Thomas, Governor of the Gila River Indian Community.

Perhaps, Chairman Doxtator, you would want to identify the people who are here with you and Governor Thomas, you would want to do the same for the record, beginning with you?

STATEMENT OF DEBORAH DOXTATOR, CHAIRWOMAN, ONEIDA GENERAL TRIBAL COUNCIL, ONEIDA, WI

Ms. DOXTATOR. Good morning, Mr. Chairman and Mr. Vice Chairman.

My name is Deborah Doxtator and I'm the Chairwoman of the Oneida Nation of Wisconsin. Accompanying me today are our tribal attorney for Indian child welfare issues, Aurene Martin and also I have the unique privilege of being able to introduce my daughter, Amanda Doxtator. Her Oneida name is Kahawhita which means she takes it with her, so she takes her mother with her. [Laughter.]

I am very privileged to have her here with me this morning.

The CHAIRMAN. Thank you.

Mary, do you want to introduce Mr. Lewis?

Ms. THOMAS. Good morning, Mr. Chairman, Mr. Vice Chairman and committee members. With me today at the table is the honorable counsel for my community, Rod Lewis.

The CHAIRMAN. Thank you.

Chairwoman Doxtator, would you proceed?

Ms. DOXTATOR. Mr. Chairman, my Oneida name is Yukhiwananun and I received that name from a tribal elder. Her name is Maria Hinton and it means, she keeps our words for us. I think that carries a large responsibility with it in that I need to, as an individual, carryout the responsibility of keeping our Oneida language and culture intact within our nation. So I take that responsibility very seriously. I think it is with that tone that I would like to present my testimony this morning.

We thank you for the opportunity to address the committee on this vitally important issue. We all recognize there is a tremendous desire to protect the best interest of Indian children. My testimony this morning will focus on the tribal perspective of the Indian Child Welfare Act and the alternative amendments developed by the National Congress of American Indians.

The Indian Child Welfare Act states in part, "There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." As a people rich in tradition, the Oneidas are taught that every decision we make must not only take into account the next generation, but the next seven generations as well. Just as we are a seventh generation to our ancestors, someone tomorrow will be a seventh generation to those of us alive today.

The Oneida tradition tells us we must walk carefully on Mother Earth because the faces of those that are yet to be born are coming out of the ground. Those are the faces we have to think about for the next seven generations.

I cannot emphasize enough how important family and children are to the Oneida Nation. This idea is based upon Iroquois traditional law, or the great law of peace. The family is the very center of our culture and as a member of the Oneida Nation, I have a responsibility not only to assist any member of my family who is in need today but to protect the interests of those children who will be living 175 years from now.

Additionally, the Oneida definition of family is different from that of majority culture. In Oneida, we define family as parents, grandparents, aunts, uncles, cousins. This extended family is our support system. It provides for us in our times of need and is there to share in good fortune and prosperity.

The Oneida also believe that it is vital for our children to have knowledge of their identity as Oneida people and to know our language and our customs. At some point in each of our lives, our identity as Oneida and our sense of family are the only anchors we have as we make our way in the world.

It is extremely important to Oneida that any change in ICWA continues to allow Indian nations to be involved in the upbringing of our children. Children are the resource that continues the existence of our culture. At the same time, our culture gives them the tools they need to establish a firm self-identity and a healthy sense of who they are.

We certainly believe that this Congress will not want to be remembered for reinstating an extinguishment policy in regards to Indian nations and the value that we bring to this natural world through our culture, our traditions and our children.

In Oneida, 98 percent of the children we serve through ICWA are victims of abuse and neglect. In terms of real numbers, Oneida presently serves 229 children, 225 of which have been placed in foster care or adoptive placements through State-initiated actions. Only 4 of the 229, less than 2 percent of our entire caseload, have been placed by private adoption agencies.

With these beliefs in mind, we went to the NCAI meeting in Tulsa, OK to develop alternative amendments that address the perceived problems with ICWA. These alternative amendments signify the willingness of Indian nations to address the specific concerns of those who feel ICWA does not work. More importantly, the amendments meaningfully address these concerns.

The NCAI amendments will provide more security for prospective adoptive parents and still protect tribal sovereignty. Highlights of the alternative amendments include expanding the notice provision and placing a deadline on intervention which will provide an incentive for parties to notify a tribe early on in an adoption proceeding. This change will allow tribes to participate in the initial adoptive placement decision.

The alternative amendments also impose a criminal sanction on attorneys who knowingly violate the Act. This change is important because virtually all controversies over ICWA began when the Act was not followed.

The Oneida Tribe has made efforts in Wisconsin to reach out to representatives of the adoption community with whom we regularly work to discuss our overall alternative amendments and their concerns. An attorney in our legal department, who is Aurene, cir-

culated correspondence locally about these issues. She has also recently been involved in discussions with other adoption attorneys, including those testifying today.

The language developed by NCAI does much to address the need for certainty in adoption proceedings. This need for predictability is common to all attorneys who work with Indian children in out-of-home placements. Additionally, those outside the adoption community understand that the House amendments do not address the perceived problems.

The State Bar of Wisconsin is on record as opposing the House amendments and believes the House amendments will have a detrimental effect on child welfare practice in Wisconsin, thereby resulting in more litigation.

The changes to ICWA that were passed by the House take away our ability to carry out our responsibilities as a nation and as individual family members. I urge you to continue to recognize the incredibly rich legacy that the Oneida Nation and all Indian nations leave not only to their children, but all Americans regarding dedication to the family by adopting the NCAI language.

ICWA is a very complex statute and any attempts to amend it should be done with great deliberation and valuable input from tribal members. The amendments proposed by NCAI do just that.

Thank you for giving me this opportunity to speak about the best interests of Indian children. I have a written statement to submit for the record and I would be happy to answer any questions you may have.

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

The CHAIRMAN. Thank you very much.

Amanda, may I ask your age?

Amanda Doxtator. I am 10 years old.

The CHAIRMAN. Do you have anything you'd like to tell the committee?

Amanda Doxtator. No.

The CHAIRMAN. Thank you. If you do, just speak up.

Governor Thomas.

STATEMENT OF MARY THOMAS, GOVERNOR, GILA RIVER INDIAN COMMUNITY, SACATON, AZ

Ms. THOMAS. That's what I was going to say, Mr. Chairman, just give her some time. [Laughter.]

She'll be like her mother, I'm sure.

The CHAIRMAN. Welcome, Mary.

Ms. THOMAS. Thank you, Senator McCain and Vice Chairman Inouye.

I'm really flattered and honored to be invited to submit testimony. I have two, in fact, one from the Intertribal Council of Arizona representing 19 tribes and my own community, the Gila River Indian Community in Arizona.

The CHAIRMAN. Without objection, they will be made a part of the record.

Ms. THOMAS. Thank you. I guess, first, I want to start off by saying that we were caught off guard, I guess, which we always should have up in regards to the method of how this came about, and we were not consulted and we were not informed, but we put our

thinking hats altogether and as a result, at the meeting Tulsa, came up with some compromise language I think will address the concerns of Congresswoman Pryce. However, I think this has been going on for about 1 year and she should have known the concerns we had and maybe even studied a little bit more.

I believe she needs to know about the different reservations and how unique we are in setting up our membership rolls. In Gila River it's very complicated, sophisticated and it's very thorough on how we provide people opportunities to enroll in our community. I think that has to be taken into consideration.

We also have a good working relationship with the State of Arizona itself. The late Honorable C. Kimball Rose, who was the presiding judge of the juvenile courts in Maricopa County in 1978, was instrumental in causing the Superior Court of Arizona to endorse and conform to the mandates of the act, so the act does work. I believe when you circumvent the act, that's when a lot of things come out and I think this is the case. That's what I'm hearing.

In Arizona, we have 1,300 cases alone regarding adoptions and foster care. I think we're just below Alaska which is the highest. In Gila River, we have 60 every year. With the agreements set up and the intergovernment memoranda with the State of Arizona, the State has recognized that they do have the option of overriding the tribal objections to placement in foster care. We do not raise those objections unless it's for the benefit of our children.

I believe the Pryce amendments, although they seem to indicate those are very minimal, will have a detrimental effect on the way it benefits our children.

I come before you with some stories involving our reservation alone because we have a lot of returning adoptees who, for some reason, when they grew out of their infancy and were no longer so dependent on the parents, they were rejected in later years as teenagers, as young adults. Maybe it's because of the standards or the apparent noticeable differences between the parent and the adopted child, whether it be the color of the skin, the eyes, whatever, but we find them back on our doorsteps asking if we can trace back their ancestry.

These are the stories that we don't hear about but there are many. Some of these children have gone into depression, relied on drugs, alcohol and have there have been suicide stories because they could not identify with who they were attached to.

Then there are stories of those who completely ignore the Indian Child Welfare Act and kidnap our children. I am searching for one now who is in Missouri somewhere and through a church affiliation, they seem to block every road that I try to find. Her mother wants to see her before she passes on and it's heart rending when she comes to my office and says what can you do and I'm still trying. I need every help that I can get.

You will see in my testimony what my feelings are about the amendments. I want to relate to you the Navajos have a concern about the time limits because of the vastness of their reservations and also because there is an unjustifiable site issue with regards to funding. There's still a lot of funding cuts going on in Indian country and most of them cannot survive. It's hard for them to survive, so some of these parents, the alternative is adoption because

they have no way of taking care of their children. That's the sad part.

In conclusion, Honorable Chairman McCain, Vice Chairman Inouye and the committee, as a tribal leader I'm very aware of the imposed standards of the great majority on American Indian life today. Within the walls of our hogans, our pueblos, our adobe homes, our straw huts, there is laughter, there is discipline, there is education, care and most important, love and also the life and the spirit.

We look into the eyes of our children, as you see one sitting here with us today, we look into the eyes of our grandchildren, and we see our future, see the future of Indian country, and the destiny of our people.

We ask for the support and respect for our living treasures and to defeat the amendments known as title III.

Thank you.

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

The CHAIRMAN. Thank you very much.

Deborah, you said that 98 percent of the children are victims of abuse that you have in custody. Would you elaborate on that situation?

Ms. DOXTATOR. 98 percent of the 229 children that we're serving in these situations through ICWA are victims of abuse and neglect. It's very unfortunate and a lot of that relates to what Mary was talking about, the statements of the Honorable Daniel Inouye earlier talking about the historical context of Native Americans and what we've had to deal with over time. A lot of that is lack of our self-identity and who we are as Native American people. I think that leads to the alcohol and drug abuse and then from there we go into the abuse and neglect.

The CHAIRMAN. Governor Thomas, you make a very eloquent statement. Can you tell us a little bit more about the woman whose child has disappeared in Missouri? How did that happen?

Ms. THOMAS. When I was working for the public schools, I was driving a bus for the handicapped children and we had a teacher there who seemed to be obsessed by this child. That's not the only one, I also have another one. Every day she was encouraging reliance from this child upon her. Eventually when the child got older, she wanted her to move with her to Salt Lake City. Through this church affiliation, she did move there and there was contact with the parent, then all of a sudden she didn't want the child anymore and she was adopted by a non-Indian family living in Utah, then decided to move to Missouri.

They told the mother that they would correspond with her and let her know how she was doing. They did point their property because they were there on the pretext of just looking around and they did point property there and then all correspondence stopped.

We tried to trace this family and we got as far as the move to Missouri and it ended there. The church did not support our efforts to try to find out where they were in Missouri. I don't know if they changed the social security number of the child, but I did find out we do have a social security number on her. She is reliant on services provided by mental health departments because she is re-

tarded. She is now about 30 years old and her mother is in her late 60's, diabetic and wishes to see her one more time.

The other one involves a person involved in an Indian organization in the City of Phoenix, a non-Indian member. I guess he had a fatal attraction for a child on the reservation who was in our custody and constantly made contact, tried in every way. He got so desperate that he came to my office asking for my intercession. I couldn't do that.

When the child turned 18 and out of our jurisdiction, naturally he disappeared. He finally got his wish. To me, he was still a child and now he's with the man wherever he is.

The CHAIRMAN. Senator Inouye.

Senator INOUE. Thank you.

Madam Chairwoman, do you believe ICWA should be amended?

Ms. DOXTATOR. I think that ICWA works as it stands at the present time. I know there are persons who are concerned about the specific instances of the *Rost* case that have been created as a result of that but I think at the present time, it's working for the most part. Some of those instances do need to be corrected, but it's working if everyone follows the law to the letter of the law.

Senator INOUE. Governor, you were part of the Tulsa compromise. Are there any provisions that you do not agree with or do you agree with all of the alternative proposals?

Ms. THOMAS. I'll say I agree to a certain degree of those. For instance, in the Navajo situation, the time lines, that poses a problem for them and in the area of membership, that poses a problem for me. We have in our English language different forms of relationships that we call each others. It even goes down to the fine hair on your leg, that's what we call [native word], which means we are related in a very, very minute way, so the membership is a little concern to me.

There are other young tribal leaders who are wishing that there would be no amendments like Brian Wallace from the State of Nevada because it's working for him. There are various levels of tribal government where it is working, they have no problem with it and so they are comfortable with it.

For other sophisticated tribes who have a lot of issues confronting them like in my case because we're so close to metropolitan Phoenix, we are working within it and it is so important that we work with the State and that is what we've done.

There needs to be careful consideration of the amendments but generally, we support them.

Senator INOUE. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Amanda, it's your last chance.

[No response.]

The CHAIRMAN. I want to thank the witnesses for being with us today. Thank you very much.

Our next panel is Ron Allen, President of the National Congress of American Indians; Marc Gradstein; Jane Gorman; and Michael Walleri who are adoption attorneys.

While they are coming, Mr. Vice Chairman, I would note with interest that both the Attorney General of the State of Washington and the Attorney General of the State of Nevada have written this

committee in opposition to title III as enacted by the House and both state they would like to see them removed from the legislation. Those letters, without objection, will be made a part of the record.

[Information appears in appendix.]

The CHAIRMAN. I believe that I can get a similar letter from the Attorney General of Arizona and perhaps Hawaii as well.

Welcome to the witnesses. Thank you for being here and I know you understand the hour is late, but we do want to get complete testimony from you.

We will begin with Ron Allen, President of the National Congress of American Indians. Welcome back, Ron.

STATEMENT OF W. RON ALLEN, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, DC

Mr. ALLEN. Thank you, Mr. Chairman. It's always an honor and a pleasure to be here before you and Vice Chairman Inouye. We always appreciate the efforts of this committee in championing our cause and caring for the issues that we face in Indian country. I'm delighted to be able to be here to share with you some of the recommendations that we have through the National Congress of American Indians.

As you well know, in our conference in Tulsa, this issue was debated and discussed thoroughly by the tribal leadership. We had our best mid-year conference ever and this was one of the key issues that faced Indian country that brought them to Tulsa, OK to discuss. It was rather exhaustive in terms of the concerns the tribes weighed.

I know that I, as president of NCAI, am very appreciative of Chairman Brian Wallace from the Washoe Tribe in Nevada and Chairman Tracy King from the Fort Belknap Tribe in Montana who cochaired this effort. They spent a great deal of energy there and as you can see from the audience, you have a number of chiefs and chairmen here from across the Nation who exhibit the concern that we have over the impact of this.

The CHAIRMAN. By the way, Ron, over 100 tribal chairmen and chiefs requested to testify at this hearing. I think that shows the depth of concern on this issue.

Mr. ALLEN. It isn't surprising one bit because we certainly concur with many of the comments that have already been made by you, Senator Inouye and others about the concern that we have for our children.

We have submitted to you for the record our testimony and it is enclosed, our resolutions and recommendations that we have. Should the Congress choose to move forward with title III or some variation thereof, we have some proposals that we think are reluctantly acceptable in terms of moving forward with the ICWA amendments.

We want you to know that these proposals were proposals developed by the tribal leadership. It is not by a set of lawyers who are guiding and leading us; it was by the leadership in terms of us deliberating on what we feel is in the best interest of the tribes' right to address Indian child welfare proceedings and processes. We feel that we've done a very good job.

We're rather concerned and somewhat disturbed sometimes when proposed amendments to legislation or even renewal of such legislation is submitted and based on exceptions to the rule. We know, understand and empathize along with Congresswoman Pryce and the others, such as, Senator Glenn, regarding the concerns that they have.

What we want the committee to recognize is that when you take a couple of isolated cases, and then all of a sudden you want to change the laws that will have serious impacts on Indian country, we have great concern. I know the chairmen who led this effort in our forum have a heavy heart over what is working and what is not working.

You will see a variety of different successes in ICWA, but as a general rule, it's working exceptionally well. No one yet has talked about the literally tens of thousands of cases that have proceeded and been administered effectively and very successfully. I know that Governor Thomas and Chairman Doxtator have shared just a few of those many exceptions and also share the great deliberation and concern that our court systems and our programs that administer these programs do it with great deliberation and with great concern. We think we do that very well. The perception by the Congress is something that needs to be kept in the right kind of focus.

Our amendments have a number of conditions that we think are probably acceptable and reasonable and a whole lot of the problems that we feel are behind Congresswoman Pryce, Senator Glenn and others is rooted in noncompliance with ICWA, not necessarily with what ICWA doesn't do, it's are they complying with ICWA conditions and requirements such as notification to the tribe.

If a child has been put into a family and that child has been there for a couple of years but that tribe has not been notified or the processes haven't been made so the tribe is aware of the child so they can cooperate and work with the child and the adoptive parents to assure the tribe knows where his or her roots are with regard to the tribal ancestry or tribal community.

We know you understand that we want them to know what the tribe is all about, our history, our culture, our traditions, our practices so that they don't have to start looking for them and backtracking when they become a young adult wondering where their roots are in terms of their community.

We think there are other problems out there and we have suggestions in there such as severe sanctions to attorneys and firms that divert or misuse their responsibilities when they are advising parents and when they are placing Indian children into families, and not notifying the tribes and the appropriate authorities.

We think we have some suggestions that provide some certainty, some predictability and some assurances that people want. We do believe that many of these things are already in place and you see them being administered very effectively through further detail and implementation with State and tribal agreements.

Deadlines, things along that order, are important. We understand they are important and we are very concerned over any kind of hypotheticals that you may see surfacing from people who may want to explain to why a certain clause or a certain set of languages need to be considered by this committee and the Congress.

We would urge you not to act in a way or propose language in a way that would be detrimental to the tribe's sovereignty, the tribe's jurisdiction, and undermine the success that you're seeing through ICWA across Indian country.

The current law does provide mechanisms by which the courts outside of the tribal court jurisdiction can coordinate with the tribe in terms of whether or not they should have jurisdiction over the tribe et cetera. Many of these mechanisms are already in place. I reiterate your comment that a lot of the problems are because no one is telling them.

Where you see the tribes and the States working together with regard to adoption practices off the reservation, it's working exceptionally well. Often you see tribes deferring to the recommendations of the State or the State court. So all those successes are out there.

We're very concerned over some conditions that may cause new problems, new sets of litigation that are worse than what you're experiencing today. We think we can take a look at it.

We would rather see this on a separate track, this proposal. We would like to see further deliberation in terms of how to consider fine-tuning amendments to ICWA which could make it a better and more effective law. We want it to be with clear and full deliberation, with the involvement of the tribal leadership. This is a very serious concern for us, including any impacts to our sovereignty.

As you well know, we absolutely object to any legislation that erodes our sovereignty and our governmental jurisdiction. Our member tribes, 210 to date, are firmly holding that position.

So we ask the committee to recognize those concerns, we ask the committee to recognize that we have been able to move fast for you in terms of responding to what your needs are, we know that this legislation is moving fast, we know it's inside another piece of legislation that is very attractive to the Congress and to the Administration, but we do not want them to do things that will negatively impact the welfare of Indian country and our children's welfare.

I will conclude my comments. Thank you and we'd be more than prepared to answer any questions you may have.

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

The CHAIRMAN. Thank you very much.

I would comment on the rapidity of the action that was taken in Tulsa and we appreciate it very much. We know that this coming together could not have been possible without the cooperation and active participation of our other witnesses. As a prelude to yours and the other testimonies, we thank you for your efforts. I don't think we'd be where we are without it. Thank you.

Mr. Gradstein.

Mr. GRADSTEIN. Senator, if it's not imposing on the protocol, I'd like to ask Ms. Gorman to speak first and then I'll follow?

The CHAIRMAN. Sure.

STATEMENT OF JANE GORMAN, ESQUIRE, TUSTIN, CA, ON BEHALF OF THE AMERICAN ACADEMY OF ADOPTION ATTORNEYS AND THE ACADEMY OF CALIFORNIA ADOPTION LAWYERS

Ms. GORMAN. I'm Jane Gorman. I'm a California attorney and am here on behalf of the American Academy of Adoption Attorneys and the Academy of California Adoption Lawyers, but most importantly and personally, I'm here to urge passage of the NCAI amendments with a few technical, but nevertheless we feel pretty important, changes. I outlined them in my written testimony but they are better outlined in Jack Trope's written testimony from the Association of American Indian Affairs. I would ask you to strongly consider making those technical changes.

The CHAIRMAN. I did read those last night and I found nothing objectionable associated with the proposed amendments. Obviously we'd like to have the input of the tribes.

Ms. GORMAN. The most important reason that I'm here, however is so that what happened to the people who became my clients—I was not their original attorney—the Rosts, will never happen to anybody else again. I believe these amendments, the NCAI amendments, will go a long way toward making that happen.

Right now, no notice to tribes in voluntary placement—

The CHAIRMAN. May I ask, if these amendments had been a part of the law at that time, could the Rost tragedy have been avoided?

Ms. GORMAN. It would not have happened. I will outline three or four reasons if you will indulge me for a few moments. I will confine my testimony to 5 minutes so I won't be very long.

The CHAIRMAN. All right. Please go ahead.

Ms. GORMAN. Right now, no notice to tribes in voluntary placement is required. You would be astounded, I think, even as knowledgeable about the Indian Child Welfare Act as you are, at how many times no notice is given. I, as a member of the adoption bar and my practice is limited to litigation so I only see the problem adoptions, can't believe how often this happens.

After the *Rost* case made headlines last year, I got dozens of phone calls from adoptive parents. Some of their adoptions were finished. Some of them were pending. Each said I have a Native American child, some of them were even tribal members, in my care. Maybe the adoption was finished. Am I going to lose this child, and what should I do? I didn't have an answer for these people because if they did what they're supposed to do, which is what I told them to do, they very well stood to lose these children. My only real answer to them is, work with us in amending the Act so notice is required and will be given.

In the *Rost* case, as in countless others, the former attorney knew the children were Native American. This wasn't all a problem with the birth parents lying. The adoption attorney really knew they were Native American and he chose not to give notice to the tribe, not to tell the adoption agency which became involved, and not to tell my clients, the Rosts, that they were taking children into their care that had Native American heritage.

This bill would preclude that scenario ever happening again, I believe. If an adoption agency or attorney had reason to believe a child is Native American, notice must be given or that person

would be subject to fairly severe criminal penalties. I don't know if this would actually ever happen, but I think it would have a totally chilling effect on practices of not notifying an Indian Child Welfare Act cases.

This bill provides something for adoptive parents that outweighs any burden that would be placed on their attorneys or agencies—finality and security, the comfort of knowing soon after a child is placed with them, whether or not the child they're caring for will come to be a child that they will raise as their own.

Under the NCAI amendments, 90 days after notice is given and 60 of those days can be before a child is born and placed, if the tribe hasn't intervened, it never can and that will be the end of that. This provision also would have saved the Rosts. When the adoption agency found out about the twins' Native American heritage a few months after their placement, the agency did notify the tribe and the tribe did nothing for a period of 6 months until the Rosts retained new counsel and we brought the matter to a head because they needed to know if they were going to be raising these kids.

Under the proposed amendments, if that had been the law then and the tribe had been given proper notice, they would have known. The tribe would have either acted, or they would have been out of it.

The proposed amendments would not only provide cutoff times for tribal intervention, but would require a tribe to make up its mind at the time it intervened whether a child is a member, not pass a resolution 1 year later to declare the child a member.

This probably addresses the retroactivity problem raised by Senator Glenn. The more I think about it, the more I believe that it would, because under the NCAI provisions, a tribe at the time that it chose to intervene in an action, would have to, at that point, determine whether a child is a member or not. So I believe that largely addresses the retroactivity problem. You may want to look at that carefully and see if it doesn't address Senator Glenn's issues.

The notice cutoff section could also enable adoptive parents to rely on a tribe's waiver. Right now, under current law, and this doesn't happen very often but again, I see only those awful cases where it does happen, if a tribe is properly noticed and says "We waive the right to intervention," but then later on in the adoption process decides it does want to intervene, it has the right to do so and that's a problem to adoptions.

The final provision of these proposed amendments, which would be incredibly helpful to both tribes and adoptive parents, is the open adoption section. When a tribe, a biological family and adoptive parents agree to post-adoption contact, the court, under these provisions, could make that agreement legally enforceable.

Interestingly, this provision could be the conduit to finally, once and for all, settle my nightmare case, the *Rost* case. An agreement is sort of in the works, but one major drawback is that the family and the tribe don't trust the Rosts to live up to the agreement because they live in Ohio and the tribe and family members are in California. Such an agreement would be enforceable possibly under California law but probably not under Ohio law. If this provision became law quickly, before the Supreme Court either decides to

take it or it goes back to trial court, we may very well be able to settle the *Rost* case.

In an era when we all recognize the importance of adopted children knowing their biological and ethnic roots and maintaining a connectedness with their heritage regardless of who is raising them, this open adoption provision is crucial.

This bill, if enacted, would equally benefit the adoptive parents and tribes and would place similar burdens on each. Indisputably, the notice and cutoff provisions, as well as the open adoption amendment, would benefit the children the act was passed to protect. If a child is subject to the act, and a tribe or family member wants to stop the placement, they should be able to do so. They should know about the placement, and they should have to make that decision in a timely manner—forget about the adoptive parents, before the child forms the attachment to the only people that child knows as parents. If a tribe doesn't act within an appropriate timeframe, the adoption should continue and the child should remain in his placement.

I appreciate the opportunity to testify here, Chairman McCain, but equally, I appreciate the opportunity over the last year to work with members of the Native American community in reaching what we believe are fair compromise amendments. I share in the committee's concern and the concern of many of the witnesses who have testified about the Native American community not being contacted for input.

I testified before the House in May of last year and I believe Mr. Trope, when he testified, brought it to the committee's attention, that none of us had contacted them about what they wanted. It really hit home and we began a year-long process and have had just incredible results and cooperation.

I believe we have some amendments that really may help everybody. I thank you.

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

The CHAIRMAN. Thank you very much.

Mr. Gradstein.

STATEMENT OF MARC GRADSTEIN, ESQUIRE, BURLINGAME, CA

Mr. GRADSTEIN. Thank you, Senator. I'll try to be brief and kind of mop up a little.

I think the most interesting thing we haven't said yet that affects my practice where I'm doing voluntary placements of mostly children that are not Indian children. We have a fairly substantial number of children who are of some Indian ancestry and the distinction I'm making, as we all know, is that the act speaks of Indian children as being members or children of members who are themselves eligible, but there is a vast number, as Senator Campbell indicated, of people of Indian ancestry in this country who no tribe would say are tribal members.

In the years I've been doing adoptions, and I've contacted tribes and asked, is the child of this perspective birth mother a member of their tribe, the vast majority of the time, the tribe says no. I'm saying probably 90 percent of the time, the tribe says no because there are that many people out there who are of some Native

American ancestry but have overwhelming ancestry and have no tribal connection.

Those adoptions go through as non-Indian cases but always with the concern under the present law that could go sideways if something changed right up until the adoption became final because of the fact that there are no cutoffs, because of the fact that if you contact the tribe as I did in my nightmare case 2 years ago and you get back a letter saying—this is the unusual case, I'm not saying tribes do this routinely at all—this child is not eligible for membership and we will not intervene on what looks like an official tribal letterhead, signed by a tribal Governor, and I advise my clients, go ahead and adopt this child, and then they change their minds under the law as it stands now and make that child a member and intervene before the proceeding is over, we were out of luck. We tried to do it right.

I'm not saying this in a committee that is obviously very friendly to Native Americans, as am I, to trash anybody but what I am saying is as the adoption attorneys have given us permission to come here and say, go ahead and criminalize aiding and abetting fraud among our people, that's a hard thing to sell to a group of adoption attorneys because they're afraid not that they will do that, but that they will be wrongfully accused of doing that and have to deal with defending that.

I'm just saying that the fear that has brought me in here in part is the fear that in that rare case, we will get a waiver or we will get a determination of noneligibility and it won't stand up. Under these amendments, a waiver means it's waived. A determination of noneligibility means it's noneligibility and I think that's very, very important for that very few number of cases where that kind of problem could exist.

To me, the big advantage of these amendments is for all those other children who are just slightly Native American in heritage who are right now very high risk adoptions to our clients who we have to advise are at total risk, really at the whim of a tribe to call that child a member without any review.

I think that the opposition which we've heard here today, which fortunately is extremely limited, is really not primarily aimed at this proposed legislation. I think almost all of the opposition we've heard today has been an effort to say that Title III should have been enacted and it could be better, it could be stronger.

I don't want to minimize that and I'm not pushing title III, but I think there is a problem that Title III addresses that perhaps in years to come, this committee might want to at least focus on and see if it can't find a better mechanism than using—I know this is anathema to some, but using membership as the criterion for applicability of the Indian Child Welfare Act.

The problem is, membership means as many tribes as there are, a different thing. It means yes, sovereignty comes into play, this critical issue to Native American tribes, because it's a membership question. It's not a blood quantum question; it's a membership question. I think it's possible to craft an act, I'm not saying it will ever happen, where we made applicability of the Indian Child Welfare Act based on something other than membership. Once membership becomes the issue, sovereignty gets into the problem and

obviously, the Native American community is never going to want to relinquish any sovereignty.

I think the California court that ruled in Ms. Gorman's case favorably to the Rosts did so because it was trying to find a constitutionally valid way of getting around this membership problem which, in one of the briefs that I thought was very, very persuasive by the child's attorney in that case, argued that Congress had delegated its legislative authority unconstitutionally to the tribes by giving the tribes the right to decide when the act applies and when it doesn't with no guidelines and with no method of review.

A tribe says somebody is a member, we lawyers have no way of challenging that. We can't even get their membership records. It presents a problem. The joint amendments that we, as a group, had tried to put forward that were not all accepted by the NCAI included a provision that was near and dear to my heart which would have required tribes to follow their own membership rules and give us a remedy in Federal court to question an arbitrary or capricious membership determination that did not follow the membership rules for obvious political and no doubt sophisticated reasons about sovereignty beyond my understanding.

The NCAI did not accept that as a good proposal and I'm not pushing that either, but I think there is a problem here with constitutionality when we're talking about membership as the sole issue. That's where this Indian family doctrine that Congresswoman Pryce was putting forward comes from. It's the idea that maybe somebody really isn't enough Indian to be brought within this act.

I don't know how to solve that problem but I think that's what the Congressman from Texas was speaking to and I think there are problems when you have a very, very small amount of Indian as kind of the tail wagging the rest of that non-Indian creature, that 1/64th person. I think it presents a problem that is worthy of consideration here, if not now, then in the future.

Two final thoughts. I think the Indian family doctrine, which I know is not going to be enacted in this Congress, part of why it is seemingly so horrible to a lot of lawyers in terms of lots of litigation is because it would have a lot of applicability to involuntary placements. I think Congresswoman Pryce probably only meant it to apply to voluntary placements. I think that is a very significant difference, when somebody, as the Congressman from Texas said, voluntarily wants to place her child versus somebody who involuntarily is having that child taken away.

Last, I'd like to say that I may be all wrong about my concern because Mr. Walleri here tells me that the Indian bar knew about ways that the membership arbitrariness of determination could have been challenged under existing United States Supreme Court law and I'd be very interested in having him explain that to the committee if he is willing to.

Thank you.

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

The CHAIRMAN. Thank you very much.

Mr. Walleri.

STATEMENT OF MICHAEL WALLERI, ESQUIRE, TANANA
CHIEFS CONFERENCE, FAIRBANKS, AK

Mr. WALLERI. Thank you, Chairman. Thank you for inviting me to testify today.

I've been a tribal attorney for 17 years representing a consortium of 34 tribes in interior Alaska and had the dubious honor and pleasure, I think, of participating in the discussions with the adoption attorneys that ultimately led to the NCAI action in Tulsa.

Generally I would concur with Mr. Allen's comments that the Indian Child Welfare Act works and it primarily works best in involuntary proceedings where the tribes receive notice, they intervene and they have the ability to provide the special and unique services that Indian children require.

Where it doesn't work so well, however, is in the voluntary area where there is no current statutory requirement to provide notice to the tribes. In our own case in Alaska, we have a caseload of about 160 cases on an annual basis. Since the enactment of ICWA, one-half of those cases in terms of our caseload, have moved from State court to tribal court which is an incredible improvement.

We do not receive on a routine basis notices on voluntary adoptions. The only time that we receive them really in Alaska has to do with when an attorney usually specializing in Native adoptions understands the risks their clients face by not involving the tribe and voluntarily goes to the tribe. We have not had a single problem with any of those cases in the time that I've been dealing with ICWA.

What we have had, however, is problems where nobody gives notice to the tribe, either because they didn't know about the tribe or in the few cases where there is active fraud, to try and avoid the application of the act.

The provisions in the NCAI draft really address these issues, and they've been described in more detail in my written comments, with basically giving notice to the tribes in voluntary proceedings, setting up time lines, and very importantly, providing criminal sanctions for people who wish to avoid the application of ICWA.

In addressing Senator Glenn's concerns about retroactivity, we believe that the NCAI amendments do in fact address the concerns about retroactivity. I think as Mr. Waxman pointed out, it's somewhat of a misnomer to refer to this as a problem of retroactive enrollment or membership since in many tribes, a child's birth is the beginning of their tribal enrollment and membership in that tribe. Rather, enrollment in most tribes is actually just a certification or an acknowledgement of that tribal membership.

For professionals who wish to evade the terms of the act, the proposal provides criminal sanctions as a disincentive. In terms of tribes in the situation that Mr. Gradstein points out, fail to or advise people that this child is not a member of a tribe, they're bound by that and that provides a certain stability for the Indian child adoptive placement.

Finally, if adoptive parents engage in the type of activity that was described by the Chairman from Gila River, I'm not exactly sure it's in the best interest of those parents to continue to try and care for that child. Those kinds of activities should be aggressively attacked by the tribes to return those children to their homes.

In the cases where there is no fraud or attempts to evade the Act, where people just simply didn't know and honestly didn't know about the child's Indian ancestry or eligibility for membership, the courts have really dealt with that.

Prior to coming down here, we did a WESTLAW search with regards to this retroactivity situation. Two appellate courts in the country, one out of Oregon, have really dealt with this issue saying it's an evidentiary issue that's presented to the court at the time of the hearing. If at the time of the hearing, these facts were known, then the court should take those facts into account. If at the time of the hearing, and subsequent to the entry of the final order, these facts become later discovered, then that is not the basis to go back and attack the adoption and the adoption is final. That is really dealt with in the existing law with regard to evidentiary standards.

So we really believe that the so-called retroactivity problem is really dealt with by existing case law and also more effectively by these amendments which really avoid the problems that we've seen occur in the past with regards to voluntary proceedings.

Finally, the issue that I think caused the most problem in Indian country that Mr. Gradstein alluded to about this membership issue and the reviewability of membership is a very touchy issue in Indian country. The idea that a court that is not sympathetic, in most cases not very knowledgeable about Indian laws and customs is going to somehow determine what in fact is an Indian harkens back to another dark passage in American history where non-Indians decided who in fact were the Indians, oftentimes to the detriment of the Indian people.

I think we need to be very careful in invading the sovereign rights of the Indian people and the Indian tribes to determine their tribal membership. It is a crucial element of sovereignty. In very limited cases, in very limited cases, when there is a known violation of due process or equal protection under the Indian Civil Rights Act, or where a tribe has simply reached out and exceeded its tribal authority with regard to decisions with regard to eligibility under its tribal law, the courts have tried to fashion remedies which seem to be working in those very, very few cases.

The Eighth Circuit case, *Dement v. Ogalala Sioux*, actually allowed the issuance of a writ of habeas corpus to remedy that situation. The Sixth Circuit has agreed with that in some cases, but it requires a sensitivity to Indian sovereignty in the sense that there has to be something more than a de novo review by somebody who is not familiar with Native law. There must be deference to the tribal decisions and there must be a full exhaustion of the tribal remedies.

I think the reason there are only two court cases in the country on this suggests that the tribal courts are doing an excellent job in administering justice in Indian country and while I think there may be a few perceived problems in the area, the existing law really deals with the problem.

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

The CHAIRMAN. Thank you very much.

Senator Inouye.

Senator INOUE. Mr. Chairman, I'd like to join you in commending President Allen for convening the Tulsa mid-year convention and to initiate this very rational debate on this very contentious matter before us. I join my chairman in saying that you've done a good job and I join my chairman in assuring you that we will study your recommendations very carefully and very likely adopt them almost in total.

I have just one question. We have been advised, Ms. Gorman, that the original adoption lawyer of the Rosts was aware of the Indianness of the biological parents. Is that correct?

Ms. GORMAN. The father, but yes, the testimony adduced at trial was pretty clear that the natural father filled out a form and said he was a Pomo Indian and also told the attorney. The attorney then told him what would happen—they had already chosen the Rosts as their prospective adoptive parents—told them what would happen because of the act, that his family would have to be notified, that the tribe would be notified and that the act would probably apply. The father then said—and this is by his own testimony—I need a new intake form and he filled out a new intake form and said he wasn't Indian.

That's absolutely correct and I believe with all my heart that these amendments would preclude that from happening in the future.

Senator INOUE. So you would suggest that fraud was committed at that stage?

Ms. GORMAN. I don't want to say that, Mr. Chairman. There is some litigation currently pending between my clients and that attorney and I don't want to get in the middle of it, with all due respect.

No notice was required, so I would hesitate to say that fraud was committed, except possibly and again, I don't want to prejudge the case, but him not notifying my clients was certainly a problem. In terms of notifying the tribe, under the act, it really isn't required. It should be required. Intervention is certainly possible, but no notice is required, so I don't think he broke the law in any way. It isn't good practice, and that's where problems like this come from, but I don't think he broke the law.

Senator INOUE. So there were no sanctions as a result of this behavior on the part of the original lawyer?

Ms. GORMAN. No.

Senator INOUE. Thank you very much.

The CHAIRMAN. Thank you, Senator.

The hour is late, Mr. Walleri but I think we need to get into this issue of membership rolls a little bit. Are you telling me that membership rolls, lists of memberships of a tribe are not public documents?

Ms. GORMAN. That's correct. They are not subject to subpoena power. If the tribe asserts that right, their records cannot be subpoenaed because—

The CHAIRMAN. They're not public documents?

Ms. GORMAN [continuing]. They are not public documents.

Mr. WALLERI. There are some significant issues related to that, including for example in our case, let me speak to the situation in Alaska. The Federal Privacy Act really governs our documents in

our negotiated compacts with the Federal Government, including our tribal enrollment lists so that we cannot disclose those records without the issuance of a Federal order.

For example, you can't go in and get individual information about an American citizen from the U.S. Government, you have to get a court order to do that. There has to be a showing. In most cases, the courts do not open up, under the Federal Privacy Act.

The CHAIRMAN. But we have to provide proof of citizenship upon request.

Mr. WALLERI. And that is the case. The practice in Alaska which is not the case in many other States is that the tribes do, when they intervene, file a certification with the court and evidence as to the tribal membership. Frankly, that's just the practice in Alaska that's emerged over the last decade. I think that is a pretty good way of handling it. That is what these acts provide for.

That has to be balanced also against simply open access to the general public to tribal enrollments. That raises other concerns about privacy of people who are totally unrelated to the issues before the court and most courts have held that the access to tribal records is allowed to the extent that they are necessary to substantiate the issues in contention before the court in the case at bar.

The CHAIRMAN. Including eligibility for Government programs?

Mr. WALLERI. Correct. But in doing that, it has to also be done procedurally in a correct manner. I can tell you that there is wide ignorance within the bar. We routinely have to remind the State Attorney General's office in Alaska how to go about getting these records properly. It's an embarrassing situation to have to tutor attorneys on the Federal Privacy Act and its provisions, but we routinely do it. In fact, we've got it set up on a computer and push the button and out it spits.

The CHAIRMAN. I can assure you that in light of recent events here in Washington, the Privacy Act is going to get a lot more visibility.

I want to thank the witnesses and thank you all for being here today.

This hearing is adjourned.

[Whereupon, at 1:47 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

I appreciate this opportunity to address the Senate Committee on Indian Affairs. I strongly support the committee's move to eliminate title III from H.R. 3286, the Adoption Promotion and Stability Act. Title III would have altered the Indian Child Welfare Act of 1978, and changed the rules by which tribes participate in the process of certifying tribal membership and overseeing the welfare of Indian children. I object to those changes, and so do the Indian tribes that would be effected. I am delighted the committee has reported the bill out without this ill-considered amendment.

As you know, when the Indian Child Welfare Act (ICWA) was passed in 1978, over a third (35 percent to 40 percent) of all Indian children were being placed for adoption outside their families and tribes. The ICWA was intended to provide a rational context for promoting the welfare of these children and placing them, in order of preference, within their own nuclear families, their extended families, their tribes, other Indian tribes, or other suitable families. The act has been successful in this purpose. The vast majority of adoptions under ICWA have proceeded smoothly; only a few (41) have been disputed. Therefore, we should proceed to amend this act only with caution and with full consultation with the tribes that will be affected.

The largest of the Indian tribes, the Navajo Nation, is located in New Mexico as well as Arizona and Utah. The Navajo have developed a highly competent set of 9 professional social workers and 8 more administrative staff to deal with the issues of Indian child adoptions off the reservation in such towns in New Mexico as Farmington, Gallup, and Albuquerque. At the very time the need for their services is clearly increasing, the BIA funds that enable their services are being cut. It is wrong to cut these funds and it is wrong to proceed without due consideration to the strong opposition these professionals have for title III.

Every tribe that has contacted my office opposes the changes proposed in title III as does the National Indian Child Welfare Association and the National Congress of American Indians. They believe the changes involved would do much more than merely "clarify" or "make minor changes in" the Indian Child Welfare Act. The tribes believe they must retain control over determining tribal membership. Fifty State court systems, making independent judgments about what constitutes significant social, cultural and political affiliation with Indian tribes, strikes at the heart of sovereignty.

Meanwhile, earlier this month the tribes themselves met at the National Congress of American Indians' Mid-Year Conference in Tulsa, Oklahoma, to draft potential amendments to ICWA as alternatives to title III. These draft amendments address the issues of 1) notice to Indian tribes of voluntary adoption proceedings; 2) a reasonable time line for tribal intervention in such cases; 3) sanctions to discourage fraudulent practices in such adoption proceedings; 4) reasonable limits on the length of time within which birth parents can withdraw consent for adoption; 5) State courts' option to allow biologic parents' contact with children when the adoptive parents agree; 6) tribal membership certification; and other provisions. The point is,

Mr. Chairman, that processes are under way in which the Indian tribes are working with each other and with adoption lawyers and others to identify realistic methods to accommodate the special issues that arise in cases of adoption of Indian children.

Changes to the Indian Child Welfare Act should not be pushed through as a part of H.R. 3286. They should be approached thoughtfully and with input from all participants. Therefore I applaud the Committee on Indian Affairs for removing these important Indian issues from the Adoption Act and for undertaking a thoughtful process in which the tribes are full partners for further refining the Indian Child Welfare Act of 1978.

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

Mr. Chairman, thank you for the opportunity to appear before the committee this morning and present my testimony. I know we are all in need of being in three places at once this morning, so I will necessarily make my statement short, but please do not take my brevity to mean that the issue I am addressing is not of concern to me. Indian issues are of particular importance to me, and any action by the Congress which would harm Indian children gets my close attention.

I want to speak today in opposition to any efforts to amend the Indian Child Welfare Act which would limit the review of tribal governments over members of their tribes, particularly concerning the adoptions of tribal members.

In 1978, Congress passed the Indian Child Welfare Act to stop the hemorrhage of Indian children being separated from their families. This act was passed after long and careful deliberation. Hearings were held, drafts were circulated, and questions were asked. Last month, the House passed legislation which would greatly reduce the influence tribal governments would have over the adoption of members of their tribes, and the House did so without even a comprehensive hearing.

The legislation considered by the House was not even referred to the Committee on Resources, the committee of jurisdiction on Indian Affairs in the House, until the last minute. The referral was for only 6 days, and within that period Committee Republicans and Democrats alike rejected the method and language used in the bill.

The House legislation would require that a child's significant cultural, social and political contacts with a tribe determine his or her "Indian-ness" instead of tribal membership. It ignores the important role of the extended family in Indian culture and would lead to increased litigation.

Mr. Chairman, it is important to note that the Indian Child Welfare Act does not require that Indian children be adopted by Indians. Other races are permitted to, and do adopt Indian children. This was not a racist act, but rather the purpose of the act was to ensure the cultural differences between Indians and other cultures were fairly taken into consideration in adoption proceedings. This is an important point which I do not believe has been brought out during the recent public debate.

The Indian Child Welfare Act was enacted because there were serious problems with the adoptions of Indian children. The outrages that prompted the passage of the act were numerous. Prior to its enactment, the rate of adoptions of Indian children was wildly disproportionate to the adoption rate of non-Indian children. Indian children in Montana were being adopted at a per capita rate 13 times that of non-Indian children, in South Dakota 16 times the per capita rate of non-Indian children, and in Minnesota at 5 times the rate of non-Indian children. The act's principal sponsor and my good friend Mo Udall, said during the floor debate, "Indian tribes and Indian people are being drained of their children and as a result their future as a tribe and a people is being placed in jeopardy."

I realize that there are problems with the Indian Child Welfare Act. I know that one is with adoption attorneys who pressure parents not to acknowledge their Indian heritage on adoption forms. But I also know that there have only been problems with less than one-half of one-percent of the total number of Indian adoptions since the act was passed. This small problem does not warrant the shotgun approach by the House.

I objected strongly to the language passed by the House on this issue and I continue to object strongly. I respectfully urge the Members of this committee to also reject that language.

Thank you Mr. Chairman

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, June 24, 1996.

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

Dear Senator McCain: I have been active on the issue of adoption of Native American children for several years now. As you know, the House passed a bill which would have a substantial impact on Indian children placed for adoption.

Many of us in the House have strong feelings on the issue of the adoption of Indian children by Indians versus non-Indians and I would like to provide my thoughts to the Committee on Indian Affairs. I am pleased the committee is holding a hearing on the Indian Child Welfare Act, and respectfully request that I be permitted to testify at the hearing on June 26, 1996.

Sincerely,

ENI F.H. FALEOMAVAEGA, Member of
Congress.

PREPARED STATEMENT OF FAY GIVENS, EXECUTIVE DIRECTOR, AMERICAN INDIAN
SERVICES

Chairman McCain and Committee Members, American Indian Services is concerned about the changes proposed regarding the Indian Child Welfare Act, under H.R. 3275. We ask that our written testimony be included as part of the hearing record of June 26, 1996.

American Indian Services, Inc. is located in the Detroit Metropolitan area. We have provided services to Native American families in Wayne County, Michigan since 1972.

The legislators proposing the changes in the I.C.W.A. apparently know very little of Native American history. The legislation requiring significant social, cultural or political affiliation with your tribe fails to consider the following issues:

- (A) Many Native Americans live a great distance from their reservations.
- (B) Native people were forced into the cities by the policies of the Federal Government during the termination, relocation period of the 1950's and the 1960's.
- (C) 90 percent of the Native people, both on and off the reservations lack reliable transportation, making it difficult to go short distances, much less long distances to maintain close contact.
- (D) Few, if any, state judges would be qualified to determine if significant "social, cultural or political affiliation" were being maintained. They lack the knowledge to make this kind of determination.
- (E) Under the proposed changes, state courts rather than Indian Nations could decide who is an Indian.
- (F) The legislation fails to consider the rights of Indians as sovereign nations.
- (G) H.R. 3275 seeks to make who is an Indian an issue of geography rather than culture. Those who have decent transportation and money that can afford to go home periodically, would be considered to have "close ties."

An Indian family that lives far removed from their reservation is not any less Indian-just further away. The staff at American Indian Services is made up of members of many Indian nations. We live far from our reservations, but come together as a family of Indian people and maintain our cultural ways within the context of a big city. Most of us are not able to go home too often, but we band together as a community of Indian people, as we have historically done. To tie membership to a geographical location, reveals how little these legislators know about Indian customs.

Our professional experience in Wayne County indicates that the I.C.W.A. has not and is not being followed today in many cases in the Juvenile Division of the Probate Court in Wayne County. If the act is followed from the inception in a child custody proceeding, the problems such as those of the Rost twins would not be an issue today. If private attorneys were disbarred for placing Indian children in non-Indian homes, which violates the I.C.W.A., perhaps it would be followed.

If non-Indian families were made aware that Indian children are covered by a unique set of Federal statutes, perhaps they would defer to the tribe at the earliest moment if the possible outcome was known.

The question that concerns us is what gives Congresswoman Pryce the right to even contemplate changes in the I.C.W.A. without in-put from the people most affected? Her behavior is typical of the arrogance we have faced in the past. Decisions

have been made for us-and about us, without any consultations with us! There is no democracy in this.

Legislators Pryce and Tiaht are attempting to make this a simple issue, which it is not. State courts do not and should not have jurisdiction over sovereign Indian nations within their boundaries. What right do these legislators have to limit appeals, or restrict when an Indian child is determined to be a member? The determination regarding who and when a person is eligible should rest solely with the tribe.

The stories of denial of due process, duress and sale of Indian children is well documented. This legislation if passed would deny Indian families the right to appeal such injustice.

Legislator Pryce's vision is only through the eyes of the Rost family that she is involved with. The private attorney that arranged for the placement of the Rost twins had no respect for the I.C.W.A., no regard for Indian people, the adoptive family or the children themselves. Where is he now? There has been no price that he has had to pay for his deceit, while everyone else has suffered.

When Congress passed the I.C.W.A. in 1978, its purpose was clear-to preserve Indian families. Indian people who were adopted out as children come into our agency everyday. The prisons and institutions house many of them. They have been robbed of their identity and they are angry. To view this matter as a simple one is to deny what we know is true.

The Rost twins will come looking for us when they grow up. (They all do.) They are Indian in the white world and white in the Indian world. They will be depressed and will have twenty times more likelihood of committing suicide than any group in America. They will have little if any understanding of who they are. They will be in crisis when they find us. We will provide mental health services, they will need it at a rate of 200 percent, more than any other group. Some come to us in their teens with serious emotional problems, substance abuse, teen pregnancy, and all the problems related to low self-esteem. Regardless of their problems they will receive fewer services that they need because they are "Indian". Early "Chief Wahoo" experiences will contribute to their esteem when they see Native American culture ridiculed.

The sacred "Sundance" for them will be a car. The proud Cherokee people will be a four wheel drive recreational vehicle. Television programming will fill in the cultural gaps with various segments on savage scalping, wagon burnings and drunken Indian displays. They will have no elders to combat the stereotypes. Will this produce Indians with positive self-esteem and pride?

Society will continue to pay the price for the injustice to Native people. Efforts to rob us of our children is the worst in a long stream of injustice. We urge you to oppose any changes in the I.C.W.A. until after consultation and input from Indian Nations, agencies and concerned parties. Our children are our future.

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

I am pleased to provide this statement to the Senate Committee on Indian Affairs as it examines amendments to the Indian Child Welfare Act (ICWA). As you know, the House recently passed H.R. 3286, the Adoption Promotion and Stability Act, which in Title III contains certain very controversial provisions affecting the adoption of American Indian and Alaska Native children.

Despite the controversial nature of the Indian provisions, the unanimous opposition of Indian tribes, the clear opposition of the Administration to those provisions, and the fact that my Committee which has primary jurisdiction over Indian matters in the House had not had the chance to hold even a single hearing or otherwise examine the new legislation, the House leadership saw fit to schedule this legislation for a floor vote just weeks after its introduction. In fact, the leadership originally attempted to bypass the Resources Committee and bring this legislation directly to the House floor.

Although the House narrowly passed this measure as part of H.R. 3286, I remain convinced that the amendments to the ICWA contained in Title III of that bill are not the answer that we need to guard against the few but high-profile Indian adoption failures that have occurred since 1978. I believe that there are alternative measures that this Congress can take that would more effectively prevent cases like these from happening again. I want to emphasize, however, that we must not let these few cases overshadow all of the good that the Act has done. What's been left out of this emotional and anecdotally driven debate are the thousands of success sto-

ries where ICWA has had the intended, positive impact on children and families alike.

Let me relate one of these success stories:

In 1995, twin baby boys from the Salish and Kootenai Tribes of the Flathead Reservation in Montana were placed with their non-Indian maternal grandparents. Though understandably frightened by the scores of horror stories they had been led to believe could occur, the prospective parents and their adoption attorney rightfully followed the ICWA and notified the tribe of their intention to adopt. The paternal grandfather of the adoptive children desperately wanted to maintain contact with the twins, especially since his only child, the birth father, had been killed in a car accident. The Tribe consented to the adoption of the children by their non-Indian grandparents and also took the extra step of helping to arrange a creative arrangement that allows the children to maintain a close connection with their Indian family and tribal heritage while being raised by their white grandparents. Books, pictures, artwork and traditional writings done by the twins' biological family members have followed and the adoptive parents have welcomed the twins' Indian heritage with respect and gratitude.

This is the attitude we should all adopt as Congress considers any change to this crucial piece of legislation.

In 1978, Congress found evidence that state courts and child welfare workers placed over ninety percent of adopted American Indian children in non-Indian homes. Sixteen years later, studies indicate that nearly 60 percent are still adopted by non-Indians. Prior to enactment of ICWA, the House held hearings which yielded information demonstrating that approximately 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions.

The Indian Child Welfare Act was enacted after years of Congressional study in order to protect Indian children and Indian tribes from these patterns of abuse. The House Committee on Interior and Insular Affairs reported that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." The 1978 bipartisan legislation was hailed as a long-overdue correction to this practice. In short the law gives tribal governments the right to have a voice in child custody proceedings involving their own members as a means of fulfilling the obligations they have to both their families and to their communities. The law allows for concerned Indian relatives to intervene in adoption and foster care cases involving an Indian child and in certain instances to ask the court to transfer proceedings to tribal courts.

Although the law gives tribes the right to play a role in all cases involving their own children, unfortunately, the law does not always require that the parents, their attorneys, or adoption agencies notify the courts or the tribe when such a case is pending. The problem is that some in the adoption profession fear that by notifying the courts that an Indian child is involved in an adoption proceeding, they either will bog down the proceedings or scare off potential adoptive parents. Often, the tribes are given no notification while parties to the adoption are encouraged to conceal the child's Indian identity, causing the number of cases where the intent of the law has been skirted to multiply rapidly. The consequences of this noncompliance can lead to emotionally troubling results for everyone involved.

Unfortunately, misunderstandings also have led to unwarranted criticism of the act. I'd like to clear at least two of those up. First, the law does not give the tribe the right to undo adoptions once they have been finalized. Second, the law gives the courts wide discretion to keep any Indian custody proceeding in state court for "good cause" which allows the court to weigh such factors as the wishes of the parents, the location of the tribal court, and the amount of time the child has spent with the adoptive or foster parents.

We have all seen the tragedy of the *Baby M* case. Nobody on either side of the debate wants anyone to go through that kind of agony and heartache, least of all the children. The ICWA's notification and good cause provisions are intended to prevent these tragedies from ever happening. When the adoptive parties follow the intent of the ICWA such tragedies are avoided. The act is not perfect in all respects and I agree that some changes will strengthen it. But the few number of troublesome Indian adoption cases should not be made to stand for the whole story and then held up as justification for the dismantling of the ICWA. The point is that we need to look at the act in a careful manner involving hearings and candid debate in the committees of jurisdiction. But if we allow ourselves to rush in and dismantle, rather than reform, the ICWA, we will destroy the careful balances struck in the act, and it is the children who will lose due to our shortsightedness.

Some have tried to blame the few but well-publicized failures on the Indians, some have concluded that rolling back the ICWA is necessary to prevent future mis-

carriages of justice, and some have even asserted that they are doing it with the best interests of the Indians at heart. But Indian people have heard claims like these all too many times before. I understand how hard it must be for them to live with this rhetoric, especially when the stakes are so high. We must bear in mind that from an Indian perspective, it is the very future of their people and their culture that is at stake.

Title III of H.R. 3286 would radically alter key definitions of how tribal membership is determined and in so doing, infringe upon the most fundamental of all tribal rights. These changes will interfere with Indian people's ability to ensure a loving and culturally sensitive environment that is in the best interests of the child and his or her community. Furthermore, these changes will not expedite custody proceedings but will in fact delay pending and future adoptions by creating a new cause for litigation.

The Resources Committee that I serve on voted to strike Title III from the bill for two critical reasons.

We struck Title III first because it goes to the heart of the act—the survival of Indian cultural protection of Indian children yet not a single tribe in the country was ever consulted. We cannot forget that we have a trust responsibility to protect Indian tribes and their resources. Congress, in passing the ICWA, and the Supreme Court in the 1988 field case, both recognized “that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.” Yet the House went on to make major changes to the act without any tribal consultation whatsoever or even a single hearing.

Second, the Committee disagreed with the substance of Title III in that it adds additional requirements for Indian parents to meet before the protections of the act, namely tribal court jurisdiction, kick in. I think it is especially important to remember that while the act sets up adoption preferences, it gives tribal and state courts great latitude to make any placement they want, including placement with non-Indian families, as long as there is good cause. In fact, that is exactly what happened in the 1988 *Holyfield* case. I disagree with the assumption that tribal courts are bound to make wrong or misguided decisions in these cases.

We were also concerned that changing the coverage requirements is not only going to exclude certain bona fide Indian children from the act's coverage, but will move the determination back from tribal courts into state courts. We passed the Act in 1978 in response to the state courts' inability to grasp the nature of Indian culture. We also disagreed with the Title III because it would tie membership and coverage to written consent and enrollment when Indian tribes themselves do not. By focusing on the degree of Indian blood, Title III's sponsors miss the fact that Indian tribes, as sovereign governments, have the right to set membership requirements on their own terms. The second largest tribe in the nation, the Cherokee Nation, does not rely on blood quantum in determining membership, yet many Cherokees who have a limited degree of Indian blood are an integral part of and play important roles in Cherokee culture.

Last, Title III's heavy reliance on the parents' contacts with the tribe entirely misses the important role of the child's extended family. In Indian culture the extended family has a special role in caring for Indian children. They are the first line in representing the tribe's interest in that child and in nearly every instance when they have knowledge of a case are willing to adopt Indian children when their natural parents can't take care of them. This is a major point: unlike other minority adoption cases where there are often no prospective adoptive families, in Indian country there are more than enough relatives and families who are willing to assume custody of Indian children. In enacting ICWA we recognized that there should be someone to speak for the tribe, and for the child's interest in his or her heritage. It should be clear that tribal courts, not state courts, are going to be in a better position to recognize this as well as be in contact with a child's relatives. The reason this is so important is because that knowledge will promote quicker foster care or adoptive placements of Indian children, something directly in their best interests.

Having agreed that the provisions our respective committees struck from H.R. 3286 are not the answer, we need to focus on what the appropriate next steps should be.

We can begin by agreeing that if a law is being ignored, especially one which fundamentally affects children, then paring that law down is simply not an answer. Commonsense dictates that the law be strengthened and enforcement be stepped up, and all voices be heard. We must put aside partisan politics and prejudice. We need to think carefully and deliberately about what is best for the children and what is best for an entire culture.

This is the commonsense approach that has gone into an effort by the National Congress of American Indians to draft new language to amend ICWA. It will bring

renewed fairness and stability to this troubled debate. One critical provision, for example, will place deadlines on tribes for when they can intervene in a voluntary adoption proceeding, once they have been notified. This will provide closure and security for adopting families as well as an incentive to notify the tribe early rather than later. Another provision will impose criminal sanction on attorneys or adoption agencies that knowingly violate the act.

It is time for non-Indians to understand that Indian families are not necessarily opposed to other people raising their children and giving them loving homes. But it is even more critical that they understand that Indian people must have a voice in these adoptions and that their voices be heard for the good of everyone. Although we in Congress are often the first to prescribe what is best for American Indians, we usually fail in our attempts to deliver on our promises, largely due to our unwillingness to listen to the very people we're trying to help. Time is running out, and the welfare of Indian children may be hanging in the balance. Difficult legislation demands a fair and balanced approach. I am committed to that approach and I hope the rest of Congress is too.

PREPARED STATEMENT OF VIRGIL MURPHY, CHAIRMAN, STOCKBRIDGE-MUNSEE
COMMUNITY, BAND OF MOHICAN INDIANS

The most important resource of the Stockbridge-Munsee Community Band of Mohican Indians is our children. For many years, Indian children were removed from their homes and denied the opportunity to be raised in their culture. In 1978, the Indian Child Welfare Act (“ICWA”) was passed to ensure that Indian tribes have a key role in the placement of Indian children who are being removed from their families. Recently the procedures and safeguards of ICWA were challenged. The Stockbridge-Munsee Community believes it is important to address the concerns about ICWA while preserving the best interest of Indian children and tribes.

In May, Congresswoman Deborah Pryce authored a provision of H.R. 3286 that contained extensive amendments to ICWA (“Title III”). The amendments provided that ICWA would not apply to child custody proceedings involving a child whose parents do not maintain an affiliation with their tribe. Such a change in the law would have been a large step backwards in ICWA's protection of Indian children and Indian tribes' role in the placement of Indian children. The Stockbridge-Munsee Community and numerous other tribal governments opposed Title III. We thank the Committee for voting to strike Title III when it was referred to the Committee.

Subsequently, the “Tulsa amendments” were developed by a cooperative intratribal effort coordinated by the National Congress of American Indians and may become a part of H.R. 3286 or introduced as stand-alone amendments to ICWA.

The Stockbridge-Munsee Community supports the “Tulsa amendments” because they were developed with the participation and support of tribal governments. Furthermore, the amendments maintain the spirit of ICWA while thoughtfully and prudently addressing the concerns of adoption attorneys and others.

We believe the amendments would improve ICWA by (1) requiring states to notify tribes in voluntary adoption or foster care placements; (2) providing sanctions against attorneys and agencies who encourage misrepresentation of a child's Indian heritage or status; and (3) clarifying the timeframes under which a tribe can intervene in a proceeding. These are changes to ICWA that the Stockbridge-Munsee Community can support.

Much of what we do as a tribal government revolves around planning for the future of our grandchildren. Through ICWA, we are able to ensure that our people's grandchildren will be in the community in the future. The maintenance of our future is the foundation of our survival as a tribe. ICWA is a law that is very precious to tribal governments. Any misguided or hasty attempts to change it could cripple the long-term survival of our tribal community.

We thank the Senate Indian Affairs Committee for your efforts to act with the best interests of Indian children and communities in mind. We support the Tulsa amendments and strongly oppose any amendments in the form of Title III, as passed by the House. ICWA has served tribes well since its enactment and will continue to do so as long as the integrity and essence of ICWA remains intact. Thank you very much.

PREPARED STATEMENT OF THE ONEIDA INDIAN NATION, ONEIDA, NY

The Oneida Indian Nation is deeply concerned over recent Congressional attempts to undermine the Indian Child Welfare Act (ICWA). We thank Chairman McCain and the members of the Senate Committee on Indian Affairs for this opportunity

to share our thoughts regarding improvements to the Indian Child Welfare Act. We would like to offer our support for the alternative amendments proposed by the National Congress of American Indians (NCAI).

There are ways to address the concerns expressed by the sponsors of House bill without forgetting the original purpose of the Indian Child Welfare Act. The National Congress of American Indians recently met to address these concerns and drafted proposed legislation that will effectively place requirements on all parties in voluntary proceedings. These alternative amendments signify the willingness of Indian governments to address the specific concerns of those who feel that ICWA does not work. But these amendments also address other issues of concern to Indian people. The only effective solution is one that will actually provide more security for prospective adoptive parents and still allow for meaningful participation of Indian governments where it is appropriate.

The proposed legislation drafted by NCAI addresses nine (9) specific concerns which are outlined below:

No. 1. Notice to Indian Tribes for Voluntary Proceedings—This provision would extend the notice provision to voluntary as well as involuntary proceedings. It also clarifies what should be included in the notice so a tribe can make an informed decision on whether the child is a member or eligible for membership.

No. 2. Timeline for Intervention—This provision would place a deadline for when a tribe could intervene in a voluntary proceeding. The time would start running from the time of notice of the proceeding. If a tribe did not intervene within the time period, then it could not intervene in the proceeding.

No. 3. Criminal Sanctions—This provision imposes criminal sanction on attorneys or adoption agencies that knowingly violate the Act by encouraging fraudulent misrepresentations or omissions.

No. 4. Withdrawal of Consent—This provision establishes a time limit for when a parent could withdraw their consent to a foster care placement or adoption. Currently, a parent can withdraw their 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 that less than 30 days have passed since the commencement of the adoption proceeding.

No. 5. Application of ICWA in Alaska—This provision would clarify that Alaskan villages are included in the definition of reservation.

No. 6. Open Adoption—This provision allows state courts to provide open adoptions where state law prohibits them.

No. 7. 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.

No. 8. Duty to Inform of Rights Under ICWA—This provision imposes a duty on attorneys and public and private agencies to inform Indian parents of their rights under ICWA.

No. 9. 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.

We urge the members of the Committee and Congressional leaders in both houses to enact the alternative amendments proposed by NCAI and to keep the Pryce amendments (Title III of H.R. 3286) out of the final version of Adoption Promotion and Stability Act of 1996.

We thank you for your efforts to strike Title III from the Senate bill, and for this opportunity to share our thoughts with you regarding enhancement of the Indian Child Welfare Act.

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

As Chairman of the Resources Committee, I want to thank my colleagues in the Senate for allowing me to testify on Title III of H.R. 3286 and provide the Resources Committee's views. I opposed very strongly the inclusion of Title III of H.R. 3286 and the full Committee on a bipartisan consensus, voted unanimously to strike Title III out of the bill. However, the House Rules Committee chose to reinstate that title in the Omnibus Adoption Bill when it was considered on the House floor.

H.R. 3286 is intended to promote family values, avoid prolonged unnecessary litigation in adoptions and to get away from race-based tests in child placement decisions. I support families, but Title III of the bill is anti-Indian family legislation and fails to accomplish all three of these goals. The bill was introduced without the consultation of the Alaska Natives and American Indian Tribes. It is an outrage

that the U.S. House of Representatives considered a very sensitive and important issue which proposes a major change in the adoption of a Native American child without Native American input.

Last year, Congresswoman Pryce introduced H.R. 1448 and our Subcommittee on Native Americans and Insular Affairs held a hearing on May 10, 1995. Alaska Natives and Tribes opposed that bill. The Committee on Resources and I directed the Tanana Chiefs Conference to begin a consultation effort with tribes, the National Association of Adoption Attorneys, the Alaska Federation of Natives, and the National Indian Child Welfare Association to draft a working document on H.R. 1448 and the issues it raised regarding the Indian Child Welfare Act (ICWA).

The National Congress of American Indians met the first week in June to discuss this working draft document on the ICWA and accepted this alternative proposal. The proposed legislation responds to issues raised in H.R. 1448 and to issues in Title III of H.R. 3286. It provides for notice to Indian tribes for voluntary adoptions, terminations of parental rights, and foster care proceedings. It provides for time lines for tribal intervention in voluntary cases and provides criminal sanctions to discourage fraudulent practices in Indian adoptions. Additionally, it clarifies the limits on withdrawal of parental consent to adoptions and provides clarity on the application of ICWA in Alaska. The proposal opens adoptions in states where state law prohibits them and clarifies tribal courts authority to declare children wards of the tribal court. In addition, it states that attorneys and public and private agencies have a duty to inform Indian parents of their rights under ICWA, and provides for a tribal membership certification in adoptions.

Mr. Chairman, I have always maintained that the Tribes needed to work with the National Association of Adoption Attorneys to ensure that ICWA is followed in the adoption of Alaska Native and American Indian children. I understand the tribes have informally discussed this new proposal with the National Association of Adoption Attorneys and that some tentative agreement has been reached. It has always been my goal to introduce ICWA legislation with the full consultation of tribes in conjunction with the National Association of Adoption Attorneys. I believe that we have a workable draft document and I plan to work with your Committee to resolve the problems associated with the unfortunate and tragic adoption cases such as the *Rost* case.

I know that Congresswoman Pryce and others are sincere in their concern about litigation which has delayed a few adoptions. But ICWA is not the problem. The *Rost* case is a sad and tragic case. But it was caused by an attorney who tried to cover up the natural parent's tribal membership and purposefully avoided checking with the grandparents and extended family of the children to see if the family was available to adopt these children. The sad part is that this attorney did not violate the law, but he inflicted untold sorrow on the *Rosts*, the grandparents of the children, and, ultimately, on the children themselves. The proposed legislation will impose criminal sanctions on attorneys who violate ICWA requirements in the adoption of a Native child. In closing, I can understand the desire to solve the problems of a few high profile cases, however, we must not do so at the cost of placing thousands of Indian children at risk of harm. I believe we have a workable ICWA document and you have my commitment to work with all affected parties to pass alternative legislation. I thank the Committee for allowing me to testify.

STATEMENT OF SENATOR PAUL WELLSTONE
SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

Mr. Chairman, I want to commend the distinguished Chairman and Vice-Chairman on their leadership on this important issue. As usual, they convey their profound understanding of the history that gave rise to the Indian Child Welfare Act, as well as the deep significance to the Native American community, of the principles underlying the Act. I know that my friends in Indian country in Minnesota are deeply appreciative of this Committee's role, under the Chairman's leadership, in opposing those changes that would undermine the Act, and in creating a forum for testimony on compromise amendments. I also want to thank the witnesses who have taken the time to come and give testimony on how to improve the Indian Child Welfare Act.

The Indian Child Welfare Act of 1978 was enacted to put an end to the practice of removing Indian children from their families, their tribes, and their cultures. Unfortunately, there is a long and shameful history of this practice in the United States. In 1978, prior to the enactment of ICWA, State courts and child welfare workers placed over 90% of adopted Native-American children in non-Native American homes. ICWA creates a framework in which Indian tribes can participate in the placement process instead of being shut out. Their assured participation has helped to preserve the cultural integrity of Indian tribes by ensuring that tribal leadership retains the ability to make decisions on matters involving the adoption and custody of Indian children. Any changes or improvements to ICWA must not supersede an individual tribe's right to determine the criteria for tribal membership as well as respecting the sovereignty of tribal governments.

Both the Department of the Interior and the Department of Health and Human Services agree that ICWA has worked well to safeguard the interests of Indian children, especially when its provisions are applied in a timely manner. It is important to note that the high-profile problematic cases under ICWA, while undoubtedly painful for the participants, represent less than one-half of one-percent of the total number of Indian adoptions since the Act was passed. I think it is important to consider the amendments developed by Indian tribes and adoption advocates in order to better serve the needs of Indian children and families. The most important concern in any custody or adoption case is the best interest of the child. The proposals developed by the NCAI in conjunction with tribal attorneys and adoption attorneys, reflect improvements to ICWA that will benefit Indian children, especially changes to reduce delay in custody proceedings and to strengthen federal enforcement tools to promote compliance with the Act.

Mr. Chairman, Minnesota is home to a large number of Native Americans, and the Twin Cities of Minneapolis and Saint Paul have

one of the largest urban Indian populations in the country. In 1990, Indian children accounted for nearly twelve-percent of total adoptions statewide. I am confident that, with the help of ICWA, the adoption of Indian children will continue to be a cooperative action involving all concerned parties. Maintaining and strengthening the participation of tribal authorities in the adoption process is clearly in the best interest of the children, families, and Indian tribes.

Thank you, Mr. Chairman.

MICHAEL O. FREEMAN
COUNTY ATTORNEY



PHONE
(612) 348-3099

OFFICE OF THE HENNEPIN COUNTY ATTORNEY
2000 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

June 25, 1996

The Honorable Paul D. Wellstone
U.S. Senator
717 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Wellstone:

I am writing, as one public representative to another, to urge you to work against any weakening amendments to the Indian Child Welfare Act, 25 USC 1911 et seq. The amendments added in the House of Representatives to H.R. 3286, The Adoption Tax Credit legislation and removed in the Senate Indian Affairs Committee on June 19, would seriously undermine the spirit and intent of the Indian Child Welfare Act.

Hennepin County has the largest urban Indian population in the country outside of the County of Los Angeles. We have a large number of cases that involve the Minnesota Chippewa Tribe, Red Lake Band of Chippewa Indians, and other various Tribes both within and outside of the state of Minnesota. We strive to work closely with the Tribal Representatives to ensure that the Act and its mandates are closely followed. We have found that the procedures that are set out in the Act are not a burden but an added protection to a sovereign nation.

Hennepin County meets regularly with Tribal Representatives to work closely together in resolving cases involving Indian children. The Tribes act as an appropriate third parent willing and able to make decisions regarding their children's welfare. Clear and consistent communication between the County and the Tribes has resulted in better protection and services for Indian children.

The proposed amendments would greatly damage Indian children as it would remove decision-making from a third appropriate parent. The Tribes have consistently demonstrated that their only concern is for the future of their culture and their children. To take away that ability would truly not be in the best interests of Indian children.

I strongly urge you to work against any weakening of the Indian Child Welfare Act. It does not serve the interests of the people of Minnesota or America - Indian or non-Indian - to allow the proposed amendments to move forward.

Sincerely yours,

MICHAEL O. FREEMAN
Hennepin County Attorney

T. D. D. (612) 348-6015 HENNEPIN COUNTY IS AN AFFIRMATIVE ACTION EMPLOYER FAX (612) 348-9712



Department of Justice

STATEMENT

OF

SETH P. WAXMAN

ASSOCIATE DEPUTY ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

CONCERNING

PROPOSED AMENDMENTS TO
THE INDIAN CHILD WELFARE ACT

PRESENTED ON

JUNE 26, 1996

Mr. Chairman, Mr. Vice Chairman, and members of the Committee, I am Seth P. Waxman, Associate Deputy Attorney General at the Department of Justice. Thank you for inviting the Department to present its views on proposals to amend the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 et seq. The Administration and the Attorney General support the right of Indian tribes to self-government and recognize the important needs of Indian children for caring families and nurturing homes. We understand that the proposals under consideration represent an effort to reach consensus among adoption attorneys and tribal representatives, including the National Congress of American Indians ("NCAI").

Recently, the application of ICWA to a relatively small number of voluntary adoption cases has evoked intense debate in Congress. Generally, in these cases Indian parents or a tribe, alleging that ICWA was not complied with or was evaded, seek to recover custody of the Indian children. The tragedy in these situations arises from the length of time consumed by the legal proceedings. Delay causes anguish and disruption, and one's heart goes out to all the parents and prospective parents, and especially to the children, who find themselves caught in the center of these disputes.

In considering amendments to ICWA, Congress should be mindful of ICWA's important purposes and tribal rights of self-government. The Justice Department supports the Committee's action on June 19, 1996, that eliminated Title III of the Adoption Promotion and Stability Act of 1996. Although the Department otherwise supports H.R. 3286, we opposed Title III because, in our view, it was inconsistent with tribal self-government in matters of tribal

membership. See Letter from Andrew Fois, Assistant Attorney General for Legislative Affairs to Chairman McCain, June 18, 1996.

We are informed by the Departments of the Interior and Health & Human Services that ICWA generally works well, particularly when the affected parties are apprised of their statutory rights and duties and its provisions are applied in a timely manner. We believe that many of the proposals developed by NCAI, tribal attorneys, and adoption attorneys move the debate in the right direction. These amendments would clarify ICWA, provide deadlines to reduce delay in custody proceedings, and strengthen federal enforcement tools to promote compliance with ICWA in the first instance. As noted below, our comments on the draft proposals are preliminary in nature. We would be pleased to assist the Committee in its effort to develop concrete proposals that are both respectful of tribal self-government and promote timeliness and certainty in voluntary adoptions of Indian children.

I. The Right of Indian Tribes to Self-Government

Since the formation of our Union, the United States has recognized that Indian tribes have the authority to govern their members and their territory. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The United States has entered into hundreds of treaties and agreements with Indian tribes, pledging protection for Indian tribes and securing the tribes' rights to the "highest and best" form of government, "self-government." Ex parte Crow Dog, 109 U.S. 556, 568 (1883). ICWA is a constitutionally valid statute that is closely tied to Congress' "unique obligations" to Indian tribes by protecting the best interests of Indian children

and families while promoting tribal rights of self-government. See Morton v. Mancari, 417 U.S. 535, 555 (1972).

II. The Statutory Framework of the Indian Child Welfare Act

The United States has a government-to-government relationship with Indian tribal governments. Protection of their sovereign status, including preservation of tribal identity and the determination of tribal membership, is fundamental to that relationship. ICWA establishes a dual jurisdictional system for Indian child custody proceedings: a) Congress confirmed the exclusive jurisdiction of tribal courts in Indian child custody proceedings when the Indian child is domiciled in tribal territory; 25 U.S.C. § 1911(a);¹ and b) Congress created a procedure to transfer off-reservation Indian child custody cases to tribal courts, but allowed state courts to retain jurisdiction of such cases where good cause exists. Notably, ICWA reserves the right of either parent to "veto" the transfer of a case involving their child to tribal court. 25 U.S.C. § 1911(b).

ICWA establishes substantive and procedural protections for Indian children, Indian families, and Indian tribes. In any involuntary state-court proceeding to place an Indian child outside the home, ICWA requires notice to the Indian parent or custodian and the child's tribe, and imposes a ten-day stay of proceedings, which may be extended to thirty days. 25 U.S.C. § 1912(a). ICWA also establishes a right to counsel for indigent parents and a right to examine records, and it requires state child welfare

¹ See Fisher v. District Court, 424 U.S. 382 (1976) (tribal courts have exclusive jurisdiction over adoptions of Indian children who are domiciled on the reservation).

agencies to make remedial efforts to prevent the breakup of the Indian family. 25 U.S.C. § 1912(b)-(d).

In any voluntary state-court proceeding for relinquishment of custody or parental rights, ICWA requires the court to certify that it has explained the consequences of the action and that the Indian parent has understood those consequences. 25 U.S.C. § 1913(a). No consent to adoption is valid if made before an Indian child is born or within ten days after birth.² *Id.* Consent to adoption may be withdrawn prior to entry of a final decree, 25 U.S.C. § 1913(c), and consent to foster care placement may be withdrawn at any time. 25 U.S.C. § 1913(b). After entry of a final adoption decree, a collateral action may be maintained only on the grounds of fraud or duress within two years of the decree, unless a longer period is provided for by state law. 25 U.S.C. § 1913(d).

III. The Operation of the Indian Child Welfare Act

The Department of Justice has only a limited role in the implementation of ICWA, so our knowledge of how, and how well, ICWA works is premised largely on the reports of the Departments of the Interior and Health and Human Services.³ They report that ICWA generally has worked well to preserve the integrity of Indian families and tribal relations, especially when parties are informed

² The ICWA ten-day protective period is consonant with many state laws. More than half of the states do not permit parental consent to adoption until 3 days after a child is born. M. Hansen, "Fears of the Heart," ABA Journal (November, 1994) at 59.

³ See Hearing Before the Senate Committee on Indian Affairs, (1995) (statement of Joann Sebastian Morris, Acting Director, Office of Tribal Services, BIA); *id.* (statement of Terry L. Cross, Executive Director, National Indian Child Welfare Ass'n); *id.* (statement of gaiashkibos, President, National Congress of American Indians).

about ICWA and it is applied in a timely manner.⁴ In fact, despite some recent concern about ICWA's application to certain off-reservation cases, legislators seem to agree that ICWA works. As Representative Pryce explained, "ICWA has worked, and it is still working." See Statement of Representative Pryce, 142 Cong. Rec. H4808-4809 (May 10, 1996).

Under ICWA, courts are able to tailor foster care and adoptive placements of Indian children to meet the best interests of children, families, and tribes. We understand that the vast majority of these cases are adjudicated without significant problems. The application of ICWA to a limited number of cases involving adoptive placements that are later challenged by biological parents or the child's tribe, however, has drawn criticism. This criticism, in turn, provides the impetus for amendments to the ICWA.

These cases are difficult and heart-rending, often having tragic consequences for all parties to the dispute. It is important to reiterate, however, that these problematic cases are not indicative of the manner in which ICWA operates in the vast majority of instances. Further, many of those cases would not have been problematic if ICWA's dictates had been complied with at the outset of the adoption process.

For example, among the cases commonly cited for the need to amend ICWA is the adoption that provided the factual predicate for the In re Bridget R. decision by the California Court of Appeal.

⁴ Other positive results reported under ICWA are the development of tribal juvenile codes, tribal court processes for addressing child welfare issues, and tribal child welfare services.

49 Cal. Rptr. 2d 507 (1996). In that case, twin girls of Indian descent were placed with a non-Indian family when their biological parents relinquished them to an adoption agency. The biological parents and the interested tribe subsequently challenged the adoption. The ensuing protracted litigation has disrupted the lives of all those who are involved in the dispute. Had ICWA been complied with in that instance, however, most of the delay -- and quite possibly the litigation itself -- would have been avoided. The biological parents would have been required to wait 10 days after birth to relinquish their rights, and when they did so they would have been instructed by a judge as to their rights under the statute and the consequences of their waiver of those rights. None of this occurred, and that created the problem. Bridget R., therefore, signals a need to fine-tune ICWA's statutory mechanisms to provide incentives that ICWA is complied with early on in the adoption process.

Many supporters of Title III, focussing solely on Bridget R. and other anomalous cases, make the assumption that ICWA's application to these cases will produce a particular outcome, namely, the removal of children from non-Indian adoptive parents. The facts of the very case addressed in the Supreme Court's seminal decision on ICWA, Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), however, demonstrate that this assumption is mistaken. In Holyfield, three years after a state court had issued an adoption order placing Indian children domiciled on the reservation with a non-Indian family, the Supreme Court reversed the order, holding that the tribal court had exclusive jurisdiction

over the case. 490 U.S. at 52-53. The Supreme Court noted that "[h]ad the mandate of the ICWA been followed [at the outset] much potential anguish might have been avoided." *Id.* at 53-54. The Court deferred to the "experience, wisdom, and compassion of the Choctaw tribal courts to fashion an appropriate remedy." *Id.* at 54. Following transfer of the case to tribal court, the tribal court determined that it was in the children's best interest to remain in the current placement with Vivian Holyfield, the non-Indian adoptive parent. In order to preserve the link between the children and the tribe, the court made arrangements for continued contact with extended family members and the Tribe. As *Holyfield* demonstrates, ICWA does not resolve the ultimate issue of who should have custody of a particular Indian child; rather it allows courts to make that decision on a case-by-case basis taking into account the best interests of the child.

IV. Proposed Amendments to the Indian Child Welfare Act

The Administration and the Attorney General strongly support the Adoption Promotion and Stability Act of 1996, without Title III.⁵ The Department, however, opposes the Title III amendments to ICWA as passed by the House because they would interfere with tribal self-government and undercut tribal court jurisdiction.⁶

⁵ In a letter from Assistant Attorney General Fois to Speaker Gingrich, dated May, 10, 1996, the Department also indicated that to avoid Eleventh Amendment concerns, Title II should be amended to reflect that it is passed pursuant to both Congress' spending power and its enforcement authority under the Fourteenth Amendment.

⁶ As passed by the House, Title III of the Adoption Promotion and Stability Act of 1996 would have amended ICWA to provide that:

(a) th[e ICWA] does not apply to any child custody proceeding involving a child who does not reside or is not domiciled

The Supreme Court held in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that the power to determine tribal membership is a fundamental aspect of tribal self-government, akin to the power of the United States to determine citizenship. Tribal membership is thus a matter of tribal law which should be determined by tribal government institutions. As the Supreme Court explained in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987): "Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority because tribal courts are best qualified to interpret and apply tribal law." Moreover, Congress found that States "have often failed to recognize the essential tribal relations of Indian people." 25 U.S.C. § 1901(5); see *United States v. Kagama*, 118 U.S. 318, 384-385 (1886).

Title III's proposal to establish a system wherein federal statutory protections turn not on tribal government determinations of tribal membership, but on a tribal member's degree of "social,

within a reservation unless--

(1) at least one of the child's biological parents is of Indian descent; and

(2) at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member.

(b) The factual determination as to whether a biological parent maintains significant social, cultural or political affiliation with the Indian tribe of which either parent is a member shall be based on such affiliation as of the time of the child custody proceeding.

(c) The determination that this title does not apply pursuant to subsection (a) is final, and, thereafter, this title shall not be the basis for determining jurisdiction over any child custody proceeding involving the child.

cultural, or political affiliation" with an Indian tribe is contrary to recognized rights of tribal self-government. To the extent that Title III authorizes state courts to make these determinations, it further undermines tribal self-government and the objectives of ICWA.

Moreover, Title III grafts onto ICWA a subjective and open-ended test that, if anything, will increase the quantum of litigation. The existing trigger for ICWA -- tribal membership and eligibility for tribal membership -- is readily discernible by an inquiry to the relevant tribal government. In contrast, the "social, cultural, or political affiliation" test incorporates subjective criteria more likely to create additional litigation, with attendant delays in the adoptive placement of Indian children, than to "streamline" adoptive placements.

V. Tribal Proposals for Reform of ICWA

A. Procedural Reforms

In response to some of the concerns raised in the context of voluntary adoptions, Indian tribes have made proposals to promote timeliness and certainty in voluntary adoptions. NCAI, which represents over 200 Indian tribes, has worked with tribal attorneys and adoption attorneys on proposals that, consistent with the right of Indian tribes to self-government, ICWA be amended by, inter alia, providing clear standards for notification to tribes in voluntary adoptive placements of Indian children; establishing deadlines for tribal intervention in such cases; and limiting the time for biological parents to withdraw consent to adoptive placements.

The Department supports efforts to develop consensus on proposals to increase certainty in the early stages of child custody proceedings and is willing to work with Congress to explore these provisions. The NCAI proposals relating to the procedural aspects of ICWA generally appear to provide a constructive alternative to the more radical changes of Title III, which represent a departure from the goals of ICWA and undermine tribal sovereignty.

B. Clarification of ICWA Requirements

The NCAI proposals also seek to clarify ICWA's requirements. The Department does not at this juncture have comments on the particular language of most of these, except one proposal that requires attorneys who facilitate adoptive placements to advise the parents of Indian children concerning the scope of the ICWA. The Department of Justice has reservations about this provision only to the extent that it might be construed to limit an attorney's ability to discuss the feasibility of various options with his or her client.

VI. Noncompliance and Enforcement

In testimony before this Committee in May 1995, the Department of the Interior and a number of other witnesses cited widespread noncompliance with ICWA by states.⁷ Reports by the Departments of the Interior and Health & Human Services on Indian child welfare

⁷ The Department of Health and Human Services issued a program instruction on August 11, 1995, requiring states beginning in FY 1996, to report measures taken under their child welfare service plans under Title IV-B of the Social Security Act to comply with ICWA.

also have emphasized enforcement problems.⁸ To address the problem of noncompliance, NCAI proposed criminal sanctions to discourage fraudulent practices in Indian adoptions. The proposed NCAI language would add a new Section 1924 to Title 25, making it a criminal violation to

(1) encourage[] or facilitate[] fraudulent representations or omissions regarding whether a child or parent is Indian, or (2) conspire[] to encourage or facilitate such representations or omissions, or (3) aid[] or abet[] such representations or omissions having reason to know that such representations or omissions are being made and may have a material impact on the application of this Act.

The section specifically exempts any "parent of an Indian child," which under the current ICWA definition includes both biological and adoptive parents. 25 U.S.C. § 1903.

As currently proposed, Section 1924 would apply broadly to "any proceeding or potential proceeding involving a child who is or may be an Indian child for purposes of this Act" and would target anyone who "encourages or facilitates fraudulent representations or omissions." Several of these phrases raise the constitutional concerns of vagueness and overbreadth. In addition, the underlying conduct targeted by proposed Section 1924, "fraudulent representations or omissions," is often difficult to prosecute. Parts 2 and 3 of the proposed sanctions, which address "conspiracy" and "aiding and abetting," are not necessary, because these offenses are already codified in 18 U.S.C. § 371 and 18 U.S.C. § 2. As the Committee considers this issue further, it may be fruitful

⁸ Opportunities for ACF to Improve Child Welfare Services and Protections for Native American Children, Off. of the Insp. Gen., Dept. of Health and Human Services (1994); Indian Child Welfare: A Status Report, Dept. of Interior (1988).

to consider 18 U.S.C. § 1001 as a model for sanctions to improve compliance with ICWA.

CONCLUSION

We hope today's hearing will promote consensus on proposals to amend ICWA in a manner that is both respectful of tribal self-government and conducive to certainty and timeliness in voluntary adoptions of Indian children.

We appreciate the efforts that the Chairman, the Vice Chairman, and the Committee are making to foster dialogue on issues related to ICWA, consistent with the government-to-government relations between the United States and Indian tribes.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 9, 1996

The Honorable John McCain
Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450


Dear Mr. Chairman:

Enclosed are the responses to the questions regarding amendments to the Indian Child Welfare Act that you sent to Associate Deputy Attorney General Seth Waxman on June 28, 1996.

The Office of Management and Budget has advised this Department that it has no objection to the presentation of these responses from the standpoint of the Administration's program.

Please do not hesitate to contact us if we may be of additional assistance.

Sincerely,


Andrew Fois
Assistant Attorney General

CC: The Honorable Daniel K. Inouye
Ranking Minority Member

Question 1. In your view, would the compromise adequately protect tribal sovereignty? How?

Response:

The set of proposals cooperatively developed by the National Congress of American Indians ("NCAI"), tribal representatives, and adoption attorneys would amend the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 et seq., by providing clear standards for notification of Indian tribes in voluntary adoptive placements of Indian children; establishing deadlines for tribal intervention in such cases; establishing time limits on withdrawal of consent to adoptive placements by biological parents; and providing sanctions for willful violations of ICWA, among other things. The compromise proposals are designed to promote timeliness and certainty in voluntary adoptions of Indian children while providing due respect for tribal self-government.

We understand that S. 1962, The Indian Child Welfare Act Amendments of 1996, is, to a large extent, based on these proposals. The Department believes S. 1962 represents a sound approach to amending the Indian Child Welfare Act (ICWA) to address the concerns of its critics without compromising tribal sovereignty or the best interests of Indian children.

Question 2. Would the compromise sufficiently advance the goals of certainty, speed and stability in adoptions involving Indian children? How?

Response:

The NCAI/adoption attorney compromise proposals seek to promote timeliness in voluntary adoptions of Indian children by providing clear standards for notification of Indian tribes in voluntary adoptive placements. In addition, the compromise proposals are designed to promote certainty and stability by ensuring that biological parents are advised of their rights prior to giving consent to adoption, thereby enhancing sound decision-making, and by establishing time limits on any withdrawal of consent to adoptive placements by the biological parents, which would promote stability. The compromise proposals also provide a framework for crafting consensual visitation arrangements, whereby Indian children would be able to maintain contact with their extended Indian families and Indian tribes even though they are placed with a non-Indian adoptive family.

Question 3. The attorney for the Rost family says in her written testimony that if these compromise amendments had been law in 1993 the "tragedy" which ensued in the Rost case would never have happened. Do you agree with her assessment?

Response:

In its testimony before the Committee on June 26, the Department noted that if ICWA had been complied with at the outset of the Bridget Rost case, most of the delay involved in that case might have been avoided. The NCAI/adoption attorney compromise proposals are designed to promote better compliance with ICWA by providing clear standards for notification of Indian tribes in voluntary adoptive placements of Indian children, providing deadlines for intervention by Indian tribes, ensuring that biological parents are advised of their rights prior to giving consent to such adoptions, providing greater flexibility in adoptive placements through consensual visitation agreements, and enhancing federal enforcement tools. The Department, therefore, believes that the NCAI/adoption attorney compromise proposals will help to avert tragedies such as the Rost case.

In her testimony, Jane Gorman, the attorney for the Rost family, suggested that the protracted litigation in the Rost case, and its attendant delay, would not have happened if the compromise proposals had been in place. Ms. Gorman has personal knowledge of the case, and we know of no reason to question her assessment.

Question 4. In your view, is the compromise the product of good faith efforts on the part of the adoption community?

Response:

The Department of Justice did not participate in the communications between the National Congress of American Indians, tribal representatives and the adoption community. We have no reason to doubt that the compromise is not a good faith effort on behalf of the adoption community.

Question 5. What issues are addressed in Title III that have not been addressed in the compromise language? Can and should these issues be addressed legislatively? How?

Response:

The Department of Justice opposed Title III of the Adoption Promotion and Stability Act, as passed by the House, because it was inconsistent with tribal self-government determinations concerning tribal membership and potentially would have

interfered with tribal court jurisdiction. We support this Committee's action striking Title III and its efforts to develop consensus on ICWA amendments that are both respectful of tribal self-government and conducive to certainty and timeliness in voluntary adoptions of Indian children. Accordingly, the Department believes that Title III has been dealt with appropriately by the Committee.

Question 6. Is it possible that the Title III provisions on "Indian descent" passed by the House would make ICWA vulnerable to challenge under the U.S. Constitution and the Adarand case?

Response:

We do not believe so. We read the term "Indian descent" in section 114(a)(1) of Title III as referring to the definition of "Indian" set forth in section 1903(3) of ICWA. That section defines "Indian" as "any person who is a member of an Indian tribe." Accordingly, under Title III, the application of ICWA would continue to be based on the tribal status of either the Indian child or one of the child's biological parents. The Supreme Court has upheld legislation based upon tribal membership criteria. See Morton v. Mancari, 417 U.S. 535 (1972).

Question 7. Would you briefly discuss some of the procedural due process issues raised by Title III? In particular, the potential for State court determinations regarding tribal membership without notice to Indian tribes, and the possibility that such determinations would not be subject to appellate review?

Response:

Title III would not authorize state courts to determine tribal membership. The right of Indian tribes to make such determinations would remain undisturbed. However, Title III does provide that, by itself, the tribal membership of either an Indian child or a biological parent of a child eligible for tribal membership would be insufficient to trigger the federal protections of ICWA. Rather, in deciding whether ICWA would apply, state courts also would be required to assess the extent of the social, cultural, and political ties maintained between the tribe and at least one of the child's biological parents.

In our view, the problem created by this provision of Title III is not one of procedural due process. Title III would undermine the traditional deference given by Congress to tribal government determinations of tribal membership for purposes of determining whether particular individuals are "Indian" and hence eligible for the protections of ICWA.

Question 8. In what ways does ICWA work, or not work, for the best interests of Indian children?

Response:

The Department of Justice has only a limited role in the litigation of ICWA cases, so our knowledge of how, and how well, ICWA works is premised largely on the reports of the Departments of the Interior and Health and Human Services. They report that ICWA has generally worked well to preserve the integrity of Indian families and tribal relations, especially when parties are informed of the requirements of the statute and it is applied in a timely manner.

ICWA's statutory design is intended to protect the best interests of Indian children by protecting the integrity of Indian families and, except when necessary and appropriate, by preventing involuntary removal of Indian children from their homes. See 25 U.S.C. §§ 1902, 1912-1913. ICWA also establishes a presumption that maintaining tribal relations is in the best interests of Indian children.

To ensure that courts have the latitude to determine the best interests of the child, ICWA contains "good cause" provisions in 25 U.S.C. §§ 1911(b), 1915(a) and (b). These provisions are designed to provide tribal and state courts with the necessary flexibility to tailor their orders to serve the best interests of each Indian child when in a particular circumstance serving the best interests of the child is in tension with the other dictates of ICWA.

Question 9. From your review of the actions taken by Indian tribes in the area of child welfare, how have tribal governments and tribal courts exercised their responsibilities under ICWA?

Response:

The Department of Justice defers to the Departments of the Interior and Health and Human Services for a response to this question.

Question 10. How does current law balance the best interests of Indian children and the interests of Indian families and Indian tribes?

Response:

ICWA protects the best interests of Indian children by preserving the integrity of Indian families, and by preventing involuntary removal of Indian children from their homes, except when such action is necessary and appropriate. 25 U.S.C. §§

1902, 1912. ICWA also establishes a presumption that tribal courts are better situated than state courts to make Indian child custody decisions, but in cases arising off-reservation, provides that either parent may veto transfer of an Indian child custody proceeding from state court to tribal court. 25 U.S.C. § 1911.

Further, ICWA establishes a presumption that maintaining tribal relations is in the best interests of Indian children and promotes placement of Indian children with Indian families. ICWA recognizes that the preferences of the parents and the Indian child must be considered, and directs the courts to "give weight" to a parent's desire for anonymity. 25 U.S.C. § 1915(c). Significantly, through its "good cause" provisions, ICWA provides tribal and state courts with the flexibility to tailor their orders to serve the best interests of each Indian child based upon the unique circumstances of that child. 25 U.S.C. §§ 1911(b), 1915(a) and (b); see also 25 U.S.C. § 1916 ("best interests of the child").

Question 11. How does current law protect the interests of a biological parent who objects to transfer of a child welfare case from State to tribal court jurisdiction?

Response:

With regard to children who do not reside on the tribe's reservation, ICWA provides that foster care or termination of parental rights proceedings shall be transferred from state court to tribal court absent good cause to the contrary, "absent objection by either parent." 25 U.S.C. § 1911(b). If either parent objects to such transfer, the proceedings would remain in state court. Thus, ICWA gives both parents a "veto" over any request to transfer an Indian child welfare proceeding from state court to tribal court.

TESTIMONY OF
 THE HONORABLE DEBORAH PRYCE (OH-15)
 BEFORE THE
 SENATE COMMITTEE ON INDIAN AFFAIRS
 ON
 JUNE 26, 1996
 IN
 ROOM 216 HART SENATE OFFICE BUILDING

Mr. Chairman, distinguished members of the Committee on Indian Affairs: Thank you for affording me the opportunity to address you concerning the Indian Child Welfare Act of 1978.

I come before you today encouraged by the movement toward needed reform of the ICWA, and I am willing to work with the Committee and other interested parties, some of whom will testify before you today, in hopes that a true compromise that satisfies the interests of all sides can be reached.

Let me begin by saying that I believe the ICWA was well-intended legislation, and I continue to support its original and intended objectives. Protecting the best interests of Indian children and promoting stability and security among their families are certainly among the most worthy of all goals.

However, today an overly broad interpretation of the ICWA by many courts has gone far beyond the protection and preservation of Indian families and Native American heritage. Children have been denied placement and adoption in permanent, stable homes, as their rights and those of their parents are made subordinate to tribal claims based often on remote and minimal tribal connections.

Mr. Chairman, children in adoptive homes have faced the horrifying possibility of being removed from the only parents and homes they have ever known, even under circumstances where their natural parents:

- were not enrolled members of a tribe
- never resided on a reservation
- never had any meaningful contact with a tribe or Indian culture
- were of a primary cultural heritage other than Native American
- voluntarily relinquished their parental rights
- AND in some instances, even chose the couple they wanted to raise their child.

It is the application of ICWA in these cases that concerns me and which serves to discourage potential adoptive parents from pursuing adoption. Title III attempts to address these concerns. As passed by the House, Title III would prevent disruption in both the placement and adoption of children whose parents have no significant affiliation with a tribe.

The goals underlying Title III and which I believe should be the basis of any ICWA reform include the following:

To place children in need of permanent, loving homes and minimize the risk of disrupted or failed adoptions.

To give due consideration to European-American, African-American, Asian-American, and Hispanic-American heritages of children in addition to their Native-American heritage, rather than ignoring all other ethnic and racial backgrounds in determining when ICWA should apply, particularly under circumstances where there exists no affiliation with a tribe and the child's Indian blood relationship is attenuated at best. Continued disregard for all other heritages will no doubt lead to the eventual demise of ICWA, and with it the good which it is achieving.

To respect the rights of birthparents of Native American descent, who choose to place their children for adoption.

To promote the best interests of children as a paramount consideration in all child custody proceedings.

Although it contains many worthy objectives and provisions, the proposal before you today fails to address many of the issues and current problems with ICWA which led to the introduction and passage of Title III of H.R. 3286, by the House of Representatives.

First, let me focus on what I feel is positive about the NCAI's proposal. I agree that parents of Native American descent wanting to place their children for adoption should be apprised of all available placement options as well as the application of this Act.

I also understand the importance of notification to the tribes, and support time limits upon a tribe's ability to intervene in voluntary, adoptive placements, as this will help to ensure the timely placement of children in permanent homes.

Further, you may be assured that I in no way condone unscrupulous or unethical conduct on behalf of attorneys in any capacity, under any circumstances. I feel that penalizing such behavior is necessary.

Finally, allowing for visitation agreements between adoptive families, birthparents and their tribes, as part of an adoption decree may serve to decrease the likelihood of disruption in adoptive placements, while enabling children to maintain desired ties to their culture and heritage.

However, I have some serious reservations about what is not addressed in the draft amendments we are discussing today. I wholeheartedly agree with Senator Glenn regarding the problems associated with required notification when a biological parent chooses not to disclose the Native American ancestry of their child or is not aware of it. Any amendment to this Act must afford

protection to adoptive parents and children in those instances where there was no way of knowing that Native American heritage was involved at the time of the adoptive placement.

Ironically, many birthparents feel the need to conceal their heritage, in order to avoid the intrusive consequences of ICWA. Sadly, many parents see abortion as their only option, when instead, we should be providing all possible alternatives to abortion and assurances to birthmothers who choose to place their children for adoption, that it will be done in a timely manner, and that they will have a voice in that decision.

No other population within our society faces the risk of having decisions about their children thwarted by unwanted, third party intervenors. Those who parent children of Indian descent would be required to provide notification of the most personal, of all decisions, rather than enjoy the right to privacy afforded the rest of us.

Further, it is my impression the notification process called for by this proposal would be extremely cumbersome, and I suspect many of us would not be able to provide all the information requested.

As written, this proposal could serve to broaden the likelihood of disrupted adoptions by permitting not only a biological parent, but also a tribe, to petition the court for nullification of finalized adoptions in the event the proposed notification requirements were not complied with in every detail.

Furthermore, the variations in time limits concerning tribal intervention would prove to be most confusing even to courts well-versed in the ICWA, as it appears separate notifications would be required in each of the proceedings involved. I am most concerned that these provisions which are intended to facilitate the timely placement of children in permanent homes could have instead, the unintended effect of delaying such placement.

Finally, this proposal does not address the issue of retroactive membership. Congress could not have intended that legitimate, voluntary adoptions be reversed as the result of birthparents joining or being enrolled by another in a tribe after the relinquishment of parental rights, the placement of children in loving homes, and the commencement of adoption proceedings. A prohibition against retroactive enrollment and recognition of membership for purposes of ICWA's application is most certainly within the authority of the U.S. Congress as we have the responsibility to determine the scope of ICWA's application as a federal law.

Not addressed by this proposal is the fact that children are being claimed by tribal authorities even in the absence of any prior recognition of their parents

as tribal members, and based upon the smallest fractions of genetic Indian ancestry. Our nation's courts are in desperate need of direction from Congress on this point. Currently, individuals are deemed members of a tribe when, the tribe says they are members, irrespective of the actual date of enrollment or acknowledgment of membership. And as we have seen, sometimes it may be months following the relinquishment of parental rights and placement for adoption.

Even those of us who are adoptive parents cannot begin to imagine the heartbreak associated with the loss of a child under these circumstances, and who among us could even pretend to understand the horror and pain felt by a child of tender years being removed from the only parents and family he or she has ever known?

Mr. Chairman, so many of these issues are ones of fundamental fairness and recognition of the basic human rights afforded all citizens who live within our great democracy.

Children are not chattel, nor are they the personal property of an Indian tribe or their parents. They are individuals who have unique and fundamental rights and needs. Above all, they have the right to permanency in a loving, nurturing, family environment providing them stability and security. They should have all these rights, irrespective of their race, as do all other American children.

Mr. Chairman, I understand this proposal is continually evolving and that further changes have been suggested, and I am hopeful that is the case. I sincerely appreciate the efforts of all the tribes and individuals who have participated in discussions and negotiations leading to the proposal offered by the National Congress of American Indians. And I remain most hopeful that we can achieve a consensus regarding ICWA reform.

In closing, I look forward to working with the Committee, the Native American community, and all interested parties toward acceptable, consensus legislation. I respectfully ask this Committee during its deliberations to focus on language that will truly address the problems at hand.

Thank you, Mr. Chairman.

Congress of the United States

Washington, DC 20515

June 14, 1996

Senator John McCain
241 Russell Senate Office Building
Washington, DC 20510

Dear Senator McCain:

We write in response to comments recently provided by Mr. Terry L. Cross, Executive Director of the National Indian Child Welfare Association, concerning Title III of H.R. 3286, the Adoption Promotion and Stability Act of 1996, passed by the House on May 10, 1996.

We believe the Indian Child Welfare Act of 1978 (ICWA) was well-intended legislation and we continue to support its original objectives: to protect the best interests of Indian children and promote the stability and security of Indian tribes and families, through the establishment of federal standards for the removal of Indian children from their families and placement of such children in foster or adoptive homes reflecting the unique values of Indian culture. ICWA has worked to prevent the removal of Native-American children from their families and culture, and we remain most supportive of the Act's original and intended purpose.

In response to the comments of Mr. Cross, we respectfully offer the following observations for your consideration.

- Title III in no way negates or denies any of the protections currently afforded Indian children under ICWA. Tribes retain all of the following:
 - Preference in placement with extended family, other tribal members, or Indian families, in adoptive placements of Indian children under state law;
 - Exclusive jurisdiction over child custody proceedings involving Indian children domiciled or residing within reservations;
 - Ability in state court proceedings to request transfer of foster care placements and cases involving the termination of parental rights to an Indian child not domiciled or residing within a reservation;
 - Right to intervene in state court proceedings for the foster care placement of, or termination of parental rights to, an Indian child;
- Title III of H.R. 3286 simply serves to clarify the scope of ICWA's application in order to prevent disruption in both the placement and adoption of children whose parents have no significant affiliation with an Indian tribe. ICWA protects against the "removal" of Indian children from their families and tribes. It is hard to argue that children of minimal Indian heritage and whose parents have no affiliation with an Indian tribe are, in fact, being "removed" from an Indian family, tribe, or culture.

Senator John McCain
June 14, 1996

- If a child's parents maintain no affiliation with a tribe or Indian culture, that child is not going to be raised in a setting which would reflect the "unique values of Indian culture." (Section 1902- Congressional declaration of policy). Children of Indian descent whose parents were not raised in an Indian environment should not be forced into cultural surroundings and home settings that are foreign to them.
- Section 301 of Title III contains common sense, clear language, currently used by some courts, that clarifies the Act while at the same time embodying the original intent of ICWA. Under H.R. 3286, courts and tribes will know from the outset the scope of ICWA's application. Precious dollars currently being spent to engage in expensive and protracted litigation can instead be placed in the Indian child welfare system, where too many children continue to languish in foster placements while awaiting loving, permanent, homes.
- The possibility of adoptions being overturned under ICWA is but one issue of grave concern. Of equal concern is the fact that ICWA is being applied to child custody proceedings involving children for whom the Act was not intended to apply. Children are subjected to claims of tribal jurisdiction solely because of their race or lineal descent, irrespective of their parents' wishes. Furthermore, children are denied placement in permanent and loving homes for months and in some instances years prior to the finalization of adoptions as their rights and interests and those of their natural parents are made subordinate to tribal claims.
- Contrary to the assertions of Mr. Cross, the House Resources Committee was originally requested to hold hearings on proposed amendments to the Indian Child Welfare Act at the beginning of the 104th Congress. On May 10, 1995, hearings were held on H.R. 1448, a bill similar to Title III of H.R. 3286, before the Subcommittee on Native American and Insular Affairs that covered the issues of Indian adoption under ICWA.
- On July 24, 1995, Senator Glenn (sponsor of S. 764, companion legislation to H.R. 1448), Representative Solomon and I hosted a meeting concerning ICWA reform and invited all of the groups who attended the Subcommittee hearing. These groups included the National Congress of Native Americans, The Association of American Indian Affairs, and the National Indian Child Welfare Association, to name a few. No one attended except an attorney from a local Washington firm who lobbies Congress on behalf of Native Americans. Input and advice were requested yet none were received.
- Most recently, Title III of H.R. 3286 was referred to the Committee on Resources, which could have amended the bill to its liking but did not.
- A review of ICWA cases considered only by state supreme courts, as suggested by Mr. Cross, does not provide an accurate accounting of the extent of litigation resulting from ICWA's application in adoption proceedings. As you know, the majority of state court litigation never reaches the state supreme court. In addition, unpublished and pending cases are likewise not included.

Senator John McCain
June 14, 1996

- During hearings before the Senate Select Committee on Indian Affairs on May 11, 1988, while testifying on the issue of tribal intervention in voluntary adoptions, Ross Swimmer, Assistant Secretary for Indian Affairs stated, "We have seen case after case of this happening under current law." Our research has identified hundreds of cases throughout the country where ICWA has been an issue in adoptive placements.
- Nothing in Title III prevents tribes from providing young Indian parents with all available information to help them make informed decisions regarding adoptive placements for their children.
- Contrary to the assertions of Mr. Cross, at no time have we stated that the Indian Child Welfare Act was not intended to provide protections to off-reservation Indian children. At the time of ICWA's enactment, off-reservation Indian families were among the most vulnerable and accessible to scrutiny by state agencies. It does not follow, however, that ICWA should apply in state court proceedings where the natural parents are not enrolled members, and have no meaningful ties to an Indian tribe, Indian country or culture. Under such circumstances, the state has a legitimate interest in assuring that the best interests of children residing and domiciled within its jurisdiction are served.
- In cases where ICWA is determined to be the applicable law, off-reservation parents currently have the right to object to a transfer to tribal court and the state court has the right to retain jurisdiction for good cause. This remains unchanged by Title III.
- Any suggestion that a grandparent or extended family member can maintain the requisite tribal affiliation for ICWA to be applied is flawed. The current definition of "Indian Child" requires the child to be a member of the tribe or the biological child of a member of a tribe.
- If Congress had intended ICWA to extend to all blood relations irrespective of their affiliation with a tribe, the definition of "Indian Child" would instead only require that the child be a lineal descendant of a member of a tribe. Such an assertion was previously rejected by the Senate during consideration of S. 1976, almost ten years ago.
- Furthermore, nothing in Section 301 will prevent tribes from providing courts with all information they deem relevant in establishing tribal affiliation. In addition, Section 301 provides a constitutionally sound basis for determining jurisdiction as opposed to subjecting children to coverage under ICWA solely because of their lineal descent, or race.
- With respect to Section 302 of Title III and the issue of tribal membership, Congress could not have envisioned the possibility of adoptions being disrupted or overturned as the result of birthparents joining or being enrolled in a tribe after the voluntary relinquishment of parental rights, placement of children in loving homes, and commencement of adoption proceedings. Application of ICWA under these circumstances creates substantial risks for adoptive parents facing the possibility of losing their children as the result of tribal intervention and has a chilling effect on all adoptions.


- Although tribes maintain the right to determine membership for the purpose of tribal self-government, only Congress can determine the scope of ICWA's application as a federal law. A prohibition against the retroactive application and recognition of membership for purposes of ICWA is most certainly within the authority of the U.S. Congress.

Parents of Native American descent are no less capable of deciding who should raise their children than any other parent. Where there exists no affiliation with a tribe, Indian culture or community, and where a child's Indian blood relationship is attenuated at best, the European-American, African-American, Asian-American, and Hispanic-American heritage of that child can no longer be considered less significant and meaningful than his or her Native-American lineage.

Finally, consideration of the best interests of children, both Indian and non-Indian, must be paramount in all child custody proceedings.

We hope you will consider these points when the Senate debates the important issues of stability and security for children and adoptive families that H.R. 3286 seeks to achieve.

Sincerely,


DEBORAH PRYCE
Member of Congress


GERALD SOLOMON
Member of Congress


PETE GEREN
Member of Congress


TODD TIAHRT
Member of Congress

Congress
of the
United States
House of Representatives

DEBORAH PRYCE
OHIO
15th DISTRICT



June 20, 1996

Senator John McCain
Chairman
Senate Indian Affairs Committee
111 Russell Building
Washington, D.C. 20510

Dear Chairman McCain:

I understand the Senate Committee on Indian Affairs will conduct a hearing on Wednesday, June 26, 1996, at which time consideration will be given to Resolution TLS-96-007A and proposed legislation adopted at the 1996 Mid-Year Congress of the National Congress of American Indians.

I continue to have serious concerns that this proposal is inaccurately being considered as a compromise to Title III of H.R. 3286, which was stricken by the Committee during markup on Wednesday, June 19. This proposal fails to address any of the current problems with the ICWA which led to the introduction and passage of Title III in the House of Representatives. In addition, I respectfully offer the following observations regarding this proposal for your consideration:

- Requiring notice to tribes in voluntary child custody proceedings would serve to broaden the application of ICWA beyond its current and intended purpose, virtually denying biological parents of Native American descent the ability to control to any degree the voluntary placement of their children for adoption.

The ICWA was never intended to allow tribes to interfere in voluntary adoptions of children whose parents have virtually no ties to Native American culture or heritage. Birthparents of Native American descent domiciled and residing off the reservation, who are not enrolled members and maintain no ties to an Indian tribe or culture, should not have to notify a tribe before voluntarily placing their children for adoption. They should have the same right to determine who will raise their children in the event they cannot, as would any other citizen.

Furthermore, in those instances where a birthparent fails to disclose his or her Indian lineage because of feared tribal intervention in an adoption plan, adoptive parents and adoption agencies can have no way of knowing whether or not an Indian child or tribe is involved. One cannot fulfill the requirement of notification of a fact not known to him.

- Notification requirements in voluntary adoptions will create an even greater risk for disruption in the permanent and timely placement of children in loving, stable homes. Such requirements will have a chilling effect on all adoptions, as adoptive parents will face the possibility of losing their children as the result of tribal intervention.

Senator John McCain
June 20, 1996

This proposal would greatly broaden the likelihood of disrupted adoptions by permitting not only a biological parent, but also the tribe, to petition the court for nullification of an adoptive placement in the event the above-mentioned notification requirements were not complied with in every detail.

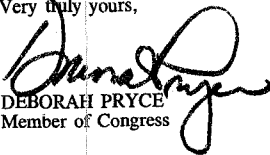
Adoptions that have been final for as long as two years would be vacated, and the placement wishes of birthparents thereby ignored, without regard for the best interests of the child. This goes far beyond the current language of section 1913(d) that allows for the withdrawal of consent, by a parent, after a final decree of adoption only upon a finding that such consent was obtained through fraud or duress. In addition, it adds an entire new tier of bureaucracy to the adoptive process.

Prior to the 1996 Mid-Year Conference, I delineated numerous concerns for consideration by all participating tribes. Among these were that 1) children are being denied placement and adoption in permanent, loving homes, as their rights and those of their parents are made subordinate to tribal claims; 2) the European-American, African-American, Asian-American, and Hispanic-American heritages of children are somehow considered less significant and meaningful than any Native-American heritage, even under circumstances where there exists no affiliation with a tribe and the child's Indian blood relationship is attenuated at best; and 3) consideration for the best interests of children must be paramount in all child custody proceedings.

Finally, Congress could not have intended that legitimate, voluntary adoptions be reversed as the result of birthparents joining or being enrolled by another in a tribe after the relinquishment of parental rights, placement of children in loving homes, and commencement of adoption proceedings.

I deeply regret that none of these issues or concerns have been remedied or even addressed in the proposal submitted by the National Congress of American Indians. For this reason, it is clear that this is no compromise or consensus legislation, and I respectfully ask the Committee to focus on language that will truly address the problems at hand.

Very truly yours,


DEBORAH PRYCE
Member of Congress

Congress
of the
United States
House of Representatives

DEBORAH PRYCE
OHIO
15th DISTRICT



July 16, 1996

The Honorable John McCain
Chairman
Senate Indian Affairs Committee
838 Hart Senate Office Building
Washington, D. C. 20510

Dear Chairman McCain:

Thank you for your swift attention and hard work on the issue of the Indian Child Welfare Act (ICWA) as it relates to adoption.

I have reviewed a draft of the legislation you plan to introduce to amend the ICWA and, after careful consideration, have decided that I can lend the bill my qualified support. As you know, your legislation offers a much different approach to reform of the ICWA than what I prefer and what was passed by the House, your changes being procedural and mine substantive. I believe, however, that procedural reforms will help to facilitate compliance with the ICWA and prevent some of the adoption tragedies that have occurred under the current Act.

Further, I appreciate your willingness to address some of my concerns by incorporating protections for adoptive parents in cases where there is no disclosure or knowledge of a child's Native American heritage. These provisions are necessary in situations like that of the Rost family of Columbus, Ohio. The Rosts were unaware of the Native American ancestry of their twin adoptive daughters because that information was withheld by the birth parents.

While I believe the reforms in your bill are useful, I still feel that additional reforms are necessary to address the underlying and fundamental problems with the ICWA as it relates to adoption. The definition and jurisdictional problems involved in the application of the ICWA remain unsolved, as it is still unclear to whom this Act should apply. More and more frequently, the courts are deciding that application of the ICWA based on race alone is unconstitutional. I believe it would be desirable for your committee to address this issue at some point, or the legitimate purpose of the ICWA -- to preserve the Indian family and culture -- may be lost with the Act's eventual demise.

However, at this point, I support your legislation, recognizing that it has the support of Native Americans, adoption attorneys, and the Rost family. In my view, this legislation represents a step toward ICWA reform that will provide stability and security to the adoption process and more importantly decrease the likelihood of adoption tragedies.

Thank you for your consideration of my views and for your hard work to develop a solution to some of the problems that the ICWA poses as currently applied. I look forward to continuing to work with you on this issue as we monitor the implementation of the changes purposed by your legislation.

Very truly yours,


DEBORAH PRYCE
Member of Congress

DP:lat

STATEMENT OF ADA E. DEER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS,
DEPARTMENT OF THE INTERIOR, AT THE HEARING BEFORE THE SENATE
COMMITTEE ON INDIAN AFFAIRS, ON AMENDMENTS TO THE INDIAN CHILD
WELFARE ACT OF 1978.

June 26, 1996

Good morning, Mr. Chairman, Mr. Vice-Chairman, and Members of the Committee. I am pleased to be here to present the Department of the Interior's views on proposed amendments to the Indian Child Welfare Act of 1978. I will submit my written testimony for the record. The Department of the Interior does not support Title III of the House passed version of H.R. 3286, however, we do support the efforts of tribal governments and the National Congress of American Indians (NCAI) to improve the ICWA.

Background Information

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

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

Implementation of the ICWA

Admittedly there have been problems with certain aspects of the ICWA and ICWA should be revised to address these problems to ensure

that the best interests of Indian children are ultimately considered, particularly since interventions are rare. On the whole, however, the ICWA has fulfilled the objective of giving Indian tribes the opportunity to intervene on behalf of Indian children eligible for tribal membership in a particular tribe.¹

Implications of Proposed Amendments to the ICWA

We share the expressed concerns of tribal leaders and a majority of your Committee members about the proposed amendments to ICWA contained in H. R. 3286, Title III, which would seriously limit and weaken the existing ICWA protections available to Indian tribes and children in voluntary foster care and adoption proceedings. Although several problematic cases have been cited to support the introduction of the amendments, these cases do not warrant a unilateral and unfettered intrusion on tribal government authority.

We have grave concerns that the amendment language regarding tribal membership of Indian children will intrude on tribal sovereignty. If passed, Title III would authorize State court judges to delve into the sensitive and complicated areas of Indian cultural values, customs and practices which under existing law have been left exclusively to the judgment of Indian tribes.

Tribes have the right to determine their own membership. The right stems from the nature of tribes as political entities with some sovereign powers. A tribe's power over its membership includes establishing the membership requirements, the procedures for enrollment, and the benefits that go with membership. The proposed amendments, however, fail to recognize the diversity with which the more than 550 tribal governments have chosen to determine their

¹ Opportunities for ACF to Improve Child Welfare Services and Protections for Native American Children, Office of the Inspector General, Dept. of Health and Human Services (1994); Indian Child Welfare: A Status Report, Department of the Interior (1988).

tribal membership. As an example of this diversity, many tribes have blood quantum requirements while others have ancestral lineage or community membership criteria. Thus, tribal enrollment is not a unified system. Each tribe establishes its own criteria; a right supported by the Supreme Court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Despite the complexities respecting tribal membership, the proposed amendments in Title III appear to assume that eligibility criteria for tribal enrollment or membership are the same for all tribes. There is a presumption that an Indian child or parent who is not enrolled at the time of a child custody proceeding is not "Indian." Moreover, it is unclear whether tribal or State courts would make determinations as to who is a tribal member. If these determinations will be made by State courts, the proposed language is vague and could be open to broad interpretation.

Because the United States has a government-to-government relationship with Indian tribes, the Department of the Interior is committed to the protection of their sovereign status, including the preservation of tribal identity and the determination of Indian tribal membership as it relates to voluntary child custody proceedings under the ICWA. For the reasons that I have specifically outlined, the Department does not support the Title III as passed by the House.

Tribally Developed Legislative Alternative

I have received numerous phone calls, faxes and letters from tribes and tribal organizations expressing their deep concerns regarding the amendments to ICWA as contained in Title III. Tribes came together at the NCAI Mid-Year Conference in Tulsa during the week of June 3, 1996. The result of their efforts was to develop a consensus-based legislative alternative to the proposed amendments

that have been offered thus far.

We have examined the recommendations and proposed legislative language endorsed by NCAI. Based on our review to date, we believe that the tribal amendments will clarify the applicability of the ICWA to voluntary child custody matters so that there are no ambiguities or uncertainty in the handling of these cases.

The tribally developed amendments clearly address the concerns which led to the introduction of Title III of H.R. 3286, including time frames for ICWA notifications, timely interventions and sanctions, definitive schemes for intervention, limitations on the time for biological parents to withdraw consent to adoptive placements, and finality in voluntary proceedings.

In closing, we appreciate the good faith efforts of tribal governments in addressing the ICWA-specific concerns raised by certain members of the Congress and pledge to devote the necessary time and energy in working with the tribes toward the resolution of these matters. I would like to thank you Mr. Chairman, and Mr. Vice-Chairman for your assistance in having this section struck from the legislation during the markup last Wednesday. This Administration will endeavor to ensure that tribal sovereignty will not be compromised, specifically the right of tribal governments to determine tribal membership and the right of tribal courts to determine internal tribal relations.

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



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JUL 26 1996

Honorable John McCain
Chairman, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510-6450

Dear Mr. Chairman:

It was a pleasure to speak before the Senate Committee on Indian Affairs during the June 26, 1996 hearing on proposed Amendments to the Indian Child Welfare Act (ICWA). Answers to the supplemental questions contained in your letter of June 27, 1996 are enclosed for your review and information.

I appreciated the Committee's remarks on the history of the ICWA and know that it provided valuable information to many people in the audience. I look forward to working with you and the tribes in your efforts to forge a compromise.

Thank you for your hard work and heartfelt assistance to tribes.

Sincerely,

Ada E. Deer

Ada E. Deer
Assistant Secretary - Indian Affairs

Enclosure

Question 1. In your view, would the compromise adequately protect tribal sovereignty? How?

Answer: The amendments developed by Indian tribes during the Mid-Year NCAI conference ("tribal amendments") were designed to protect tribal sovereignty and to address the concerns which were the impetus for the Pryce amendments. One of the fundamental aspects of tribal sovereignty is the ability to make tribal membership determinations. The tribal amendments protect tribal membership determinations and do not subject to State court review the basic tribal political relationship between tribes and members/eligible members that is necessary for the ICWA to apply.

Question 2. Would the compromise sufficiently advance the goals of certainty, speed and stability in adoptions involving Indian children? How?

Answer: Currently, there are no specific time frames for voluntary adoptive proceedings. The tribal amendments set specific time limits with respect to voluntary adoptive placements and would thereby advance the goals of certainty, speed and stability in such placements. The tribal amendments decrease the remote possibility of disruptive placements by requiring timely notification to tribes and establishing a definitive scheme for intervention and finality in voluntary proceedings. The tribal amendments establish an outer time limitation within which birth parents can withdraw their consent to adoption to six months after notice is provided to the tribe. No adoption which has been in effect for at least two years may be invalidated unless otherwise permitted under State law. This would provide for certainty, speed, and stability in Indian adoptions and safeguards that these adoptions would not be negatively impacted by the ICWA.

Question 3. In your view, is the compromise the product of good faith efforts on the part of the adoption community? Of the tribal governments?

Answer: The Bureau of Indian Affairs (BIA) supports the efforts of tribal governments in addressing specific concerns which gave rise to the introduction of Title III of H.R. 3286 and believes the tribes produced a viable, constructive alternative to Title III. The BIA was not privy to similar efforts on the part of the adoptive community and cannot speak to their activities in this matter. It should be noted that witnesses from the adoptive community expressed their general support for and acceptance of the tribal amendments during the hearing.

Question 4. What issues are addressed in Title III that have not been addressed in the compromise language? Can and should these issues be addressed legislatively? How?

Answer: The Department of the Interior did not support Title III of H.R. 3286 because it compromised Indian tribal sovereignty. The consensus amendments address these same issues while protecting tribal sovereignty.

Question 5. Since 1978 when ICWA was enacted, how many Indian children have been adopted

by Indian families? By non-Indian families? Have these numbers increased since 1978? Why?

Answer: Since the CSR survey, "Indian Child Welfare Act -- A Status Report," was completed in 1988, no other comprehensive survey has been conducted to date to collect the information/data requested. Additionally, no single source, Federal or State, routinely collects this type of information. According to the 1988 CSR findings, on average, approximately 89 percent of the Indian children that comprised the caseload reported by five states were placed in non-Indian homes. Due to the paucity of specific information on the adoption of Indian children, it is difficult to determine whether the number of Indian children that are adopted has increased or not.

Question 6. Since 1978, how many Indian children have been placed in "substitute care" outside of their biological family's custody for any length of time? Have these numbers increased since 1978? Why?

Answer: According to BIA statistics, approximately 3,000 children per year are placed in substitute care, for which the BIA is financially responsible. These figures have increased incrementally each year, in keeping with population increases. The BIA does not have access to the number of Indian children placed in substitute care by States, where States have jurisdiction or provide such services, nor the number of Indian children placed in substitute care in accordance with tribal-state agreements.

Question 7. ICWA (Title 25, Section 1933) directs the Interior Department to enter into agreements with the Department of Health and Human Services to fund Indian child and family service programs on and off-reservation. Have these Departments ever entered into any such agreements? If so, please describe them? If not, why has Interior failed to capture some of the HHS funds in this way to serve Indians?

Answer: 25 U.S.C. 1933 authorizes the Secretaries of the Departments of the Interior and Health and Human Services to enter into agreements to fund Indian child and family service programs. To our knowledge, the respective Secretaries of these Departments have not entered into any interdepartmental agreements specifically to fund Indian child and family service programs. It is known, however, that in the mid-1980's, the Secretaries issued joint Federal Register announcements on the availability of each Department's discretionary grant funds intended to fund Indian child and family service programs. The intent of these announcements was to coordinate resources available to tribes for such programs. Funds appropriated for Indian child and family services under the auspices of HHS reach tribes via tribal-state agreements, through direct funding mechanisms from HHS' Children's Bureau or via state plans for these services. Discretionary funds administered by HHS are generally appropriated for specific purposes and awarded through a competitive process.

Question 8. Under ICWA (Title 25, Section 1951), the Interior Secretary is supposed to receive and maintain records of all final adoption decrees involving Indian children in order to respond to the requests of adult adoptees for help in identifying the tribe in which the adoptees can enroll. How many adoption records has the Secretary received since 1978? And how many of these individuals, upon reaching the age of 18, have asked the Department for assistance in identifying their tribe?

Answer: In compliance with 25 U.S.C. 1951, the Secretary has been notified of and has received adoption records on 1,702 Indian children whose adoptions were finalized in State courts since 1978. Within the last five years, two of these children, upon reaching the age of 18, requested assistance in enrolling with their tribe; both were successful in their efforts to locate and enroll in their respective tribes. The BIA also receives telephonic inquiries on a daily basis from individuals for whom the BIA has no adoption records and who are seeking to locate their Indian biological parents or extended family.

Question 9. In your view, how well has ICWA been implemented by the States? It is my understanding that the Department of Health and Human Services is currently conducting a survey to determine what steps States have taken to implement ICWA. Is the BIA involved in this effort? How? Can you describe any preliminary findings?

Answer: In general, some States make every effort to comply with the major provisions of the ICWA, but a majority of States still do not comply fully with the ICWA mandates. A classic example is given by the Cherokee Nation of Oklahoma which received a total of 5,528 ICWA notices last year, 12 of which fully met the ICWA notice requirements and were considered proper notices; the remaining were improper notices. In addition, tribes face continuing ICWA enforcement problems.

What are the State non-compliance issues?

Responsible agencies/parties:

- do not adequately check for Indian heritage of children involved in cases
- do not notify the appropriate tribes
- do not provide timely notification to tribes
- lack knowledge of the complexities of the law
- do not always apply the ICWA requirements to voluntary proceedings

Lack of uniform training on ICWA requirements and cultural competency training for appropriate State personnel also contribute to non-compliance problems.

Enforcement problems include:

- no Federal oversight over States or State courts' implementation of the ICWA

-- no consequences/sanctions for violations of the ICWA

Regarding the survey, the Health and Human Services' (HHS) Children's Bureau reports that there is no ICWA survey underway at HHS. The Division of Social Services considered using urban ICWA funds to conduct a joint study with HHS' Children's Bureau similar to the CSR study. However, the plan was shelved as no funds were available to conduct the study.

For the past several years, the BIA has been attempting to address critical areas of concern to tribes. In 1994, the BIA's Division of Social Services' Child Welfare unit collaborated with the Office of the Inspector General within HHS in the design of the mechanism for gathering information on the provision of child welfare services to Indian children by the States and the Administration for Children and Families (ACF) within HHS. Findings of the IG report indicated that Indian children are significantly over-represented in substitute care; state compliance with the ICWA is inadequate; DHHS/ACF has not adequately overseen protections of Indian children guaranteed by statute; and few tribes are able to access resources through DHHS or other flow-through State programs. The BIA sought long-term solutions to the issues identified by the IG report and therefore advocated for institutional and regulatory changes by DHHS.

As a result of ongoing collaborative efforts among the Division of Social Services' Child Welfare unit and HHS' ACF and Children's Bureau, two long-standing concerns in Indian Country have been addressed satisfactorily -- lack of tribal access to Social Security Title IV-B parts I and II funds administered by HHS' ACF for child welfare services and family preservation, and continuing non-compliance by States with major provisions of the ICWA. In response to statutory changes made by Sec. 204 of Public Law 103-432, HHS' Children's Bureau, in consultation with the BIA, made and implemented regulatory revisions and program guidelines for Title IV-B programs which removed former barriers for tribes and streamlined tribal application procedures. As a direct result of these changes, beginning in FY 1996, every tribe is eligible for the first time in history for direct funding for Title IV-B child welfare funds and additional tribes will receive family preservation funds. The BIA also insisted that ACF address on a long-term basis the States' non-compliance with the ICWA and recommended the linking of the States' receipt of Federal funds with ICWA compliance. Thus, beginning in FY 1996, as a condition for receiving Federal funds ALL States must submit plans to HHS delineating how they will consult with tribes within their State to address and determine how they will comply with the ICWA.

Additionally, to assist tribes in accessing other Federal funding streams which require matching funds, BIA Social Services and the Office of Self Determination Services issued a memorandum allowing the use of '638 contract or grant funds by tribes as non-Federal shares to match other Federal resources. This significantly impacted

tribal access to other critical resources which were otherwise unattainable by tribes.

In summary, the BIA has vigorously advocated on behalf of tribes in the above areas and is extremely proud of its accomplishments and successes in ensuring that tribes access the Federal funding sources for which they are eligible and in addressing and providing a constructive solution for the States' non-compliance with the ICWA. As a result, the BIA and ACF/Children's Bureau have arrived at a very close and productive working relationship on behalf of Indian tribes.

Question 10. Please describe the impact of the BIA's guidelines for States regarding ICWA? Have they been effective in ensuring State compliance with the Act? If so, how?

Answer: BIA's Guidelines for State Courts offer guidance however, they do not have the force and effect of law. To the extent that the procedures are followed, the guidelines assure that rights guaranteed by the ICWA are protected when State Courts decide Indian child custody matters. State courts may take into account what the BIA Guidelines say, but are free to act to the contrary if they are convinced that the guidelines are not required by the statute. As a result, there are varying interpretations amongst the courts.

See answer to # 9 regarding the States' implementation of the ICWA.

Question 11. The Committee has been contacted by many urban Indian child welfare centers alarmed by the BIA's recent decision to cut-off all grant funds to them for the current year. I'm now told BIA has now decided to reverse itself. Why did the BIA originally decide to stop funding direct services provided by these centers and instead use these funds to pay for national meetings, training, and a newsletter?

Answer: Considering the limited resources and manpower at the Central and Area Office levels and because of the amount of time, staffing and other resources, technical and administrative work required in the conduct of a national grant competition, the BIA initially determined to look for other useful avenues on which to expend these available funds.

Title II urban ICWA grant funds were intended to prevent the unnecessary removal of Indian children from their families, as a feasible alternative to issuing grants. The BIA proposed to expend urban ICWA funds for several projects of national significance, so that Indian families and communities would still have benefitted from these funds. The BIA supports Pathways, a national child and family services publication because tribes requested at a national consultation meeting that the BIA disseminate such a newsletter to tribal programs. Because it did not appear that urban ICWA would be funded in FY 1997, the BIA had preliminarily proposed to link up existing urban ICWA programs with other funding sources and train them in critical

areas.

However, following extensive deliberations, it has been determined that the FY 1996 urban ICWA grant competition will go forward. The competition will be announced in the Federal Register. It is anticipated that this announcement will be published during the week of July 12, 1996. Area offices have been notified of this decision.

Oneida Tribe of Indians of Wisconsin

Post Office Box 365

Phone: (414) 869-2214

Oneida, WI 54155



Oneidas bring several hundred bags of corn to Washington's starving army at Valley Forge, after the colonists had consistently refused to aid them.



UGWA DEMOLIM YATEHE
Because of the help of this Oneida Chief in cementing a friendship between the six nations and the colony of Pennsylvania, a new nation, the United States was made possible.

TESTIMONY OF DEBORAH J. DOXTATOR
CHAIRWOMAN OF THE ONEIDA TRIBE OF INDIANS OF WISCONSIN
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
JUNE 26, 1996

Good morning Mr. Chairman and members of the Committee. My name is Deborah Doxtator, and I am the Chairwoman of the Oneida Tribe of Indians of Wisconsin. Thank you for the opportunity to address the Committee on this vitally important issue. We all recognize there is tremendous interest on behalf of Indian tribes across the country to protect the best interests of Indian children.

The Oneida tribe has more than 12,000 enrolled members and is located in Northeastern Wisconsin. We have made a commitment to the preservation of our community, and as part of this commitment we have chosen to devote many of our resources toward the retention of children who are part of the Oneida community.

In my testimony this morning, I will cover four areas. I will give a brief overview of the Indian Child Welfare Act (ICWA) and I will discuss the Oneida's ICWA program. Next, I will discuss the impact of the amendments that passed the House and finally, I will discuss the alternative amendments proposed by the National Congress of American Indians to enhance ICWA for everyone, especially Indian children.

THE INDIAN CHILD WELFARE ACT

I must stress that ICWA is not the heavy-handed tool used in the placement of Indian children that other testimony presented to Congress has indicated. Rather, the statute provides a procedural framework for tribal participation in child custody cases involving Indian children.

Congress passed the Indian Child Welfare Act of 1978 (ICWA) to stop the mass removal of Native American children from their Native American communities. In 1978, state courts and child welfare workers placed over ninety percent of adopted Native American children in non-Native American homes. By 1994, sixteen years after the ICWA's enactment, more than half were still adopted by non-Native Americans.

ICWA provides a mechanism that allows Indian tribes to become involved in child placement proceedings to address the problem of Indian children being placed outside their community. For children that are living on the reservation, the Act provides the Tribe with exclusive jurisdiction. Where the child is living off the reservation, the Act allows the Tribe to participate in the state court proceeding. It is important to note that ICWA allows for a tribe's participation in the proceedings, not complete dominance over those proceedings. This misperception is one of the most common misunderstandings of the Act.

In a case involving a child living off the reservation, the Tribe can intervene in the state court proceeding. The tribe also has the option of petitioning the state court to transfer the case to tribal court, but either parent can block this request simply by objecting to the transfer. Also, the decision on whether or not to transfer to tribal court is made by the state court. State courts often decline to transfer jurisdiction when the petition is received late in the proceeding, or when the forum would be inconvenient for the parties.

Another component of the Act is placement preferences. These preferences are not absolute, and a "good cause" exception exists that allows state courts flexibility in making placement decisions. Also, the accompanying BIA guidelines, which were developed in 1979, outline several considerations to establish good cause to modify the placement preferences. For example, the request of the biological parents or the child, when the child is of sufficient age; the extraordinary physical or emotional needs of the child; and the unavailability of suitable families for placement after a diligent search has been completed are all considerations that can establish good cause.

ONEIDA'S INDIAN CHILD WELFARE ACT PROGRAM

The Oneida Tribe actively utilizes the Indian Child Welfare Act as a tool for maintaining contact with families and children who are Oneida. We have devoted an entire unit of our Social Services Program to ICWA cases and have assigned an attorney who works full-time on those cases.

In addition, the Oneida Business Committee created the Oneida Child Protective Board to oversee all ICWA cases involving Oneida children. It is the duty of the Oneida Child Protective Board to monitor ICWA cases and make appropriate decisions regarding the placement of Oneida children by using information from the Oneida Tribal social workers, the Oneida attorney, as well as county social workers, and the child's guardian ad litem. This system has allowed us to place hundreds of children over the years in Indian homes, either permanently or until their parents were able to care for them.

Currently the test for whether ICWA applies is if one of the parents is a tribal member and the child is a tribal member or eligible for membership. Oneida enrollment guidelines require that a child be one quarter Oneida Indian blood to qualify for enrollment. These provisions are strictly adhered to by our tribe.

The Oneida Child Protective Board regularly declines to intervene in cases involving children who do not meet the enrollment standards. In the last three years, the Oneida Tribe has received 271 inquiries regarding the applicability of ICWA. Of those inquiries, the Oneida Tribe has declined involvement in 159 of those cases because of inadequate evidence demonstrating that the children involved were of sufficient Oneida heritage to qualify for enrollment. Another 18 cases did not fall within the jurisdiction of ICWA based on other reasons. Thus, the percentage of cases screened out at the inquiry level, under the current provisions of the Act is 65%.

Once the Oneida Tribe determines that a child is enrolled or enrollable under ICWA, the child is not snatched forcibly from his or her home. Nor does the Tribe march into state court and demand placement of a child with the Tribe. Instead, 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 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 state court that makes the determination on placement taking into consideration all the interests of the parties involved.

IMPACT OF HOUSE AMENDMENTS

During the House debate on the ICWA amendments, many of the proponents characterized the amendments as "clarifying or technical." This characterization is at best, misleading. The House amendments are fundamental changes directed at the applicability of the entire statute.

The concerns about ICWA originated in the area of private adoptions of Indian children. These concerns relate to the perceived ability of an Indian tribe to become involved and remove children, after an adoptive placement has been made. Unfortunately, the House amendments do not directly address these problems. In fact, the amendments will bring uncertainty into the present law and cause increased litigation.

Although the original concern with ICWA involved its applicability in private, voluntary adoptions, the proposed amendments would apply to all proceedings which fall within the jurisdiction of the Act, including involuntary foster care proceedings. In the Oneida's situation, voluntary, private adoptions make up only 2% of the entire caseload. The vast majority of children presently on our caseload have been placed in foster care because their parents are unable to care

for them at the present time. Of the 229 children with whom we are currently involved, 225 are provided services by Oneida Social Services and a county social service agency, such as Milwaukee County Social Services. Only four of the children on our current caseload, less than 2% of our total, have been placed through a private adoption agency.

Additionally, the proposed amendments do not address the ability of a Tribe to become involved in a voluntary, private adoption. Instead, the amendments propose an evidentiary test that would measure the "Indianness" of a parent as a guide to determine whether the Act applies. Rather than the current test which is that ICWA applies when either parent is a tribal member, and the child is a tribal member or eligible for membership, the new definition would have ICWA apply when either parent is of Indian descent and either parent maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member at the time of the custody hearing.

This test not only fails to address the perceived problem, it exacerbates the problem by confusing the process and adding a test that is impossible to administer in a consistent manner. There are hundreds of Indian Tribes in the United States. Every Indian Tribe has different customs and traditions. Every Indian person has different ideas and beliefs of what it means to be Indian. Every attorney and judge in this country has a preconceived notion of what an Indian person is. How can any court apply this new subjective test, and make a factual determination of whether a person is Indian enough for their children to be protected by ICWA? The proposed amendments are unworkable and offensive to the Indian community.

The amendments would also place membership limitations on tribes. For example, the amendments would prohibit a tribe from making a person over the age of 18 a tribal member without the person's written consent. The amendments also prohibit the tribe from considering a person a tribal member unless the person is an "enrolled member". Even once a person becomes an enrolled tribal member, the amendments limit that membership status to a prospective status only.

In terms of real numbers, the House amendments could be devastating to our commitment to remain involved with our children who fall within the current scope of ICWA. The House amendments have the potential of affecting approximately 80% of our ICWA cases. The reasoning is that in 80% of our cases, either the parents or the children were not enrolled within the time frames mandated by Section 2 of the House amendments. Many of the parents we work with fail to formerly enroll themselves and their children. As a result, we get numerous inquiries for children who are eligible for enrollment, but who have not yet been enrolled. However, the vast majority of these cases involve parents and children who reside within the community and whose lives are closely intertwined with other Tribal families. To say that a child is not a part of the community because he or she is not enrolled is simply unfair.

Since 1990 to the present, the Oneida Child Protective Board has intervened in cases involving 336 Oneida children. Of those 336 children, only 69, a mere 20% were enrolled prior to the initiation of the proceedings resulting in their out-of-home placement. An additional 107 became enrolled during the pendency of the state court action. The remainder have never become enrolled, yet these children are still a part of the community. Tying the question of whether ICWA applies to the date of enrollment of either the parent or the child would seriously undermine the purpose for which ICWA was created.

Finally, the effective date of the amendments would have them apply in all cases in which a final decree has not been entered. This would include all cases involving children in state foster care as well as private adoption cases. Therefore, every case in the United States that is pending in state court which involves an Indian child will have to be reevaluated to determine whether ICWA applies using this new subjective test. The potential impact on state courts is enormous. This reevaluation will place a tremendous burden on both states and counties, many of which barely have the resources to operate. It could also create more delays in the placement of Indian children.

SUMMARY OF ALTERNATIVE AMENDMENTS

There are ways to address the concerns expressed by the sponsors of the House bill without forgetting the original purpose of the Act. The National Congress of American Indians recently met to address these concerns and drafted proposed legislation that will effectively place requirements on all parties in voluntary proceedings. The Oneida Tribe played a role in drafting proposed alternatives and building a consensus among tribal leaders for possible enhancement of ICWA.

These alternative amendments signify the willingness of Indian Tribes to address the specific concerns of those who feel that ICWA does not work. But more importantly, the amendments meaningfully address the concerns raised about ICWA. We believe that the only way to effectively handle 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.

Since the NCAI conference, the Oneida Tribe has made efforts to reach out to the Adoption community. For example, an Oneida tribal attorney, Aurene Martin spoke at length with the president of the Milwaukee County Bar Association, Stephen Hayes, who is a member of the American Academy of Adoption Attorneys. She also participated in discussions with the Adoptions attorneys and the Tribal attorney work group. These efforts illustrate the good faith on behalf of the tribes to include all parties in developing amendments.

The following is a summary of the proposed amendments with an explanation of what concerns they will address.

1. NOTICE TO INDIAN TRIBES FOR VOLUNTARY PROCEEDINGS

Explanation: This provision would extend the notice provision to voluntary as well as involuntary proceedings. It also clarifies what should be included in the notice so a tribe can make an informed decision on whether the child is a member or eligible for membership.

Rationale: Currently, notice is mandatory for involuntary cases only. One of the problems with voluntary cases was that the tribe would move to intervene after the child had been placed in an adoptive or pre-adoptive home because it received notice late. Extending the notice provision 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 are not aware of. Finally, the expanded notice provision combined with a deadline for intervention go a long way to addressing concerns raised about ICWA.

2. TIMELINE FOR INTERVENTION

Explanation: This provision places a deadline for when a tribe could intervene in a voluntary proceeding. The time would start running from the time of notice of the proceeding. If a tribe did not intervene within the time period, then it could not intervene in the proceeding.

Rationale: One of the criticisms of ICWA is that the tribe intervene in cases, after the child had been placed for adoption. Usually the reason for the delay in intervention in voluntary cases was 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.

3. CRIMINAL SANCTIONS

Explanation: This provision imposes criminal sanctions on attorneys or adoption agencies that knowingly violate the Act by encouraging fraudulent misrepresentations or omissions.

Rationale: This amendment will help deter attorneys and adoption agencies from failing to comply with ICWA. Many of the problem cases that prompted the legislation in the House started because of knowing violations of the Act. This amendment directly addresses this problem.

4. WITHDRAWAL OF CONSENT

Explanation: 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.

Rationale: 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.

5. APPLICATION OF ICWA IN ALASKA

Explanation: This provision would clarify that Alaskan villages are included in the definition of reservation.

6. OPEN ADOPTION

Explanation: This provision allows state courts to provide open adoptions where state law prohibits them.

Rationale: 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.

7. WARD OF TRIBAL COURT

Explanation: 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.

8. DUTY TO INFORM OF RIGHTS UNDER ICWA

Explanation: This amendment imposes a duty on attorneys and public and private agencies to inform Indian parents of their rights under ICWA.

Rationale: 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 proceeding. 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.

9. TRIBAL MEMBERSHIP CERTIFICATION

Explanation: 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.

Rationale: This amendment directly responds to the criticism that the determination of whether a child is eligible for membership is arbitrary. The certification details the child's relationship to the tribe.

CONCLUSION

In preparing this testimony, we reviewed statements of a number of individuals expressing frustration and a sense of unfairness at what was perceived as an arbitrary rule. We are quite familiar with those feelings. We regularly encounter frustration and a sense of unfairness when we are faced with the negative consequences of failure to comply with the Act. We are no strangers to the lack of recourse when an Oneida child is not identified prior to an out-of-home placement or adoption decision being made.

The Oneida Tribe is at a disadvantage when the proper time and energy are not spent in making every effort to determine whether ICWA applies to the case. However, we have been fortunate enough to develop positive working relationships with surrounding communities and have been successful in decreasing the occurrence of these situations. Additionally, the State of Wisconsin has been very supportive of ICWA and requires compliance with the Act's requirements through state law mandates. The State Bar of Wisconsin has joined us in our effort to oppose the House amendments.

I would stress that ICWA works well when it is understood, respected and when all parties cooperate in decision making and planning. It is disappointing and alarming that consideration is given to amending a federal law because highly paid professionals are not taking the time to read understand the law. It is even more disturbing to learn that the law would be changed without receiving tribal input.

I urge you to recognize the success of ICWA and the positive impact it has made on Indian communities and the lives of Indian children. I urge you to give serious consideration to the alternative amendments proposed by the National Congress of American Indians. Unlike the amendments that passed the House, the NCAI amendments will seriously address the concerns raised about ICWA without forgetting its original purpose.

Thank you for the opportunity to present this statement. We appreciate the time and effort this Committee is making to understand this proposed legislation.

Oneida Tribe of Indians of Wisconsin

Post Office Box 365

Phone: (414) 869-2214

Oneida, WI 54155



Oneidas bringing several hundred bags of corn to Washington's starving army at Valley Forge, after the colonists had consistently refused to aid them.



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Because of the help of this Oneida Chief in cementing a friendship between the six nations and the colony of Pennsylvania, a new nation, the United States was made possible.

July 5, 1996

The Honorable John McCain
Senate Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, D.C. 20510-6450

Dear Mr. Chairman,

Thank you for the invitation to supplement the record on the issue of the proposed amendments to the Indian Child Welfare Act. I appreciate your willingness to address this very important issue very carefully and hope that any input we give you is helpful.

I will respond to each of your questions in order.

1. **In your view, is the compromise the product of good faith efforts on the part of the adoption community? Of the Tribal governments?**

I believe that the NCAI amendments are the product of good faith efforts of the parties. As a participant in the drafting of the NCAI document in Tulsa, it was apparent to Oneida that it was necessary to produce a document that would not only address the concerns of the adoption community, but would also protect and enhance Tribal sovereignty. Each of the participants was aware of this need. It was the goal of all involved in the work group to produce a document that would be acceptable to both Tribes and the adoption community within as short a time as possible, due to the time constraints of the Senate.

Once the NCAI draft was completed and approved, our contact with the national working group of attorneys and the local attorney who had the most input into the draft was entirely positive. Every attorney we spoke with recognized the need for compromise and appeared to agree that the NCAI draft was a good compromise.

2. **In what ways would the compromise advance the goals of certainty, speed and stability in adoption involving Indian children?**

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The NCAI alternative amendments provide better notice to tribes of adoption proceedings, which allow them to determine at a much earlier date whether they will become involved with an initial placement decision. This change will provide greater certainty for all parties because potential adoptive parents will be aware from the beginning of a case that the Tribe will or will not become involved. The majority of problem cases arise when a Tribe receives notice or otherwise learns of a proceeding after a child has already been placed for adoption. By implementing the alternative amendments, this situation will be avoided.

Additionally, the deadlines for intervention require a Tribe to become involved once it receives notice. If a Tribe fails to respond within the given time period, it waives its right to participate in the case. Also, the provision allowing open adoptions will result in more adoptions of Indian children by non-Indian parents, because Tribes will be less likely to oppose a placement where they know the adoptive parents are willing to allow a child to keep ties to his or her culture.

Each of these provisions allows for early determination of each party's rights and places a definite deadline on when rights may be enforced, thus avoiding protracted litigation late in proceedings and ensuring certain and speedy determinations early in proceedings involving Indian children.

3. Other witnesses today have expressed concern about the "retroactive application of ICWA." How would the compromise proposal address this issue?

First of all, I believe that the use of the term "retroactive application of ICWA" illustrates a misperception and has been used as a red herring to draw attention away from the fact that many of the cases that become problems occur in instances where the current language of ICWA has not been followed.

ICWA, the way it is presently written, allows for several factors to be considered by a judge as good cause not to follow the placement preferences contained in the Act.

When a Tribe receives notice of a proceeding involving an Indian child, they will intervene and attempt to determine what is in the best interest of that child. A Tribe cannot intervene until it learns about proceedings, either by receiving notice or learning of it through word of mouth; therefore, when a Tribe intervenes late in proceedings it is not because they are acting in bad faith or are attempting to apply ICWA retroactively. The Tribe is simply attempting to determine what is in the best interest of the child.

I am not personally aware of any Tribe waiting months or even years to intervene after receiving notice in a voluntary Indian Child Welfare Act case. In the vast majority of cases, Tribes intervene late in proceedings because they have not received notice.

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The compromise amendments directly address this issue by requiring a Tribe to be noticed in voluntary proceedings and also requiring that the Tribe intervene within certain time limits. When a Tribe receives the required notice and does not intervene within the required time, it loses the right to intervene. This will address the problem cases alleged to "retroactively" apply the Act by preventing them from happening. *Where a Tribe receives proper notice and does not intervene in a timely fashion, they cannot intervene later and attempt to assert their rights "retroactively."*

4. Please describe what your Tribe has done to work with adoption attorneys in Wisconsin and around the country to shape the compromise proposal.

The Oneida Tribe was deeply involved in the drafting of the amendments that were developed by the National Congress of American Indians. An attorney for the Oneida Tribe who has numerous Indian Child Welfare cases, Ms. Aurene Martin, played a meaningful and important role in the drafting of those amendments and has continued to advocate for that document. Ms. Martin represented what she felt was in the best interest of Indian Country and attempted to balance the need for certainty in adoption proceedings against the need to protect Tribal sovereignty.

Additionally, Ms. Martin has contacted leaders in the Wisconsin adoption community to discuss their feelings on the Indian Child Welfare Act. One attorney with whom Ms. Martin recently spoke with at length has vigorously opposed our intervention in the past, but was very earnest and honest about his feelings regarding the NCAI document. It was from this attorney, Mr. Stephen Hayes, that she was referred to Mr. Marc Gradstein and Ms. Jane Gorman.

Ms. Martin, after receiving these referrals, began discussions with Mr. Gradstein and the national working group, which consisted of Mr. Gradstein, Ms. Jane Gorman, Mr. Mike Waller, Mr. David Simmons, Mr. Jack Trope and Mr. Bert Hirsch.

Ms. Martin has also met and discussed the House amendments with numerous parties. Since last May, she has met with several members of the Wisconsin congressional delegation or their staff members, and has sent correspondence as well. She has also met with the Indian Law Section and Board of Governors of the State Bar of Wisconsin.

5. How would the compromise amendments encourage timely involvement by an interested Tribe and prevent Tribal intervention late in child placement arrangement?

The compromise amendments would encourage timely involvement by an interested Tribe by requiring that they receive notice in a timely manner. Presently, a Tribe is not entitled to notice in voluntary adoption proceedings. Yet they have the right to intervene in those same

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proceedings. What often happens is that proceedings are initiated and the Tribe is not given notice. The case proceeds without input from the Tribe. Eventually, the Tribe learns of the proceedings and moves to intervene.

The lack of required notice results in the late intervention of the Tribe. The compromise amendments address this situation by requiring certain notice to the Tribe which includes specific information regarding the family, if it is reasonably attainable by the agency/attorney working with the family, *when the proceedings are commenced*. Additionally, the compromise amendments also place a time limit on Tribal intervention. These two changes require an adoption agency or attorney to provide early and adequate notice to the Tribe, and they also place the responsibility for timely intervention on the Tribe involved by placing a deadline on the ability to intervene.

6. In what ways does ICWA work, or not work, for the best interests of Indian children?

ICWA works for the best interest of Indian children when it is understood and followed. ICWA provides a framework for the involvement of Indian tribes in child custody proceedings and expands the pool of foster and adoptive homes. When the requirements of the Act are met, ICWA works to provide Indian children with families that are sensitive to all of their needs, including their need to remain connected to their Tribe.

In the vast majority of ICWA cases in which the Oneida Nation intervenes, *98 percent*, involve children who are placed in foster care through proceedings initiated by the State of Wisconsin. Most of these children are victims of abuse and neglect and their connection to our community provides them with the stability they need. Many of these children are not of adoptable age, and many of them have special needs. Our involvement in these cases allows us to provide these children and their families with many of the culturally-oriented services they need for reunification, as well as providing stability for these children by allowing them remain connected to their community through foster care placement with other Tribal families.

Finally, it is important to note that ICWA does not allow a Tribe to completely dominate proceedings to the exclusion of the best interests of the children. In any proceeding involving an Indian child, it is up to the court to determine what is in the best interest of any child. A Tribe is only one party, and the court must also consider the positions of the biological parents, the state or the potential adoptive parents, and the child, before it can make any determination.

7. How does current law balance the best interests of Indian children and the best interests of Indian families and Tribes?

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At the outset of a case, the best interest of Indian children, families and Tribes are closely intertwined. When the Act is followed throughout the pendency of proceedings, ICWA is valuable because it allows for all needs of an Indian child to be provided for, including a home that is culturally sensitive.

However, there are a very small number of cases where the interests of each party do not correlate. In these rare cases, ICWA, as it is currently drafted, provides much more flexibility than its opponents have acknowledged. For example, where "good cause" exists, a placement may be made outside of the placement preferences designated in the Act. Many courts have declined to follow the preferences outlined in the Act when a disruption in placement would be contrary to the child's best interest. Here in Oneida, we recognize the fact that it is sometimes in a child's best interest to be placed outside of the placement preferences outlined the Act, and we have consented to the adoption of Oneida children by non-Indian parents.

In an overwhelming majority of cases the best interests of the Indian child, Indian families and the Indian Tribe are very similar. However, the present provisions of the Act do provide for the rare occasion where those interests do not coincide and permit the best interest of the child to be the deciding factor in placement decisions.

8. Do the Oneida Tribe's enrollment procedures now permit the swift and certain determination by the Tribe of an Indian child's eligibility for membership? Please describe how this is done.

Once the Oneida Tribe receives a notice regarding proceedings that may fall within our jurisdiction under ICWA, we can determine if the child is eligible within minutes, if we are given the appropriate information. The Oneida Enrollment Department has the genealogical history of every enrolled Tribal member online. We can, through a simple telephone call, give the enrollment clerk the names and dates of birth of the child and his or her parents, and know within minutes whether either parent is enrolled and whether the child is enrolled or eligible for enrollment.

When we determine a child is enrolled or eligible for enrollment, we request the enrollment clerk to certify that child's information on a form we submit along with our pleadings to the state court for intervention. Also included with these pleadings are affidavits from the attorney handling the case, which contain information affirming the child's enrollment or eligibility for enrollment, information regarding our recognition as a tribe, and the attorney's authority for filing the motion.

This process is delayed, however, when we do not receive timely and appropriate basic information regarding the names or birth dates of the child and his or her parents. Because that

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information is vital to our determination of eligibility for membership, when we do not have it, our ability to make a clear determination is lessened and takes much longer.

9. I see from your testimony (page 3) that the Oneida Tribe has considered 271 ICWA cases in the past three years. How many of these cases were in State courts? In how many of these cases did the Tribe move to intervene in State court proceeding? How many of these cases were transferred from State to Tribal court?

Our Tribe has received inquiries in regard to 271 children in the past three years. With the exception of three children, those cases were heard in state court. The majority were heard in Wisconsin, but others took place in Michigan, Illinois, California, Minnesota, Oregon, New York and Oklahoma. The other three children were subjects of a proceeding heard in the Tribal court of the Lac du Flambeau Band of Lake Superior Chippewa. The children involved in that case were eligible for membership in both the Oneida and Lac du Flambeau Tribes.

We have intervened in cases involving only 112 of those children. We were unable to confirm enrollment eligibility of the other 159 children, either due to insufficient blood quantum or inability to confirm blood quantum due to inadequate information.

The Oneida Tribe of Indians of Wisconsin does not presently adjudicate child welfare cases in any of its available forums, which are primarily administrative in nature. Accordingly, we do not move to have these cases transferred and none of these cases were heard by an Oneida Tribal judicial body.

The Oneida Tribe of Wisconsin appears solely in cases that originate in other courts, the great majority of which are heard in state courts.

Thank you for this opportunity to supplement my written testimony. If I can be of any assistance to you regarding this or any other issue, please do not hesitate to contact me.

Sincerely,



Deborah Dostator
 Chairperson
 Oneida Tribe of Indians of Wisconsin

Office of the Reservation Attorney
 QUINAULT INDIAN NATION
 Post Office Box 189
 Taholah, Washington 98587

(360) 276-8211

The Quinault Indian Nation respectfully submits this testimony in opposition to Title III (H.R. 3286) of The Adoption Promotion and Stability Act, passed by the House of Representatives on May 10 and currently being considered by the Senate. In the alternative, the Quinault Nation expresses its strong support for the substitute provisions proposed by the National Congress of American Indians (NCAI) for the purpose of amending the Indian Child Welfare Act of 1978.

- No Consultation with Tribes or ICWA Experts

Apart from the substance of Title III, the Quinault Nation strongly objects to the manner in which H.R. 3286 was introduced and passed in the House of Representatives. Proponents of Title III claim that its primary purpose is to protect Indian children by amending the Indian Child Welfare Act of 1978 (ICWA). Therefore, we would like to begin with a reminder that ICWA has, to a great extent, fulfilled its dual purpose of protecting the well-being (not only physical, but emotional and psychological) of individual Indian children in need of foster placement and adoption while helping tribal governments keep their communities intact. ICWA is a good piece of legislation and any amendments to it should be carefully considered.

We also urge the Committee to remind the full Senate that, prior to its passage, ICWA, in stark contrast to Title III, was given lengthy consideration by both houses of Congress. Passage of ICWA was the culmination of ten years of Congressional study, including consultation with tribal governments, a broad array of professionals possessing expertise in the area of Indian adoptions, Indian birth parents, Indian adoptees and other concerned parties. In contrast, Title III was introduced on May 8, a floor vote was taken on May 9, and the bill was passed on May 10. Furthermore, with all due respect to Congresswoman Pryce who sponsored Title III, it is our understanding that she and her staff, at least initially, had little or no experience with Indian tribes or Indian affairs. Judging from the content of Title III, it is also apparent that they had scant understanding of certain well-established principles of Federal Indian law, not to mention the historical context which gave rise to the need for ICWA in the first place.

Title III effectively gives state agencies and/or state courts responsibility for making an initial determination as to Tribal membership of an Indian child not living on the reservation. In so doing, Title III disregards the constitutionally-protected interest of Tribal governments in determining Tribal membership. This authority was recognized in the provisions of ICWA and was based on years of federal court rulings which have placed this prerogative

at the core of governmental authority afforded to Tribal governments under the Constitution. In addition, the federal courts have long recognized the right of Tribal governments to be free from state interference in exercising governmental authority for the purpose of promoting the health and welfare of Tribal members, including the health and welfare of Indian children. Title III also interferes with this fundamental right for the obvious reason that, in many cases, an initial decision by a state agency or state court will prevent a Tribal court from exercising jurisdiction over a case involving a child it considers to be a Tribal member.

Finally, and most egregiously, Congresswoman Pryce and her staff did not seek the assistance of those more knowledgeable than themselves before drafting Title III. There were no hearings; not a single Indian tribe was consulted; nor was advice sought from professionals and other individuals familiar with ICWA and its implementation over the past 18 years. Congress should not allow the considerable successes of ICWA to be overturned by a hastily-drafted piece of legislation which will reverse years of progress and undermine the ability of Tribal governments to protect Indian children. Aside from the substance of the bill, the very process by which Title III was introduced and passed in the House of Representatives betrays a blatant disrespect for Tribal governments which should not be countenanced by the Senate.

- Title III Will Create Additional Problems in the Implementation of ICWA

In terms of substance, Title III will create more problems than it solves. First, it exempts from ICWA protection *"any child custody proceeding involving a child who does not reside or is not domiciled within a reservation unless--(1) at least one of the child's biological parents is of Indian descent; and (2) at least one of the child's biological parents maintains significant social, cultural or political affiliation with the Indian tribe of which either parent is a member"*. The bill is unclear as to who makes this determination. Predictably, however, as mentioned above, state courts and/or state agencies will be saddled with this unenviable task. The result will be extensive litigation over the meaning of such terms as *"Indian descent"* and *"significant social, cultural or political affiliation"*.

For no explicable reason, the bright-line, practical test for determining Tribal membership under ICWA (that is, whether the Tribe recognizes the child as a member or as eligible for membership) was replaced by a vague and subjective test under Title III. The existing test, in fact, works very well and there is no need to change it. The reality is that it has often been a failure of those involved in Indian adoptions to comply with the notice requirements imposed by ICWA which has resulted in late intervention by tribes and which, ultimately, has harmed Indian children and their adoptive and birth families. Thus, if the notice requirements of ICWA are followed, Tribal determination of

membership will reduce, rather than cause, litigation and uncertainty with regard to Indian adoptions.

Another problem with Title III is that it provides that *"membership in an Indian tribe shall be effective from the date of actual admission to membership in the Indian tribe and shall not be given retroactive effect"*. Congress should be aware that this provision will result in the denial of ICWA protections to many Indian children. For example, in some tribes, completion of the enrollment process may take a year or more from date of birth of the child. The enrollment process depends upon the provisions of a particular tribe's constitution.

Summary

There are admittedly, some very real and disturbing problems which have manifested themselves in individual cases involving the implementation of ICWA. Most often, however, tragic consequences involving Indian adoptions have been due to the violation of ICWA requirements, not the requirements themselves. The NCAI provisions will cure this defect by imposing sanctions on the knowing or willful violation of the notice requirements imposed by ICWA. If tribes receive timely notice of child custody cases in the early stages of adoption or custody proceedings, ICWA will work as Congress envisioned.

It should also be noted that Indian adoption cases gone awry have been publicized far out of proportion to the frequency of their occurrence, giving the public (and perhaps, certain members of Congress unfamiliar with Indian issues and the implementation of ICWA over the past 18 years) a somewhat distorted perception of the nature and extent of the problem. Only one-half of one percent of ICWA cases have ended up in state supreme courts (that is, 40 cases in 18 years). By the same token, rarely, if ever, has the mainstream media publicized Indian adoption cases in which Indian children are unnecessarily placed in non-Indian homes. As a result, many suffer great emotional and psychological pain, loss of a sense of identity, and the complete severance of ties with Indian relatives who could have provided them with certain intangibles which are every child's birthright.

NCAI's proposed language is narrowly and precisely targeted to address the problems which have arisen in the implementation of ICWA without striking at the heart of ICWA's intent. The NCAI amendments preserve the careful balance which ICWA, in its present form, strikes among the interests of all those concerned with the adoption of an Indian child. This includes families who seek to adopt Indian children, Indian children in need of adoptive homes or foster care, birth parents of Indian children and their extended families, and last but not least, the legitimate, constitutionally-protected

interest of Indian tribal governments in determining tribal membership and promoting the health and welfare of Tribal members. It is our firm belief that Title III, while motivated by a sincere concern for the welfare of Indian children, will not only undermine ICWA but will, in fact, cause further harm to Indian children by increasing the uncertainty related to Indian adoption cases. Therefore, we urge the Committee to oppose Title III of the adoption bill and to support, in its place, NCAI's proposed amendments to ICWA.

**TESTIMONY OF GOVERNOR MARY V. THOMAS
GILA RIVER INDIAN COMMUNITY
REGARDING AMENDMENTS TO THE INDIAN CHILD WELFARE ACT
BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC
JUNE 26, 1996**

Senator McCain, members of the Committee, staff members, and fellow Indian leaders, my name is Mary V. Thomas and I am the Governor of the Gila River Indian Community (the "Community"), in Sacaton, Arizona. I was pleased to receive the invitation from the Chairman of this Committee and I am here today to express strong opposition to Title III of H.R. 3286 and to support substitute amendments to the Indian Child Welfare Act of 1978 (the "Act")

Our Reservation is located immediately south of the Greater Phoenix Metropolitan area and consists of approximately 373,000 acres. Traditionally Pimas and Maricopas have and remain agrarian people. We have farmed the Gila River Valley since time immemorial. Our Reservation population is approximately nine thousand (9,000) members and our membership rolls exceed thirteen thousand (13,000).

It is the long standing and clear position of the Community that there is no resource more precious to Pimas and Maricopas than our children. The protection of our children and the enhancement of opportunities for our children is the highest priority for our Community. Fortunately, revenues derived from our casinos have assisted our efforts to improve funding for children's programs.

I. THE INDIAN CHILD WELFARE ACT HAS BEEN OF IMMENSE HELP IN ASSURING THAT COMMUNITY CHILDREN HAVE ACCESS TO APPROPRIATE SERVICES OFF THE RESERVATION.

The Community strongly supported enactment of the Act and since 1978, we have enjoyed a very positive experience with implementation of the Act's requirements. Since 1978 the Community has maintained an ongoing case load of approximately sixty (60) cases at any given time. The great majority of these cases are in the Superior Court of Maricopa County Arizona and another large percentage are in other Superior Courts throughout Arizona. We do have many cases in the Courts of California particularly in Los Angeles. In past years we have litigated cases in New York, Florida, West Virginia, Hawaii, Washington, and Ohio. It seems that Pimas and Maricopas are living in many places throughout the United States.

The Honorable C. Kimball Rose who was the Presiding Judge of the Juvenile Courts of Maricopa in 1978, was instrumental in causing the Superior Courts of Arizona to enthusiastically endorse and conform to the mandates of the Act. Since then, Arizona courts have consistently complied with the Act and have been supportive of the needs of the Community and other Indian Tribes. This initial direction caused standardized procedures to be developed and as a result there rarely have been problems in following the requirements of the Act. This is not to say that there have not been significant differences of opinions with regard to the merits of any

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particular case. Community Social Services personnel often disagree with case plans developed by state social workers and there are differences of opinions with respect to disposition of cases. Our positive experience in Arizona has been largely duplicated in California.

Two areas which persistently reoccur are the Transfer of proceedings pursuant to 25 USCS § 1911 (b) of the Act, and definition of an Indian child pursuant to 25 USC § 1903 (4) and (5). First, the Community makes a strong effort to ensure that every eligible child is enrolled as soon as is possible after birth. Our Enrollment Office has a full time staff that researches and processes enrollment applications throughout the year. Enrollment personnel are meticulous and exacting in processing enrollment applications and checking the blood quantum of each potential member. At times, however, individual members do not make sure that paternity is established in every situation and this causes tragic results if the father dies before enrollment efforts are initiated. The failure to establish paternity directly effects the child's blood quantum and thus eligibility for enrollment. The Community's Enrollment staff follows a process that ensures confidentiality and every potential member's application is thoroughly researched. Once the Enrollment Office personnel complete their research, our Enrollment Committee, composed of representatives from each District in the Community, reviews the decisions of the Enrollment Office and makes a recommendation for or against enrollment. In turn the Committee's evaluation is reviewed by the Community Council's Legislative Standing Committee for recommendation to the Community Council. Finally, the Community Council reviews the record that has been developed by this process and determines if an applicant shall be officially enrolled. Aggrieved persons may contest the decisions in the Community Court.

The Community receives numerous notices from states of matters involving our youth. The Community is cautious in making a decision to transfer cases from a state court to our Community Court. The cases are carefully reviewed by Community Social Services personnel such as the Permanency Planner and by attorneys in the Community Law Office. The review of the case takes into account such factors as: (1) is the Community able to offer a placement where the child may thrive; (2) are there extended family members on the Reservation who are able to provide support and assistance; (3) are there special needs of the child which can be met with Community resources; (4) are the efforts by the state essential to reunite the family; and (5) will transfer geographically impede reunification or treatment for the children. An underlying concern is always the potential impact of transfer on the child.

It should be kept in mind that the decision to transfer is not solely the Community's decision. The state has the full opportunity to present the views of the more fully funded state social services personnel through the state's attorney general. A state court judge then makes an informed decision based on the information provided by the parties. Often, the mother or father, will oppose transfer and in some courts this opposition is completely **determinative**.

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The Act as it exists, has enabled us to participate in or contest adoption of Community children by non-Indian parents. Ordinarily, if children are adopted by non-member Indians or non-Indians, Community enrollment is still established in order that children are not lost and lose connection with their tribal heritage. In past years, before enactment of ICWA, many Indian children of adolescent age traveled to our Reservation attempting to find their Tribe and their natural parents. These children were adopted to non-Indian families and thus had no concept of their tribal identity. It is heart breaking because these incidents did not need to occur. Before the Act many of our Indian children were adopted by non-Indian families. These children are now adults and are utilizing the protective features of the Act to trace their identity and heritage and in a sense, are being repatriated with the Community. The mandates of the Act have helped to almost eliminate these situations. Overturning or significantly changing the Act in its current form, could return us to a time where these tragedies were allowed to occur.

II. TITLE III OF H.R. 3286 DOES NOT ADVANCE THE INTERESTS OF INDIAN CHILDREN OR FOSTER OR ADOPTIVE PARENTS.

The amendments to the Act contained in Title III must be rejected. Substitute provisions that meet current concerns in the Act must be considered. Section 114 is unrealistic and poorly drafted. For instance, the insertion of the Indian descent standard conflicts with Tribal enrollment ordinances. The Tribe's enrollment standard, not the vague term "Indian descent" should be met before the Act's coverage is triggered. Moreover, subsection (c) appears to foreclose any possibility of appeal.

The retroactivity provision of Section 302 (b) is particularly offensive. A child should not suffer because his or her parents have been negligent in causing the necessary documents to be sent to a Tribal Enrollment Office. This provision would negate any possibility of a child's extended family being involved in supporting or assuming custody of an Indian child. The Community requires an affirmative act of a member or the member's family before membership is recognized. But the mandate in Section 302 (b) requiring a person's written consent clearly intrudes on a fundamental power of an Indian Tribe to determine membership and to prescribe procedures for enrollment. There are reasonable alternative methods to establish membership and that policy decision is now with Indian Tribes and should remain with the Tribes.

The attempt in Title III to cure specific instances of alleged abuse is not workable. No consideration was given to the possible harm to Indian children and the negative impact on the powers of Indian Tribes. The unintended consequences have not been fully analyzed and the potential adverse impact has not been ascertained. More analysis and consideration of possible alternatives must be taken before Congress acts. The Act has carefully allocated power and responsibility between the Tribes and States and that balance will be disrupted if the Pryce amendments are enacted. The current system developed pursuant to the Act is dispensing justice in a very effective and efficient manner.

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It is important that Tribes, States, and affected parties move forward after the amendments in Title III have been rejected. It serves no purpose or interest to reconsider the Pryce amendments. All parties should be able to arrive at agreements on provisions which will protect their respective interests.

III. THE COMMUNITY SUPPORTS THE FOLLOWING PROPOSED AMENDMENTS.

The Community has reviewed the recommendations of the National Congress of American Indians and supports the following provisions. It is important to address the concerns set forth in Title III and to possibly develop provisions that meet the interests not only of Indian Tribes but all those involved in ensuring that Indian families are first re-united. In the event that Indian children must be placed in foster homes or adoptive placements, procedures must be developed and followed that meet the best interests of such children.

I feel the following proposed amendments are constructive and respond fully to the concerns raised by the supporters of the Pryce amendments. These amendments would impose new notice requirements and time lines on voluntary adoptions, termination of parental rights, and foster care proceedings. They also clarify the limits on the withdrawal of parental consent to adoptions and provide for open adoptions. The provisions also propose that criminal sanctions to discourage fraudulent practices with respect to Indian adoptions be enacted and that Indian parents be made fully aware of their rights under the Act.

The recommendations are shown by underlining.

§ 1903 (10) DEFINITIONS:

"Reservation" means Indian Country as defined in section 1151 of Title 18, United States Code, any lands not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation, and to the extent, if any, not otherwise included in this definition, any lands located within an Alaska Native village.

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child who resides or is domiciled within the reservation of an Indian tribe is made a ward of a tribal court or where an Indian child becomes a ward of a tribal court following a transfer of jurisdiction subsection (b) of this section, the Indian tribe shall retain exclusive jurisdiction over any child custody proceeding involving such ward, notwithstanding any subsequent change in the residence or domicile of the child.

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§ STATE COURT PROCEEDINGS; INTERVENTION: (c) Except as provided in section 103(e) [25 U.S.C. 1913(e)]. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

§ 1913(a) CONSENTS TO FOSTER CARE, ADOPTION, TERMINATION OF PARENTAL RIGHTS - Where any parent or Indian custodian of an Indian child voluntarily consents to a foster care or adoptive placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian and that any attorney, public or private agency facilitating the voluntary termination or adoptive placement has informed the natural parents of their placement options and the applicable provision of this Act. The court shall also certify that either the parent or Indian custodian fully understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

§ 1913(b) WITHDRAWAL OF CONSENT - (i) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and upon such withdrawal, the child shall be immediately returned to the parent or Indian custodian.

(ii) Except as provided in subsection (b) (iii), a consent to adoption or voluntary termination of parental rights may be revoked and the child shall be immediately returned to the parent only if no final decree of adoption has been entered and

- (A) less than six months have passed from the date the Indian child's tribe received notice of the adoptive placement pursuant to § 1913(c) and (d), or
- (B) the adoptive placement specified by the parent ends, or
- (C) less than 30 days have passed since the commencement of the adoption proceeding.

(iii) If a consent has not been revoked within the time frames provided in subsection (b) (ii), a parent may thereafter revoke consent only under applicable State law or, upon petition of a parent or the Indian child's tribe to a court of competent jurisdiction and a finding that consent to adoption or termination of parental rights was obtained through fraud or duress, or the notice was not provided under this section. In which case, the child shall be immediately returned to the parent and a final decree of adoption, if any, shall be vacated. No adoption which has been in effect for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

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[(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption as the case may be, and the child shall be returned to the parent.]

[(d) After the entry of a final decree of adoption of any Indian child in any State court, the parent may withdraw consent whereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been in effect for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.]

ADD § 1913(c) NOTICE TO TRIBES - Notice shall be sent by a party seeking voluntary placement of an Indian child or voluntary termination of the parental rights of a parent of an Indian child to the Indian child's tribe, by registered mail with return receipt requested, in the following circumstances:

- (i) within one hundred days following any foster care placement;
- (ii) within five days following a pre-adoptive or adoptive placement;
- (iii) within ten days of the commencement of termination of parental rights proceeding; and
- (iv) within ten days of the commencement of an adoption proceeding.

ADD § 1913(d) CONSENT OF NOTICE - The notices required under section 1913(c) shall contain:

- (i) the child's name and actual or anticipated date and place of birth;
- (ii) the names, maiden names, address and dates of birth of the Indian parents and grandparents of the child, and tribal enrollment numbers, if known;
- (iii) the names and address of the child's extended family members having a priority in placement under section 1915, if any;
- (iv) the reasons why the child is believed to be an Indian child;
- (v) the names and address of parties to the state court proceeding;

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- (vi) the name and address of the state court in which the proceeding is pending or will be filed and the time and date of such proceeding;
- (vii) the tribal affiliation, if any, of the prospective adoptive parents;
- (viii) the name and address of any social services or adoption agency involved;
- (ix) the identity of any tribe in which the child or parent is a member;
- (x) a statement that the tribe may have the right to intervene;
- (xi) an inquiry as to whether the tribe intends to intervene or waive any right to intervene;
- (xii) a statement that any right to intervene will be waived if the tribe does not respond in the manner and within the time frames required by section 1913(e).

ADD § 1913 (e) INTERVENTION BY TRIBES - The Indian child's tribe shall have the right to intervene at any point in any voluntary child custody proceeding in a state court if any or the following has occurred:

- (i) In the case of a termination of parental rights proceeding, the tribe has filed a notice of intent to intervene in a written objection to termination within 30 days of receiving notice of such proceeding.
- (ii) In the case of an adoption proceeding, the tribe has filed a notice of intent to intervene or a written objection to the adoptive placement within 90 days of receiving notice of the adoptive placement or within 30 days of receiving notice of the voluntary adoption proceeding, whichever is later;
- (iii) In any case where the tribe did not receive notice that complies with subsections (c) and (d), provided, that a Tribe shall be precluded from intervention if it gives written notice of its intent not to intervene in a specific proceeding or waives notice that neither the child or parents are members of the tribe.

ADD § 1913(f) Any action by a tribe pursuant to subsection shall not:

- (i) affect the rights of any person having a placement reference or other right under this Act;

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- (ii) preclude intervention by the Indian child's tribe the event that the proposed adoption placement is changed; or
- (iii) otherwise affect the applicability of this Act.

ADD § 1913(g) No voluntary termination of parental rights or adoption proceeding under State law shall be held until at least 30 days after receipt of notice by the Indian child's tribe.

ADD § 1913(h) Any state law to the contrary notwithstanding, a court may approve as part of an adoption decree, an agreement that the birth parents, extended family and Indian tribe of an Indian child shall have an enforceable right to visitation or continued contact with such child after the entry of a final decree of adoption. Failure to comply with the provisions of any court order regarding such continued visitation or contact shall not be grounds for setting aside a final decree of adoption.

ADD § 1924 (a) In connection with any proceeding or parental proceeding involving a child who is or may be an Indian child for purposes of this Act, whoever:


- (1) encourages or facilitates fraudulent representations or omissions regarding whether a child or parent is Indian; or
- (2) conspires to encourage or facilitate such representations or omissions; or
- (3) aides or abets such representations or omissions having reason to know that such representations or omissions are being made and may have a material impact on the application of this Act.

shall be fined not more than \$100,000, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined not more than \$250,000, or imprisoned not more than 5 years, or both.

- (b) No parent of an Indian child shall be prosecuted under this section.

IV. CONCLUSION

The Indian Child Welfare Act has and will continue to be a positive mechanism in assisting Indian Tribes to maintain connection with member children who reside off the Reservation. Moreover, the Act allows Tribes to directly assist member children who are in dysfunctional families, through no fault of their own, to obtain necessary services so that family unity may be maintained. Any changes to such this Act must be carefully studied and evaluated before potentially harmful amendments are approved. I thank you for this opportunity to present the position of the Community and I will respond to any questions regarding my testimony.



National
Congress of
American
Indians

Executive Committee

President
W. Ron Allen
Jamestown S'Klallam Tribe

First Vice President
Ernie Stevens, Jr.
Oneida Nation of Wisconsin

Recording Secretary
S. Diane Kelley
Cherokee Nation

Treasurer
Gerald (Gerry) E. Hope
Ketchikan Indian Corporation

Area Vice Presidents

Aberdeen Area
Russell (Bud) Mason
Three Affiliated Tribes

Albuquerque Area
Joe Garcia
San Juan Pueblo

Anadarko Area
Merle Boyd
Sac & Fox Tribe

Billings Area
John Sunchild, Sr.
Chippewa Cree Tribe

Juneau Area
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Tlingit-Haida Central Council

Minneapolis Area
Marge Anderson
Mille Lacs Band of Ojibwe

Muskogee Area
Rena Duncan
Chickasaw Nation

Northeast Area
Ken Phillips
Oneida Nation of New York

Phoenix Area
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Reno-Sparks Indian Colony

Portland Area
Bruce Wynne
Spokane Tribe

Sacramento Area
Juana Majel
Yuma Band of San Luiseno

Southeast Area
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 faxline

Prepared Statement of W. Ron Allen, President

National Congress of American Indians

Before the Senate Committee on Indian Affairs

Regarding Amendments to the Indian Child Welfare Act (ICWA) of 1978

26 June 1996

INTRODUCTION

Good morning Chairman McCain, Vice Chairman Inouye, and distinguished members of the Committee. I am Ron Allen, Chairman of the Jamestown S'Klallam Tribe of Washington State and President of the National Congress of American Indians (the "National Congress" or the "NCAI"). As the oldest, largest, and most representative Indian advocacy organization in the United States, the National Congress is dedicated to the exercise of tribal sovereignty by Indian Nations and the continued viability of tribal governments.

I first want to state for the record, Mr. Chairman, that the National Congress has never advocated that the Indian Child Welfare Act be amended. Our tribes have taken the position that ICWA works well and, despite some highly publicized cases, continues to work well. Nonetheless, since May, 1995, when then-NCAI President gaisshkibos appeared before the House Native American and Insular Affairs Subcommittee and testified in strong opposition to proposed ICWA amendments contained in HR 1448,¹ the National Congress has been involved in the current debate surrounding the ICWA and efforts to amend the Act. As this Committee is aware, the "Adoption Promotion and Stability Act of 1996" (HR 3286) which passed the House, retains Title III proposing significant amendments to the ICWA. Despite the vigorous efforts of House Resources Committee members, the NCAI, Indian tribes around the nation, and numerous Indian organizations, Title III remains in HR 3286.

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 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.

HR 1448, the "Indian Child Welfare Act Amendments of 1995" was introduced by Rep. Pryce of Ohio, and co-sponsored by Reps. Solomon (New York) and Burton (Indiana).

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.²

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 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.³

III. INTRODUCTION TO THE INDIAN CHILD WELFARE ACT

I thank the Committee for this opportunity to present the tribal perspective on the Indian Child Welfare Act of 1978 and tribal proposals to strengthen the Act. I want to thank Chairman McCain and Vice Chairman Inouye for the leadership and dedication you have shown over the years in leading this Committee, and this Congress, to more enlightened federal policy about Indians and Indian tribes. Indian country owes both of you a debt of gratitude for all the lives you have touched through your commitment.

Before addressing what I will refer to as the "Tulsa Amendments", I think it is necessary, Mr. Chairman, to provide a basic foundation for the ICWA including the context of its enactment in order to better understand the situation we now find ourselves in.

² See *Morton v. Mancari*, 417 U.S. 535 (1974).

³ See 25 U.S.C. Sec. 1901(2), (3).

As the Committee is aware, the Indian Child Welfare Act has worked well since its inception in 1978. The ICWA was enacted in response to a situation involving the unwarranted, wholesale removal of Indian children from their families, tribes, and cultures often without adequate procedures protecting the Indian family and the Indian tribe. Unethical attorneys, and adoption and placement agencies arranged for the adoption of Indian children and in 1978 this Congress sought to stanch this horrid practice. After ten years of thoughtful 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."⁴

Prior to the enactment of the ICWA, the best evidence suggests that *from between 25% and 35% of all Indian children* were separated from their families and placed with adoptive families, or in foster care or institutions.⁵ The Committee concluded that at this rate, the Indian community was being drained of its lifeblood --- 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*,⁶ "(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."

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.⁷

⁴ H. Rep. 1386, 95th Congress, 2d Sess. 9; hereafter the "House Report"

⁵ House Report at 9.

⁶ 490 U.S. 30 (1988).

⁷ The proposed Pryce amendments contained in Title III of HR 3286 would make the determination of when ICWA applies much more subjective. The new test would require state courts to have an evidentiary hearing to determine whether either parent has "significant social, cultural, or political affiliation" with the Indian tribe of which either parent is a member at the time of the custody hearing. It also creates more opportunity for adoption agencies and private attorneys to circumvent ICWA by focusing the inquiry solely on the biological parents at that particular time without considering extended family or the relationship either parent may have had with the tribe in the past. The proposed amendments would also apply to all cases "in

The purpose of 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 has procedural mechanisms that allow a tribe to participate in the proceeding:

A. Intervention: The Act allows a tribe simply to intervene in the state court proceeding and participate as a party.

B. Transfer: The Act allows a tribe or a biological parent to *request* a transfer to tribal court, but either parent may block the transfer by objecting. 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 and 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 TULSA AMENDMENTS

In May, 1996, over the strenuous objections of Chairman Young, Congressman Miller, and other members, the House voted to retain Title III of HR 3286. The proposed amendments were not vetted through the normal procedures of the Resources Committee, the committee of jurisdiction, and no Indian tribe was afforded the opportunity to comment on them in accord with fundamental notions of due process. This procedural defect is all the more poignant as we find ourselves today at a hearing centering on tribally-driven proposals --- the Tulsa Amendments. It is ironic and a sad reminder of the past history of U.S.-tribal relations that the very same members of Congress who actively sought to prevent Indian tribes from commenting on their ICWA proposals, have determined it critical that they have the chance to comment on the tribal proposal here today.

which a final decree has not been entered." As a result of this, every state that has children in foster care would have to re-evaluate whether the ICWA applies using the new subjective standard, thereby delaying the permanent placement of children.

Before I go on to discuss the details of the Tulsa Amendments, I would like to introduce for the record the two documents that contain the Tulsa Amendments which consist of two National Congress of American Indians resolutions⁸ as well as draft legislative language that was approved as part of the tribal endorsement of the amendments.

There are ways to address the concerns expressed by the sponsors of the House bill without violating either fundamental principles of tribal sovereignty and governance, or the original intent of Congress in enacting ICWA. The National Congress met recently to address these concerns and drafted proposed legislation that will effectively place requirements on all parties in voluntary proceedings. These alternative amendments signify the willingness of Indian tribes to address the specific concerns of those who feel that ICWA is "unfair" in application. More importantly, the amendments meaningfully and substantively address the concerns raised about the ICWA. The proper way to effectively handle these issues is to propose amendments that will actually provide *more security and certainty of consequence* for prospective adoptive parents and still allow for meaningful participation of Indian tribes as envisioned by Congress in enacting the ICWA in 1978.

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 very cognizant that the concerns expressed about ICWA really centered on issues about the timeliness and certainty of tribal intervention and how the Act could be "tightened up" to minimize to the extent possible seemingly "unfair" tribal interventions in placement proceedings. There was, and probably still is, 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 sanctions for counseling the deliberate evasion of Act, the tribes have proposed formal notice requirements to the potentially affected tribe, and time limits for tribal intervention after such notice is in fact received.

It is anticipated that, taken together, the Tulsa Amendments will significantly strengthen the Act and minimize the "retroactively applied" situations to those involving fraudulent practices by adoption attorneys. This proposed amendment is more fully discussed below.

As a general matter, expanded notice provisions combined with deadlines for tribal intervention make significant strides in addressing concerns about certainty of intervention.

⁸ Resolution TLS-96-007A, "Amendments to the Indian Child Welfare Act" and Resolution TLS-96-007B, "Protection of Public Law 280 Tribes Regarding Amendments to the Indian Child Welfare Act". Both of these resolutions were formally adopted by the member tribes of the National Congress of American Indians on 3-5 June 1996 in Tulsa, Oklahoma.

The Tulsa Amendments propose that timely, and substantive notice⁹ to the affected tribe at the earliest possible stage will 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 as to whether the child is a member or eligible for membership. Currently, notice is mandatory in involuntary cases only. One of the problems experienced with voluntary cases is that tribes have moved to intervene after the child had been placed in 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 whether 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 of adoptive or foster families that the state and / or private adoption agencies are not aware of.

2. Time Lines for Tribal Intervention

In tandem with the embellished notice provisions noted above, the Tulsa Amendments propose and would institute a deadline for tribal intervention in a voluntary proceeding. The time period would begin from the time of 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 and is the perception 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 intervention in voluntary cases was the lack of timely notice to the tribe and/or fraudulent adoption practices by adoption attorneys. By extending the notice requirement and placing a deadline on tribal intervention, all involved will have a more definite understanding of the rights and obligations of all parties as early as possible in placement cases.

3. Criminal Sanctions

Many "problem cases" that have been cited in the popular media and on the floor of the House of Representatives actually began with *knowing* violations of the Act. Current law does not provide

⁹ The Tulsa Amendments propose 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(e).

explicit penalty for such violations. The Tulsa Amendments directly address the problem by proposing severe criminal sanctions for attorneys and adoption agencies that *knowingly* violate the Act through encouraging fraudulent misrepresentations or omissions by their clients. As was the case with the celebrated *Rost Case*¹⁰ 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 proposed Tulsa Amendment will provide 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 strong disincentive for 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 propose 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 up until the adoption is finalized*. The Tulsa Amendments would place an additional requirement that the child be in the adoptive placement for less than 6 months or less than 30 days has passed since the commencement of the adoption proceeding.

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 in ICWA limitations for withdrawals of such consent. Mr. Chairman, it is important to note that the issue of withdrawal of consent occurs in *non-Indian adoptions* as well as Indian adoptions, and this amendment will provide more clarity when an Indian parent can withdrawal 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 include a sensitivity to the unique aspects of those states denominated "P.L. 280 states" Indian tribes in P.L. 280 states have experienced significant difficulty exercising jurisdiction under the ICWA, and we are mindful that we do not intend our proposals to negatively impact any Indian tribe's rights to exercise jurisdiction under the Act.¹¹

¹⁰ In deposition testimony presented in the trial court in *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.

¹¹ See Resolution TLS-96-007B, "Protection of Public Law 280 Tribes Regarding Amendments to the Indian Child Welfare Act".

6. Open Adoptions

The Tulsa Amendments propose that state courts be allowed to approve "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. The Tulsa Amendments propose that this option be kept open, even if state law prohibits it.

7. Ward of Tribal Court

The Tulsa Amendments propose 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

Mr. Chairman, of all issues and concerns addressed and debated in Tulsa, the provision dealing with tribal membership was the most contentions and rightly so. An Indian tribe's right to freely determine its own membership criteria goes to the heart of self-governance and tribal sovereignty. Any tampering with the tribal right to determine tribal membership is rightfully condemned as unacceptable, and intolerable. The National Congress was formed in the 1940s 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" 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.

As a tribal chairman and President of the NCAI, it is difficult for me to imagine a more fundamental assault on tribal governments across the nation. I am here to oppose such notions in whatever form and legislation they appear. Instead of running roughshod over tribal rights, the Tulsa Amendments propose 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 tribe's relationship with the Indian child.

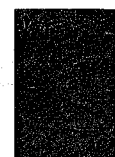
V. CONCLUSION

Mr. Chairman, I have set out the fundamental concepts and principles that are embodied in the Tulsa Amendments. Attached to my Statement I have attached copies of the NCAI Resolutions, as well as the supporting legislative language that I commented on today. In reviewing the tribal proposals I encourage the Committee 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. Having as our goal the best interests of the Indian child, Indian tribes from around the nation have tried to put forth reasoned and reasonable 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 Indian families and 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 Committee for the opportunity to appear today and comment on these proposed amendments. I would be happy to answer any questions you may have at this point.

* * *



National Congress of American Indians

Executive Committee

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Mandan, Hidatsa & Arikara

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

RESOLUTION TLS-96-007A

Title: AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

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 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, on May 10, 1996, the House of Representatives passed the "Adoption Promotion and Stability Act of 1996," and Title III of the bill contains provisions to amend the Indian Child Welfare Act (ICWA) that will undermine the ability of Indian tribes to intervene in adoptions and child protection proceedings involving Indian children living off reservation; and

WHEREAS, Title III was developed without any consultation with Indian tribes, passed without a hearing and over the objection of the House Resources Committee, and is not supported by a single tribe; and

WHEREAS, the bill was passed by the House in response to perceived problems with ICWA and in the absence of constructive alternatives stands a good chance of passage in the Senate; now

THEREFORE BE IT RESOLVED, that the National Congress of American Indians hereby forwards the NCAI workshop draft amendments to the

Indian Child Welfare Act, (official attachment dated June 2, 1996), for favorable consideration by the Senate Indian Affairs Committee, which constructively responds to the issues raised by Title III of HR 3286 by providing;

- 1) notice to Indian tribes for voluntary adoptions, termination of parental rights, and foster care proceedings;
- 2) time lines for tribal intervention in voluntary cases;
- 3) criminal sanctions to discourage fraudulent practices in Indian adoptions;
- 4) clarification of the limits on withdrawal of parental consent to adoptions;
- 5) application of ICWA in Alaska;
- 6) open adoptions in states where state law prohibits them;
- 7) clarification of tribal court's authority to declare children wards of tribal court;
- 8) a duty that attorneys and public and private agencies must inform Indian parents of their rights under ICWA; and
- 9) tribal determination of membership is beyond compromise. Any method of addressing membership must be done with full protection of tribal sovereignty.

CERTIFICATION

The forgoing resolution was adopted at the 1996 Mid-Year Congress of the National Congress of American Indians, held at the Adam's Mark Hotel at Williams Center in Tulsa, Oklahoma, on June 3-5, 1996 with a quorum present.



W. Ron Allen, President

ATTEST:



S. Diane Kelley, Recording Secretary

Adopted by the General Assembly at the 1996 Mid-Year Conference held at the Adam's Mark Hotel at Williams Center in Tulsa, Oklahoma on June 3-5, 1996.

ADDENDUM TO ICWA RESOLUTION

9. Tribal Membership Certification

TRIBAL MEMBERSHIP CERTIFICATION

Any motion for Intervention filed by a tribe shall be accompanied by a certification which includes a statement documenting the child's membership or eligibility for membership pursuant to tribal law or custom.

NCAI Resolution TLS-96-007A -- Official Attachment

NCAI WORKSHOP DRAFT AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

JUNE 2, 1996

"underlined words" - additions to existing law

["words in brackets"] - deletions to existing law

25 U.S.C. § 1903(10)

NCAI Proposed language: #5 under Summary

"reservation" means Indian country as defined in section 1151 of Title 18, United States Code, any lands not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation, and to the extent, if any, not otherwise included in this definition, any lands located within an Alaska Native village;

25 U.S.C. § 1911(a)

NCAI Proposed language: #7 under Summary

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child who resides or is domiciled within the reservation of an Indian tribe is made a ward of a tribal court or where an Indian child becomes a ward of a tribal court following a transfer of jurisdiction pursuant to subsection (b) of this section, the Indian tribe shall retain exclusive jurisdiction over any child custody proceeding involving such ward, notwithstanding any subsequent change in the residence or domicile of the child.

25 U.S.C. § 1911(c)

NCAI Proposed language: #2 under Summary

(c) Except as provided in section 103(e) [25 U.S.C 1913(e)], in any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian

custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

25 U.S.C. § 1913

NCAI Proposed language: #8 under Summary

§ 1913(a) CONSENTS TO FOSTER CARE, ADOPTION, TERMINATION OF PARENTAL RIGHTS - Where any parent or Indian custodian of an Indian child voluntarily consents to a foster care or adoptive placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian and that any attorney, public or private agency facilitating the voluntary termination or adoptive placement has informed the natural parents of their placement options and the applicable provisions of this Act. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

#4 under Summary

§ 1913(b) WITHDRAWAL OF CONSENT - (i) Any parent or Indian custodian may withdraw consent to a foster Care placement under State law at any time and upon such withdrawal, the child shall be immediately returned to the parent or Indian custodian.

(ii) Except as provided in subsection (b) (iii), a consent to adoption or voluntary termination of parental rights may be revoked and the child shall be immediately returned to the parent only if no final decree of adoption has been entered and

(A) less than six months have passed from the date the Indian child's tribe received notice of the adoptive placement pursuant to § 1913(c) and (d), or

(B) the adoptive placement specified by the parent ends, or

(C) less than 30 days have passed since the commencement of the adoption proceeding.

(iii) If a consent has not been revoked within the time frames provided in subsection (b) (ii), a parent may thereafter revoke consent only under applicable State law or, upon petition of a parent or the Indian child's tribe to a court of competent jurisdiction and a finding that consent to adoption or termination of parental rights was obtained through fraud or

duress, or that notice was not provided under this section. In such case, the child shall be immediately returned to the parent and a final decree of adoption, if any, shall be vacated. No adoption which has been in effect for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

[(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.]

[(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.]

#1 under Summary

ADD § 1913(c) NOTICE TO TRIBES - Notice shall be sent by a party seeking voluntary placement of an Indian child or voluntary termination of the parental rights of a parent of an Indian child to the Indian child's tribe, by registered mail with return receipt requested, in the following circumstances:

- (i) within one hundred days following any foster care placement,
- (ii) within five days following a pre-adoptive or adoptive placement,
- (iii) within ten days of the commencement of a termination of parental rights proceeding; and
- (iv) within ten days of the commencement of an adoption proceeding.

#1 under Summary

ADD § 1913(d) CONTENT OF NOTICE - The notices required under section 1913(c) shall contain

- (i) the child's name and actual or anticipated date and place of birth;
- (ii) the names, maiden names, addresses and dates of birth of the Indian parents and grandparents of the child;
- (iii) the names and addresses of the child's extended family members having a priority in placement under Sec. 1915, if known;
- (iv) the reasons why the child may be an Indian child;

(v) the names and addresses of the parties to the state court proceeding;

(vi) the name and address of the state court in which the proceeding is pending or will be filed, and the time and date of such proceeding;

(vii) the tribal affiliation, if any, of the prospective adoptive parents;

(viii) the name and address of any social services or adoption agency involved;

(ix) the identity of any tribe in which the child or parent is a member;

(x) a statement that the tribe may have the right to intervene;

(xi) an inquiry as to whether the tribe intends to intervene or waive any right to intervene;

(xii) a statement that any right to intervene will be waived if the tribe does not respond in the manner and within the time frames required by section 1913(e).

#2 under Summary

ADD § 1913(e) INTERVENTION BY TRIBES - The Indian child's tribe shall have the right to intervene at any point in any voluntary child custody proceeding in a state court if any of the following has occurred:

(i) In the case of a termination of parental rights proceeding, the tribe has filed a notice of intent to intervene or a written objection to termination within 30 days of receiving notice of such proceeding,

(ii) In the case of an adoption proceeding, the tribe has filed a notice of intent to intervene or a written objection to the adoptive placement within 90 days of receiving notice of the adoptive placement or within 30 days of receiving notice of the voluntary adoption proceeding, whichever is later,

(iii) In any case where the tribe did not receive notice that complies with subsections (c) and (d), Provided, that a tribe shall be precluded from intervention if it gives written notice of its intent not to intervene in a specific proceeding or gives notice that neither the child or parents are members of that tribe.

#2 under Summary

ADD § 1913(f) Any action by a tribe pursuant to subsection (e) shall not

(i) affect the rights of any person having a placement preference or other right under this Act,

(ii) preclude intervention by the Indian child's tribe in the event that the proposed adoption placement is changed, or

(iii) otherwise affect the applicability of this Act.

#1 under Summary

ADD § 1913(g) No voluntary termination of parental rights or adoption proceeding under State law shall be held until at least 30 days after receipt of notice by the Indian child's tribe.

#6 under Summary

ADD § 1913(h) Any State law to the contrary notwithstanding, a court may approve, as part of an adoption decree, an agreement that the birth parents, extended family and Indian tribe of an Indian child shall have an enforceable right to visitation or continued contact with such child after the entry of a final decree of adoption. Failure to comply with the provisions of any court order regarding such continued visitation or contact shall not be grounds for setting aside a final decree of adoption.

Add 25 U.S.C. § 1924

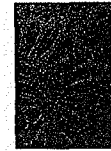
NCAI Proposed language: #3 under Summary

Add § 1924 (a) In connection with any proceeding or potential proceeding involving a child who is or may be an Indian child for purposes of this Act, whoever

- (1) encourages or facilitates fraudulent representations or omissions regarding whether a child or parent is Indian, or
- (2) conspires to encourage or facilitate such representations or omissions, or
- (3) aids or abets such representations or omissions having reason to know that such representations or omissions are being made and may have a material impact on the application of this Act

shall be fined not more than \$100,000, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined not more than \$250,000, or imprisoned not more than 5 years, or both.

(b) No parent of an Indian child shall be prosecuted under this section.



National
Congress of
American
Indians

Executive Committee

President
W. Ron Allen
Jamestown S'Klallam Tribe
First Vice President
Ernie Stevens, Jr.
Oneida Nation of Wisconsin
Recording Secretary
S. Diane Kelley
Cherokee Nation

Treasurer
Gerald (Gerry) E. Hope
Ketchikan Indian Corporation

Area Vice Presidents
Aberdeen Area
Russell (Bud) Mason
Three Affiliated Tribes

Albuquerque Area
Joe Garcia
San Juan Pueblo
Anadarko Area
Merle Boyd
Sac & Fox Tribe

Billings Area
John Sunchild, Sr.
Chippewa Cree Tribe

Juneau Area
Edward K. Thomas
Tlingit-Haida Central Council

Minneapolis Area
Marge Anderson
Mille Lacs Band of Ojibwe

Muskogee Area
Rena Duncan
Chickasaw Nation

Northeast Area
Ken Phillips
Oneida Nation of New York

Phoenix Area
Arlan D. Melendez
Reno-Sparks Indian Colony

Portland Area
Bruce Wynne
Spokane Tribe

Sacramento Area
Juana Majel
Pawnee Band of San Luiseno

Southeast Area
James Hardin
Lumbee Tribe

Executive Director
JaAnn K. Chase
Mandan, Hidatsa & Arikara

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

RESOLUTION TLS-96-007B

Title: PROTECTION OF PUBLIC LAW 280 TRIBES REGARDING
AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

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 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

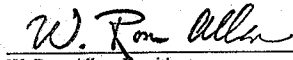
WHEREAS, Indian tribes, which are subject to Public Law 280, have experienced significant difficulties exercising tribal jurisdiction under the Indian Child Welfare Act; and

WHEREAS, these difficulties have negatively impacted their ability to protect their children, families and tribes.

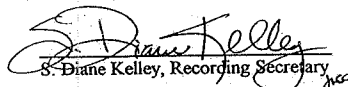
NOW THEREFORE BE IT RESOLVED that the National Congress of American Indians is hereby directed to work with experts in the field of Public Law 280 to explore potential legislative proposals to remedy any negative impacts on Indian child custody proceedings resulting from Public Law 280.

CERTIFICATION

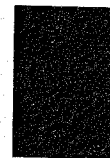
The forgoing resolution was adopted at the 1996 Mid-Year session of the National Congress of American Indians, held at the Adam's Mark Hotel at Williams Center in Tulsa, Oklahoma, on June 3-5, 1996 with a quorum present.


W. Ron Allen, President

ATTEST:


S. Diane Kelley, Recording Secretary

Adopted by the General Assembly at the 1996 Mid-Year session held at the Adam's Mark Hotel at Williams Center in Tulsa, Oklahoma on June 3-5, 1996.



National
Congress of
American
Indians

25 June 1996

United States Senator
Attention Legislative Director

Re: The Truth About the Indian Child Welfare Act

Dear Senator:

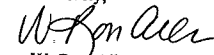
The Indian Child Welfare Act (ICWA) works and it works well. Despite this fact, Congresswoman Deborah Pryce has proposed amendments to the ICWA (Title III of HR 3286) that will eviscerate the act and do significant harm to Indian tribal governments and Indian children. On June 20, the Committee on Indian Affairs stripped Title III from HR 3286 and plans on crafting reasonable, stand-alone legislation that addresses the concerns of adoptive families without violating tribal sovereignty and fundamental federal Indian law and policy.

Indian tribes have developed **Alternative ICWA Amendments** which will be the subject of a Committee on Indian Affairs hearing on 26 June 1996. Both Indian Affairs Committee Chairman John McCain and House Resources Committee Chairman Don Young have stressed the need for tribal involvement in the ICWA debate and have pledged to bring a free-standing ICWA bill to a vote in Congress. The purpose of this letter and enclosures is to present the true story of the ICWA and to ask your support for the **Alternative ICWA Amendments**, which have been reviewed and endorsed by non-Indian family adoption attorneys. To aid in your decision, enclosed you will find the following documents:

1. ICWA Myth vs. ICWA Facts: Addressing Rep. Pryce's Propaganda
2. Indian Child Welfare Act Summary: How The Act Works
3. A View From the States: The Attorneys General and Governors Perspective
4. Summary of Alternative ICWA Amendments
5. Alternative ICWA Amendments (TLS-96-007A and 007B)

Thank you for your thoughtful consideration of these materials. We respectfully urge your support for the **Alternative ICWA Amendments** and your continued support of Indian tribes and Indian people across the United States.

Sincerely,


W. Ron Allen
President

Executive Committee
President
W. Ron Allen
Jamestown S'Klallam Tribe
First Vice President
Ernie Stevens, Jr.
Oneida Nation of Wisconsin
Recording Secretary
S. Diane Kelley
Cherokee Nation
Treasurer
Gerald (Gerry) E. Hope
Ketchikan Indian Corporation
Area Vice Presidents
Aberdeen Area
Russell (Bud) Mason
Three Affiliated Tribes
Albuquerque Area
Joe Garcia
Son Juan Pueblo
Anadarko Area
Merle Boyd
Sac & Fox Tribe
Billings Area
John Sunchild, Sr.
Chippewa Cree Tribe
Juneau Area
Edward K. Thomas
Tlingit-Haida Central Council
Minneapolis Area
Marge Anderson
Mille Lacs Band of Ojibwe
Muskogee Area
Rena Duncan
Chickasaw Nation
Northeast Area
Ken Phillips
Oneida Nation of New York
Phoenix Area
Arlan D. Melendez
Reno-Sparks Indian Colony
Portland Area
Bruce Wynne
Spokane Tribe
Sacramento Area
Juana Majel
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Southeast Area
James Hardin
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Executive Director
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2010 Massachusetts Ave., NW
Second Floor
Washington, DC 20036
202.466.7767
202.466.7797 facsimile

ICWA Myth vs. ICWA Fact: Addressing Rep. Pryce's Propaganda

MYTH: ICWA fails to take into consideration the wishes of biological parents or the Indian child.

FACT: ICWA identifies placement preferences for Indian children and explicitly states that "(w)here appropriate the preference of the Indian child or parent shall be considered." (25 USC 1915(c)). The Act has real flexibility in that it states that placement preferences shall be followed absent "good cause to the contrary". Accompanying BIA guidelines, as well as the legislative history of the Act, indicate that the use of the term "good cause" was designed to give state courts discretion in determining the placement of an Indian child. Case law identifies several factors to be taken into consideration to establish "good cause": the best interests of the child, the wishes of the biological parents, the suitability of persons referred for placement, the child's ties to the tribe, and the child's ability to make cultural adjustments made necessary by a placement.

MYTH: Under ICWA, Indian tribes can only place Indian children with Indian families.

FACT: The Act specifically states that "in the case of a placement under subsection (a) (involving adoptions) or (b) (involving foster care or pre-adoption), if an Indian child's tribe shall establish a different order of preference...the agency or court effecting the placement shall follow such order..." 25 USC 1915(c). Indian tribes can and do place Indian children with non-Indian parents when it is in the best interests of the child. An example of such placements is the *Holyfield* case, where the tribe, after successfully assuming jurisdiction over the case, agreed to the pending adoption by non-Indian parents as in the best interest of the child --- the adoption did take place.

MYTH: The Act is to blame in delays in placements of Indian children.

FACT: The problems experienced are not with the Act itself, but rather with a lack of compliance with the Act. In many of the alleged ICWA "horror stories" legal mistakes or outright deceptions occurred that resulted in tragedies for everyone involved. In addition, the amendments offered by Congresswoman Pryce could result in even more litigation, thereby delaying placement of Indian children because they use a different, subjective test for determining whether the Act applies in the first instance. The proposed test is unworkable and will create a litigation explosion.

MYTH: The Pryce ICWA amendments are "minor" or "technical changes" to the Act.

FACT: The Pryce ICWA amendments represent radical changes to the ICWA by changing the legal definition of "Indian child". The amendments also place membership restrictions on tribes and would require every state that currently has custody of children in foster care to re-evaluate whether ICWA applies to those cases using the proposed subjective test.

MYTH: Every member in the Congress has an ICWA "horror story" in his or her district.

FACT: The National Indian Child Welfare Association has determined that since 1979, only 40 cases have been. This number represents 1/10 of 1% of the total number of placements and cases since the Act was implemented. The proper way to avoid problems in administering the law is first, to comply with the requirements of the law by fostering better legal and social work practices to ensure that all requirements of the ICWA are met. Many tribes across the nation have made significant strides and efforts in working with local social service agencies and in developing policies that ensure compliance with the ICWA.

Indian Child Welfare Act Summary: How The Act Works

Purpose of the Act: To protect the integrity of Indian families by creating a procedural framework for tribes to participate in custody proceedings involving Indian children.

When The Act Is Applicable: The Act 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 Triggers Certain Events: The Act establishes minimum standards for removal of Indian children, and placement preferences for Indian children in foster care and adoptive homes. The Act has several procedural mechanisms that allow a tribe to participate in the proceeding.

A. Intervention: The Act allows a tribe to intervene in the state court proceeding and participate as a party.

B. Transfer: The Act allows a tribe or a biological parent to request a transfer to tribal court, but either parent may block the transfer by objecting. 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: The Act establishes preferences for placement of Indian children with extended family, other members of the child's tribe and other Indian families. However, the Act contains a "good cause" exception to these preferences. The accompanying BIA guidelines identify situations that establish good cause not to follow the preferences, including 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.

Impact of the Pryce Proposals: The proposed amendments would make the determination of when ICWA applies much more subjective. The new test would require state courts to have an evidentiary hearing to determine whether either parent has "significant social, cultural, or political affiliation" with the Indian tribe of which either parent is a member at the time of the custody hearing. It also creates more opportunity for adoption agencies and private attorneys to circumvent ICWA by focusing the inquiry solely on the biological parents at that particular time without considering extended family or the relationship either parent may have had with the tribe in the past. The proposed amendments would also apply to all cases "in which a final decree has not been entered." As a result of this, every state that has children in foster care would have to re-evaluate whether the ICWA applies using the new subjective standard, thereby delaying the permanent placement of children.

* * *



Christine O. Gregoire

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

May 31, 1996

The Honorable Slade Gorton
U.S. Senator
730 Hart Senate Office Building
Washington, DC 20510

Re: Proposed Indian Child Welfare Act Amendments

Dear Senator Gorton:

As Attorney General for the State of Washington, I have given much attention and priority to children's and family issues. It has recently come to my attention that the House of Representatives has passed legislation which significantly amends the Indian Child Welfare Act (ICWA).

I am concerned that the proposed amendments to ICWA contained in Title III of HR 3286, the Adoption Promotion and Stability Act of 1996, will add uncertainty to the applicability of the ICWA. This uncertainty will likely result in a delay in the permanent placement of the children involved. This clearly is not in the children's best interest.

Under the current law, ICWA applies if (1) a child is a member of a tribe or (2) eligible for membership in a tribe and the biological child of a member. Membership is determined by the tribe. If ICWA applies, the placement preferences in the Act are followed.

The proposed amendments add the requirements that one of the parents of the child be of tribal descent and one of the parents have significant social, cultural, or political affiliation with the tribe. Who would make these determinations - the tribes, the social workers, or the courts? How far back is a parent's ancestry searched? What standards are applied to determine if there is adequate affiliation? These uncertainties would lead to increased litigation on whether or not ICWA applies in a child's case. In the meantime, the permanent placement of the child would be delayed.

The policy stated in ICWA is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. 25 USC 1902. The amendments do not further this policy. ICWA was enacted in 1978 after much careful deliberation, with extensive input from tribes and others. It should not be amended without an opportunity for all affected to study the proposed changes and to provide input.

ATTORNEY GENERAL OF WASHINGTON

Honorable Slade Gorton
May 31, 1996
Page 2

It is our experience that problems involving the permanent placement of Indian children are most likely prevented through complete and timely compliance with ICWA. The key is early determination of whether a child is an Indian child under the Act. That can be accomplished quickly and finally by the tribe if it is given proper and timely information. The proposed amendments would make such a determination more difficult and uncertain.

I urge you to remove the ICWA amendments from H.R. 3286 when it comes before the Senate. Thank you for your attention to this important matter.

Sincerely,

CHRISTINE O. GREGOIRE
Attorney General



STATE OF NEVADA
EXECUTIVE CHAMBER
Capital Complex
Carson City, Nevada 89710

TELEPHONE
(702) 687-5070
FAX (702) 687-4484

BOB MILLER
Governor

May 8, 1996

The Honorable Newt Gingrich
Speaker
The House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I am writing in opposition to H.R. 3286, which is designed to amend the Indian Child Welfare Act (ICWA). This legislation strives to redefine which off-reservation child custody cases should be considered under the Indian Child Welfare Act. As the Governor of a state that has taken several proactive steps to guarantee efficient enforcement of the ICWA, I feel compelled to express my opposition to this legislation.

As you know, the ICWA grants tribal governments the option to hear Indian child custody cases for families they recognize as having a relationship to the tribe but do not live on the tribe. It is the intent of the ICWA to give Indian children every opportunity to maintain their cultural background and give them the ability to grow up as Indian people. Trying these cases in Indian courts is a significant measure for ensuring these goals.

H.R. 3286 changes the definition of off-reservation families who may be able to have their case heard by a tribal government. Under this amendment, one of the parents of the child must be of "Indian descent." In addition, the amendment requires a subjective determination as to whether the parent of the child has "significant social, cultural, or political affiliation with the Indian tribe." It would no longer be up to the Indian family and the tribe to determine if a bona fide relationship between the two exists. Instead, state and private custody workers would have to interpret the guidelines outlined in H.R. 3286 to determine if the case could be heard in a tribal court. This interpretation will undoubtedly be challenged in court. Rather than decreasing litigation under the ICWA, this amendment will likely increase litigation.

When fully complied with, the ICWA effectively places Indian children with caring families. The State of Nevada has worked hard to ensure that the ICWA is complied with, and proper compliance has

The Honorable Newt Gingrich
May 8, 1996
Page 2

successfully placed Indian children in proper homes. I do not support the passage of H.R. 3286, which will complicate the placement and adoption of Indian children.

Thank you for your consideration.

Sincerely,

BOB MILLER
Governor



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

Capitol Complex
Carson City, Nevada 89710
Telephone (702) 687-4170
Fax (702) 687-6798

FRANKIE SUE DEL PAPA
Attorney General

BROOKE A. NIELSEN
Assistant Attorney General

May 6, 1996

The Honorable Newt Gingrich
Speaker
House of Representatives
Washington, D.C. 20515

VIA FACSIMILE
AND U.S. MAIL

Dear Mr. Speaker:

One of my major priorities as the chief law enforcement officer for the State of Nevada has been in the area of family law and child protection. It has recently come to my attention there is an effort to amend the Indian Child Welfare Act (ICWA) which will significantly alter the definitions and likely result in increased litigation for the State. See Title III of H.R. 3286.

It should be noted that currently litigation under ICWA is few and far between. Litigation usually occurs when there is a failure to comply with the Act rather than over the meaning of the Act. The proposed amendment, however, changes ICWA from an objective standard for qualification under the Act to a subjective standard. The only result can be increased litigation.

Under the current law, ICWA applies to those children who are eligible for tribal membership. Eligibility for tribal membership may vary from tribe to tribe, but this determination can be made objectively and relatively easily through contact with the tribe and through the assistance of the Bureau of Indian Affairs.

The amendment will throw uncertainty into the law. The amendment requires that one of the parents of the child be of "Indian descent." This could be much more far-reaching than a requirement of eligibility for tribal membership. How far back in genealogy must one go to make this determination?

In addition, the amendment requires a subjective determination as to whether the parent of the child has "significant social, cultural, or political affiliation with the Indian

Honorable Newt Gingrich
Speaker, House of Representatives
May 3, 1996
Page 2

tribe." It is unclear who would make this determination. If the determination is made by a social worker, who is the likely first contact with an Indian child, this determination is likely to result in litigation with the tribe. If the determination is to be made by the court, an evidentiary hearing would have to be held. Rather than decreasing litigation under ICWA, this amendment is much more likely to increase such litigation.

In Nevada, we have found that when state and private agencies and officials fully understand and comply with the provisions of the ICWA, there has been no need for litigation. Through their cooperative efforts, state and tribal officials are able to effectively place Indian children with loving families without harming Indian families or causing any hardship to prospective adoptive parents. Litigation occurs when ICWA is ignored or attempts are made to circumvent it. I hope that the positive results we have experienced in Nevada through the vigilant enforcement of ICWA will serve as a guide to those who wish to promote adoptions that benefit Indian children and their families.

Thank you for your attention to this important matter. Should you have any additional questions, please do not hesitate to contact me or Chief Deputy Attorney General Nancy Angres at (702) 687-7335.

Cordially,

FRANKIE SUE DEL PAPA
Attorney General

FSDP/rc

cc: Senator Harry Reid
Senator Richard Bryan
Congresswoman Barbara Vucanovich
Congressman John Ensign
Congressman Dick Arney
Congressman Richard Gephardt
Congressman David Bonior
Congressman George Miller
Congressman Don Young
Nevada Governor Bob Miller

SUMMARY OF ALTERNATIVE ICWA AMENDMENTS

There are ways to address the concerns expressed by the sponsors of the House bill without violating the original intent of Congress in enacting the ICWA. The National Congress of American Indians met recently to address these concerns and drafted proposed legislation that will effectively place requirements on all parties in voluntary proceedings.

These alternative amendments signify the willingness of Indian tribes to address the specific concerns of those who feel that ICWA does not work. But more importantly, the amendments meaningfully address the concerns raised about ICWA. The proper way to effectively handle 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.

What follows is a summary of the tribal proposals with an explanation of what issues they address.

1. NOTICE TO INDIAN TRIBES FOR VOLUNTARY PROCEEDINGS

Explanation. This provision would extend the notice provision to voluntary as well as involuntary proceedings. It also clarifies what should be included in the notice so that a tribe can make an informed decision as to whether the child is a member or eligible for membership.

Rationale. Currently, notice is mandatory for involuntary cases only. One of the problems with voluntary cases is that the tribe would move to intervene after the child had been placed in adoptive or pre-adoptive home because it received late notice. Extending the notice provisions would allow potential adoptive parents to know immediately 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 are not aware of. Finally, expanded notice provisions combined with a deadline for intervention go a long way in addressing concerns about certainty of intervention.

2. TIME LINES FOR TRIBAL INTERVENTION

Explanation. This provision would institute a deadline for when a tribe could intervene in a voluntary proceeding. The time would start running from the time of notice of the proceeding. If a tribe did not intervene within the time period, then it could not intervene in the proceeding.

Rationale. One of the criticisms of ICWA is that the tribe was intervening in cases after the child had been placed for adoption. Usually the reason for the delay in intervention in voluntary cases is the lack of notice to the tribe. By extending the notice requirement and placing a deadline on tribal intervention, all parties will have a more definite understanding early in placement cases.

3. CRIMINAL SANCTIONS

Explanation. This provision imposes criminal sanctions on attorneys or adoption agencies that knowingly violate the Act by encouraging fraudulent misrepresentations or omissions.

Rationale. This amendment will help deter attorneys and adoption agencies from counseling the deliberate evasion of ICWA. Many problem cases that have prompted the legislation in the House began with knowing violations of the Act. This amendment directly addresses the problem.

4. WITHDRAWAL OF CONSENT

Explanation. This provision places a time limit for when a parent can withdraw consent to a foster care placement or adoption. Currently, a parent can withdraw consent to an adoption at any point up 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 has passed since the commencement of the adoption proceeding.

Rationale. There is a perception that many of the problem cases began when the biological parents withdrew consent to the adoption under the 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 when an Indian parent can withdrawal consent to adoptions.

5. APPLICATION OF ICWA IN ALASKA

Explanation. This provision would clarify that Alaska Native villages are included in the definition of "reservation" under the Act.

6. OPEN ADOPTIONS

Explanation. This provision allows state courts to approve open adoptions where state law prohibits them.

Rationale. 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, even if state law prohibits it.

7. WARD OF TRIBAL COURT

Explanation. This provision clarified 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.

8. DUTY TO INFORM OF RIGHTS UNDER ICWA

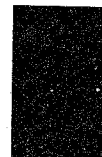
Explanation. This amendment imposes a duty on attorneys and public and private agencies to inform Indian parents of their rights under ICWA.

Rationale. 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. This change 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

Explanation. 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.

Rationale. This amendment directly responds to the criticism that the determination of whether a child is eligible for membership is "arbitrary". The certification would also explain the child's relationship to the tribe.



National
Congress of
American
Indians

Executive Committee

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Jamestown S'Klallam Tribe
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Oneida Nation of Wisconsin
Recording Secretary
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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

15 July 1996

Honorable John McCain
Chairman - Committee on Indian Affairs
United States Senate - 838 SHOB
Washington, D.C. 20510

Dear Chairman McCain:

I am writing in follow-up to my letter of 11 July regarding amendments to the Indian Child Welfare Act (ICWA). This letter addresses question 10 regarding the experience of the Jamestown S'Klallam Tribe in handling ICWA matters.

Since 1991, my tribe has operated a comprehensive Indian Child Welfare program by utilizing funding identified under ICWA and included as part of the tribe's self-governance Annual Funding Agreement. The flexibility provided under self-governance has allowed the tribe to create a program which better addresses and serves the needs of Indian children in our service area. Child welfare activities are provided as part of the tribe's overall "Family Services Program" under the Social Services Department. Ongoing support services include counseling, intervention, family reconciliation, mediation, legal advocacy, and referral services. The tribe employs one full-time Child Welfare Assistant who currently handles a caseload of approximately 56 families on a quarterly basis. Additionally, other support services provided through the tribe's child welfare program include coordination and shared management with the Department of Social and Health Services, Division of Children and Family Services, and Office of Support Enhancement for cases involving Native American families in Washington State.

The Social Services Department remains one of the fastest growing of the tribe. Existing staff have been overwhelmed in attempting to provide all the diverse areas of services needed by tribal members and other Indian people within our service area. By utilizing the flexibility provided under self-governance and by coordinating funding with other federal and state resources, the tribe has successfully designed an effective child welfare program as part of a holistic approach towards meeting the overall health, safety, and welfare needs of tribal membership.

Sincerely,

W. Ron Allen
W. Ron Allen
President

**National
Congress of
American
Indians**

Executive Committee

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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*

11 July 1996

HAND DELIVERED

Honorable John McCain
Chairman - Committee on Indian Affairs
United States Senate - 838 SHOB
Washington, D.C. 20510

Dear Chairman McCain:

Thank you for your letter of 27 June regarding amendments to the Indian Child Welfare Act (ICWA). On behalf of the National Congress of American Indians (NCAI) I am pleased to submit the following answers to the questions raised in that letter.

Q.1. In your view, is the compromise the product of good faith efforts on the part of the adoption community?

A.1. In May, 1995, the House Native American and Insular Affairs Subcommittee held a hearing on HR 1448, proposing amendments to the Indian Child Welfare Act. In the wake of the hearing informal discussions regarding ICWA were held between tribal representatives and members of the adoption community. Many in the tribal community were skeptical of the process and doubtful that any initiative involving the adoption community would protect the interests of Indian children and Indian tribes. Nonetheless, the suggestions borne of this and other efforts were considered and debated by tribal representatives in Tulsa, Oklahoma, in June, 1996. It is the considered opinion of Indian tribes across the nation that the "compromise" reflects good faith efforts by the adoption community to remedy what it views as inefficiencies with the act, and simultaneously to give consideration to the concerns of Indian parents and tribal governments.

Q.2. In what ways would the compromise advance the goals of certainty, speed, and stability in adoptions involving Indian children?

A.2. The recurring concern expressed by the adoption community centers on a perceived fundamental unfairness in tribal ICWA interventions. One of the current problems is that by not requiring notice in voluntary proceedings, Indian tribes may invoke their right to intervene at a date considered late or untimely by the adoption agency, state authority, and / or the non-Indian adoptive family. The Tulsa Amendments would provide needed certainty by including timely and substantive notice to tribes in voluntary proceedings. This notice will enable a tribe to make reasoned decision regarding its right to intervene in the proceeding. In addition,

2

the Tulsa Amendments provide rather strict time lines for tribal intervention that set some parameters for tribal action beyond which intervention will not be permitted except in extraordinary cases. If a tribe, armed with the descriptive notice mentioned above, chooses not to intervene within this time period, then it is precluded from doing so at a later date. This limitation combined with the notice provision will go a long way in making available a clear, more definitive framework of the rights and obligations of all parties to an ICWA-related adoption.

Q.3. How would the compromise amendments encourage timely involvement by an interested tribe and prevent tribal intervention late in a child placement arrangement?

A.3. As I indicated in response to question 2, the goals of certainty and stability are served by the notice requirement, the limitation on tribal intervention, and the spirit of the Tulsa Amendments which encourages full and timely disclosure of all pertinent information so that enlightened decisions can be made with regard to the best interests of Indian children.

Q.4. Other witnesses today have expressed concern about the "retroactive application of ICWA". How would the compromise proposal address this issue?

A.4. There has been confusion generated about the so-called "retroactivity problem" of ICWA in general. "Retroactivity" is a pejorative term and has a largely negative connotation. Those that have, frankly, misused the term retroactivity are in reality concerned with what they perceive to be "unfair" or "late" interventions by Indian tribes in adoption and foster care proceedings that are already progressing or, more frequently, already completed. In those instances when a tribe does intervene "late" under current law, the factor most often responsible is the lack of notice and / or fraudulent adoption practices by adoption professionals undertaken in an attempt to circumvent the requirements of ICWA to "expedite" the case. Most often these ill-advised attempts to expedite the case actually leads to protracted litigation and needless pain for all parties involved. The Tulsa Amendments recognize that by not requiring notice to tribes in voluntary proceedings, for example, there is a greater probability that a given tribe will at some point choose to invoke its rights under ICWA and intervene in the matter. Under the amendments, the degree to which intervention is "certain" is increased.

Q.5. In your testimony you (page 5) indicate that the compromise amendments should be "taken together". Does this mean that each of the provisions are essential to hold the compromise together?

A.5. In my testimony I stated that "(it) is anticipated that, taken together, the Tulsa Amendments will significantly strengthen the Act and minimize the 'retroactively applied' situations to those involving fraudulent practices by adoption attorneys." In Tulsa, the tribes met to discuss tribal concerns, as well as areas of concern expressed by the adoption community. The ICWA provides a complex series of procedural requirements that is incumbent on all parties to an adoption involving Indian children. The act cannot be departmentalized --- it is a legally-mandated process rather than a legally mandated result. To paraphrase, the Tulsa document as a whole is better

than its component parts. That is, each of the amendments, taken alone, would probably serve to enhance the Act, but taken together buttress and strengthen each and every key facet of the Act. By the same token, while discreet, technical changes can be made to the Tulsa Amendments, the weaknesses of the act have been addressed. The essence of the document and the intent of the tribes should be preserved in whatever final version is introduced in the Congress.

Q.6. Why do you believe that the tribal certification of membership requirement will allay the concerns of those who charge that Indian tribes readily confer tribal membership on people who simply are not very connected to the Indian community?

A.6. The Tulsa Amendments require that after receiving notice, an Indian tribe has a time certain within which to alert the party seeking placement that it has an interest in the placement and that it may intervene to protect that interest. As part of the notice the tribe is required to provide, a tribal certification of membership made *pursuant to tribal law and custom* is mandated. The determinations will remain with the tribe, pursuant to criteria determined by the tribe. At the same time, the certification serves to provide the party seeking placement with a formal document containing information on the child's membership or eligibility for membership pursuant to tribal law and custom. Such certification will bolster the certainty provided by the Tulsa Amendments in general and serves to demonstrate that membership determinations are not made arbitrarily or without objective basis. I am not certain that tribal certification of membership will allay these individuals, but I am sure that tribal certification does satisfy their stated concerns regarding an up-front, and timely notice by the tribe that a given child is or may be Indian and that the tribe will or will not intervene in the pertinent proceeding.

Q.7. Despite our best efforts, Federal Indian spending is being reduced at the same time that the demand for services on the reservations is increasing. In your view, do these factors encourage Indian tribes to loosen or tighten their tribal membership criteria?

A.7. Membership criteria is not a mechanism tribes use to increase or decrease the impact of federal appropriations. Indian tribes, as nations, have differing standards for membership and I dare say that those standards *do not* include a cost-benefit analysis as to whether any given tribe will be better or worse off by manipulating its membership criteria. As you know, there are many factors determining membership criteria including heritage, religion, culture, kinship, and a host of others. The availability of federal appropriations is assuredly not one of those factors.

Q.8. You say in your testimony (page 3) that ICWA "has worked well". In what ways has ICWA worked for the best interests of Indian children?

A.8. The ICWA *has* worked well when we look at the severe problems the act was intended to remedy. The history of pre-ICWA days has been discussed many times in recent months, but no discussion can fully relay the pain and injury done to Indian children, Indian families, and Indian tribes in the days before the enactment of ICWA. Before 1978 Indian tribes were hemorrhaging our most vital resource, our children, and since then the unwarranted removal of Indian children

has been stanch largely by the requirements contained in the act. The intent of Congress in enacting the ICWA was to provide fundamental procedural guarantees and requirements that had to be complied with before an Indian child could be removed. One of those requirements permits an Indian tribe to intervene in certain instances to safeguard the interests of the child and the family.

Make no mistake, the best interests of Indian children remain the focus of the act. The intent of the Congress was to allow a deliberate, reasoned adoption and foster care procedure to afford Indian tribes the right to intervene to protect these vital interests. It should also not be lost on anyone that the Congress saw fit to enact the *Indian Child Welfare Act*, *not* the "Adoptive Families Welfare Act", or the "State Adoption Agencies Welfare Act". The act was intended to allow tribes to intervene to guard against unfettered and unwarranted removal of children. The Congress wisely recognized that in so doing, the tribe was protecting the best interests of Indian children, *and* the continued survival of the tribe itself. Seen in this light the act has worked well.

Q.9. How does current law balance the best interests of Indian children and the interests of Indian families and tribes?

A.9. The ICWA strives to protect the best interests of the Indian child and simultaneously preserve the rights of Indian families and tribes to ensure their interests are also served. Contrary to the assertions of some, the ICWA does not provide an Indian tribe with the ability to "block" any given adoption or proceeding. Indeed, the act specifically provides that the preference given to place the Indian child with an Indian family can be set aside if it would be in the best interests of the child. This scenario was played out in the Supreme Court case of *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1988), where the court stated that the protection of the 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 that of the parents. Nonetheless, the practical result of *Holyfield* was the placement of the Indian child with non-Indian adoptive parents precisely because it would be in the best interests of that child.

Q.10. I know you are the elected chairman of a tribe with very few members. How does your tribe handle ICWA cases?

A.10. To smaller tribes the ICWA issue is particularly pertinent and critical. In order to provide a thorough answer to this question, I would like to submit it in the near term under separate cover.

Q.11. What is your experience with how the State of Washington has implemented the ICWA? How do you feel this could be improved?

A.11. The State of Washington has implemented a progressive ICWA policy and has reduced that policy to writing. Recognizing that the interests sought to be protected by the ICWA are best served by strict adherence to the requirements of the act, the State has been very cooperative and has worked to ensure that tribes and tribal courts be afforded their rights under the law.

Q.12. I note that the State Attorney General from Washington has provided a letter to the Committee expressing opposition to Title III of HR 3286. In your experience, would the State courts of Washington be properly equipped to make determinations of tribal membership in the Jamestown S'Klallam tribe? Would the State courts of Washington want the responsibility for these types of determinations?

A.12. In my experience state courts are rarely, if ever, "properly equipped" to make enlightened decisions on Indian issues. The institutional mandate and bias of state courts precludes them from rendering decisions that take adequate consideration of tribal factors and the many factors that imbue federal law and policy with regard to Indian tribes and Indian people. The prevention of depredations against Indians and Indian lands, and indeed the unattractiveness of having state-by-state determinations of Indian policy led the United States to deal with Indian tribes on the federal, government-to-government basis that continues to the current era --- at least theoretically.

As you note, the Attorney General for Washington State did go on record as opposing Title III to HR 3286 noting that it would "add uncertainty to the applicability of the ICWA...", and result in "...delay in the placement of the children involved..." Attorney General Gregoire also states that determinations regarding tribal affiliation are not likely to be made with any certainty resulting in increased litigation. I would add that Governor Gary Johnson of New Mexico, Governor Bob Miller of Nevada, and Attorney General Frankie Sue Papa of Nevada have all weighed in against Title III for the very reasons you suggest in your question. As these officials state, if given the opportunity, state courts would prove ill-equipped to make these types of determinations under the ICWA. I am also equally sure that these same courts would probably not want the added burdens of Title III-mandated tribal membership determinations.

Thank you for the opportunity to appear before you on 26 June, and this chance to flesh out my answers to the Committee regarding this most important issue. Please contact me or JoAnn K. Chase at (202) 466-7767 if you have any further questions.

Sincerely,

W. Ron Allen
W. Ron Allen
President

Jane A. Gorman

attorney at law

513 East First Street, Second Floor
Tustin, California 92680-3340
(714) 731-3600
FAX (714) 731-7760

June 20, 1996

United States Senate Committee on Indian Affairs
Washington, D.C. 20510

Re: Proposed Amendments to the ICWA
Hearing Date: June 26, 1996

Honorable Senators:

Thank you for your invitation to speak before the Senate Committee on Indian Affairs regarding the Indian Child Welfare Act. On behalf of the American Academy of Adoption Attorneys, the Academy of California Adoption Lawyers, and on my own behalf as an adoption litigator and advocate, I urge your approval of the NCAI draft of proposed amendments to the Indian Child Welfare Act if four technical changes, outlined below, are made to the language.

I am the attorney for Ohio adoptive parents Jim and Colette Rost, whose case prompted the flurry of proposed amendments to the ICWA which began last year and is continuing to this day. Let me begin my written testimony by making it clear that both adoption organizations I represent continue to be supportive of the Pryce bill, Title III of the Adoption Reform Act, but also support the compromise amendments now before this committee. These proposed amendments are not inconsistent with the Pryce bill, but would also stand alone as a significant improvement to the 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 and I have been working for more than a year 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 last

Jane A. Gorman
attorney at law

year 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 a year of meetings, conference calls and faxes, the joint group created a final draft of "compromise language" at a several-day meeting in Phoenix earlier this year.

At the NCAI meeting this month, a substantial portion of our agreed-upon language was stricken, but a core agreement remains: If the NCAI draft 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

Jane A. Gorman
attorney at law

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.

Interestingly, this provision, if enacted, may provide the vehicle by which the Rost case can be settled.

Necessary changes to the NCAI draft:

In order for the adoption community to support the NCAI draft legislation, four technical changes need to be made. I believe that each of these problems is a drafting error, not a deliberate change in the agreed-upon language, but the changes are nevertheless necessary.

I. 1913(b)(ii)(C) and 1913(b)(iii) should be replaced as follows:

1913(b)(ii)(C): "less than thirty days have passed since the parent received notice of the commencement of the adoption proceeding."

1913(b)(iii): "If a consent has not been revoked within the time frame provided in subsection (b)(iii), a parent may

Jane A. Gorman
attorney at law

thereafter revoke consent only pursuant to applicable State law and such relief as may be provided thereunder or, upon petition of a parent to a court of competent jurisdiction and a finding that consent to adoption or termination of parental rights was obtained through fraud or duress. Upon a finding that such consent was obtained through fraud or duress, the child shall be immediately returned to the parent and a final decree of adoption, if any, shall be vacated. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law."

This change is necessary so as to preclude a final adoption decree being attacked for failure to comply with the notice requirements.

II. 1913(d)(ii) should read as follows:

"the names, maiden names, addresses and dates of birth of the Indian parents and grandparents of the child if known, after inquiry of the birth parent placing the child or relinquishing parental rights and the other birth parent if available, or if otherwise ascertainable through any other reasonable inquiry."
(new language is in bold face type)

The necessity for this additional language is that this information may not be available to the adoption attorney or agency, and as the NCAI draft reads, the cutoffs would not apply if this information is not given. The additional language would require the agency or attorney to ask the placing parent and the other parent, if that parent is available, for the information needed for the notice, but would not nullify the cut-off provisions if the information is not available.

III. In 1913(e) the word "only" should be added as follows:

1913(e): Intervention by Tribes - The Indian child's tribe shall have the right to intervene at any point in any voluntary child custody proceeding in a state court only if any of the following has occurred:

(I) In the case of a termination of parental rights proceeding, the tribe has filed a notice of intent to intervene or a written objection to termination within 30 days of receiving notice of such proceeding.

(ii) In the case of an adoption proceeding, the tribe has filed a notice of intent to intervene or a written objection to the adoptive placement within 90 days of receiving notice of the adoptive placement or within 30 days of receiving notice of the voluntary adoption proceeding, whichever is later;

Jane A. Gorman
attorney at law

(iii) In any case where the tribe did not receive notice that complies with subsections (c) and (d), Provided, that a tribe shall be precluded from intervention if it gives written notice of its intent not to intervene in a specific proceeding or gives notice that neither the child or parents are members of that tribe.

Although this section as written in the NCAI draft, coupled with the notice requirements of the previous section, implies that a tribe can only intervene if one of the three specified circumstances occurs, the word "only" is necessary in order to clarify the meaning of this subsection.

IV. Section 1913(c)(ii) should be amended as follows:

(ii) no later than five days following a pre-adoptive or adoptive placement. [the word "within" is deleted and replaced with the words "no later than."]

An additional sentence should be added at the end of section 1913(c):

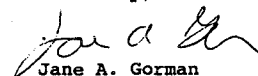
"The notice required in subsection (ii) may be given prior to placement if a particular adoptive or pre-adoptive placement is contemplated."

The necessity for this additional language is to clarify that notice to the tribes can be given pre-birth.

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 truly believe that had these amendments been in place in 1993 when Lucy and Bridget were placed with the Rost family, the tragedy which ensued would never have happened. I also hope that these amendments may provide the vehicle necessary to settle the Rost case. I encourage this honorable committee to amend the Act to help provide quicker security for adoptive placements.

Sincerely,


Jane A. Gorman
Attorney at Law

AMERICAN ACADEMY OF ADOPTION ATTORNEYS

P.O. BOX 24044
WASHINGTON, D.C. 20003-0044
(202) 638-8828
PLEASE REPLY TO:

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Samuel C. Totaro, Jr., President
Four Greenwood Square, Suite 100
Bensalem, PA 19020
(215) 244-1045
Fax (215) 244-0641

June 24, 1996

United States Senate
Committee on Indian Affairs
Washington, D.C.

Attn: Philip Baker-Shenk

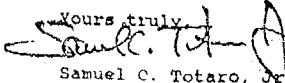
Dear Chairman McCain and Honorable Committee Members:

The American Academy of Adoption Attorneys is an organization composed of over 300 attorneys throughout the United States and Canada who practice predominantly in the field of adoption law. Specifically, we represent individual adoptive parents as well as adoption agencies and birth parents. The purpose of the Academy is to study, encourage, and promote and improve the laws and practice of law pertaining to the adoption of children throughout the United States and abroad.

On behalf of the Academy, I wish to express our organization's support for the proposed draft amendments which have been developed by adoption attorneys and tribal representatives, including the National Congress on American Indians.

Although we recognize that no bill actually has been drafted, and that technical amendments may be necessary to the preliminary drafts, the idea that notice be given to tribes in voluntary adoptive placements and that tribes either intervene or waive intervention in a timely manner is a good one.

This support is not intended to indicate any change in our previous position in support of the I.C.W.A. amendments proposed by Congresswoman Pryce (R. OH.). We believe that the two different approaches to amending the I.C.W.A. are both positive.

Yours truly,

Samuel C. Totaro, Jr.

SCT:ejn

Jane A. Gorman

attorney at law

513 East First Street, Second Floor
Tustin, California 92680-3340
(714) 731-3600
FAX (714) 731-7760

September 27, 1996

Honorable Don Young, Chairman
Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515

Honorable Deborah Pryce
Member of Congress
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Young and Congresswoman Pryce:

I urge you to seek the immediate consideration and adoption by the House of S. 1962, a bill to amend the Indian Child Welfare Act, which has passed the Senate and is at the desk of the House.

I strongly support S. 1962. In my adoption law practice, I have represented many adoptive families who have become embroiled in litigation with Indian tribes over the adoption of Indian children. For example, I am the attorney for Jim and Colette Rost, an adoptive family couple in Ohio who have been involved in litigation (*In re Bridget R.*), a case involving their adoption of two Indian children.

I have reviewed the "Dear Colleague" letter from Congressmen Todd Tiahrt and Pete Geren dated September 24, 1996. While it is correct that a petition for certiorari is pending before the U.S. Supreme Court in the *Bridget R.* case which addresses the constitutionality of ICWA as applied to children who are not members of an "existing Indian family," Congressmen Tiahrt and Geren are mistaken in their assertions that "it would be imprudent to consider legislation which ignores this issue" and that the amendments would "strengthen the reach" of the Act.

These amendments, if passed, would likely prevent the tragedy which befell the Rosts and the twin girls they are seeking to adopt from ever happening again for the following reasons:

- 1) If these amendments are enacted, notice of adoptive placements to tribes would be required. As the law now stands, a tribe may intervene in an adoptive placement at any point prior to the finalization of the adoption, yet no notice is

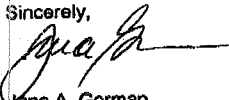
Jane A. Gorman
attorney at law

required. Most adoption attorneys and agencies give notice now to protect the adoptive parents and the child, however some do not. Hence, those attorneys who ignore the spirit of the Act and overlook the absolute right of tribal invention put their clients and the children they seek to adopt at risk for the entirety of the children's minority. This practice would end.

- 2) Criminal penalties would attach to attorneys who knowingly and willfully fail to disclose a child's Indian heritage. These amendments would, in large part, stop the practice of "looking the other way" or in fact even advising birth parents to fail to disclose Indian heritage. If these amendments had been in effect in 1993 when the birth father in the Rost case disclosed his Indian heritage to the adoption attorney, that attorney would doubtless have given notice to the tribe and the tragedy which ensued would not have happened.
- 3) If these amendments are passed, once a tribe is given notice it would have a very brief time to respond. Under existing law, a tribe has until the adoption is finalized to make up its mind. In the Rost case, once the father's Indian heritage was disclosed to the adoption agency, it gave the tribe notice. Almost six months passed, and the tribe did not respond, yet were able to successfully seek intervention when the twins were a year old. If these amendments had been the law at the time the Rost case began, the time for the tribe's right to intervene would have passed.
- 4) The proposed amendments do not strengthen the ICWA beyond its present scope. It still applies to children who are tribal members or whose parent is a tribal member (if the child is eligible for membership). While it may be the purpose of future legislation to change the scope of the ICWA, these amendments do not attempt to do so.
- 5) To oppose S. 1962 because of what it does not accomplish ignores the fact that it does accomplish a great deal. In the (statistically) unlikely event the U.S. Supreme Court takes the Rost case, it can still rule on the constitutionality of the ICWA regardless of Congressional action on S. 1962.

If you have any questions that you feel need further clarification, I would be happy to assist you. Again, I urge that S. 1962 be supported to protect the rights of not only the adoptive families, but more importantly, the children themselves.

Sincerely,



Jane A. Gorman
Attorney at Law
JAG/sab

ACADEMY OF CALIFORNIA ADOPTION LAWYERS

1450 Frazee Road, Suite 409
San Diego, California 92108
(619) 296-6251

June 21, 1996

United States Senate
Committee on Indian Affairs
Washington, D.C.

Facsimile #202-224-5429

Attention: Philip Baker-Shenk

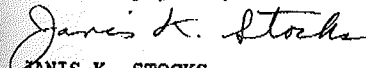
Dear Chairman McCain and Honorable Committee Members:

The Academy of California Adoption Lawyers has reviewed the proposed draft amendments regarding the Indian Child Welfare Act. It was the unanimous vote of the Academy members to support these proposed draft amendments. The Academy understands that this proposed legislation will be reviewed separately from the ICWA bill sponsored by Congresswoman Pryce (R.OH.) which has already passed in the House. The Pryce bill is also supported by the Academy.

Particular support was expressed for those changes which provide that an interested tribe must intervene within 30 days of notice and that a tribal waiver of intervention be binding.

We appreciate the hard work accomplished by the adoption attorneys and the tribal representatives in proposing changes that will improve adoption practice involving children of Indian ancestry.

Very truly yours,



JANIS K. STOCKS
President of the Academy of California Adoption Lawyers

JKS:bs

Jane A. Gorman

attorney at law

513 East First Street, Second Floor
 Tustin, California 92680-3340
 (714) 731-3600
 FAX (714) 731-7760

June 30, 1996

The Honorable John McCain
 Chairman, United States Senate Committee on Indian Affairs
 Washington, D.C. 20510

Dear Chairman McCain:

Thank you for the opportunity to testify before the Committee on June 26, and for allowing me the opportunity to provide this additional written testimony. I will attempt to answer each of your questions, and welcome further inquiry.

QUESTION 1. You have said that if these compromise amendments had been law in 1993, the "tragedy" which ensued in the Rost case would never have happened. Is it your view that similar cases in the future would also be precluded by the compromise language?

Cases similar to the Rost case would be precluded if the amendments were enacted for two major reasons:

A. If the compromise language were enacted, notice in voluntary proceedings would be required, and criminal sanctions would attach if an attorney ignored this mandate. In the Rost case, the attorney had reason to believe that the father was of Native American descent, as he wrote down on his initial intake form that he was Pomo Indian. However, after the attorney explained the Act to the parents, and the Act's requirements that placement preferences be followed which would cause the tribe and the father's family to receive notice of the adoption and be considered as people appropriate to take care of the twins, the father "changed his mind" about his ethnicity, and filled out a new intake form denying his Indian heritage.

On the basis of the father's later statements that he was not Indian, the attorney did not disclose the Indian heritage to the Rosts or to the adoption agency. Unfortunately for the Rosts, the father also lied to them and to the agency, ensuring that his heritage not be known and the tribe and the family not receive notice.

Jane A. Gorman

attorney at law

The amendments would not preclude a parent from lying, but would certainly put a chilling effect on attorneys telling birth parents the consequences of disclosing their Indian heritage before the attorney asks the questions about ethnicity.

B. If the compromise language were enacted, a tribe would have a very limited time to act before its right to intervene was cut off. In the Rost case, the father's Indian ancestry became known when the girls were about three months old. The tribe wrote to the adoption agency saying that it had been contacted by the father's family, who may be eligible for membership. No request for any action whatsoever was made by the tribe. The adoption agency immediately wrote back to the tribe, giving them notice that the twins were in a non-Indian home and essentially asking the tribe what it wanted to do.

More than six months elapsed, and the Agency and the Rosts had no further contact from the birth family or from the tribe. The Rosts and the Agency, not the tribe or the birth family, then brought an action in the California court to determine the applicability of ICWA to the adoption. Only then did the tribe respond, passing a resolution "declaring" the whole family members since birth, and asking to intervene.

If the proposed amendments had been in place in 1993, the original attorney would almost certainly have given the tribe and the family notice of the adoption before the twins were born, and the tribe would only have had as little as 30 days after the twins were placed to make up its mind what it wanted to do. Had it not acted within that time frame, its right to later declare the children members would presumably have been waived, thereby giving the parents no grounds to rescind their relinquishments.

QUESTION 2. Do you have reason to believe that enactment of the compromise proposal would open the door to settlement of the Rost case?

Settlement negotiations, initiated by the twins' biological family, are in progress in the Rost case. However, the two families have an obvious lack of trust of one another, given two years of intensive, high-profile litigation. Even if the Rosts and the Adams family and the tribe were able to reach an agreement whereby the Rosts would raise the twins and the biological family and tribe would have contact, the laws of California do not provide a mechanism for enforcing such an "open adoption" agreement. If these amendments were enacted, the Rost case would be more likely to settle because the biological family would have legal assurance that the Rosts would follow through in allowing whatever contact was agreed upon.

Jane A. Gorman
attorney at law

QUESTION 3. In your view, is the compromise the product of good faith efforts on the part of tribal governments?

Yes, I believe the agreement is the product of a good faith effort on the part of both the adoption community and the tribal governments. When Marc Gradstein and I first proposed sitting down with tribal attorneys to see if we could reach a compromise after the May, 1995 House Resources Committee hearing on the Pryce amendments, the attorneys we approached -- Jack Trope and Bert Hirsh -- were wary, but willing to talk. Bert Hirsh was heavily involved in drafting the 1978 Act, and Jack Trope was the principal drafter of the failed 1987 amendments, so we quickly realized how deeply attached they were to the language of the Act.

I had some personal knowledge of both these men, as I represented the birth mother and they represented the tribe in a high profile ICWA case in California about a decade earlier. (Baby Girl A. (1991) 230 Cal.App.3d 1611) We had some general basis for a trusting working relationship, as we had all been surprised and shocked when my client, along with the baby whose adoption was at issue, had been whisked out of the jurisdiction to another country by an adoption attorney not involved with the case without my knowledge or court consent. One of the proposed changes to the NCAI draft (which was proposed by AAIA) would address this issue by making it a crime to move a child out of the country to avoid application of ICWA.

Mr. Gradstein and I went to New York a few weeks later and spent two full days with Trope and Hirsh to feel out areas of possible agreement. At first, we almost walked out and returned to California, as agreement on anything seemed impossible, but as they knew we had traveled across the country to try to work out a compromise, we all took a step back and decided to move slowly through the Act and see if we could at least identify areas we all agreed were problematic, and then see if we could agree on how to fix them.

After the initial attempt by the four of us to draft language, they expanded their group to include a broader base of Indian attorneys and tribal leaders. We met several more times during the year, and had multiple conference calls of several hours each, culminating in a three-day meeting in Phoenix in December of 1995 at which we finished the proposed amendments. They then circulated the proposal through the tribes and tribal organizations, and we circulated it through the adoption community, and we all met in Washington in late January 1996 to try to "sell" the amendments to the staffs of various Congressional members.

Jane A. Gorman
attorney at law

A short answer to your question is "yes": I do not believe that the tribal attorneys and representatives would have given so generously of their time and energy if this were anything but a good faith effort on their part.

QUESTION 4. In what ways would the compromise advance the goals of certainty, speed and stability in adoptions involving Indian children?

With notice to tribes being mandatory in voluntary placements, coupled with criminal penalties as a "stick" and speedy cut-offs as a "carrot," adoption attorneys and agencies will have every reason to obtain as much information as possible and to give notice as early as feasible in order to fully represent their clients' interests.

We have every reason to believe that if a tribe says it opposes a proposed placement, the adoptive parents will walk away from the proposed adoption then. The earlier that time can be, the better for all concerned. If, however, a tribe either does not respond, or writes back saying that it waives its right to intervene, the placement should be made and go forward. These amendments will ensure that the "at risk" period for adoptive parents and for children is much shorter.

QUESTION 5. Should Indian biological families and Indian tribes be involved in the adoptive placement of Indian children? If so, to what degree, and how?

As Indian biological mothers and fathers make the initial decision themselves of who will adopt their children in virtually every state, I presume you mean by your question should the "extended Indian biological families and Indian tribes" be involved? I believe that biological parents should have the unfettered right to choose by whom their child will be raised. I do not believe that this right should be intruded upon by their parents, much less their extended family.

The ICWA as it is currently written imposes placement preferences on adoptive placements of Indian children. If the amendments were enacted, and the tribe would be given notice of each placement, the mother's right to choose the adoptive family would still be preserved, but could be overridden by the tribe if the tribe thought the placement were inappropriate. By putting tight time frames on this intervention right, the mother would quickly know if her plan can go forward and could then choose whether to allow the alternative placement advocated by the tribe, or to keep the child.

Jane A. Gorman
attorney at law

QUESTION 6. Do you have reason to believe the Indian tribes will find acceptable the modifications you have proposed?

Yes. We spoke with a fairly large and representative group of tribal leaders and attorneys before coming to Washington last week, and got verbal approval. Jack Trope incorporated our proposed modifications into his testimony at the June 26 hearing (Appendix A of his testimony) and said that the Association on American Indian Affairs supports these technical amendments. (fn. 4, page 19)

QUESTION 7. On page one of your statement, you say the "lack of clarity" on notice and intervention in current law has disrupted placements. How would the compromise address this problem?

Under current law, no notice is required in voluntary placements. However, tribes have the right to intervene. Several California court of appeal decisions have implied a notice requirement in the Act, finding that the right to intervention, absent notice, is meaningless.

How this apparent conflict in provisions of the Act can cause disrupted placements is exemplified by the frantic calls I received after the Rost case became national news. As I testified last week, dozens of adoptive parents--some of them with completed adoptions, some with adoptions in progress--called and told me that both they and their attorneys knew that the children were Indian (some were even tribal members) but that no notice had been given to the tribes.

They all wanted to know what to do. All I could tell them were the risks involved in either course of action, and that the only way I could represent them is if they chose to belatedly give notice. The risks, obviously, to giving the tribe notice far into an adoption is that the placement can be disrupted then. The risk, just as obvious, of not giving notice at all is that the placement may forever be in jeopardy. What a Hobson's choice those poor people face.

These amendments would help eliminate this dilemma in future cases.

QUESTION 8. Based on your experience, do you agree with Mr. Gradstein's statement that the number of controversial cases is "few."

My practice consists solely of adoption litigation, so my experience is skewed. Every ICWA case I see is controversial. The ones in which adoptive parents decide to not proceed over the tribe's opposition, and the ones in which the tribes are either

Jane A. Gorman
attorney at law

given no notice or do not oppose the placement, never come my way.

However, I am aware that Mr. Gradstein took an informal survey of other placement attorneys to see if his statement was correct, and I believe he is discussing the results in his testimony.

I am sure that in the overall number of adoptions, those cases in which adoptive parents decide to try to adopt a child over a tribe's opposition are very few. However they are all tragic, and all stem from a placement being made, time elapsing during which the child is bonding to the adoptive parents and they to him, and then the tribe later trying to stop the adoption. The proposed amendments would preclude virtually all of these problems from happening.

QUESTION 9. How would the compromise lead to the early identification of those cases that will be controversial? And, how would this serve the "best interests" of the Indian children involved?

If a tribe is given notice pre-birth that an adoptive placement is contemplated which does not comport with the placement preferences, it has the opportunity right then to say it does not agree. These amendments would serve the best interests of Indian children no matter what happens: If a tribe wants the child, then the child will be placed at birth in compliance with the preferences or be raised by the birth mother. As Indian children being raised by Indian families is the primary purpose of the Act, the statutory purpose of the Act would be fulfilled. If, however, the child does not come under the provisions of the Act, or if the tribe does not want to intervene in the placement, then the child could be placed according to the birth parents' wishes, and the adoptive parents could begin at birth to fully bond with the child, secure in the knowledge that the placement will continue.

We hope that most of the problems can be identified pre-birth so no placements, or very few, will be disrupted at any time.

QUESTION 10. I note that you support making it a crime for professionals like yourself to wilfully disregard the obligation to provide proper notice to a tribe. Is this an indication of how strongly you support the notice requirement?

Yes. If the notice requirement had no "teeth," attorneys and agencies could disregard it just as they occasionally ignore the implied requirement in the Act as it currently reads.

The members of the two adoption academies we represented at the hearing (American Academy of Adoption Attorneys and Academy of

Jane A. Gorman
attorney at law

California Adoption Lawyers) have no desire to protect attorneys who encourage fraud. Thus we had little opposition to this provision. The only concern expressed was the fear of having to defend against baseless claims.

QUESTION 11. What issues have been addressed in Title III of H.R. 3286 that are not addressed in the NCAI compromise language? How would you propose to address these issues, given widespread tribal and Administration opposition to Title III?

A. Title III would make ICWA applicable only to children from existing Indian families. Although this is a hotly contested issue, I don't believe anyone in Indian country believes the Act should apply to children who are not really Indian or are not from Indian families. To argue otherwise would be to confer extra-territorial jurisdiction on tribes, by making children members who have no social, political or cultural connection with the tribes. No purpose would be served by making the Act applicable to children with no Indian heritage to protect.

The issue, then, becomes how to define Indian children. All tribes require some quantum (perhaps unspecified as to amount) of Indian blood. As specified blood quantum requirements appear to work quite well in determining the applicability of other federal Indian legislation, why would they not work equally well in ICWA? By applying the ICWA to tribal members who are also at least 25% Indian, there would be an objective standard that is not related to the volatile issue of "sovereignty."

The tribes respond that being Indian is a political classification, not a racial classification. If so, then in order for ICWA to apply, a child or his family should have some social, cultural or political connection with Indian culture in order to have a heritage worth preserving.

It seems to me that in order for the Act to withstand constitutional challenge, it needs to apply only to the population to whom it was meant to apply: children of existing Indian families.

In our compromise discussion with the tribes' attorneys, we learned during the first 10 minutes in New York last June that this was an issue we couldn't discuss. So we left it alone.

B. The second issue that Title III addresses is retroactive membership. I believe that to a certain degree, the compromise legislation addresses this issue in that it would require that when a tribe intervenes it has to declare that the child on whose behalf it is intervening is either a member or eligible for membership.

Jane A. Gorman
attorney at law

Just as our attorney groups do not want to protect fraudulent conduct among our members, we do not believe that tribes want to protect fraudulent conduct in Indian country either. The "wrong" that Title III seeks to remedy is a tribe wanting to stop an adoption for some reason and late into the placement retroactively declaring a child a tribal member in order to have ICWA apply and stop the adoption.

Our discussion group had formulated provisions which better addressed this issue than does the NCAI proposal, but those provisions did not survive the NCAI conference.

These provisions would have required a tribe to follow its own rules in making a child or a parent a tribal member, and would have provided a federal cause of action for "arbitrary and capricious" actions of a tribe when it inappropriately declared a child a tribal member. I would suggest that you look at these provisions and consider them. These were the product of the joint thinking of a fairly large group of tribal attorneys.¹

¹ Add 25 U.S.C. § 1923.

Proposed Language:

Add § 1923(a): PUBLICATION OF TRIBAL MEMBERSHIP CRITERIA - Within one hundred and eighty days after the enactment of this Act, and on an annual basis thereafter, the Secretary shall publish in the Federal Register the membership requirements of each Indian tribe which elects to have such requirement published.

Add § 1923(b): In any voluntary child custody proceeding in a state court in which an Indian tribe, which elects to not publish its membership requirements as provided in this section, seeks to intervene or file a notice of objection, such tribe shall append a copy of its membership requirements or statement disclosing the basis the tribe believes it is the Indian child's tribe to such notice.

Add § 1923(c)(1): REVIEW OF MEMBERSHIP DETERMINATION - For purposes of applying this Act to any voluntary child custody proceedings under State law, the United States district courts shall have original and exclusive jurisdiction over all civil actions to declare whether a determination by an Indian tribe that a child or biological parent of a child is or is not a member of such Indian tribe is contrary to the membership requirements of such tribe: Provided that the district courts shall exercise such jurisdiction only after the party seeking to invoke the jurisdiction of the district court has exhausted the procedures of

Jane A. Gorman
attorney at law

Again, I appreciate the opportunity to provide this additional input. I am looking forward to seeing the draft of the bill, and hope to be able to give further input.

Sincerely,

Jane A. Gorman, Esq.

JAG/sab

such Indian tribe, if any, for the review of such tribe's determination. The plaintiff in any such civil action shall have the burden of proving, by a preponderance of the evidence, that there is no objective basis for the tribal determination under the membership requirements of such tribe. In the absence of a finding that there is no objective basis for the tribe's determination, the district court shall defer to the tribe's determination. Any tribe whose membership determination is the subject of a civil action brought pursuant to this section shall be notified of such action and shall be given an opportunity to participate either as a party or as amicus curiae in such action.

Add § 1923(c)(2): NOTICE REQUIREMENT - The court shall have no jurisdiction to determine a cause of action brought under this subsection where a plaintiff who knew or had reason to know that child may be of Indian ancestry has not provided notice, in compliance with the requirements of sections 1913(c) and (d), to the Indian tribe prior to filing such action.

Add § 1923(d): FULL FAITH AND CREDIT - In any voluntary child custody proceeding under State law, the court, in determining the applicability of this Act to such proceeding, shall give full faith and credit to a judgment in an action brought pursuant to subsection (a) of this section.

MARC GRADSTEIN
ATTORNEY AT LAW
1204 BURLINGAME AVE., #7
BURLINGAME, CALIFORNIA 94010
TELEPHONE (415) 347-7041

June 21, 1996

United States Senate
Committee on Indian Affairs
838 Hart Building
Washington, D.C. 20510

RE: HEARING, JUNE 26, 1996, PROPOSED
AMENDMENTS TO THE INDIAN CHILD
WELFARE ACT (I.C.W.A.)

Dear Chairman McCain and Honorable Committee Members:

I am writing in support of the concepts set forth in the proposed draft amendments which have been developed by adoption attorneys and tribal representatives including the National Congress on American Indians (N.C.A.I.). Because no bill has been drafted as of this writing, and because the language approved by the N.C.A.I. needs "technical" (rather than "substantive") changes, I must condition my support on the final draft containing the modifications set forth in the testimony of my colleague, Jane Gorman.

The proposed amendments are intended to:

1. require notice to tribes in voluntary placements;
2. give the tribes as little as 30 days after the child's birth to intervene or lose the opportunity to do so;
3. make a tribal waiver of the right to intervene binding; and
4. make it a crime to aid and abet fraudulent misrepresentations by a birth parent regarding her/his Indian ancestry.

My perspective is that of a lawyer whose practice is primarily devoted to representing would-be adoptive parents. My clients are people who are seeking to adopt a baby or a young child in voluntary circumstances. They are highly motivated to avoid contested situations involving the pain and costs of litigation. My clients are not desperate, acquisitive baby-snatchers, but unluckily infertile people who seek to share their lives and love with a child whose birth parents are not in a position to take on the burdens of child-rearing. They enter into the world of adoption with high hopes and hearts overflowing.

I discovered this area of the law, after practicing in other fields, because my wife and I were unable to carry a pregnancy to term and we adopted a baby boy who is now in college. I know that adoption is a very good social institution and doubt that there is a more "politically correct" issue to endorse.

Page Two

Likewise, it is hard to oppose the purposes of the I.C.W.A. Indian children need protection against the loss of their heritage and culture. Tribes must safeguard their most precious "resource" - their children - if they are to remain in existence.

The problems these amendments seek to address are several:


- (1) As written, the I.C.W.A. does not clearly require notice to tribes other than for the involuntary termination of parental rights;
- (2) Tribes cannot intervene in adoptions or voluntary termination of parental rights cases unless they know that such cases exist;
- (3) Children who could be "Indian," as defined by the I.C.W.A., are "high risk" to potential adoptive parents and are, themselves, at risk of having their placements disrupted long after they have become attached to their adoptive families;
- (4) Children who are "Indian" are even more risky to adopt and "at risk" themselves.

These amendments would further the purposes of the I.C.W.A. and at the same time enable children of Indian heritage to be adopted with a much shorter period of uncertainty for the adoptive parents and the children alike.

Those few cases that involve controversy could be identified early. Settlement of such cases would be promoted by making visitation agreements enforceable.

For the foregoing reasons, I believe it will be an improvement for all concerned if these ideas can become the law.

Sincerely,


MARC GRADSTEIN
Attorney at Law

/e

MARC GRADSTEIN
ATTORNEY AT LAW
1204 BURLINGAME AVE., #7
BURLINGAME, CALIFORNIA 94010
TELEPHONE (415) 347-7041

July 1, 1996

United States Senate
Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator McCain and Honorable Members
of the Senate Committee on Indian Affairs:

This is in reply to your letter of June 27, 1996 asking additional questions. Before answering, please accept my thanks for inviting me to comment on these matters, both at the hearing and again at this time.

1. In your view, is the compromise the product of good faith efforts on the part of the tribal governments?

The simple answer is "yes." The most significant and far-reaching product of the draft legislation produced at our joint meetings in Phoenix, last December, is embodied in the N.C.A.I. proposal.

Although I took the opportunity at the hearing to advise the Committee that my "pet" provision of our work in Phoenix had not been approved by the N.C.A.I., I did not intend to question the "good faith" of those who voted it down. I was not present at the N.C.A.I. meeting, but I have been told that the debate was lively and lengthy and that the broader issue of "sovereignty" was believed by those who opposed the measure to be at stake.

The provision I had hoped to see enacted would have given a clear legal remedy for persons seeking to question the "good faith" of a tribal membership determination. It would have given Federal District Courts jurisdiction to hold the I.C.W.A. inapplicable to a child where the child's membership was granted in arbitrary and capricious disregard of the tribe's own membership rules.

Fortunately, I do not believe that tribes often ignore or stretch their membership requirements to bring children

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within the I.C.W.A. Therefore, the proposals which the N.C.A.I. did endorse, and which apply to all potential voluntary I.C.W.A. adoption cases, are of much more widespread importance and impact than the one I regretted to see voted down. I mentioned my concern over the federal remedy provision to the Committee in the context of the broader issues of due process and constitutionality of the I.C.W.A. raised below at question number 7.

2. In what ways would the compromise advance the goals of certainty, speed and stability in adoptions involving Indian children?

By requiring notice to tribes and by requiring prompt intervention by tribes, contested I.C.W.A. cases would be identified much sooner than at present. Likewise, uncontested I.C.W.A. cases would be able to proceed with the assurance that they would remain uncontested.

Adoptive parents dread litigation. The early knowledge that a tribe intended to go to court to try to block their prospective adoption would send all but the rarest adoptive parents running to locate a different child. Under the present law, the likelihood is much greater that by the time tribal intervention occurs, the attachment between the child and the adoptive parents is too great to sever without a court order.

3. Should Indian biological families and Indian tribes be involved in the adoptive placement of Indian children? If so, to what degree and how?

This question calls for a value judgment that I must make as the non-Indian person who I happen to be. Except for I.C.W.A. cases, voluntary adoptive placement decisions are usually made by the birthparents, sometimes in consultation with their families, sometimes over the objection of their families, and sometimes without the knowledge of their families. This is based on the concept that it is the parents' unique right to place their child (subject, of course, to court approval that the home is "suitable").

Indian tribes, as Senator Inouye pointed out at the hearing,

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have no direct analog among other ethnic, racial or religious groups in our society. It is my humble, non-Indian belief that Indian children are viewed by their tribal members as being a part of a larger "family unit" than the so-called "nuclear" family. Presumably, they have a right, as children, not to be adopted out of this "family" solely on the basis of their parents' wishes. If this is correct, then for the child's sake, the larger tribal unit must be consulted and offered an opportunity to be heard.

The I.C.W.A. attempts to balance parental, tribal, relative and children's interests by giving each some voice in the decision. Assuming that these interests should be each given weight, the I.C.W.A. probably has enough checks and balances to be fair to each.

However, two of these underlying assumptions are worthy of examination and have led, I believe, to questions of constitutional magnitude in the courts:

(1) Is tribal membership, alone, a sound standard by which to determine that a child should be included within the I.C.W.A.? Is a child who has a very small percentage of Indian heritage (and, thus, a very large percentage of non-Indian heritage) and no real social, cultural, religious and/or political ties to the tribe of ancestry, sufficiently "Indian" so that the I.C.W.A. should apply? Should the child's parents or the child himself or herself have the right to opt out of this "family," who may be strangers?

Questions such as these have led some courts to embrace the so-called "existing Indian family" doctrine held, thus far, in the Rost case to be the only way to save the I.C.W.A.'s constitutionality. Included with these answers as "Exhibit A" is a copy of a recent appellate decision that goes beyond the Rost case on this issue.

(2) In my oral testimony I made reference to a second constitutional argument against the "tribal membership"

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standard which determines I.C.W.A. applicability. That argument was made on behalf of the twins in the Rost case and I will quote it in full:

"In the ICWA, Congress has delegated the power to determine who is an Indian child and subject to the ICWA to the tribe. The determination is conclusive and not subject to attack. (*In re Junious M.*, *supra*, 144 Cal.App.3d at 793.) Congress has provided no standards -- including a minimum percentage of Indian blood -- by which to guide the tribe's determinations. As Congress has provided no guidelines to the tribe in the ICWA, the delegation of authority cannot be deemed reasonable as there is no manner by which abuse of the decision making power by a tribe may be prevented or challenged.

In order to constitutionally delegate the power to determine who is an Indian child to a tribe, Congress must establish some policies for that determination. From those policies, Congress must create a framework or guidelines to guide the empowered tribe. For example, in *Morton v. Mancari*, Congress made a specific policy determination that Indians were to be given a preference in hiring at the BIA. "To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a federally recognized tribe." (*Morton v. Mancari*, *supra*, 417 U.S. at 553 n. 24 [emphasis added].) From this fundamental policy decision made by Congress, the agency charged with executing this policy was able to issue rules and policies toward promoting the congressional policy. Thus, whether the BIA's decisions were consistent with the congressional mandate was a matter with sufficient standards for evaluation by others outside of the BIA.

By contrast, the ICWA provides no yardstick by which to measure compliance with legislative policy. Congress has set no minimum guidelines with the ICWA and provided unbridled power to a tribe to determine a child's Indian status. Presumably, a child with no Indian blood or a very small percentage of Indian blood could be deemed an Indian

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child under the ICWA without challenge by anyone -- including that individual. This oversight by Congress virtually places the most important decisions about the ICWA -- whether it applies at all -- in the hands of the Indian tribe with no right of review and no standards by which to judge the tribe's determination.

While a tribe may have the power to govern its internal affairs and determine membership for tribal purposes, a determination of an Indian child's status is not a decision affecting only the internal political workings of a tribe. It is one thing to define tribal membership for internal purposes only. It is quite another to define tribal membership for purposes of applying a federal statute.

Congress' lack of standards in the ICWA to define "Indian child" creates the potential for abuse as Congress did not delegate its authority consistent with constitutional principles. For example, a situation could exist where a child is placed in foster care or an adoptive placement and an Indian tribe later "conclusively" determines that the child is an Indian child. The child may have been in his or her placement for years before the child's Indian status is conclusively determined by the tribe.

In such a situation, where an Indian Child's status is determined after a child has been in a placement for a period of time, the child's fundamental liberty interests are impacted. Even where a child is old enough and perhaps mature enough to voice a preference for his or her placement, where an Indian tribe has determined that a child is an Indian child subsequent to placement, the child's desires may be ignored under the federal statute if his or her current placement is outside of the placement scheme dictated by the ICWA.

Further, the principle that "[a]ny member of an Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses," cannot be said for children. (Cohen, *Handbook of Federal Indian Law* 135 (1971).) Under the ICWA, a child has no option but to be considered an Indian child and subject to the ICWA if the tribe so determines.

Moreover, to the extent the ICWA provides conclusive

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authority to the tribe to determine a child's status as an Indian child without any articulated standards, it provides the child with no procedural safeguards or right of review.²¹ As the ICWA is premised on the assumption that it is in an Indian child's best interests to be placed within their tribe, it is clear Congress was not concerned about procedural due process and safeguards. Where a minor has not been represented and heard in the tribal determination regarding the child's status as an Indian child, the child should be able to attack the judgment."

My answer to this question is murky because I believe that the use of the term "Indian children" for the purpose of I.C.W.A. applicability requires serious reconsideration. I have no illusions that this Committee will undertake such a huge, controversial inquiry this year in the context of the N.C.A.I. proposals. However, to honestly address this question, I must condition my wish to see the purposes of the I.C.W.A. promoted on my belief that the statute, as written, is constitutionally defective.

4. Do you have reason to believe the Indian tribes will find acceptable the modifications you and Ms. Gorman have proposed?

Yes. All of our proposed modifications have been thoroughly discussed with representatives of the group that drafted the N.C.A.I. language in Tulsa. As stated by Jack Trope in his written testimony on behalf of Association on American Indian Affairs, Inc., at p. 19, footnote 4, the modifications, though important, are clarifying and not in conflict with the intent of the N.C.A.I. draft. Nevertheless, failure to make these changes would sufficiently undermine the purposes of the proposal so that we and the organizations we represent could not support it.

²¹ Such power delegated to an administrative body, for example, would be subject to the procedural protections afforded to an individual under the Administrative Procedures Act. (5 U.S.C. sec. 501, et seq.)

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5. On page two of your statement, you say cases that involve controversy are "few" in number. Based on your experience, can you estimate the number of these cases?

I based my statement on the fact that the I.C.W.A. is part of any adoption in which a child is of Indian ancestry. This is true because the threshold question: "Is this child subject to the I.C.W.A.?" must be answered in every such case.

In my experience, and that of many other adoption attorneys with whom I have consulted, the estimated numbers are as follows:

- (1) Children of Indian ancestry: 10-20%
- (2) Children of Indian ancestry who are "Indian children" as defined by the I.C.W.A.: 1-2%
- (3) "Indian children" as defined by the I.C.W.A. whose voluntary adoption is opposed by the tribe and results in litigation: less than 1%

The reasons for this very low estimated number of cases involving controversy are:

- (1) Adoption attorneys and agencies are dealing with the population-at-large, of which only a small percentage are "tribal members" or "children of tribal members who are, themselves, eligible for membership;"
- (2) Most tribes do not choose to intervene in voluntary placements to thwart the birthparents' wishes;
- (3) When a tribe indicates that it will intervene early in the process, adoptive parents back off.

Unfortunately, it is important to remember that in as many as 20% of all adoptions (based on these numbers) the adoption is "at risk" because of the presence of any Indian ancestry and the possibility of intervention for years after the placement. The reality of possible risk and the common perception that the risk is substantial make children of Indian ancestry less desirable to many would-be adoptive

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parents than if that risk were reduced or eliminated.

6. How would the compromise lead to the early identification of those cases that will be controversial? And how would this serve the "best interests" of the Indian children involved?

If enacted, the "compromise" legislation would cause tribes to get notice as soon as possible of known potential "Indian children." Lawyers and agencies planning adoptive placements would have a huge incentive to notify tribes at least 60 days before the child's birth (or placement). This would limit the time that the child would be "in limbo" in the adoptive home to a maximum of 30 days.

The tribe seeking to block a potential adoption would, likewise, have every reason to act promptly. I believe that tribes would give notice of intent to intervene as soon as they were to decide that that is their plan, in order to possibly preclude a placement and to minimize harm to the child.

Early awareness of which cases will be controversial is of immeasurable benefit to the children in question. At best, the adoptive placement could be avoided. If litigation did ensue, it would be concluded as soon as possible. This would be advantageous to the child regardless of the result.

7. What issues have been addressed in Title III of H.R. 3286 that are not addressed in the NCAI compromise language? How would you propose to address these issues, given wide spread tribal and Administration opposition to Title III?

Title III of H.R. 3286 codifies the "existing Indian family" doctrine as articulated in the decision in the Rost case. Nothing in the N.C.A.I. language addresses this issue. As I stated in my answer to question number 3 above, I believe that the question "To which children should the I.C.W.A. apply?" is a highly controversial policy issue of constitutional dimension. Were Title III to become the law, courts across the country would decide I.C.W.A. applicability on a case-by-case

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basis. I cannot tell this Committee that I believe that courts would not act wisely and appropriately.

Both groups of attorneys who have authorized me to speak on their behalf support Title III. Personally, based on my perhaps naive political assessment that Title III cannot be enacted into law, I believe that Congress should carefully reexamine the breadth of the "membership" basis for I.C.W.A. applicability in a future legislative session.


I do believe that the "retroactivity" problem addressed in Title III will be ameliorated if the N.C.A.I. draft becomes law. The relatively short time lines for membership and/or intervention determinations will solve the most egregious "retroactivity" horror stories by forcing tribes to take action in a timely manner or forego intervention.

I have tried to answer your questions thoroughly, but not too technically or tediously to be read easily. I continue to be at the Committee's disposal if I need to expand or explain my answers or if I can be of any further service.

While we have used words like "compromise draft" a good deal, this effort is more an attempt to do the "right" thing for all concerned than a battle of forces. All of us who have worked on this project want to see children of Indian ancestry well served and kept out of court battles as much as possible.

Thank you again for inviting my views.

Sincerely,


MARC GRADSTEIN
Attorney at Law

COPY

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL, 4TH DIST., DIV. 3
FILED

MAY 3 1 1996

Stephen M. Kelly, Clerk
Deputy Clerk

In re ALEXANDRIA Y., A Person
Coming Under the Juvenile
Court Law.

ORANGE COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

SEMINOLE NATION OF OKLAHOMA,

Defendant and Appellant.

G018179

(Super. Ct. No. J-423844)

OPINION

Appeal from a judgment of the Superior Court of Orange County, James P. Gray, Judge. Affirmed.

Sylvia L. Paoli and Paoli & Paoli, Inc., under appointment by the Court of Appeal, for Defendant and Appellant.

Laurence M. Watson, Chief Assistant County Counsel, and Michelle Ben-Hur, Deputy County Counsel, for Plaintiff and Respondent.

John L. Dodd and Harold La Flamme, under appointment by the Court of Appeal, for the Minor.

EXHIBIT A

The Seminole Nation of Oklahoma (the SNO) appeals from the judgment terminating the parental rights of Renea Y., an enrolled tribal member, to her daughter, Alexandria. The SNO contends the trial court violated the Indian Child Welfare Act (hereinafter "ICWA" or "Act") by failing to transfer jurisdiction of the proceedings to the SNO and failing to follow the ICWA placement preferences. We find the trial court properly refused to apply the provisions of the ICWA because neither Alexandria nor Renea had any significant social, cultural or political relationship with Indian life; thus, there was no existing Indian family to preserve.

Facts

Alexandria Y. was born in December 1990 with cocaine in her system. She was immediately taken into custody by the Orange County Social Services Agency (SSA) and was placed in an emergency shelter home. She was declared a dependent of the juvenile court under Welfare and Institutions Code section 300, subdivisions (a) and (b) in February 1991. In August, when Alexandria was seven months old, she was moved to the home of the T.'s, an Hispanic family,¹ where she has lived ever since. In September, the six-month review hearing was held. SSA had been unable to locate either parent and neither of them had contacted or visited Alexandria. The trial court terminated reunification services and set a selection and implementation hearing for December 1991.

In October, SSA discovered that Renea was an enrolled member of the SNO, making Alexandria eligible for enrollment and potentially subject to the ICWA. It was determined that Renea is one-eighth Seminole Indian; she was adopted as a toddler by a non-Indian family. The selection and implementation hearing was continued several times to accommodate the notice requirements of the ICWA, and the SNO indicated its intent to intervene in the proceedings by letter dated February 11,

¹ Alexandria's father is Hispanic.

1992. It expressly stated it did "not wish to transfer these state court proceedings to tribal court," but requested that the trial court follow the placement preferences of the ICWA. The SNO (and, for the first time, Renea) appeared on March 31. The SNO again requested the placement preferences be followed, and in May counsel was appointed to represent it. In June, the trial court held a hearing to determine whether Alexandria was an Indian child as defined by the ICWA.² After several days of testimony, the trial court concluded that she was, but found the ICWA inapplicable because the SNO's criteria for membership was not based on a quantum of blood analysis and was, therefore, unreasonable.³

The SNO filed for writ relief in this court, arguing that once a minor is determined to be an "Indian child" as defined by the ICWA, the juvenile court has no jurisdiction to consider the reasonableness of such determination. This court agreed, and issued a peremptory writ of mandate directing the trial court to recognize "SNO's determination that Alexandria is an Indian child and therefore entitled to placement preference under section 1915, subdivision (b) [fn. omitted]." (*Seminole Nation of Oklahoma v. Superior Court* (July 31, 1992) G012836.)⁴

² An Indian child is defined as "any unmarried person who is under age eighteen and is . . . eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903, subd. (4)(b).)

³ Membership in the SNO is open to those who can prove their blood relationship, no matter what the degree, to one of the Seminole Indians named on a tribal list prepared around 1900.

⁴ The SNO claims this holding is law of the case and dispositive of the question whether the trial court should have applied ICWA's placement preferences. But the doctrine of law of the case does not apply where the appellate court is considering a ground that was not raised in the prior appellate proceeding. (*Searle v. Allstate Life Ins. Co.* (1983) 38 Cal.3d 425, 435.) The issue before us in the writ proceeding was narrowly framed: "Once a minor is determined to be an 'Indian child' as defined by the ICWA, does the juvenile court have jurisdiction to inquire into the reasonableness of such determination?" (*Seminole Nation of Oklahoma v. Superior Court, supra*, G012836.) The "Indian child" determination was a threshold issue in this case; none of the considerations involved in applying the placement preferences or other provisions of the ICWA had yet been presented to the trial court, let alone this court, at the time of the writ proceeding.

When proceedings resumed, the mother filed a petition to transfer Alexandria's case to the tribal court. (25 U.S.C. § 1911, subd. (b).) The trial court set a hearing on the issue of whether good cause existed to deny the transfer petition, followed by the trailing selection and implementation hearing, for September 21. The trial court notified the SNO of the transfer petition by letter, stating, "Please be advised that the mother of [Alexandria] . . . has . . . filed a PETITION FOR TRANSFER OF CASE TO TRIBAL COURT . . . [¶] Pursuant to the Indian Child Custody Guidelines, C. 4. (b), you have twenty days from the receipt of this notice of proposed transfer to decide whether to decline the transfer. [¶] You may inform this court, per the Guidelines, of your decision orally, or in writing." SNO petitioned the tribal court to accept jurisdiction, and Chief Magistrate Tah-Bone, thinking the trial court had already transferred jurisdiction, issued an order accepting jurisdiction on September 8.

On September 21, the SNO orally joined in Renea's petition to transfer, and Renea orally joined in the SNO's motion to enforce the ICWA placement preferences. The hearing on the transfer motion commenced and continued for several days over a three-month period. Dr. Roberto Flores de Apodaca, a clinical child psychologist, testified he had performed a bonding study on Alexandria and her foster parents when Alexandria was about 15 months old. He observed that a "secure bonding or attachment had taken place" between them, providing Alexandria with a sense of security which was critical to her optimum development. Removing her from her placement with the T. family would probably cause her to "suffer negative emotional consequences" manifested by "emotional withdrawal . . . , indiscriminate friendliness or provocative behavior" Dr. Apodaca performed a supplemental bonding study in November, and testified there was still a strong bond between Alexandria and her foster parents. He opined she was even more vulnerable to emotional damage from a separation than he had initially thought, and it was likely she would suffer detrimental effects if she were to be removed from the T. family.

Dr. Dixie Noble, a Native American psychologist, testified that she believed, based on reading studies performed by others, "Native American children who grow up in non-Indian homes have greater difficulties later on when the issue of identity becomes important in adolescence." After hearing the testimony and argument, the trial court denied the petition for transfer, finding the petition was untimely and that transfer would result in an inconvenient forum for the hearing on termination of parental rights and would be contrary to the best interests of the child.

The selection and implementation hearing concluded in March 1993. The trial court selected adoption as Alexandria's permanent plan and terminated Renea's parental rights. The trial court then found there was good cause, beyond a reasonable doubt, not to enforce the ICWA placement preferences. Its determination was based on the record of all proceedings in the case since December 1991, specifically including the prior testimony of Drs. Apodaca and Noble. Both Renea and the SNO appealed.

In January 1994, this court filed an unpublished opinion reversing the judgment terminating Renea's parental rights. We found it was error to terminate reunification services and schedule the selection and implementation hearing after the six-month review hearing when jurisdiction over Alexandria had not been based on abandonment. (Welf. & Inst. Code, § 300, subd. (g), § 366.21, subd. (e).) We remanded the case for a new six-month hearing and noted: "Our disposition of this issue eliminates the need to address several of the other issues raised by Renea and the Seminole Nation of Oklahoma." (*In re Alexandria Y.* (January 31, 1994) G013944.) Both SSA and Alexandria filed petitions for rehearing, urging us to address the ICWA issues because they would be relevant on remand. Both petitions were denied. A

petition for review in the Supreme Court was also denied. The remittitur issued on May 9, 1994.⁵

After several continuances to accommodate the reappointment of counsel, the adoption of a reunification plan for Renea, and notice requirements, a new 12-month hearing was held in February 1995. Shortly before the hearing, Renea filed a petition for transfer of jurisdiction to the tribal court. At the hearing, the SNO expressly declined to join in the petition. The trial court denied the petition, erroneously finding the October 1992 order denying transfer was *res judicata* and thus could not be reconsidered; it also reaffirmed the previous bases for denial, finding the petition was untimely, and that transfer would result in an inconvenient forum and be contrary to Alexandria's best interests. The trial court then addressed the 12-month review issues. The social worker reported she had received a letter from Renea expressing her desire to relinquish her parental rights to Alexandria and to have the child adopted by her present caretakers. The trial court terminated reunification services and set a selection and implementation hearing for June 1995.

On June 15, the SNO filed a motion requesting a change in Alexandria's placement based on the ICWA preferences. On June 20, the court denied the motion on several grounds: (1) no Indian family existed to which the provisions of the ICWA could be applied; (2) the preferences were unconstitutional in that they denied Alexandria equal protection of the law based on race; (3) the issue of placement preferences was *res judicata*, having been previously decided by the trial court and not

⁵ Both Alexandria and SSA argue because we did not order Alexandria removed from the T. family home and placed with an Indian family in the first appeal, we impliedly approved her placement. Thus, they claim, the propriety of her placement is now law of the case. But the effect of our reversal was to place the case back at the six-month hearing stage, before the SNO became involved and any of the ICWA issues were raised. The posture of the case was as if none of the subsequent hearings had been held. (*Barnes v. Litton Systems, Inc.* (1994) 28 Cal.App.4th 681, 683-684.) Although we could have addressed the issue for the guidance of the trial court on remand, we chose not to. Our refusal to speak gratuitously to an issue does not render it law of the case.

ruled on by this court in the prior appeal; (4) neither the original nor the present request to apply the ICWA preferences was filed in a timely manner.

The trial court then conducted the selection and implementation hearing. All parties stipulated the permanency issues would be decided based on the 12-month review findings, the prior testimony of Dr. Apodaca, and the most current SSA report. The trial court made the necessary findings, terminated Renea's parental rights and ordered Alexandria to be placed for adoption.

Discussion

The SNO levels a host of challenges at the trial court proceedings, but the most significant is the viability of the judicially created "existing Indian family doctrine." There is a split on this issue, both nationally and in California. For the reasons explained below, we follow those cases refusing to apply the ICWA unless the Indian child or at least one of his parents has a significant social, cultural or political relationship with Indian life.

The ICWA (25 U.S.C. § 1901 et seq.)⁶ was enacted in 1978. It "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 109 S.Ct. 1597, 1600.) Testimony of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, at congressional hearings indicated that tribal sovereignty in the socially and culturally determinative area of family relationships was being undermined by authorities who lacked an understanding of the Indian way of life. "One of the most serious failings of the present system is that Indian children are removed from the custody of their natural

⁶ All further statutory references are to the United States Code, ICWA.

parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.' [(Hearings on Sen. Bill No. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978) at pp. 191-192.)]' (*Id.* at p. 1601.)⁷

The ICWA sets forth a congressional declaration of policy: "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." (§ 1902.) The Act provides an Indian tribe shall have exclusive jurisdiction over custody proceedings involving an Indian child who resides or is domiciled within the reservation (§ 1911, subd. (a)), and the state court shall, upon petition and in the absence of good cause to the contrary, transfer proceedings for foster care placement or termination of parental rights involving a non-domiciliary Indian child to the tribe (§ 1911, subd. (b)). If the proceedings remain in state court, the tribe has the right to

⁷ Congress enacted findings in the ICWA that reflect the gist of the testimony: "Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

".....
 ¶ "(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and ¶ (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." (§ 1901)

intervene. (§ 1911, subd. (c).) The Act provides that no involuntary termination of parental rights to an Indian child may be ordered unless the court determines, based on proof beyond a reasonable doubt, including the testimony of expert witnesses, that continued custody of the child by the parent is likely to result in serious emotional or physical damage. (§ 1912, subd. (f).) Absent good cause to the contrary, placement preference shall be given to: (1) a member of the Indian child's extended family; (2) a foster home approved by the child's tribe; (3) an Indian foster home approved by a non-Indian authority; or (4) a children's institution approved by an Indian tribe. (§ 1915, subd. (b).)

Cases following the "existing Indian family doctrine" refuse to apply the ICWA to situations where an Indian child is not being removed from an existing Indian family, because in that situation the underlying policies of the ICWA are not furthered. The perception of "Indian family" has differed from court to court. One group of cases has refused to apply the ICWA where the Indian child himself has never lived in an Indian family and has had no association with Indian culture, even though his biological parent has had such associations. (See, e.g., *Matter of Adoption of Baby Boy L.* (Kan. 1982) 643 P.2d 168; *Matter of Adoption of T.R.M.* (Ind. 1988) 525 N.E.2d 298; *In Interest of S.A.M.* (Mo. 1986) 703 S.W.2d 603; *Adoption of Baby Boy D.* (Okla. 1985) 742 P.2d 1059.)

In *Baby Boy L.*, the first case to articulate the doctrine, the baby was the illegitimate child of a non-Indian mother, who voluntarily surrendered him to a non-Indian family for adoption on the day of his birth. The biological father, who was incarcerated, objected to the adoption and requested custody. Because the father was five-eighths Kiowa Indian, the Kiowa Tribe of Oklahoma was notified, and it petitioned to intervene and to transfer jurisdiction. The Kansas Supreme Court stated, "A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the

maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother. Section 1902 of the Act makes it clear that it is the declared policy of Congress that the Act is to adopt minimum federal standards 'for the removal of Indian children from their (Indian) families.' Numerous provisions of the Act support our conclusion that it was never the intent of Congress that the Act would apply to a factual situation such as is before the court." (*Matter of Adoption of Baby Boy L.*, *supra*, 643 P.2d at p. 175.)

In *Baby Boy D.*, the Oklahoma Supreme Court likewise found the ICWA inapplicable to an unwed Indian father who sought to invalidate an adoption accomplished with the non-Indian mother's consent. Although the father had attended an Indian school and had other contacts with his tribe, the court found the child was not being removed from an existing Indian family unit. "Here we have a child who has never resided in an Indian family, and who has a non-Indian mother." (*Adoption of Baby Boy D.*, *supra*, 742 P.2d 1059, 1064.) In *In Interest of S.A.M.*, a Missouri court also followed *Baby Boy L.* and refused to apply the ICWA where an unwed "full-blooded" Kickapoo Indian father sought custody of his seven-year-old daughter after the non-Indian mother's parental rights were involuntarily terminated. The father was not aware of the child's existence until she was almost seven, and the two had visited only twice before the litigation. She had severe emotional problems and was mentally handicapped. The court found the relationship between the father and daughter "does not constitute an 'Indian family' of the type mentioned in [ICWA]." (*In Interest of S.A.M.*, *supra*, 703 S.W.2d at p. 608.) And in *Adoption of T.R.M.*, the Indiana Supreme Court found the ICWA inapplicable to an attempt by the Oglala Sioux Indian

Tribe and the Indian mother to revoke her consent to the adoption of her daughter by a non-Indian couple. Although the child had not been formally adopted by the couple until the mother sought her return, she had lived with them as their daughter for seven years. The court held, "In the case before us, the child's biological ancestry is Indian. However, except for the first five days after birth, her entire life of seven years to date has been spent with her non-Indian adoptive parents in a non-Indian culture. While the purpose of the ICWA is to protect Indian children from improper removal from their existing Indian family units, such purpose cannot be served in the present case before this Court. . . . [W]e cannot discern how the subsequent adoption proceeding constituted a 'breakup of the Indian family.'" (*Matter of Adoption of T.R.M.*, *supra*, 525 N.E.2d at p. 303.)

Other cases have looked beyond the Indian ties of the child to those of the parents when considering the existing Indian family exception to the applicability of the ICWA. In *Matter of Adoption of Crews* (Wash. 1992) 825 P.2d 305, the mother, who discovered some Indian heritage after the birth of her child, sought to revoke her consent to the child's adoption. The Washington Supreme Court reviewed the purposes of the ICWA and concluded there was no existing Indian family unit where "[n]either [the mother] nor her family has ever lived on the . . . reservation in Oklahoma and there are no plans to relocate the family [The father] has no ties to any Indian tribe or community and opposes [the child's] removal from his adoptive parents. Moreover, there is no allegation by [the mother] or the [tribe] that, if custody were returned to [the mother], [the child] would grow up in an Indian environment. To the contrary, [the mother] has shown no substantive interest in her Indian heritage in the past and has given no indication this will change in the future." (*Id.* at p. 310.) In *Hampton v. J.A.L.* (La. App.2 Cir. 1995) 658 So.2d 331, the mother was 11/16th Indian and was a member of her father's tribe. She was born on the reservation of her mother's tribe and lived there for nine years, but had not since maintained any ties to

either tribe. She agreed to the adoption of her child by a non-Indian couple, who took custody the day after the birth. Six months later, the mother sought to revoke her consent under the ICWA. Citing *Baby Boy L., Crews*, and *T.R.M.*, the Louisiana appellate court found the adoption would not cause the breakup of an existing Indian family or removal of a child from an Indian environment. "The child has never participated in Indian culture or heritage and more importantly based on the evidence presented, would not be exposed to such culture in the future even if returned to her biological mother or her family." (*Hampton v. J.A.L.*, *supra*, 658 So.2d at p. 337.)

In *re Bridget R.*, *supra*, 41 Cal.App.4th 1483, the most recent case on the existing Indian family doctrine, involved a voluntary relinquishment of twins for adoption. The mother was not a Native American, but the father was recognized as a member of the Pomo Indian tribe, whose reservation is in northern California. The parents lived in Los Angeles County at the time of the births. Upon the execution of the relinquishment documents, the twins were immediately placed with their adoptive family, who returned with them to their home in Ohio where they have remained ever since. The father subsequently petitioned to have his voluntary relinquishment rescinded as not in compliance with the ICWA. (§ 1913, subd. (a); § 1914.) Declining to apply the existing Indian family doctrine, the trial court invalidated the relinquishments, and ordered the twins removed from their adoptive family and returned to the custody of the father's extended family.

After extensive analysis, the appellate court reversed, holding that recognition of the existing Indian family doctrine was necessary to preserve the ICWA's constitutionality. "We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or

political relationship with their tribe.” (*In re Bridget R.*, *supra*, 41 Cal.App.4th at p. 1492.) The court concluded that the application of the Act under these circumstances would thwart its purpose of preserving Indian culture through the preservation of Indian families and would violate the Constitution by:

(1) impermissibly intruding upon a power ordinarily reserved to the states; (2) interfering with Indian children’s fundamental due process rights respecting family relationships; and (3) depriving Indian children of equal opportunities to be adopted and exposing them to an unequal chance of having non-Indian families torn apart based solely on race, in the absence of a compelling state purpose. Because the trial court had not taken evidence on whether the biological parents maintained “significant social, cultural or political relationships” with the tribe, the case was remanded for a determination on that issue.⁸

We agree with *Bridget R.* that recognition of the existing Indian family doctrine is necessary to avoid serious constitutional flaws in the ICWA. But we disagree with its holding that the doctrine *cannot* come into play unless the child *and* both his parents lack a significant relationship with Indian life. We are not willing to so limit the doctrine. As demonstrated by our review of the cases, whether there is an existing Indian family is dependent on the unique facts of each situation.

Nor must the existing Indian family be limited as suggested in *Bridget R.*. Contrary to the view of the *Bridget R.* court (41 Cal.App.4th at p. 1500), a broader interpretation of the doctrine has not been impliedly rejected by the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*, *supra*, 109 S.Ct. 1597. *Holyfield*

⁸ Two additional California cases have recognized the doctrine, but neither relied on it as a basis for the decision. (*In re Baby Givi A.* (1991) 230 Cal.App.3d 1611; *In re Wanomi P.* (1989) 216 Cal.App.3d 156.) And two California cases have refused to apply the doctrine where only the child’s Indian contact was considered. (*Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404; *In re Junious M.* (1983) 144 Cal.App.3d 786.) Several other states have rejected the doctrine. (See, e.g., *Matter of Adoption of T.N.F.* (Alaska 1989) 781 P.2d 973; *Matter of Baby Boy Doe* (Idaho 1993) 849 P.2d 925; *Matter of N.S.* (S.D. 1991) 474 N.W.2d 96.)

involved twin babies whose parents lived on the reservation and were enrolled members of the tribe. The babies were born 200 miles from the reservation and were voluntarily relinquished for adoption to a non-Indian couple, who adopted them in state court. The trial court found the twins’ were not domiciled on the reservation because they had never been physically present there; thus, the tribal court did not have exclusive jurisdiction of the proceedings under § 1911, subdivision (a). The Supreme Court disagreed. It held that the domicile of minors is generally the domicile of their parents; thus, the twins were domiciled on the reservation and the tribal court had exclusive jurisdiction.

Holyfield did not reject any form of the existing Indian family doctrine. It dealt with reservation-domiciled Indian parents who had left the reservation temporarily for the birth of their children so they could relinquish them for adoption and avoid the application of the ICWA. The Supreme Court held the application of the exclusive jurisdiction provisions of the ICWA could not be defeated by the acts of the parents. (*Id.* at pp. 1608-1609.)

Furthermore, the facts of the case before us do not require us to hold, in the abstract, that the existing Indian family exception will *not* apply (in other words, the ICWA *will* apply) if one of an Indian child’s biological parents, no matter how removed from the child’s life, has maintained a connection to Indian life that a trial court deems significant. Here, the ICWA is not applicable under any version of the doctrine. Neither Alexandria nor Renea has any relationship with the SNO, let alone a significant one. Renea was raised by a non-Indian family, and her extended family is non-Indian. The issue of the existing Indian family doctrine was fully litigated below, but no evidence was presented to suggest Renea had ever been exposed to her Indian heritage as a child or pursued such an interest as an adult. The father is Hispanic, and Alexandria is placed in a preadoptive Hispanic home where Spanish is spoken. Under

these circumstances, it would be anomalous to allow the ICWA to govern the termination proceedings. It was clearly not the intent of the Congress to do so.

On the basis of the existing Indian family doctrine, we affirm the trial court's refusal to transfer jurisdiction to the SNO and to apply the ICWA's placement preferences.⁹ The judgment terminating Renea's parental rights is affirmed.

CERTIFIED FOR PUBLICATION.

WALLIN, J.

I CONCUR:

SILLS, P. J.

⁹ The SNO argues the case was actually transferred to it in September 1992 when the trial court notified the tribal court of the mother's petition and the tribal court issued an order accepting jurisdiction. This argument must fail because the letter from the trial court could not function as an order. Chief Magistrate Tah-Bone thought the trial court was transferring jurisdiction, and the trial court thought it would see if the tribal court wanted jurisdiction before it held a good cause hearing. This was a misunderstanding and does not elevate a letter to the status of a binding order.

CROSBY, J., concurring:

While I concur in the result in this case and some of the court's reasoning, I decline to endorse the majority's gratuitous criticism of *In re Bridget R.* (1996) 41 Cal.App.4th 1483. (Maj. slip opn. pp. 13-14.)

CROSBY, J.

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

on

**AMENDMENTS TO THE INDIAN CHILD WELFARE ACT
PROPOSED BY THE NATIONAL CONGRESS OF AMERICAN
INDIANS**

Washington, D.C.
June 26, 1996

Walleri Testimony

Chairman McCain, Members of the Committee, Good Morning.

My name is Michael J. Walleri, from Fairbanks, Alaska. For the last 17 years, I have represented the Tanana Chiefs Conference, a consortium of 34 Indian tribes in Interior Alaska. I am currently, general counsel for the TCC and the tribes. The member tribes have a combined tribal population of a little over 15,000 people, and our office manages an active ICWA case load comprised of between 120-160 children's cases, one half of which are in tribal courts. Over the last year and a half, I participated with several tribal and adoption attorney's in a national workgroup to develop amendments to the Indian Child Welfare Act, which culminated in the proposal submitted for your consideration by the National Congress of American Indians (NCAI).

HOW THE PROPOSAL WAS DEVELOPED

The NCAI proposal is the product of discussions over the last year and a half between the National Indian Child Welfare Association (NICWA), the Association on American Indian Affairs (AAIA), Tanana Chiefs Conference, (TCC) and the American Academy of Adoption Attorney's (AAAA). The effort was intended to develop a consensus package of amendments which would address mutually perceived problems with the Indian Child Welfare Act. These problems tend to destabilize Indian child adoptive placements by protracted and avoidable litigation over ambiguous language in the Act. The goal was to clarify and improve various provisions of the Act to bring more stability to Indian child adoptive placements in a manner consistent with the underlying policies of the Act.

The need for this legislation is not new. In 1988, the Committee considered several amendments advanced by tribal groups. In recent years, new accounts of contentious and prolonged litigation, and the adoption of different interpretations of this federal law by various states, has highlighted problems with the Act.

Last year, several proposals to amend ICWA were filed in the House and Senate. The House held a subcommittee hearing on one of the proposals in May, and several tribal groups and adoption practitioners testified. After the hearing, representatives of the AAAA contacted representatives of NICA and TCC to explore the possibility of developing consensus legislation. A national workgroup was formed and met over the following summer to discuss and develop such an approach.

The national workgroup produced several drafts of possible language, and finally presented a draft proposal to the Alaska Federation of Natives (AFN) in October of 1995. The AFN endorsed the package at its annual convention, and in November of 1995 the package was presented to NCAI at its annual convention in San Diego. NCAI gave the process a "yellow light" by endorsing the draft, and encouraging the process to continue, including consultation with a broader cross -

Walleri Testimony

2

section of tribes on the national level. Substantive concerns within the adoption attorney community required further modification of the proposal, which was developed at a meeting in Phoenix in December, 1995. AAAA endorsed the Phoenix draft, which contained substantive changes and required resubmission to NCAI at its mid-year meeting in Tulsa in June, 1996. NCAI offered a further revision of the draft proposal at that time, which is before you now. Last week, the AAAA endorsed the NCAI proposal.

In the interim, the House passed amendments to ICWA contained in Title III of H.R. 3286, without benefit of a hearing process. There was no tribal consultation without a hearing process, and not a single tribe in the nation supported the proposal. The bi-partisan leadership of the House Resources Committee strongly objected to the provisions, and expressed its support for a more balanced and reasoned process such as the national workgroup involving meaningful participation by the tribes and adoption professionals. The action by this Committee, last week, to strike Title III of H.R. 3286 demonstrates an equal commitment to a more balanced and reasoned approach to the problem.

ANALYSIS OF NCAI PACKAGE

The amendments to the Indian Child Welfare Act (ICWA) proposed by NCAI are an attempt to promote stability and certainty of Indian child adoptive placements, by addressing the causes of protracted and needless litigation. The litigation has been caused by efforts of some adoption practitioners to evade the application of the Act, and some tribal agencies to extend the provisions of the Act improperly.

The House version attempts to simply reclassify certain Indian children to no longer be Indian. The approach is a disingenuous slight of hand premised upon a rude image of Indian people and society captured in the 19th century reservation system. The test harkens back to a discredited policy in place prior to extending the right to vote to Indians generally, when individual Indians could apply to become reclassified as non-Indian, if they could demonstrate that they were "civilized". Moreover, the House version goes beyond addressing problems with voluntary adoptions by limiting Indian tribes from intervening and providing services in child abuse and neglect cases which arise off reservation.

The NCAI draft suggests a different approach which focuses upon specific problems within the area of Indian child welfare practice. It proposes certain reforms of ICWA intended to promote stability and certainty in the adoption process for Indian children, adoptive parents, extended Indian family and Indian tribes by providing:

- * clarification of ICWA provisions and procedures,
- * incentives for early dispute resolution, and
- * penalties for efforts by all parties to violate ICWA provisions.

The NCAI draft also avoids the adverse consequences of the House draft which would prevent tribes from providing services to Indian children in involuntary child protection proceedings and needlessly interfere with tribal membership determinations which would deny other tribal benefits to off-reservation Indian children.

The specific provisions of the NCAI proposal address the following points:

1. NOTICE TO INDIAN TRIBES (VOLUNTARY) [refer to pages 4 and 6 of NCAI draft]

PROBLEM STATEMENT: 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 needless delays the development of tribal responses and interventions. This has been unnecessarily disruptive of adoptive placements and prolonged litigation.

PROPOSED SOLUTION: Provide notice to tribes for voluntary adoptions. The NCAI proposal also 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.

2. TIMELINESS FOR INTERVENTION (VOLUNTARY) [refer to pages 2,3 and 5 of NCAI draft]

PROBLEM STATEMENT: 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, and their intervention is delayed, this can be a common problem.

PROPOSED SOLUTION: If tribes receive early notice, it is reasonable that tribes be limited to file their intent to intervene, or objection to the adoption within 90 days, or be precluded from further intervention. Additionally, the NCAI draft 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.

3. CRIMINAL SANCTIONS [refer to pages 6 of NCAI draft]

PROBLEM STATEMENT: In the *Rost* case [In re *Bridget R.*, 49 Cal. Rpt. 2d 507 (1996)] the attorney for the adoptive parents counseled the biological parents to not disclose that they were tribal members. This issue became a central part of the litigation. That attorney is now being sued by the Rosts, the tribe, and the biological family, but the practice is still common among some adoption attorney's. These deceptive practices, by some unethical adoption practitioners, destabilize adoptive placements and stimulate needless litigation between tribes, Indian extended family members and the adoptive families, and irreparably harm Indian children. These practices are a fraud upon adoptive parents, Indian children, and Indian extended families, which is destructive to all the involved parties.

PROPOSED SOLUTION: Efforts intended to evade application of federal law, committed by attorney's, and public or private agencies facilitating adoptions, should be a crime.

4. WITHDRAWAL OF CONSENT [refer to pages 3 and 4 of NCAI draft]

PROBLEM STATEMENT: 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. There is a need for a national standard as to when an Indian parent may withdraw consent to an adoption to provide more predictability and stability to the adoption process.

PROPOSED SOLUTION: The NCAI proposal establishes a national standard for the withdrawal of parental consent to adoption by providing that 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.

5. CLARIFICATION OF APPLICATION OF ICWA IN ALASKA [refer to page 2 of NCAI draft]

PROBLEM STATEMENT: Much of the litigation in Alaska over ICWA involves the issue of Indian country. The concern over the issue continues to drive protracted litigation based upon the implication of such decisions on non-ICWA concerns. This has impeded implementation of the primary goals of ICWA. Consequently, Indian children suffer the trauma of such needless litigation.

PROPOSED SOLUTION: The NCAI draft proposes to define reservations to include Alaska Native villages for ICWA purposes.

6. OPEN ADOPTIONS [refer to page 6 of NCAI draft]

PROBLEM STATEMENT: Much of the litigation over Indian children is related to the winner-take-all characteristic of 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 family and/or tribe, while remaining in an adoptive placement to which the child has emotionally bonded.

PROPOSED SOLUTION: The NCAI proposal would authorize open adoptions for Indian children in all states. This would also reflect traditional customs of many Native American cultures which generally permit open adoptions by custom and tradition.

7. WARD OF TRIBAL COURT [refer to page 2 of NCAI draft]

PROBLEM STATEMENT: 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.

PROPOSED SOLUTION: The NCAI proposal would clarify that for ICWA purposes, 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.

8. INFORMING INDIAN PARENTS OF RIGHTS [refer to page 2 of NCAI draft]

PROBLEM STATEMENT: 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.

PROPOSED SOLUTION: The NCAI proposal would provide that attorney's, 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.

9. TRIBAL MEMBERSHIP.

PROBLEM STATEMENT: The most contentious ICWA litigation involves whether a particular child is a member of a tribe or eligible for membership, and therefore included within the coverage of ICWA. A central premise of US Indian self-determination policy provides that tribes have the right to determine their membership, and that different Indian tribes are free to have different membership criteria. Tribal critics have accused tribes of extending their tribal membership beyond permissible boundaries, while tribes have resisted efforts by state courts to unduly restrict tribes from employing modern tribal membership determinations adopted by the tribes.

Critics of the tribes have called for federal review of such determinations by the tribes, however, an emerging body of case law is addressing the matter. One line of cases has treated the matter as an evidentiary question capable of determination by State courts, with some cases going so far as to hold that State courts can determine tribal membership determinations without regard to established tribal membership determination processes.

On the other hand, another line of cases is emerging which holds that tribal membership must be determined by the tribe, and that review is available in by state and federal courts, after exhaustion of tribal remedies, in determining whether the tribe exceeded its lawful powers, or violated the due process provisions of the Indian Civil Rights Act, and the tribal decisions is entitled to State court full faith and credit.

PROPOSED SOLUTION: The NCAI proposal provides that tribal membership be determined by a certification by the tribe to be filed upon intervention. The proposal does not disturb emerging case law which allows state and federal court review of such determinations after exhaustion of tribal remedies.

OTHER AMENDMENTS

Last week members of the national workgroup continued to meet to discuss various concerns being raised by tribal and adoption advocates. The most recent set of concerns are

- 1) allowing pre-birth notice to a tribe of a planned adoption,
- 2) further clarifying standards of tribal intervention,
- 3) prohibiting removal of a child from a jurisdiction to evade application of ICWA,
- 4) need for more specific language regarding Alaska,
- 5) further clarification of language respecting parental withdrawal of consent, and
- 6) language requiring information in notice to tribe only if known after a reasonable inquiry,

The national workgroup has developed language to address these concerns and transmitted the proposed language to the committee in a letter by Mr. Jack Trope of AALA. These amendments are consistent with both the NCAI and AALA endorsements and merely clarify the drafters understandings of the proposal.

CONCLUSION

I hope this helps the Committee understand the logic and background behind the NCAI proposal. I believe that the proposal will greatly improve the stability and certainty of Native child adoptive placements, and will reduce the litigation which has plagued the area. I have been impressed with the improvements which have occurred as a result of ICWA when tribal, state and private agencies work together to provide safe and appropriate homes for Indian children, who might not otherwise have an opportunity to be raised in a healthy Indian family environment. On the other hand, there is too much litigation between multiple families seeking to raise the same child. These battles do as much harm to a child as might occur if no body wanted the child. I would urge the committee to take action to adopt the NCAI proposal as a rational, well balanced and thoughtful attempt to curb such destructive litigation.

Monday
November 26, 1979

Part III

Department of the Interior

Bureau of Indian Affairs

Guidelines for State Courts; Indian Child Custody Proceedings

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Guidelines for State Courts; Indian Child Custody Proceedings

This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

There was published in the Federal Register, Vol. 44, No. 79/Monday, April 23, 1979 a notice entitled Recommended Guidelines for State Courts—Indian Child Custody Proceedings. This notice pertained directly to implementation of the Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.* A subsequent Federal Register notice which invited public comment concerning the above was published on June 5, 1979. As a result of comments received, the recommended guidelines were revised and are provided below in final form.

Introduction

Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect. Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. To the extent that the Department's interpretations of the Act are correct, contrary interpretations by the courts would be violations of the Act. If procedures different from those recommended in these guidelines are adopted by a state, their adequacy to protect rights guaranteed by the Act will have to be judged on their own merits.

Where Congress expressly delegates to the Secretary the primary responsibility for interpreting a statutory term, regulations interpreting that term have legislative effect. Courts are not free to set aside those regulations simply because they would have interpreted that statute in a different manner. Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance. *Batterton v. Francis*, 432 U.S. 416, 424-425 (1977).

In other words, when the Department writes rules needed to carry out

responsibilities Congress has explicitly imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding. Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Portions of the Indian Child Welfare Act do expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language. For example, under 25 U.S.C. 1918, the Secretary is directed to determine whether a plan for reassignment of jurisdiction is "feasible" as that term is used in the statute. This and other areas where primary responsibility for implementing portions of the Act rest with this Department, are covered in regulations promulgated on July 31, 1979, at 44 FR 45092.

Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S. Rep. No. 95-597, 95th Cong., 1st Sess. 17 (1977). The Department's interpretation of statutory language of this type is published in these guidelines.

Some commenters asserted that Congressional delegation to this Department of authority to promulgate regulations with binding legislative effect with respect to all provisions of the Act is found at 25 U.S.C. 1952, which states, "Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.

Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory

control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.

Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act. Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect.

Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court. That approach has not been adopted because the Department has an obligation not to assert authority that it concludes it does not have.

Each section of the revised guidelines is accompanied by commentary explaining why the Department believes states should adopt that section and to provide some guidance where the guidelines themselves may need to be interpreted in the light of specific circumstances.

The original guidelines used the word "should" instead of "shall" in most provisions. The term "should" was used to communicate the fact that the guidelines were the Department's interpretations of the Act and were not intended to have binding legislative effect. Many commenters, however, interpreted the use of "should" as an attempt by this Department to make statutory requirements themselves optional. That was not the intent. If a state adopts those guidelines, they should be stated in mandatory terms. For that reason the word "shall" has replaced "should" in the revised guidelines. The status of these guidelines as interpretative rather than legislative in nature is adequately set out in the introduction.

In some instances a state may wish to establish rules that provide even greater protection for rights guaranteed by the Act than those suggested by these guidelines. These guidelines are not intended to discourage such action. Care should be taken, however, that the

provision of additional protections to some parties to a child custody proceeding does not deprive other parties of rights guaranteed to them by the Act.

In some instances the guidelines do little more than restate the statutory language. This is done in order to make the guidelines more complete so that they can be followed without the need to refer to the statute in every instance. Omissions of any statutory language, of course, does not in any way affect the applicability of the statute.

A number of commenters recommended that special definitions of residence and domicile be included in the guidelines. Such definitions were not included because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act. Recommending special definitions for the purpose of this Act alone would simply provide unnecessary complications in the law.

A number of commenters recommended that the guidelines include recommendations for tribal-state agreements under 25 U.S.C. 1919. A number of other commenters, however, criticized the one provision in the original guidelines addressing that subject as tending to impose on such agreements restrictions that Congress did not intend should be imposed. Because of the wide variation in the situations and attitudes of states and tribes, it is difficult to deal with that issue in the context of guidelines. The Department is currently developing materials to aid states and tribes with such agreements. The Department hopes to have those materials available later this year. For these reasons, the provision in the original guidelines concerning tribal-state agreements has been deleted from the guidelines.

The Department has also received many requests for assistance from tribal courts in carrying out the new responsibilities resulting from the passage of this Act. The Department intends to provide additional guidance and assistance in that area also in the future. Providing guidance to state courts was given a higher priority because the Act imposes many more procedures on state courts than it does on tribal courts.

Many commenters have urged the Department to discuss the effect of the Act on the financial responsibilities of states and tribes to provide services to Indian children. Many such services are funded in large part by the Department of Health, Education, and Welfare. The policies and regulations of that

Department will have a significant impact on the issue of financial responsibility. Officials of Interior and HEW will be discussing this issue with each other. It is anticipated that more detailed guidance on questions of financial responsibility will be provided as a result of those consultations.

One commenter recommended that the Department establish a monitoring procedure to exercise its right under 25 U.S.C. 1915(e) to review state court placement records. HEW currently reviews state placement records on a systematic basis as part of its responsibilities with respect to statutes it administers. Interior Department officials are discussing with HEW officials the establishment of a procedure for collecting data to review compliance with the Indian Child Welfare Act.

Inquiries concerning these recommended guidelines may be directed to the nearest of the following regional and field offices of the Solicitor for the Interior Department:

Office of the Regional Solicitor, Department of the Interior, 510 L Street, Suite 403, Anchorage, Alaska 99501, (907) 265-5301.

Office of the Regional Solicitor, Department of the Interior, Richard B. Russell Federal Building, 75 Spring St., SW, Suite 1328, Atlanta, Georgia 30303, (404) 221-4447.

Office of the Regional Solicitor, Department of the Interior, c/o U.S. Fish & Wildlife Service, Suite 306, 1 Gateway Center, Newton Corner, Massachusetts 02158, (617) 628-6258.

Office of the Field Solicitor, Department of the Interior, 688 Federal Building, Fort Snelling, Twin Cities, Minnesota 55111, (612) 725-3540.

Office of the Regional Solicitor, Department of the Interior, P.O. Box 25007, Denver Federal Center, Denver, Colorado 80225, (303) 234-3175.

Office of the Field Solicitor, Department of the Interior, P.O. Box 548, Aberdeen, South Dakota 57401, (605) 225-7254.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1536, Billings, Montana 59103, (406) 245-6711.

Office of the Regional Solicitor, Department of the Interior, Room E-2753, 2600 Cottage Way, Sacramento, California 95823, (916) 684-4331.

Office of the Field Solicitor, Department of the Interior, Valley Bank Center, Suite 280, 291 North Central Avenue, Phoenix, Arizona 85071, (602) 261-4758.

Office of the Field Solicitor, Department of the Interior, 3810 Central Avenue, (714) 727-1560, Riverside, California 92506.

Office of the Field Solicitor, Department of the Interior, Window Rock, Arizona 86515, (602) 871-6151.

Office of the Regional Solicitor, Department of the Interior, Room 3088, Page Belcher Federal Building, Tulsa, Oklahoma 74103, (918) 551-7301.

Office of the Field Solicitor, Department of the Interior, Room 7302, Federal Building & Courthouse, 600 Gold Avenue, S.W., Albuquerque, New Mexico 87101, (505) 706-2547.

Office of the Field Solicitor, Department of the Interior, P.O. Box 287, W.C.D. Office Building, Route 1, Anadarko, Oklahoma 73005, (405) 247-6873.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1806, Room 319, Federal Building, 6th and Broadway, Muskogee, Oklahoma 74401, (918) 683-5111.

Office of the Field Solicitor, Department of the Interior, c/o Oage Agency, Grandview Avenue, Pawhuska, Oklahoma 74664, (918) 237-2431.

Office of the Regional Solicitor, Department of the Interior, Suite 6201, Federal Building, 125 South State Street, Salt Lake City, Utah 84138, (801) 624-5677.

Office of the Regional Solicitor, Department of the Interior, Lloyd 600 Building, Suite 607, 500 N.E. Multnomah Street, Portland, Oregon 97232, (503) 231-2123.

Guidelines for State Courts

A. Policy

1. Determination that child is an Indian
2. Determination of Indian child's tribe
3. Determination that placement is warranted by the Act

B. Pre-trial requirements

4. Determination of jurisdiction
5. Notice requirements
6. Time limits and extensions
7. Emergency removal of an Indian child
8. Improper removal from custody

C. Requests for transfer to tribal court

1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding
2. Criteria and procedures for ruling on 25 U.S.C. § 1911(b) transfer petitions
3. Determination of good cause to the contrary

D. Adjudication of involuntary placements

1. Access to reports
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A. Policy

- (1) Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own

families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

(2) In any child custody proceeding where applicable state or other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

A. Commentary

The purpose of this section is to apply to the Indian Child Welfare Act the canon of construction that remedial statutes are to be liberally construed to achieve their purpose. The three major purposes are derived from a reading to the Act itself. In order to fully implement the Congressional intent the rule shall be applied to all implementing rules and state legislation as well.

Subsection A.(2) applies to canon of statutory construction that specific language shall be given precedence over general language. Congress has given certain specific rights to tribes and Indian children. For example, the tribe has a right to intervene in involuntary custody proceedings. The child has a right to learn of tribal affiliation upon becoming 18 years old. Congress did not intend 25 U.S.C. 1921 to have the effect of eliminating those rights where a court concludes they are in derogation of a parental right provided under a state statute. Congress intended for this section to apply primarily in those instances where a state provides greater protection for a right accorded to parents under the Act. Examples of this include State laws which impose a higher burden of proof than the Act for removing a child from a home, give the parents more time to prepare after receiving notice, require more effective notice, impose stricter emergency removal procedure requirements on those removing a child, give parents

greater access to documents, or contain additional safeguard to assure the voluntariness of consent.

B. Pre-trial requirements

B.1. Determination That Child is an Indian

(a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's identity to become publicly known.

(b)(i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.

(ii) Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

(c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:

(i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.

(ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.

(iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.

(iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.

(v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

B.1. Commentary

This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets those criteria. *Cohen, Handbook of Federal Indian Law 133 (1942)*. Because of the Bureau of Indian Affairs' long experience in determining who is an Indian for a variety of purposes, its determinations are also

entitled to great deference. See, e.g., *United States v. Sandoval*, 231, U.S. 28, 27 (1913).

Although tribal verification is preferred, a court may want to seek verification from the BIA in those voluntary placement cases where the parent has requested anonymity and the tribe does not have a system for keeping child custody matters confidential.

Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 U.S.C. § 1912 with 25 U.S.C. § 1913. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. § 1915(c). The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless.

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative. *United States v. Broncheau*, 597 F.2d 1280, 1283 (9th Cir. 1979).

The guidelines also list several circumstances which shall trigger an inquiry by the court and petitioners to determine whether a child is an Indian for purposes of this Act. This listing is not intended to be complete, but it does list the most common circumstances giving rise to a reasonable belief that a child may be an Indian.

(ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.

(iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.

(iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.

(v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

B.2. Determination of Indian Child's Tribe

(a) Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.

(b) The court shall send the notice specified in recommended guideline B.4. to each such tribe. The notice shall

specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.

(c) In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:

- (i) length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
- (ii) child's participation in activities of each tribe;
- (iii) child's fluency in the language of each tribe;
- (iv) whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
- (v) residence on or near one of the tribes' reservation by the child's relatives;
- (vi) tribal membership of custodial parent or Indian custodian;
- (vii) interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these guidelines; and
- (viii) the child's self identification.

(d) The court's determination together with the reasons for it shall be set out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.

(e) If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even though the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

B.2. Commentary

This guideline requires the court to notify all tribes that are potentially the Indian child's tribe so that each tribe may assert its claim to that status and the court may have the benefit of the views of each tribe. Notification of all the tribes is also necessary so the court can consider the comparative interest of each tribe in the child's welfare in making its decision. That factor has long been regarded an important consideration in making child custody decisions.

The significant factors listed in this section are based on recommendations

by tribal officials involved in child welfare matters. The Act itself and the legislative history make it clear that tribal rights are to be based on the existence of a political relationship between the family and the tribe. For that reason, the guidelines make actual tribal membership of the child conclusive on this issue.

The guidelines do provide, however, that previous decisions of a court made on its own determination of the Indian child's tribe are not invalidated simply because the child becomes a member of a different tribe. This provision is included because of the importance of stability and continuity to a child who has been placed outside the home by a court. If a child becomes a member before a placement is made or before a change of placement becomes necessary for other reasons, however, then that membership decision can be taken into account without harm to the child's need for stable relationships.

We have received several recommendations that "Indian child's tribe" status be accorded to all tribes in which a child is eligible for membership. The fact that Congress, in the definition of "Indian child's tribe," provided a criterion for determining which is the Indian child's tribe, is a clear indication of legislative intent that there be only one such tribe for each child. For purposes of transfer of jurisdiction, there obviously can be only one tribe to adjudicate the case. To give more than one tribe "Indian child's tribe" status for purposes of the placement preferences would dilute the preference accorded by Congress to the tribe with which the child has the more significant contacts.

A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe had proved unsuccessful. So long as the special rights of the Indian child's tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act.

Determinations of the Indian child's tribe for purposes of this Act shall not serve as any precedent for other situations. The standards in this statute and these guidelines are designed with child custody matters in mind. A different determination may be entirely appropriate in other legal contexts.

B.3. Determination That Placement Is Covered by the Act

(a) Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.

(b) Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.

(c) Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

B.3. Commentary

The purpose of this section is to deal with some of the questions the Department has been receiving concerning the coverage of the Act.

The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child—whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses.

Placements based on status offenses (actions that are not a crime when committed by an adult), however, are usually premised on the conclusion that the present custodian of the child is not providing adequate care or supervision. To the extent that a status offense poses any immediate danger to society, it is usually also punishable as an offense which would be a crime if committed by an adult. For that reason status offenses are treated the same as dependency proceedings and are covered by the Act and these guidelines, while other juvenile delinquency placements are excluded.

While the Act excludes placements based on an act which would be a crime if committed by an adult, it does cover terminations of parental rights even

where they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed.

The Act excludes from coverage an award of custody to one of the parents "in a divorce proceeding." If construed narrowly, this provision would leave custody awards resulting from proceedings between husband and wife for separate maintenance, but not for dissolution of the marriage bond within the coverage of the Act. Such a narrow interpretation would not be in accord with the intent of Congress. The legislative history indicates that the exemption for divorce proceedings, in part, was included in response to the views of this Department that the protections provided by this Act are not needed in proceedings between parents. In terms of the purposes of this Act, there is no reason to treat separate maintenance or similar domestic relations proceedings differently from divorce proceedings. For that reason the statutory term "divorce proceeding" is construed to include other domestic relations proceedings between spouses.

The Act also excludes from its coverage any placements that do not deprive the parents or Indian custodians of the right to regain custody of the child upon demand. Without this exception a court appearance would be required every time an Indian child left home to go to school. Court appearances would also be required for many informal caretaking arrangements that Indian parents and custodians sometimes make for their children. This statutory exemption is restated here in the hope that it will reduce the instances in which Indian parents are unnecessarily inconvenienced by being required to give consent in court to such informal arrangements.

Some private groups and some states enter into formal written agreements with parents for temporary custody (See e.g. Alaska Statutes § 47.10.230). The guidelines recommend that the parties to such agreements explicitly provide for return of the child upon demand if they do not wish the Act to apply to such placements. Inclusion of such a provision is advisable because courts frequently assume that when an

agreement is reduced to writing, the parties have only those rights specifically written into the agreement.

B.4. Determination of Jurisdiction

(a) In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section B.7. of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.

(b) If the Indian child has previously resided or been domiciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Section B.7. of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.

B.4. Commentary

The purpose of this section is to remind the state court of the need to determine whether it has jurisdiction under the Act. The action is dismissed as soon as it is determined that the court lacks jurisdiction except in emergency situations. The procedures for emergency situations are set out in Section B.7.

B.5. Notice Requirements

(a) In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.

(b) In any involuntary Indian child custody proceeding, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:

- (i) The name of the Indian child.
- (ii) His or her tribal affiliation.
- (iii) A copy of the petition, complaint or other document by which the proceeding was initiated.
- (iv) The name of the petitioner and the name and address of the petitioner's attorney.

(v) A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.

(vi) A statement that if the parents or Indian custodians are unable to afford

counsel, counsel will be appointed to represent them.

(vii) A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.

(viii) The location, mailing address and telephone number of the court.

(ix) A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.

(x) The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.

(xi) A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

(c) The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which the notice was received to prepare for the proceeding.

(d) The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.

(e) Notice may be personally served on any person entitled to receive notice in lieu of mail service.

(f) If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

(g) If the court or a petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau of Indian Affairs personnel arrange to have the notice explained to that person in the language that he or she best understands.

B.5. Commentary

This section recommends that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian. If anyone asserts that the child is an Indian or that there is reason to believe the child may be an Indian, then the court shall contact the tribe or the Bureau of Indian Affairs for verification. Refer to sections B.1 and B.2 of these guidelines.

This section specifies the information to be contained in the notice. This information is necessary so the persons who receive notice will be able to exercise their rights in a timely manner. Subparagraph (x) provides that tribes shall be requested to assist in maintaining the confidentiality of the proceeding. Confidentiality may be difficult to maintain—especially where small tribes are involved and the likelihood that the family involved is well known by tribal officials is great. Although Congress was concerned with confidentiality, it concluded that the interest of tribes in the welfare of their children justified taking some risks with confidentiality—especially in involuntary proceedings. It is reasonable, however, to ask tribal officials to maintain as much confidentiality as possible consistent with the exercise of tribal rights under the Act.

The time limits are minimum ones required by the Act. In many instances, more time may be available under state court procedures or because of the circumstances of the particular case. In such instances, the notice shall state that additional time is available.

The Act requires notice to the parent or Indian custodian. At a minimum, parents must be notified if termination of parental rights is a potential outcome since it is their relationship to the child that is at stake. Similarly, the Indian custodians must be notified of any action that could lead to the custodians' losing custody of the child. Even where only custody is an issue, noncustodial parents clearly have a legitimate interest in the matter. Although notice to both parents and Indian custodians may not be required in all instances by the Act or the Fourteenth Amendment to the U.S. Constitution, providing notice to both is in keeping with the spirit of the Act. For that reason, these guidelines recommend notice be sent to both.

Subsection (d) requires filing the notice with the court so there will be a complete record of efforts to comply with the Act.

Subsection (e) authorizes personal services since it is superior to mail services and provides greater protection

or rights as authorized by 25 U.S.C. 1921. Since serving the notice does not involve any assertion of jurisdiction over the person served, personal notice may be served without regard to state or reservation boundaries.

Subsections (f) and (g) provide procedures to increase the likelihood that rights are understood by parents and Indian custodians.

B.6. Time Limits and Extensions

(a) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional twenty days from the date upon which notice was received to prepare for participation in the proceeding.

(b) The proceeding may not begin until all of the following dates have passed:

(i) ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;

(ii) ten days after the Indian child's tribe is unknown to the petitioner) has received notice;

(iii) thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding; and

(iv) Thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.

(c) The time limits listed in this section are the minimum time periods required by the Act. The court may grant more time to prepare where state law permits.

B.6. Commentary

This section attempts to clarify the waiting periods required by the Act after notice has been received of an involuntary Indian child custody proceeding. Two independent rights are involved—the right of the parents or Indian custodians and the right of the Indian child's tribe. The proceeding may not begin until the waiting periods, which both are entitled to have passed.

This section also makes clear that additional extensions of time may be granted beyond the minimum required by the Act.

B.7. Emergency Removal of an Indian Child

(a) Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or

custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.

(b) When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:

(i) The name, age and last known address of the Indian child.

(ii) The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.

(iii) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.

(iv) The tribal affiliation of the child and of the parents and/or Indian custodians.

(v) A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.

(vi) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.

(vii) A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

(c) If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case—whichever is earlier.

(d) Extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness.

that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

B.7. Commentary

Since jurisdiction under the Act is based on domicile and residence rather than simple physical presence, there may be instances in which action must be taken with respect to a child who is physically located off a reservation but is subject to exclusive tribal jurisdiction. In such instances the tribe will usually not be able to take swift action to exercise its jurisdiction. For that reason Congress authorized states to take temporary emergency action.

Since emergency action must be taken without the careful advance deliberation normally required, procedures must be established to assure that the emergency actions are quickly subjected to review. This section provides procedures for prompt review of such emergency actions. It presumes the state already has such review procedures and only prescribes additional procedures that shall be followed in cases involving Indian children.

The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end. State action shall also end as soon as the tribe is ready to take over the case.

Subsection (d) refers primarily to the period between when the petition is filed and when the trial court renders its decision. The Act requires that, except for emergencies, Indian children are not to be removed from their parents unless a court finds clear and convincing evidence that the child would be in serious danger unless removed from the home. Unless there is some kind of time limit on the length of an "emergency removal" (that is, any removal not made pursuant to a finding by the court that there is clear and convincing evidence that continued parental custody would make serious physical or emotional harm likely), the safeguards of the Act could be evaded by use of long-term emergency removals.

Subsection (d) recommends what is, in effect, a speedy trial requirement. The court shall be required to comply with the requirements of the Act and reach a decision within 90 days unless there are "extraordinary circumstances" that make additional delay unavoidable.

B.8. Improper Removal From Custody

(a) If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have

been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

(b) If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

B.8. Commentary

This section is designed to implement 25 U.S.C. § 1920. Since a finding of improper removal goes to the jurisdiction of the court to hear the case at all, this section provides that the court will decide the issue as soon as it arises before proceeding further on the merits.

C. Requests for Transfer to Tribal Court**C.1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding**

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.

C.1. Commentary

Reference is made to 25 U.S.C. 1911(b) in the title of this section in order to clarify that this section deals only with transfers where the child is not domiciled or residing on an Indian reservation.

So that transfers can occur as quickly and simply as possible, requests can be made orally.

This section specifies that requests are to be made promptly after receiving notice of the proceeding. This is a modification of the timeliness requirement that appears in the earlier version of the guidelines. Although the statute permits proceedings to be commenced even before actual notice is received by parties entitled to notice, those parties do not lose their right to request a transfer simply because neither the petitioner nor the Secretary was able to locate them earlier.

Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to

the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions.

The Department received a number of comments objecting to any timeliness requirement at all. Commenters pointed out that the statute does not explicitly require transfer requests to be timely. Some commenters argued that imposing such a requirement violated tribal and parental rights to intervene at any point in the proceedings under 25 U.S.C. § 1911(c) of the Act.

While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention.

Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

C.2. Criteria and Procedures for Ruling on 25 U.S.C. § 1911(b) Transfer Petitions

(a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

(b) If the court believes or any party asserts that good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer. The petitioners shall have the opportunity to provide the

court with their views on whether or not good cause to deny transfer exists. C.2. Commentary

Subsection (a) simply states the rule provided in 25 U.S.C. § 1911(b).

Since the Act gives the parents and the tribal court of the Indian child's tribe an absolute veto over transfer, there is no need for any adversary proceedings if the parents or the tribal court opposes transfer. Where it is proposed to deny transfer on the grounds of "good cause," however, all parties need an opportunity to present their views to the court.

C.3. Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exist:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.3. Commentary

All five criteria that were listed in the earlier version of the guidelines were highly controversial. Comments on the first two criteria were almost unanimously negative. The first criterion was whether the parents were still living. The second was whether an Indian custodian or guardian for the child had been appointed. These criteria were criticized as irrelevant and arbitrary. It was argued that children who are orphans or have no appointed Indian custodian or guardian are no more or less in need of the Act's protections than other children. It was also pointed out that these criteria are

contrary to the decision in *Wisconsin Potawatomies of the Hannahville Indian Community v. Houston*, 397 F. Supp. 719 (W.D. Mich. 1973), which was explicitly endorsed by the committee that drafted that Act. The court in that case found that tribal jurisdiction existed even through the children involved were orphans for whom no guardian had been appointed.

Although there was some support for the third and fourth criteria, the preponderance of the comment concerning them was critical. The third criteria was whether the child had little or no contact with his or her Indian tribe for a significant period of time. The fourth was whether the child had ever resided on the reservation for a significant period of time. These criteria were criticized, in part, because they would virtually exclude from transfers infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant previous contact with the tribe or the reservation. Some also argued that these criteria invited the state courts to be making the kind of cultural decisions that the Act contemplated should be made by tribes. Some argued that the use of vague words in these criteria accorded state courts too much discretion.

The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more evenly divided and many of the critics were ambivalent. They worried that young teenagers could be too easily influenced by the judge or by social workers. They also argued that fear of the unknown would cause many teenagers to make an ill-considered decision against transfer.

The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe was not advised. The circumstances under which it may be proper for the state court to take such considerations into account are set out in the revised subsection (iv).

It is recommended that in most cases state court judges not be called upon to determine whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.

This reasoning does not apply, however, where there is no parent available to make that decision. The guidelines recommend that state courts be authorized to make such determinations only in those cases where there is no parent available to make it.

State court authority to make such decisions is limited to those cases where the child is over five years of age. Most children younger than five years can be expected to adjust more readily to a change in cultural environment.

The fifth criterion has been retained. It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives.

The existence of a tribal court is made an absolute requirement for transfer of a case. Clearly, the absence of a tribal court is good cause not to ask the tribe to try the case.

Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "The subsection is intended to permit a State court to apply to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation. This problem may be alleviated in some instances by having the court come to the witnesses. The Department is aware of one case under that Act where transfer was conditioned on having the tribal court meet in the city where the family lived. Some cities have substantial populations of members of tribes from distant reservations. In such situations some tribes may wish to appoint members who live in those cities as tribal judges.

The timeliness of the petition for transfer, discussed at length in the commentary to section C.1, is listed as a factor to be considered. Inclusion of this criterion is designed to encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays. Long periods of uncertainty concerning the future are

generally regarded as harmful to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings.

Almost all commenters favored retention of the paragraph stating that reservation socio-economic conditions and the perceived legacy of tribal institutions are not to be taken into account in making good cause determinations. Some commenters did suggest, however, that a case not be transferred if it is clear that a particular disposition of the case that could only be made by the state court held especially great promise of benefiting the child.

Such considerations are important but they have not been listed because the Department believes such judgments are best made by tribal courts. Parties who believe that state court adjudication would be better for such reasons can present their reasons to the tribal court and urge it to decline jurisdiction. The Department is aware of one case under the Act where this approach is being used and believes it is more in keeping with the confidence Congress has expressed in tribal courts.

Since Congress has established a policy of preferring tribal control over custody decisions affecting tribal members, the burden of proving that an exception to that policy ought to be made in a particular case rests on the party urging that an exception be made. This rule is reflected in subsection (d).

C.4. Tribal Court Declination of Transfer

(a) A tribal court to which transfer is requested may decline to accept such transfer.

(b) Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.

(c) Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties.

(d) If the case is transferred the state court shall provide the tribal court with all available information on the case.

C.4. Commentary

The previous version of this section provided that the state court should presume the tribal court has declined to accept jurisdiction unless it hears otherwise. The comments on this issue were divided. This section has been revised to require the tribal court to decline the transfer affirmatively if it does not wish to take the case. This approach is in keeping with the apparent intent of Congress. The language in the Act providing that transfers are "subject to declination by the tribal court" indicates that affirmative action by the tribal court is required to decline a transfer.

The recommended time limit for a decision has been extended from ten to twenty days. The additional time is needed for the court to become apprised of factors it may want to consider in determining whether or not to decline the transfer.

A new paragraph has been added recommending that the parties assist the tribal court in making its decision or declination by giving the tribal court their views on the matter.

Transfers ought to be arranged as simply as possible consistent with due process. Transfer procedures are a good subject for tribal-state agreements under 25 U.S.C. § 1919.

D. Adjudication of Involuntary Placements, Adoptions, or Terminations of Parental Rights

D.1. Access to Reports

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. No decision of the court shall be based on any report or other document not filed with the court.

D.1. Commentary

The first sentence merely restates the statutory language verbatim. The second sentence makes explicit the implicit assumption of Congress—that the court will limit its considerations to those documents and reports that have been filed with the court.

D.2. Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the

need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian caregivers.

D.2. Commentary

This section elaborates on the meaning of "breakup of the Indian family" as used in the Act. "Family breakup" is sometimes used as a synonym for divorce. In the context of this statute, however, it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health.

This section also recommends that the petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home for the child. The term "individual Indian care givers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed.

One commenter recommended that detailed procedures and criteria be established in order to determine whether family support efforts had been adequate. Establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not contemplate such a role for the courts and they generally lack the expertise to make such judgments.

D.3. Standards of Evidence

(a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents of Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.

D.3. Commentary

The first two paragraphs are essentially restatement of the statutory language. By imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be shown that it is shown that it is dangerous for the child to remain with his or her present custodians. Evidence of that must be "clear and convincing" for placements and "beyond a reasonable doubt" for terminations.

The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be—without any testing of the implicit assumption that only a family that conformed to that stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress. The focus must be on whether the particular conditions are likely to cause serious damage.

D.4. Qualified Expert Witnesses

(a) Removal of an Indian child from his or her family must be based on

competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.

(b) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

- (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
- (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
- (iii) A professional person having substantial education and experience in the area of his or her specialty.

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

D.4. Commentary

The first subsection is intended to point out that the issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically two questions are involved. First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?

The party presenting an expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by nonexperts.

The second subsection makes clear that knowledge of tribal culture and childrearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior—which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.

Indian tribes and Bureau of Indian Affairs personnel frequently know persons who are knowledgeable

concerning the customs and cultures of the tribes they serve. Their assistance is available in helping to locate such witnesses.

E. Voluntary Proceedings

E.1. Execution of Consent

To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

E.1. Commentary

This section provides that consent may be executed before either a judge or magistrate. The addition of magistrates was made in response to a suggestion from Alaska where magistrates are found in most small communities but "judges" are more widely scattered. The term "judge" as used in the statute is not a term of art and can certainly be construed to include judicial officers who are called magistrates in some states. The statement that consent need not be in open court where confidentiality is desired or indicated was taken directly from the House Report on the Act. A recommendation that the guideline list the consequences of consent that must be described to the parent or custodian has not been adopted because the consequences can vary widely depending on the nature of the proceeding, state law and the particular facts of individual cases.

E.2. Content of Consent Document

(a) The consent document shall contain the name and birthdate of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.

(b) A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

(c) A consent to termination of parental rights or adoption shall contain,

in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

E.2. Commentary

This section specifies the basic information about the placement or termination to which the parent or Indian custodian is consenting to assure that consent is knowing and also to document what took place.

E.3. Withdrawal of Consent to Placement

Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing, in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.

E.3. Commentary

This section specifies that withdrawal of consent shall be filed in the same court where the consent document itself was executed.

E.4. Withdrawal of Consent to Adoption

A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.

E.4. Commentary

This provision recommends that the clerk of the court be responsible for notifying the family with whom the child has been placed that consent has been withdrawn. The court's involvement frequently may be necessary since the biological parents are often not told who the adoptive parents are.

F. Dispositions

F.1. Adoptive Placements

(a) In any adoptive placement of an Indian child under state law preference must be given (in the order listed below)

absent good cause to the contrary, to placement of the child with:

- (i) A member of the child's extended family;
- (ii) Other members of the Indian child's tribe; or
- (iii) Other Indian families, including families of single parents.

(b) The Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed so long as placement is the least restrictive setting appropriate to the child's needs.

(c) Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

F.1. Commentary

This section makes clear that preference shall be given in the order listed in the Act. The Act clearly recognizes the role of the child's extended family in helping to raise children. The extended family should be looked to first when it becomes necessary to remove the child from the custody of his or her parents. Because of differences in cultures among tribes, placement within the same tribe is preferable.

This section also provides that single parent families shall be considered for placements. The legislative history of the Act makes it clear that Congress intended custody decisions to be made based on a consideration of the parent or potential custodian's ability to provide the necessary care, supervision and support for the child rather than on preconceived notions of proper family composition.

The third subsection recommends that the court or agent make an active effort to find out if there are families entitled to preference who would be willing to adopt the child. This provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities.

F.2. Foster Care or Preadoptive Placements

In any foster care or preadoptive placement of an Indian child:

- (a) The child must be placed in the least restrictive setting which (i) most approximates a family; (ii) in which his or her special needs may be met; and (iii) which is in reasonable proximity to his or her home.

(b) Preference must be given in the following order, absent good cause to the contrary, to placement with:

- (i) A member of the Indian child's extended family;

- (ii) A foster home, licensed, approved or specified by the Indian child's tribe whether on or off the reservation;
- (iii) An Indian foster home licensed approved by an authorized non-Indian licensing authority; or
- (iv) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed so long as the criteria enumerated in subsection (a) are met.

F.2. Commentary

This guideline simply restates the provisions of the Act.

F.3. Good Cause To Modify Preference

(a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause does not follow the order of preference set out above shall be based on one or more of the following considerations:

- (i) The request of the biological parents or the child when the child is of sufficient age.
- (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

(b) The burden of establishing the existence of good cause does not follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.

F.3. Commentary

The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph (i) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons. The wishes of an older child are important in making an effective placement.

In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Paragraph (ii) recommends that such considerations be considered as good cause to the contrary.

Paragraph (iii) recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

Since Congress has established a clear preference for placements within the tribal culture, it is recommended in subsection (b) that the party urging an exception be made be required to bear the burden of proving and exception is necessary.

C. Post-Trial Rights

G.1. Petition To Vacate Adoption

(a) Within two years after a final decree of adoption of any Indian child by a state court, or within any longer period of time permitted by the law of the state, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such consent was obtained by fraud or duress.

(b) Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

G.1. Commentary

This section recommends that the petition to vacate an adoption be brought in the same court in which the decree was entered, since that court clearly has jurisdiction, and witnesses on the issue of fraud or duress are most likely to be within its jurisdiction.

G.2. Adult Adoptee Rights

(a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

(b) The section applies regardless of whether or not the original adoption was subject to the provisions of the Act.

(c) Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

G.2. Commentary

Subsection (b) makes clear that adoptions completed prior to May 7, 1979, are covered by this provision. The Act states that most portions of Title I do not "affect a proceeding under State law" initiated or completed prior to May 7, 1979. Providing information to an adult adoptee, however, cannot be said to affect the proceeding by which the adoption was ordered.

The legislative history of the Act makes it clear that this Act was not intended to supersede the decision of state legislatures on whether adult adoptees may be told the names of their biological parents. The intent is simply to assure the protection of rights deriving from tribal membership. Where a state law prohibits disclosure of the identity of the biological parents, tribal rights can be protected by asking the BIA to check confidentially whether the adult adoptee meets the requirements for membership in an Indian tribe. If the adoptee does meet those requirements, the BIA can certify that fact to the appropriate tribe.

G.3. Notice of Change in Child's Status

(a) Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.

(b) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.

G.3. Commentary

This section provides guidelines to aid courts in applying the provisions of Section 106 of the Act. Section 106 gives

legal standing to a biological parent or prior Indian custodian to petition for return of a child in cases of failed adoptions or changes in placement in situations where there has been a termination of parental rights. Section 106(b) provides that whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, such placement is to be in accordance with the provisions of the Act—which requires notice to the biological parents.

The Act is silent on the question of whether a parent or Indian custodian can waive the right to further notice. Obviously, there will be cases in which the biological parents will prefer not to receive notice once their parental rights have been relinquished or terminated. This section provides for such waivers but, because the Act establishes an absolute right to participate in any future proceedings and to petition the court for return of the child, the waiver is revocable.

G.4. Maintenance of Records

The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

G.4. Commentary

This section of the guidelines provides a procedure for implementing the provisions of 25 U.S.C. § 1915(e). This section has been modified from the previous version which required that all records be maintained in a single location within the state. As revised this section provides only that the records be retrievable by a single office that would make them available to the requester within seven days of a request. For some states (especially Alaska) centralization of the records themselves would create major administrative burdens. So long as the records can be promptly made available at a single location, the intent of this section that the records be readily available will be satisfied.

Forrest J. Gerard,
Assistant Secretary, Indian Affairs,
November 18, 1979.
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TESTIMONY OF THE NATIONAL INDIAN CHILD WELFARE ASSOCIATION

Mr. Chairman and members of the Committee, thank you for the opportunity to present this testimony on behalf of the National Indian Child Welfare Association which 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 developed by the tribes and the National Congress of American Indians, with input from the American Academy of Adoption Attorneys, represents such an approach. However, we also believe that the ICWA amendments in Title III of H.R. 3286, "The Adoption Promotion and Stability Act", do not represent an effective solution to concerns that some have regarding the implementation of the ICWA in voluntary adoption proceedings. Our testimony will provide background on the Indian Child Welfare Act and identify the reasons we believe Congress should support the tribal/NCAI draft ICWA amendments and oppose the House passed ICWA amendments contained in Title III of H.R. 3286.

National Indian Child Welfare Association (NICWA). The National Indian Child Welfare Association provides a broad range of services to tribes, Indian organizations, states and federal agencies, and private social service agencies throughout the United States. These services are not direct client services such as counseling or case management, but instead help strengthen the programs that directly serve Indian children and families. NICWA services include: 1) professional training for tribal and urban Indian social service professionals; 2) consultation on social service program development; 3) facilitating child abuse prevention efforts in tribal communities; 4) analysis and dissemination of public policy information that impacts Indian children and families; and 5) helping state, federal and private agencies improve the effectiveness of their services to Indian people. Our organization maintains a strong network in Indian country by working closely with the National Congress of American Indians and tribal governments from across the United States.

INDIAN CHILDREN AND FEDERAL POLICY

In 1819, the United States Government established the Civilization Fund, the first federal policy to directly affect Indian children. It provided grants to private agencies, primarily churches, to establish programs to "civilize the Indian." In a report to Congress in 1867, the commissioner of Indian services declared that the only successful way to deal with the "Indian problem" was to separate the Indian children completely from their tribes. In support of this policy, both the government and private institutions developed large mission boarding schools for Indian children that were characterized by military type discipline. Many of these institutions housed more than a thousand students ranging in age from three to thirteen. Throughout the remainder of the nineteenth century, boarding schools became more oppressive. In 1880, for instance, a written policy made it illegal to use any native language in a federal boarding school. In 1910, bonuses were used to encourage boarding school workers to take leaves of absence and secure as many students as possible from surrounding reservations. These "kid snatchers" received no guidelines regarding the means they could use. Congress addressed this issue by declaring, "And it shall be unlawful for any Indian agent or other employee to induce, by withholding rations or by other

improper means, the parents or next of kin of any Indian child to consent to the removal of any Indian child beyond the limits of any reservation." In addition to boarding schools, other federal practices encouraged moving Indian children away from their families and communities. In 1884, the "placing out" system placed numerous Indian children on farms in the East and Midwest in order to learn the "values of work and the benefits of civilization."

Federal policy continued throughout the twentieth century with assimilation being the key focus in the Boarding Schools up until the 1950's. The passage of Public Law 280 in 1953 represented the culmination of almost a century old federal policy of assimilation. Its ultimate goal was to terminate the very existence of all Indian tribes. This ultimate assimilation policy was reflected in the child welfare policies of this period.

Throughout the 1950 and 60s, the adoption of Indian children into non-Indian homes, primarily within the private sector, was widespread. In 1959, the Child Welfare League of America, the standard-setting body for child welfare agencies, in cooperation with the Bureau of Indian Affairs, initiated the Indian Adoption Project. In the first year of this project, 395 Indian children were placed for adoption with non-Indian families in eastern metropolitan areas.

Little attention was paid, either by the Bureau of Indian Affairs or the states, to providing services on reservations that would strengthen and maintain Indian families. As late as 1972, David Fanshel wrote in *Far From the Reservation* that the practice of removing Indian children from their homes and placing them in non-Indian homes for adoption was a desirable option. Fanshel points out in the same book, however, that the removal of Indian children from their families and communities may well be seen as the "ultimate indignity to endure."

Fanshel's speculation bore out the truth of the matter. A 1976 study by the Association on American Indian Affairs found that 25 to 35 percent of all Indian Children were being placed in out-of-home care. Eighty-five percent of those children were being placed in non-Indian homes or institutions. In a response to the overwhelming evidence from Indian communities that the loss of their children meant the destruction of Indian culture, Congress passed the Indian Child Welfare Act of 1978.

THE INDIAN CHILD WELFARE ACT

The unique legal relationship that exists between the United States government and Indian people made it possible for Congress to adopt this national policy. Because of their sovereign nation status, Indian tribes are nations within a nation. The Constitution of the United States provides that "Congress shall have power to regulate commerce with Indian tribes." Through this and other constitutional authority, Congress has plenary power over Indian affairs, including the protection and preservation of tribes and their resources. Finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," Congress passed the Indian Child Welfare Act.

The Act, designed to protect Indian families, and thus the integrity of Indian culture, has two primary provisions. First, it sets up requirements and standards for child-placing agencies to follow in the placement of Indian children. It requires, among other things, providing remedial, culturally appropriate services for Indian families before a placement occurs; notifying tribes regarding the placement of Indian children and, when placement occurs, notifying tribes 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 LIFE BLOOD 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.

COMMONLY ASKED QUESTION REGARDING THE ICWA

1) Was the ICWA intended to provide protections to Indian children and families living off the reservation?

Most definitely. 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, natural 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 Representative Pryce identified in the Congressional Record where young Indian parents, some that were not even 18 years of age, were being counseled by adoption attorneys to avoid involving their extended families in decisions to adopt out their children. Regrettably, these parents were then faced with a very tough

decision, one that has lifelong consequences, with little, if any, balanced information on alternatives to placing the child outside the natural family.

Situations like these where young Indian parents are only provided one way out of their dilemma do not meet the best interests of anyone, particularly the child. Allowing tribes to be a part of the adoption process enables extended family members in the community to be notified of a potential adoption of their grandchild, niece or nephew and be afforded the chance to discuss a possible placement in their family before it is too late.

In addition, tribes can provide assistance in locating appropriate homes for Indian children needing out of home placements. Many states and private adoption agencies find themselves with a shortage of qualified Indian adoptive homes and can benefit from the pool of homes that tribes may have available. As an example, in the state of Washington, the Yakama tribe has a pool of Indian foster care and adoptive homes which they have allowed the state Division of Social and Health Services to have access to. This agreement enables the agency facilitating the adoption to find the very best home for that child without unnecessary delays.

4) Is the ICWA a barrier to the timely placement of Indian children in foster care or adoptive homes?

No. In fact, since the passage of the ICWA, hundreds of thousands of Indian children have been successfully placed in both loving foster care and adoptive homes; both Indian and non-Indian. The ICWA has been a bright ray of hope for the vast majority of Indian children by helping them be reunified with their families and finding new homes when there are no natural family placements available. Tribal child welfare programs, which play a pivotal role in this accomplishment, have been increasingly successful in recruiting and maintaining foster care and adoptive homes within and outside of their reservation boundaries, making it possible for tribes to place Indian children even more quickly than states and private agencies in many cases. In many cases, state and private child placing agencies look to tribal child welfare programs to assist them in developing quality foster care and adoptive homes for Indian children.

A 1988 study on the status of the Indian Child Welfare Act revealed that tribal involvement in the placement of Indian children has resulted in, 1) Indian children being reunified more often with their natural families than with state or Bureau of Indian Affairs programs, and 2) shorter stays for Indian children in substitute care (i.e. foster care) than with state or Bureau of Indian Affairs programs. These successes are not surprising given the continued growth and sophistication of tribal child welfare programs in the United States. Many of these programs are now offering a full range of child welfare services independently or in collaboration with private and state child welfare agencies.

5) Are the protections available to Indian children in the ICWA still necessary today?

Yes. While the ICWA has certainly helped to reduce the chances that Indian children will not be unnecessarily removed from their homes, families and communities, there are still too many individuals and agencies involved in the unlawful placement of children; especially Indian children.

It is not an exaggeration to say that every year over a thousand Indian children who are eligible for and need the protections of the ICWA are being denied these fundamental rights to have access to their family and culture. This means that one or more of the following violations of the ICWA is usually occurring:

- Tribes and extended family members are not being notified when a member child is being considered for an out of home placement.
- Qualified Indian families, often times relatives of the Indian child, are not being given consideration as a placement resource for the child.
- Child welfare agencies working with Indian families who are experiencing difficulties are not making active and reasonable efforts to provide rehabilitative services to the family, thereby precluding any chance of the child being able to return home.
- State courts, without good cause, are refusing to transfer jurisdiction of child custody proceedings to tribal courts of which Indian children are members.
- Individuals or agencies are choosing to thwart the law by counseling young Indian families to not disclose their native heritage as a way to avoid the application of the ICWA or simply are refusing to take the necessary steps to confirm or deny whether the ICWA applies in a case.

6) Does the ICWA provide any flexibility for state courts to make individualized decisions in adoption cases?

Yes. A state court has the discretion to place an Indian child outside the placement preferences in the ICWA if it finds good cause to the contrary. While an Indian tribe may seek transfer of jurisdiction to tribal court of an off-reservation case, either birth parent may object to the transfer which has the effect of preventing such a transfer. Moreover, even where a parent does not object, a state court may deny transfer of jurisdiction to a tribal court.

7) Can the ICWA be used to disrupt an adoption proceeding at almost anytime?

No. If the jurisdictional and intervention provisions, and the procedures for consent to adoption in the ICWA are followed, no adoption may be disturbed once it is finalized unless there is fraud or duress in the initial consent. Even when there is fraud or duress, a challenge can be brought only two years after an adoption decree is final. A search of reported court decisions involving Indian adoptions where the ICWA was involved found only 30 cases since 1978 where adoptions were disrupted because of court disputes. Thus, where the ICWA is complied with initially, there is little threat that an adoption will be overturned.

WHY THE ICWA AMENDMENTS IN TITLE III OF H.R. 3286 WILL NOT WORK

- **Contrary to the sponsor's claims, this legislation will extend well beyond just voluntary adoption proceedings.** The legislative language will also deny Indian children the important protections they need in involuntary proceedings, both foster care and adoptions.
- **The amendments do much more than just "clarify" or "make minor changes" in the Indian Child Welfare Act as the sponsors have claimed.** Many full-blooded Indian children could end up in homes with strangers while their own extended family members who are qualified to care for them are ignored as potential placements.
- **The amendments address none of the real problems that give rise to lengthy adoption disputes.** Removing tribal government and tribal court jurisdiction over child custody proceedings will not improve placement outcomes for Indian children, and in fact will likely produce worse outcomes. The blaming of tribal governments and tribal courts ignores efforts by individuals who circumvent the ICWA law in state courts and cause most of the pain and suffering that both adoptive and natural families experience. In addition, tribal governments and courts have shown time and time again that they are in the best position to determine what the best interests of Indian children are and consistently produce better outcomes for Indian children when compared to state courts and placing agencies.
- **Indian families are being overlooked as viable placements for Indian children.** While the sponsors of this legislation state that they are just trying to provide loving homes for Indian children, they have completely ignored the fact that many wonderful, qualified Indian families, many who are relatives of these children, are being overlooked as placements.
- **The bill has many serious flaws that will cause an explosion of new litigation on virtually every section of the bill. This will only result in delaying efforts to find good homes for Indian children awaiting adoption or foster care - the very problem that supporters of Title III say they are trying to resolve.** What is social, cultural, or political affiliation? What evidence proves or disapproves such affiliation? What does it mean to be affiliated as of the time of the proceeding? Does the court consider the affiliation over the last 10 years or just within the last month? What if a child maintains such relationship through a grandparent or other relative, but the parent does not? What if the child's parent(s) are deceased? What does it mean that a determination of non-affiliation is final? Does it mean that a judge's determination cannot be appealed to a state appellate court or that a state appellate court decision which violates the ICWA cannot be reviewed in a federal court? Interestingly, determinations that uphold the application of the ICWA will be eligible to be appealed or reversed. What if a natural parent claims a lack of affiliation, the judge accepts this representation and two weeks later an Indian tribe presents overwhelming evidence that the parent has substantial contacts with the tribe? Every one of these questions and many more will be litigated repeatedly.

- **The bill replaces a bright line political test - membership in an Indian tribe as the trigger for the coverage of the ICWA - with a multi-faceted test that transforms the classification into more of a racial identification test.** This provision is likely unconstitutional since the legitimacy of Indian-specific legislation rests upon the fact that such legislation is based upon a political classification, and not a racial classification.
- **The arbitrary nature of Section One could result in Indian grandparents, uncles, aunts, nieces, nephews, and siblings being considered irrelevant in the lives of Indian children.** In the case of an Indian child who had very meaningful, significant relationships with their tribe and extended Indian family over a period of years, but maybe not within the last 3-6 months, the court could determine that this was sufficient evidence to exclude the child's tribe and extended family from being any part of that placement decision.
- **This section does not reflect the realities of how tribal membership mechanisms work and would likely exclude coverage of vast numbers of bona fide Indian children from coverage by the Indian Child Welfare Act.** Many Indian children are not formally enrolled, but are clearly members of a tribe and could be enrolled. In addition, assertions by the sponsors that tribes are trying to make members of everyone are false. First of all, tribes reserve the right to determine their own memberships as sovereign governments. State agencies and courts are not equipped to make these kind of membership determinations and could easily make mistakes that would deny bona fide Indian children and their families from being covered by the ICWA in both foster care and adoption proceedings. Secondly, tribes have every incentive to not be enrolling children who are not legitimately connected with the tribe since ultimately these children will be eligible for benefits that the tribe provides to its members - benefits which are generally limited in nature.
- **Title III would also impact Indian children and families resident or domiciled on the reservation.** Typically, child custody proceedings involving these families would be under the exclusive jurisdiction of the tribal court. However, in those circumstances where a state court misinterprets the parent or child's membership status or where the parent or child have not been formally enrolled, but are clearly eligible to be enrolled, there is nothing to stop states from coming on to the reservation and unnecessarily removing Indian children from their homes based on state, not tribal standards. There would be no requirement that an extended family or tribal placement for the child be sought. Tribal court authority over the voluntary and involuntary placement of such children would be lost, essentially taking us back to the types of rampant abuse which gave rise to the Indian Child Welfare Act.
- **Title III will interfere with positive efforts between tribes and states to protect Indian children and provide quality foster care and adoptive services.** A number of states and tribes have developed inter-governmental agreements to assist compliance efforts with the ICWA and create the best possible services for Indian children and families. Many of these agreements have put into place model services, court procedures, and training projects which will become almost totally irrelevant if Title III is enacted. Evidence of this assertion comes from states like Washington and Nevada which have gone on record to oppose the Title III ICWA amendments for these same reasons.

THE NCAI ICWA AMENDMENTS ARE A POSITIVE AND EFFECTIVE ALTERNATIVE TO TITLE III OF H.R. 3286

The following alternative amendments were adopted by member tribes at the National Congress of American Indian's Mid-Year Conference in Tulsa, Oklahoma. They were carefully developed by tribal leaders and experts in the field of adoption and foster care of Indian children with input from representatives of the American Academy of Adoption Attorneys.

This effort by the tribes signifies their willingness to address the specific concerns of those who feel that ICWA has flaws in some areas. But just as important, the amendments meaningfully address the concerns raised about ICWA in a way that can provide more security for potential adoptive parents and still allow for meaningful participation of extended family members and tribes when appropriate.

1. Notice to Indian Tribes of Voluntary Proceedings

Provides for notice to tribes in voluntary adoptions, termination of parental rights, and foster care proceedings. Also clarifies what should be included in notices to tribes of these proceedings. Providing timely and adequate notice to tribes will serve to ensure a more appropriate and permanent placement decision for the Indian child. When tribes and extended family members are allowed to be part of a placement decision the risk for disruption is significantly decreased. With proper notice, tribes can make informed decisions on whether the child is a member and whether or not they have an interest to participate in the placement decision. Notice also helps to expand the pool of potential adoptive parents because frequently the tribe knows of extended family members and other quality adoptive homes that are unknown to the individual or agency facilitating the adoption.

2. Timeline for Intervention in Voluntary Cases

Provides for a window of 90 days for tribes to intervene after notice of a voluntary adoptive placement or 30 days after notice of a voluntary adoption proceeding whichever is later. If a tribe does not intervene within these timelines after proper notice, they can not come back and later intervene.

Timely placements of children, whether they be Indian or non-Indian, are a concern of everyone. It is in no one's interest to let children languish in foster care or institutions when there is an appropriate adoptive placement available. Understanding this, tribes at NCAI came together to adopt language that will place an appropriate timeline on their ability to intervene in voluntary adoptive proceedings involving their children.

Historically, tribes and extended family members interests were almost never given any consideration in these sensitive proceedings. They often only found out about adoptions of their children months and sometimes years after deals had been cut. With proper notice, tribes can make informed decisions regarding their interests in a child and help facilitate a timely and successful adoptive placement.

3. Criminal Sanctions to Discourage Fraudulent Practices

Provides criminal sanctions for individuals or agencies which knowingly misrepresent whether a child is Indian to avoid application of the Indian Child Welfare Act. The vast majority of disrupted adoptions involving Indian children happen as a result of unethical and illegal behavior on the part of the individual or agency facilitating the adoption. In the now infamous "Rost" adoption case, the natural father was counseled to avoid disclosing he was Indian in order to avoid application of the ICWA, after which the adoption attorney falsified adoption papers that asked for the natural father's ethnicity. This is just one example amongst many where a number of innocent people, as well as the adoption itself, were exposed to unnecessary risks for the purposes of making life a little easier for the person facilitating the adoption. This kind of disregard for the lives of children, their natural families and potential adoptive families cannot be tolerated and should be punishable by law.

4. Limits for Withdrawal of Consent to Adopt

Limits the length of time within which birth parents can withdraw their consent to adoption to six months after notice to the tribe. Provides more certainty that adoptions involving Indian children will not be disrupted by placing time limits on the natural parents ability to revoke their consent to adopt. Furthermore, it brings federal law pertaining to the adoption of Indian children more in line with applicable state laws by avoiding unlimited timelines on when consent to adoption can be revoked.

5. Clarification of Application of ICWA in Alaska

Clarifies that, for the purposes of the Indian Child Welfare Act, Alaskan Native Villages have a land base over which they can exercise child welfare jurisdiction. The Alaskan tribes and the Alaskan delegation are working on a modification to this provision and the National Indian Child Welfare Association supports whatever modifications are developed by these parties.

6. State Court Option to Allow Open Adoptions

Allows state courts to provide open adoptions of Indian children where state law prohibits them. Some state courts prohibit biological family members from maintaining contact with the child, even when the adoptive parents agree. This provision provides another tool in a state court adoption proceeding to avoid protracted litigation and ensure children with access to their natural family and culture when deemed appropriate. However, state courts will still have full discretion as to whether this option is utilized.

7. Clarifying Ward of Tribal Court

Clarifies tribal court's authority to declare children wards of the tribal court, much like state courts do. Clarifies that once a tribal court takes control of an on-reservation child or a child transferred to them by a state court that the tribal court retains control. Ensures that tribal courts will not unilaterally reach out and take control over a child whose permanent home is off-reservation.

8. Informing Indian Parents of Their Rights

Provides that attorneys and public and private agencies must inform Indian parents of their rights and their children's rights under the ICWA. This provision will ensure that Indian parents are informed up front and able to make balanced decisions on the adoption or foster care placement

of their children. This will help avoid unnecessary litigation due to natural parents making uninformed decisions that they may wish to change later.

9. Tribal Membership Certification

Any motion to intervene in an adoption proceeding by a tribe shall be accompanied by certification of the child's membership or eligibility for membership according to tribal law or custom. This provision will help ensure that there is no question as to whether a child is Indian under the ICWA and that tribal membership determinations are not arbitrarily made.

THE SUCCESS OF ICWA IN HUMAN TERMS

I want to tell you in human terms what the Indian Child Welfare Act means to Indian families. Recently a 32 year-old Indian mother in Oakland, California, Prisella Packineau, rediscovered her Indian heritage. She was the child of a Navajo mother and a Mandan-Hidatsa father. When Prisella was only eighteen months old, her mother became mentally ill while living in the Phoenix area. Because her mother was unable to care for her Prisella was placed with a non-Indian foster family and never returned to her mother or extended family. She never even knew she had an Indian family or relatives. Her non-Indian family forbid her to speak of her Indian heritage and passed it off as something that was not important.

Years later, while battling depression and anxiety about her lost identity Prisella developed a substance abuse problem and her own children were placed in substitute care. But this time there was an Indian Child Welfare Act and a social worker who knew how to implement it. Even though Prisella had been enrolled in the Navajo Nation at birth, because of her placement in a non-Indian family at such a young age, no one had bothered to inform or help her enroll her own children. Fortunately, the social worker notified the Navajo tribe who moved to enroll Prisella's children and help find a placement with her extended family.

Upon visiting the home of one of Prisella's aunts, the social worker found pictures of the Prisella at eighteen months of age still on the wall. The aunt told of the families grief and the frustration at not being able to find this child whom they had helped raise as an infant. They told of not being able to find information to know where Prisella might be or if she was even alive. The years of not knowing where their loved one had disappeared to had left a definite mark on this family.

The tribe working with the mother's maternal aunt asked that the children be placed with her while the mother sought treatment for her substance abuse problem. As a result of the Indian Child Welfare Act and the good work of the tribe and Prisella's social worker, the children were placed with Prisella's aunt and are doing beautifully there on the Navajo reservation.

Today, Prisella has been reunited with her Navajo family and will very soon be celebrating three years of sobriety. She also knows she has a biological father, whom she was told by her earlier caseworker was dead, and hopes someday to meet him as well. She is a much happier, self-

confident person today, while her children have found a loving home with their extended family. As Prisella puts it, "I am able to give my children today what I did not get - a strong sense of who they are as Indian people. I am still trying to find what was lost to me long ago and it is very, very hard. I am trying to fill the hole in my heart."

If the proposed amendments in Title III of H.R. 3286 had been enacted into law this success story would not be possible. The state court would likely have found that ICWA does not apply because Prisella would have been judged to not have significant cultural, social, or political affiliation with her tribe. In addition, it is likely that she would have failed the test that she and her children had to be enrolled prior to a child custody proceeding commencing. In both cases, Prisella would have been denied the opportunity to discover her extended family and her children would likely be living in a home where they had no contact with their mother or culture. This story is not an uncommon one in Indian Country and tells the most important reasons why the Indian Child Welfare Act does work and why it would be a grave mistake to weaken it in any way. The mother in this story has agreed to send the Committee her story.

CONCLUSION

The Indian Child Welfare Act has provided much needed protection and hope to thousands of Indian children since its enactment. What many people do not know is that this law has also given Indian communities hope for a better future. It is not uncommon to find Indian people in communities all across the country that have either found their own identity because of the ICWA or have a family member that was reunited because of the ICWA. These collective experiences which are shared every day provide the healing that is needed for Indian communities ravaged by federal policies that were designed to isolate and assimilate Indian people. In many of these cases, the discovery of their lost identity has enabled them to fill an emptiness inside themselves and find the kind of support and understanding they never had. This is the ICWA that we know, and when allowed to work properly, provides security and certainty in Indian children's lives.

We ask you to support the NCAI draft amendments to the ICWA. We believe they will continue the positive contributions to the health and safety of Indian children, while also providing the certainty prospective adoptive parents need. This balanced approach is the kind that makes everyone a winner and achieves what everyone says they want, which is the best interests of the child. Thank you for serious consideration of this testimony and request.



- Federal Bar Association

STATEMENT OF THE FEDERAL BAR ASSOCIATION, INDIAN LAW SECTION
BY DONNA J. GOLDSMITH

PREPARED FOR SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON PROPOSED AMENDMENTS TO
THE INDIAN CHILD WELFARE ACT OF 1978

My name is Donna J. Goldsmith. I am an attorney, a former adjunct professor of Federal Indian Law, and current Deputy Chairperson of the Indian Law Section of the Federal Bar Association. During the last ten years, I have represented Indian children, parents, extended family members, foster parents, and Indian tribes from both the United States and Canada in Indian Child Welfare Act¹ proceedings in state courts throughout the country. From January of 1993 through October of 1995 I represented Indian children and parents in hundreds of ICWA proceedings involving members of numerous Indian families. The views that I express to this Committee in this statement are professional conclusions derived from my litigation experience in the field of child welfare, and have been adopted by the Indian Law Section of the Federal Bar Association. The views expressed herein are those of the Indian Law Section of the Federal Bar Association, and do not necessarily represent the views of the Federal Bar Association itself.

It is axiomatic, given the nature of the current debate in Congress, that there is an ongoing necessity for federal legislation to prevent the continuing separation of Indian

¹ Indian Child Welfare Act of 1978, 25 U.S.C. 1901 *et seq.* (hereafter "the ICWA" or "the Act").

children from their cultural heritage. As this Committee is aware, last month Congresswoman Pryce introduced, and the House of Representatives passed, amendments to the Indian Child Welfare Act which threaten the futures of Indian children, and of their future generations. Congress was asked to fatally weaken the ICWA at the behest of those who continuously and consistently violate the Act -- state agencies, attorneys, state judges, and the adoption industry. The Indian Law Section believes that this is bad policymaking.

Because the Indian Law Section of the Federal Bar Association registered its objections to the procedural defects which led to passage of those amendments, I will not repeat those comments today. Rather, these comments will focus on the patterns and practices that I have encountered nationwide during the last ten years, and which I believe have created the perceived problems that this Committee seeks to remedy today. First, I will address the factual misconceptions that appear to be controlling this debate, and whether there is a need for amended legislation. I will not comment upon the sovereignty issues that the proposed legislation would affect -- those are issues that are more appropriately addressed by tribal leaders. I will also make suggestions that I believe might remedy some of the current problems.

It has been my experience that there is *no* support for the broad-brushed comments made by supporters of the House amendments. While I have litigated and consulted on ICWA cases throughout the country, I have litigated a substantial number of cases in three states where there are large Indian populations -- Alaska, California,

and Oregon -- and have found that as far as those three states are concerned, the information presented in the House debate was purely of an emotional nature. Although the adoption industry -- and I refer to it as an industry because it is precisely that -- and general opponents of the ICWA would have us all believe that thousands of Indian children continue to suffer great anguish as they languish in foster care, unable to be placed in permanent homes, reality presents a very different picture. During the last three years the Juvenile Court in Portland, Oregon appointed me and attorneys from the Native American Program, Oregon Legal Services to represent almost all of the Indian children and parents in Portland, Oregon in child abuse and neglect proceedings. *If* there were *any* Indian children languishing in foster care, much less great numbers of them, I would have been aware of them. By the same token, I have been training judges, attorneys, and state and tribal personnel on Indian Child Welfare Act issues nationwide, and have heard no data to support the emotional pleas made by supporters of the House amendments.

Another factual misconception that appears to be playing on peoples' fears is the argument that there are numerous cases in which Indian tribes are removing children from their adoptive homes after substantial bonding has occurred. In more than ten years of law practice in the area of Indian child welfare, I have represented parties in only two cases in which the child's tribe even attempted to challenge the adoptive placement -- and only one case in which the tribe was successful in doing so. In the latter case, the adoption agency placed the child with her adoptive parents with full

knowledge that the child was a full-blooded Indian child who had substantial numbers of family members who might wish to adopt her. The agency chose to place the child with a non-Indian couple who lived out of state -- presumably a couple who could afford to pay the substantial fees that adoption agencies collect for each adoption -- and never bothered to contact the child's tribe or family members regarding adoption. The child's grandmother learned of the placement and pending adoption, notified the tribe, and the tribe intervened immediately to assert its exclusive jurisdiction. Two different California state courts recognized the tribe's exclusive jurisdiction in the case, and dismissed the petitions pending before the state courts. Subsequently, the attorney for the adoptive parents ignored tribal court orders -- and the tribe was forced to seek the help of state authorities to return the child to her family.

This was not an isolated incident. I have received many calls from frantic grandparents, some of whom are spiritual elders and leaders in their communities, who have learned of a pending adoptive placement at the last minute, only to find that the adoption agency has shipped the child out of state to a new home -- without even calling a member of the child's family. There is something inherently wrong about permitting economics to drive adoption decisions that will affect children for their entire lives. In fact, this Congress would be shocked to learn of another society that tolerated and even encouraged the wholesale removal of indigenous children from their communities and families, and whose government moved to weaken the only law that gave those communities a small degree of power to protect their children from such removal.

Anyone who thinks that all that an Indian child needs is a loving home in *any* family demonstrates no sensitivity to the special needs of Indian children. Indian children need their families, their spiritual connections, and their culture. As this Congress is well aware, psychological studies demonstrated historically that Indian children raised in non-Indian homes were at greater risk. Testimony from psychologists who had worked with numerous Indian children who had been raised outside of their families and cultures formed the basis of Congress' decision to enact the ICWA in the first place. Thus, if Congress weakens the ICWA, we will have come full circle.

Contrary to popular opinion, adoptions by seemingly loving parents do not always last -- with devastating consequences for the children. I represented one Indian child whose "loving and devoted" non-Indian adoptive parents *gave her back* after five years -- because they decided that she was too emotionally troubled. A diligent state caseworker discovered the child's Indian community, and was able to place the child with her grandmother. Imagine how that child felt when her adoptive parents gave her back -- as if she were a doll that no longer pleased them. She is now a gifted young artist and a talented dancer who is totally immersed in her family's traditional ways -- and who loves every minute of it.

There appear to be different variations of the same theme continuing to play. Proponents of H.R. 3286 continue to plead that we must act to remove tribal interference with adoption decisions that are being made by private adoption agencies, and that to do otherwise is not in the "best interests" of the Indian child. They argue

that Indian children need to be placed in permanent homes, and that many Indian children are languishing, without adoption prospects, because prospective adoptive parents are afraid to adopt Indian children for fear that tribes will interfere with the placement. These same individuals, who know nothing about the individual cultures from which they continue to remove Indian children, presumptuously propose that it is in the best interests of Indian children to find placement in loving homes regardless of whether or not those homes are able to infuse the child with substantial knowledge of his/her culture. Such attitudes are ethnocentric, at best -- and terribly patronizing. When I read the floor debate in favor of the House amendments, I wondered how many Indian children the proponents of that remedial legislation have personally known, or to how many Indian children they have even spoken. My personal experience with the numerous Indian children I have represented has been that Indian children suffer immeasurably when they are removed from their cultures and their extended families. I have witnessed, firsthand, the tragedy that so often occurs when young Indian adults who have been placed with loving non-Indian families come home to their tribal communities looking for connections -- looking for themselves, as they have told me -- only to find that they cannot become a part of those communities because they do not understand the intricacies and nuances of the tribal cultural and social fabric. My tribal clients have shared stories with me year after year concerning the many young adults who come home to them, adults who were placed out of culture without the tribes' knowledge -- adults who are angry that no one fought to bring them home, who are angry that they do

not fit in. And, perhaps most frightening of all, these same young, displaced adults often have children who ultimately become numbers in the child welfare statistics because the loss of culture and identity has such a devastating impact upon both the individual and subsequent generations.

In fact, contrary to the assertion that Indian tribes are routinely intervening at late stages and disrupting placements that are, in the best interest of Indian children, it has been my routine experience that Indian tribes are quite sensitive to their children's needs, and carefully consider their placement decisions with *only* the children's needs in mind. I am, quite honestly, baffled by the adoption industry's characterization of tribal decisions regarding adoption of their children. Many of the tribes that I have represented have had the ability, pursuant to the ICWA, to disrupt adoptive placements that did not comply with even the minimum requirements of the Act. In all but one instance the tribes chose, after independently assessing the children's needs, *not* to disrupt the placements.

I have represented little children who have articulated to me, unsolicited, how painful it is for them to be disconnected from their families. It strikes me that it is terribly presumptuous for members of Congress to amend the ICWA in response to a few cases that have gained national notoriety. The "best interests" of Indian children is to ensure for them immersion in -- not mere awareness of -- their cultural heritage. Thus, while they, along with all children, want to know where and with whom they will live, more often than not they do not appreciate the significance of the legal nuances

between adoption, guardianship, and permanent foster care.

While I would not dispute that there might be a need for some amendments to the ICWA, the House amendments do not address the failures that should be at the heart of this debate. There are several causes why a few adoptions, such as those brought to the attention of the media in recent years, have gained national attention -- and while the House amendments appear to address the concerns raised by the adoption industry, it is my belief that the House amendments will exacerbate, rather than remedy, any existing problems regarding implementation of the Act.

There appear to be four consistent failures within the adoption, dependency and neglect systems that thrust some adoptions of Indian children into the public arena. First, and most important, state court personnel, caseworkers, private agencies, and attorneys are failing, on a regular basis, to attempt to properly *identify* who is and who is not an "Indian child" for purposes of the Act -- often because the mere thought of following the ICWA intimidates them. *If* the state court is even cognizant that the ICWA exists, and that its application is not discretionary, it is not uncommon for a state agency or court to look at a child, conclude that the child does not "look Indian", and dismiss any potential ICWA concerns. In several memorable cases, I personally asked a family member whether or not there was Indian heritage, and discovered that although the caseworker had advised the court that there was none, in fact the children were either enrolled or eligible for membership in a federally-recognized tribe. In those instances, had adoption been the immediate goal, the child's tribe would not have had an

opportunity to request placement of the child with extended family or other members of the tribe.

Second, in the event that *someone* raises the question of whether or not the ICWA applies in a child custody proceeding, it is equally common for a judicial officer to conclude after an inquiry to the child's family member regarding blood quantum that the child is "not Indian enough" to qualify as an Indian child under the Act. This is different from the judicially-created "existing Indian family" exception. If an attorney who understands federal Indian law happens to be sitting in court on that particular day, and can advise the court that membership decisions must be made by the child's tribe -- and only the child's tribe -- there is a chance that the child's tribe will receive notice of those proceedings. However, it is more common that no one challenges these judicial determinations, because no one who cares about ICWA concerns happens to be in court on that particular day. The result is that a child's Indian heritage (and, perhaps, membership in a tribe) is not discovered for many months -- or, worse yet, at the termination of parental rights stage -- and the court must reevaluate more than a year's worth of placement decisions. My recommendation would be that Congress contemplate an amendment that specifically requires all judicial officers to inquire at the beginning of each child custody proceeding whether or not a child has Indian heritage, and which further orders the *court* to send notice to the child's tribe if the answer to the Indian heritage question is in the affirmative. Oregon has enacted such a statute² -- and while

² See ORS 419B.310(2).

not all judicial officers always remember to follow that law, it has proven to be helpful in identifying ICWA cases. If federal law were to impose a similar requirement, it is my belief that many of the problems that state courts currently face regarding challenged ICWA adoptions would disappear.

A third leading cause for litigation surrounding adoptions, particularly regarding why children's tribes are not able to respond and intervene at an early stage on their children's behalf, is that it is not uncommon for a child's tribe to receive no notice of a proceeding -- voluntary or involuntary -- because none of the parties to the case believe that it is their duty to notify the child's tribe. Because the state courts do not believe that it is a duty of the court to send notice to a tribe, and the attorneys will not necessarily take on the responsibility, there is often a large gap in time before a child's tribe may receive notice. While the current language of the Act regarding notice is explicit, failure to follow its directives continues to be a problem today. Although I recognize that this Committee might be primarily interested in voluntary adoptions, it is not uncommon for a proceeding that begins as an involuntary proceeding to result in a voluntary relinquishment before the case runs through the normal sequence of events. Thus, it would behoove this Committee to consider all factors that might alleviate current concerns.

A fourth leading cause of litigated ICWA adoptions is the refusal of state and private agency personnel and attorneys to follow the mandates and policies of the ICWA. For example, even in those instances where the agency involved in removing the child

attempts to comply with the notice provisions of the Act, there is often a failure to comply with the explicit requirements set forth in the ICWA. Tribal personnel from numerous Indian nations have advised me that tribal enrollment clerks often receive inquiries from state agencies regarding a child's enrollment status -- commonly, no information about any child custody proceeding is included in that inquiry. If the enrollment clerk does not realize the purpose of the inquiry, and does not advise the person who is responsible for tribal child welfare decisions about the inquiry, and if the state or private agency subsequently advises the court that a notice to the child's tribe has been sent and the court notes that the tribe has not intervened, it is obvious what will likely ensue. I have personally reviewed the notices that state caseworkers have sent to tribes on many of my cases -- and found almost all of them to be wholly inadequate and in violation of the direct mandates of the ICWA.

In some cases, the only notice that tribes receive is a telephone inquiry from a state caseworker -- and nothing more, in spite of the fact that the Act requires written notice. In addition, I have been in *numerous* cases where I heard a caseworker advise the court that he/she had called the child's tribe and determined that there was no Indian heritage -- yet, when I contacted tribal personnel, I discovered that the child was actually an enrolled member.

Failure to properly advise the court that a case is covered by the ICWA is a common problem that often results in precluding Indian nations from participating in their children's custody cases. In one Oregon case, the fourteen-year-old mother's

attorney advised her client not to let anyone know that she was Native American, as it would cause problems for the adoption. My understanding is that this happened in the Rost case, too. I recently received a call about another case where an Indian grandmother's court-appointed attorney refused to notify the court that an Indian child was involved in the dependency and neglect proceeding, because she feared that doing so would anger the court and result in the loss of future court appointments in that court. We advised this attorney that she was committing malpractice by refusing to raise this issue, and she subsequently notified the court that the Act applied. That child is now with her grandmother, instead of in foster care on her way toward an adoption. These are only three out of numerous cases nationwide. I understand that in some states, state and private agency personnel indirectly encourage young Indian mothers not to reveal their Indian heritage or tribal affiliation, advising the mothers that if the agency becomes aware that the mother is Indian the agency is required to follow laws that would make it difficult for the agency to place the child.

There are additional, equally compelling reasons why the Indian Law Section urges this Committee to refrain from entertaining any other amendments at this time, as to do so would put the cart before the proverbial horse. At least sixteen states are in the process of completing voluntary internal assessments of the efficacy of their courts' compliance with the ICWA, pursuant to Congressional allocation of funds to the Administration for Children and Families, Department of Health and Human Services,

State Court Improvement Program, fiscal year 1995.³ In addition, *all* fifty states are conducting mandatory evaluations of their own ICWA compliance pursuant to Title IV-B of P.L. 103-432, beginning in fiscal year 1996. Each state must draft a report on the specific remedial measures that the state intends to take to bring itself into full compliance with the ICWA. It seems inappropriate, then, for Congress to enact remedial ICWA legislation at this time, when Congress has allocated substantial amounts of money to ascertain how states can better comply with the ICWA -- and the surveys and proposals are not yet in.

Perhaps the greatest irony of all is that the proposed amendments would punish those members of tribes who are forced to leave their reservation for economic reasons - - and who find themselves before a judge who has concluded that because they have left their communities and become "urban" Indians, they do not maintain significant enough ties to their community to warrant application of the ICWA. The amendments place in the hands of the very systems that caused Congress to enact the ICWA the power to determine that the ICWA does not apply to Indian children. This creates a fundamental conflict of interest.

³ According to the various regional and state offices of the Administration for Children and Families, Department of Health and Human Services, those states are Alaska, Arizona, California, Colorado, Iowa, Kansas, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. This list is not necessarily complete. In addition, while South Dakota is not conducting a full evaluation of state court ICWA compliance, the state is evaluating its need for additional Indian foster homes near the reservations within the state. The state of Oregon, alone, received eighty-eight thousand dollars (\$88,000) to conduct a survey of the entire judicial and child welfare system.

It has been said before, but is worth repeating, that the problems that have led to this debate are not problems with the Act, or with tribal responses to adoptions of Indian children. Rather, the problem lies with those individuals (judges, attorneys, state or private agency personnel) who consistently refuse to comply with the terms of the Act. In states such as Nevada and New Mexico, where state and tribal judges and government leaders are working hard at developing and maintaining good lines of communication, few problems arise regarding out of home placements of Indian children.

Finally, I understand that the Committee is entertaining an amendment that would require state and private agencies to notify a child's tribe of any voluntary placement of an Indian child. This is a critical amendment, as notice in voluntary cases would alleviate the need for much of the litigation that occurs now. It is most important, however, that tribes receive notice within a very short time after a placement of *any* kind -- both voluntary and involuntary. Once a child has been placed in either foster care or a pre-adoptive placement, it becomes increasingly difficult to challenge that placement. In fact, it is quite common for state agencies to place Indian children in non-Indian foster placements with the idea that the foster care will be for only a short time -- only to find that the foster placement becomes the pre-adoptive placement and, ultimately, adoptive placement. The states continue to argue that the shortage of Indian foster homes justifies these placements -- the reality is that many states do not make any efforts -- significant or otherwise -- to solicit help from the Indian community to expand the numbers of Indian foster homes. It is easy to see that if the state fails to notify the

child's tribe in the initial stages of any proceeding, the child's bonding with the foster/adoptive family is likely to interfere with the ability to move the child at a later date to his/her family.

One last comment: It is my belief that the House amendments, and any other amendments that are similar in nature, will impose a tremendous burden on state courts, and that they guarantee that there will be a dramatic and substantial increase in litigation. Thus, in addition to the fact that the House amendments infringe upon an area of tribal sovereignty that is fundamental and inimical to the very concept of sovereignty, enactment of these amendments will exacerbate, rather than diminish, any timeliness issues that affect adoption of Indian children.

The Indian Law Section of the Federal Bar Association thanks the Committee for the opportunity to offer these comments on proposed amendments to the Indian Child Welfare Act.



OFFICE OF THE GOVERNOR
STATE CAPITOL
SANTA FE, NEW MEXICO 87503

GARY E. JOHNSON
GOVERNOR

June 25, 1996

(505) 827-3000

The Honorable John McCain
United States Senator
Chair, Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

**Re: Statement Prepared for Senate Committee on Indian Affairs,
Hearing on Proposed Amendments to the Indian Child Welfare Act of 1978.**

Mr. Chairman, Members of the Committee:

I believe it important to inform the Committee of my position on the proposed amendments to the Indian Child Welfare Act (ICWA).

As Governor of the State of New Mexico, I believe that the Act should not be amended with respect to defining who qualifies as an Indian child, and who is entitled to notice of state court hearings involving Indian children.

I understand that the proposed amendments would substitute a subjective definition of "Indian child" in place of the current objective definition. Currently, ICWA defines an Indian child as one who is enrolled as a member of a tribe, or eligible for tribal membership. This is an objective standard which does not invite costly litigation over the question of who is an Indian child.

The proposed amendments would allow state courts to decide the question of who is an Indian child based on a finding that one of the parents is "of Indian descent". Two problems are immediately apparent: 1) the qualifier ("Indian descent") is a standard so broad that, should it become law, almost anyone in America today might qualify; and 2) the issue of who is or isn't "of Indian descent" is a question of fact that can be decided only after hard-fought, costly, and time consuming litigation.

The proposed amendments would also allow the state to determine whether a child's parent has sufficient "social, cultural, or political affiliation with the Indian tribe" to warrant application of ICWA. This particular amendment would create yet another subjective standard whereby a tribal community would be denied the right to receive notice of a state court proceeding involving an Indian child. If a tribe is denied such notice, then the tribal community is denied the opportunity to have any say on behalf of an Indian child with blood and cultural ties to the tribe.

Senator McCain
June 25, 1996
Page 2

The proposed standards for defining an Indian child and for determining whether there is a nexus between the child and a tribe are, at best, subjective and therefore susceptible to differing interpretations. Replacing the traditional objective definition of Indian child with the kinds of subjective definitions or standards described above will result in unnecessary and emotionally wrenching litigation which, ultimately, will hurt children.

We must not lose sight of the historical and legal facts underlying ICWA. ICWA is not an Act designed to protect special interests or privileges. The Indian Child Welfare Act is a law that acknowledges the historical fact that Native American people occupied the Americas as self-governing sovereign nations long before Europeans, African Americans, and others immigrated to this land. ICWA -- in its current form -- is the instrument essential to protecting the cultural integrity and survival of Native Americans. It also acknowledges the historical fact that, before its enactment, large numbers of Indian children were taken from their families under false pretenses.

I understand that the proposed amendments have been prompted by some emotionally charged cases as well as an intense debate about the rights of individual parents who have loose or severed connections with a tribe which can claim rights over that parent's children. These are not easy issues. But I do believe that the proposed amendments to ICWA would make the process more difficult, more litigious and, ultimately, more harmful to children and their families.

Sincerely,



Gary E. Johnson
Governor

GEJ/HAW:yc

CC:
Pete V. Domenici
United States Senator
328 Hart Bldg. 20510-3101
Washington, D. C.



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Three Affiliated Tribes • Fort Berthold Indian Reservation
HC3 Box 2 • New Town, North Dakota 58763-9402

Statement

Russell D. Mason, Sr.
Chairman, Three Affiliated Tribes
Before the United States Senate
Indian Affairs Committee
Hon. John McCain, Chairman
Hearing on Indian Child Welfare Act
June 26, 1996

Mr. Chairman, members of the Committee. Thank you for the opportunity to present written testimony before your committee.

First, we want to thank the many members of the Committee and especially the Chairman and Vice-Chairman who have shown their continued commitment to the Indigenous Peoples of these United States in this 104th Congress. We are especially grateful for the recent action this Committee has taken to remove Title III of H.R. 3286, the Adoption Promotion and Stability Act of 1996, which contained amendments to the Indian Child Welfare Act (ICWA).

It is my understanding that having removed the provisions to which Indian Tribes and Nations across the country, including ours, have actively opposed, your committee now wishes to examine various amendments to ICWA that Indian Tribes and Nations could support, especially including the draft amendment language developed, with our active participation, at the recent mid-year conference of the National Congress of American Indians (NCAI) in Tulsa, Oklahoma. As you may know, I am a First Vice-President of NCAI representing the Aberdeen Area tribes. First, however, I want to give a brief background about the Three Affiliated Tribes, and why the Indian Child Welfare Act is important to us. Then, I will describe why we believe that Title III is a misguided effort to amend ICWA and, in contrast, suggest how the draft NCAI Tulsa language addresses some of the fundamental concerns raised by the proponents of Title III.

The Three Affiliated Tribes are the Arikara, Mandan and Hidatsa Nations located on the Fort Berthold Indian Reservation in northwest North Dakota. Like most other Indian tribes and Nations within the United States, the Nations that make up our affiliated Tribes were vastly reduced in population for many reasons by the turn of the 20th century. As our population began to stabilize by the middle of this century, new threats to our population, culture and way of life appeared, including the construction of the Garrison Dam along the Missouri River, which split our traditional homeland along the Missouri River into five distinct communities all divided by a large body of water. This great "flood", as we call it, turned our largely self-sufficient society upside down, causing massive relocation, and assisted in creating great poverty and other social problems on our reservation.

This, in turn, meant that more of our population was inclined to leave the reservation, which dramatically increased the possibility that our members would be adopted into non-Indian families. As a result, these

tribal members have lost their Native culture and traditions. The psychological effect of the loss of one's Indian culture and traditions has been, for far too many Tribal members, an empty feeling of not knowing who they are and being unable to recover their "lost identity". The loss to the Tribe as a whole when its members are taken away is incalculable.

The traumas created for families by both voluntary and involuntary placement of their children outside of our communities remain very real, especially because of a common feature of most Indian tribes, the "extended family". Aunts, uncles, grandfathers and grandmothers all often share in the responsibilities of raising their nieces, nephews and grandchildren. Cousins become like brothers and sisters, and are often referred to that way.

The extended family relationships that develop are very strong. Recently, as we were preparing a letter to send to this Committee while it considered whether to remove Title III of H.R. 3286, within a few minutes in our Tribal building, nearly every Tribal member employee over the age of 35 could recall different incidents of family traumas caused by adoptions and placements of family members into non-Indian families, because there were generally available perfectly capable extended family tribal members who could have raised and cared for the children being taken away. Often, the children placed or adopted were never heard from again. The following is one of those stories.

An Indian woman had four (4) children and also had a drinking problem. However, the Indian grandmother cared for the children in her home. The Indian grandmother was an excellent caretaker and loved her grandchildren very much. One day, non-Indian social workers arrived in a station wagon to take the Indian children "away." The children began running but, eventually, the children were loaded into their station wagon. The grandmother never gave away or disposed of the children's clothing, hoping that someday they would return. The grandmother cried every day and mourned for her lost grandchildren until the day she died in 1974. The grandchildren would have been in their teens when their grandmother passed away. To this day, the mother's sisters, the children's aunts, vividly remember the children crying as the station wagon drove away, and stated they will never forget that day. It was one of the aunts who told this story and as she did she wept for the children, including remembering how her mother suffered the rest of her life grieving and mourning for the children. In 1978, several years after this incident, the mother had another baby, which was just prior to when the Indian Child Welfare Act took effect. Again, the non-Indian social workers took her newborn son right from the hospital. The social workers told the mother that her son was being taken somewhere on the east coast. To this day, the Indian relatives have never seen or heard from the children taken away.

The passage of the Indian Child Welfare Act (ICWA) in 1978 was a modest step forward to prevent our existence as the Three Affiliated Tribes from being further eroded. Our Three Affiliated Tribes, as a sovereign, Federally recognized Tribe, whose member Tribes existed long before the United States was a nation, was assured by ICWA that if we wished, we had the right to be notified and to intervene in state sanctioned actions in which the fate of our children was being decided, assist in influencing the outcome and to potentially obtain a transfer of the case to Tribal court where the best interests of our children would be finally determined.

Our state courts in North Dakota, like other State courts, initially resisted the application of ICWA to its court proceedings, but now, nearly 20 years after ICWA's passage, our state courts generally comply with the law and understand it. Along with that understanding has come a new recognition that the tribal courts of the tribes in North Dakota are as capable as state courts in reaching wise decisions about the custody and welfare of children.

Now, however, because of a few celebrated and largely misunderstood cases in which some people have reached the erroneous conclusion that the welfare of children is secondary to tribal political goals, we face a new and grave threat to our very existence as sovereign peoples. We simply cannot even think about going back to the days when State courts could decide our children's fates without tribal involvement, and where necessary, intervention and assertion of tribal jurisdiction.

The proposed Title III of the Adoption Promotion and Stability Act of 1996, H.R. 3286, in our opinion, was and remains dangerous in several ways, and would lead, if adopted, to further costly and time consuming litigation over a number of issues. If amendments to ICWA are necessary, we believe the have NCAI Tulsa meeting language provides a basis for meeting most of the objectives of those who are concerned about the misapplication of ICWA in state court proceedings.

First, Title III would set a new standard for who is an Indian child for the purpose of allowing the tribe the right to intervene in a child custody proceeding. It states that a tribe may not intervene unless: 1) one of the child's biological parents is "of Indian descent," and 2) at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member. The determination of parental affiliation is to be based on the parent's affiliation at the time of the custody proceeding. Finally, a determination by the state court that ICWA does not apply is final.

Under Title III, this determination of "affiliation" with the child's member tribe is one left to a state judge, without tribal input, and thus makes a tribal determination of eligibility for membership or actual membership in the tribe irrelevant. This is exactly the kind of situation ICWA was enacted to prevent. It represents a very drastic invasion of tribal sovereignty by replacing the tribe's determination of eligibility for membership with a vague and virtually impossible to define state determined standard of tribal association sure to cause protracted and costly litigation. Tribes are political entities, not racial classifications, recognized by the Federal government as capable of self-governance, and ICWA is legislation specifically based on that recognition.

Therefore, we can only support legislation which preserves the fundamental right of tribes to determine their own membership and apply that determination in tribal and state child custody proceedings. We believe that the NCAI Tulsa meeting language concerning "certification" of membership by a tribe at the time it seeks to intervene in a child custody proceeding goes a long way to meet the objective of certainty in the state court setting and, although we feel that no changes to ICWA are necessary at this time, we support the proposed language.

Second, Title III is concerned about retroactive enrollment of Indian children affecting ongoing adoption proceedings or affecting adoptions that have already occurred. These provisions of Title III do not take into account the fact that many tribes update membership rolls sporadically; that a child is not

necessary enrolled at birth; that in some cases where the child's parents are members of different tribes, the parents will let the child make the tribal enrollment decision; that many people are fully recognized as being part of a tribal community even though they are not formally enrolled; and that many Indian people do not enroll until there is specific need for it (e.g., voting privileges, scholarship applications). It also does not take into account what Congress recognized when it enacted ICWA, that there are abuses inflicted on young Indian parents who are counselled to give their children away shortly after birth, before the enrollment decision is even made.

We believe that a major part of the perceived problems with ICWA are procedural. Thus, the NCAI Tulsa meeting language helps to resolve the procedural problems of delayed intervention by a tribe in a child custody proceeding by setting strict timelines in voluntary cases for providing notice to tribes of the possibility of a child being a tribal member and timelines for tribal intervention in the custody proceeding. Along with these timelines, the contents of the notice given to the tribe is specified, to allow the tribe a better opportunity to determine if it wants to intervene at all. At present, the practice is often that the intervention decision is made simply to preserve the tribe's rights in the case.

Third, and finally, Title III would provide that the amendments to ICWA made by the Title would apply to current ICWA proceedings. While this provision might be well meant to benefit parties in certain cases, such an application would only serve to delay and increase the complexity of existing litigation, rather than simplify it. Further, application of the present Title III language to ongoing proceedings would only highlight the tribal objections to the first two portions of the Title which enormously undermine tribal sovereignty.

Again, we believe the modest provisions of the NCAI Tulsa meeting language should be sufficient to provide clarity and certainty to the legal proceedings in future child custody proceedings without requiring new interpretations of vague standards.

Other portions of the NCAI Tulsa meeting language address additional problems raised in the discussion of the Title III amendments to ICWA. Among those are: 1) Criminal sanctions against those who would prevent the proper application of ICWA, for example, attorneys who counsel a party to deny his or her Indian heritage would be subject to criminal charges; 2) specific language that applies the act to Alaskan tribes and native villages; 3) clarification of a tribal court's power to declare children wards of the tribal court; and 4) the allowance in state court, regardless of the State's laws, of "open adoptions", wherein the parent whose child is being adopted can still have some contact with the child.

While we support the NCAI Tulsa meeting language amending ICWA, we again want to emphasize that we are not prepared to compromise further regarding the right of each tribe to determine its membership free of state or federal interference or review. After all, the United States Supreme Court has long recognized the right of Indian tribes to determine their own membership. If ICWA is to be changed, let it be changed to create as much procedural certainty as possible without compromising the ability of all tribes to intervene in State court proceedings and protect those who are most important to us but least able to defend themselves, our children.

Thank you, Mr. Chairman, and members of the Committee for your time and consideration of this issue.

Testimony before the Senate Select Subcommittee on Indian Affairs in support

of:

H.R. 3286, the Indian Child Welfare Act of 1978

delivered on June 21, 1996

by John W. Steele

Introduction

I am grateful for the opportunity to testify in support of H.R. 3286, the Indian Child Welfare Act. In 1978 Congress passed ICWA to address the concerns surrounding the high incidence of removal of Indian children from their Indian families and tribes and the placement of Indian Children in adoptive or foster homes outside the extended families, tribes and cultures. ICWA recognizes that cultural biases in child custody proceedings contribute to this problem. To promote the stability of Indian tribes and to counter cultural biases, Congress enacted ICWA to provide minimum procedural and substantive requirements which state courts must apply to child custody proceedings. The Oglala Sioux Tribe feels that ICWA should be strengthened and amended to address concerns raised by the Tribes across the nation.

The Oglala Sioux Tribe is in support of the Resolution TLS -96-007A passed by the National Congress of American Indians Mid Year Conference and recommend the following amendments.

1. Notice to Indian Tribes of Voluntary Proceedings

Provides for notice to tribes in voluntary adoptions, terminations of parental rights, and foster care proceedings. Also clarifies what should be included in notices to tribes of these proceedings.

Providing timely and adequate notice to tribes will serve to ensure a more appropriate and permanent placement decision for the Indian child. When tribes and extended family members are allowed to be a part of a placement decision the risk for disruption is significantly decreased. With proper notice tribes can make informed decisions on whether the child is a member and whether or not they have an interest to participate in the placement decision. Notice also helps to expand the pool of potential adoptive parents because frequently the tribe knows of extended family members and other quality adoptive homes that are unknown to the individual or agency facilitating the adoption.

2. Timeline for Intervention in Voluntary Cases

Provides for a window of 90 days for tribes to intervene after notice of a voluntary adoptive placement or 30 days after notice of a voluntary adoption proceeding whichever is later. If a tribe does not intervene within these timelines after proper notice, they can not come back and later intervene.

Timely placements of children, whether they be Indian or non-Indian, are a concern of everyone. It is in no one's interest to let children languish in foster care or institutions when there is an appropriate adoptive placement available. Understanding this, tribes at NCAI came together to adopt language that will place an appropriate timeline on their ability to intervene in voluntary adoptive proceedings involving their children.

Historically, tribes and extended family members interests were almost never given any consideration in these sensitive proceedings. They often only found out about adoptions of their children months and sometimes years after deals had been cut. With proper notice tribes can make informed decisions regarding their interests in a child and help facilitate a timely and successful adoptive placement.

3. Criminal Sanctions to Discourage Fraudulent Practices

Provides criminal sanctions for individuals or agencies which knowingly misrepresent whether a child is Indian to avoid application of the Indian Child Welfare Act. The vast majority of disrupted adoptions involving Indian children happen as a result of unethical and illegal behavior on the part of the individual or agency facilitating the adoption. In the now infamous "Ross" adoption case the natural father was counseled to avoid disclosing he was Indian in order to avoid application of the ICWA, after which the adoption attorney falsified adoption papers that asked for the natural father's ethnicity. This is just one example amongst many where a number of innocent people, as well as the adoption itself, were exposed to unnecessary risks for the purpose of making life a little easier for the person facilitating the adoption. This kind of disregard for the lives of children, their natural families and potential adoptive families cannot be tolerated and should be punishable by law.

4. Limits for Withdrawal of Consent to Adopt

Limits the length of time within which birth parents can withdraw their consent to adoption to six months after notice to the tribe. Provides more certainty that adoptions involving Indian children will not be disrupted by placing time limits on the natural parents ability to revoke their consent to adopt. Furthermore, it brings federal law pertaining to the adoption of Indian children more in line with applicable state laws by avoiding unlimited timelines on when consent to adopt can be revoked.

5. Clarification of ICWA in Alaska

Clarifies that, for the purposes of the Indian Child Welfare Act, Alaskan Native Villages have a land base over which they can exercise child welfare jurisdiction.

6. State Court Option to Allow Open Adoptions

Allows state courts to provide open adoptions of Indian children where state law prohibits them. Some state courts prohibit biological family members from maintaining contact with the child, even when the adoptive parents agree. This provision provides another tool in a state court adoption proceeding to avoid protracted litigation and ensure children with access to their natural family and culture when deemed appropriate. However, state courts will still have full desecration as to whether this option is utilized.

7. Clarifying Ward of Tribal Court

Clarifies tribal court's authority to declare children wards of the tribal court, much like state courts. Clarifies that once a tribal court takes control of an on-reservation child or a child transferred to them by a state court that the tribal court retains control. Ensures that tribal courts will not unilaterally reach out and take control over a child whose permanent home is off-reservation.

8. Informing Indian Parents of Their Rights

Provides that attorneys and public and private agencies must inform Indian parents of their rights and their children rights under the ICWA. This provision will ensure that Indian parents are informed up front and able to make balanced decisions on the adoption or foster care placements of their children. This will help avoid unnecessary litigations due to natural parents making uninformed decisions that they may wish to change later.

9. Tribal Membership Certification

Any motion to intervene in an adoption proceeding by a tribe shall be accompanied by certification of the child's membership or eligibility for membership according to tribal law or custom. This provision will help ensure that there is no question as to whether a child is Indian under the ICWA and that tribal membership determination are not arbitrarily made.

Reasons to oppose the ICWA Amendments in Title III of H.R. 3286

Contrary to the sponsor's claims this legislation will extend well beyond just voluntary adoption proceedings. The legislative language will also deny Indian children the important protections they need in involuntary proceedings, both foster care and adoptions.

The amendments do much more than just "clarify" or "make minor changes" in the Indian Child Welfare Act as the sponsors have claimed. Many full-blooded Indian children could end up in homes with strangers while their own extended family members who are qualified to care for them are ignored as potential placements.

Sponsors of this legislation have greatly misrepresented the amount of control that tribes have over placements of Indian children under the ICWA. If the jurisdictional and intervention provisions and procedures for consent to adoption in the ICWA are followed no adoption may be disturbed once it is finalized unless there is fraud or duress in the initial consent. Even when there is fraud or duress, challenge can be brought only two years after an adoption decree is final. Furthermore, a state court has the discretion to place an Indian child outside the placement preferences in the ICWA if it finds good cause to the contrary. While an Indian tribe may seek transfer of jurisdiction of an off reservation case, either parent may object to the transfer which generally has the effect of preventing such a transfer. Moreover, even where a parent does not object, a state court may deny transfer of jurisdiction. Finally, tribal courts who have jurisdiction routinely order placements for Indian children with non-Indian families. The ICWA only sets out references, not mandates, for the placements of Indian children with the primary emphasis being on the family of the child, regardless of whether it is Indian or non-Indian. Thus, where the ICWA is complied with initially, there is no threat that an adoption will be overturned.

The sponsors want to make significant changes to the ICWA without holding any substantive hearings or allowing time for Indian tribes to provide their input. The Senate should not allow these proposed ICWA amendments to proceed with H.R. 3286 and allow the Senate Indian Affairs Committee to more carefully examine these amendments and issues involved as they are proposing to do during a hearing scheduled for June 26.

The amendments address none of the real problems that give rise to lengthy adoption disputes. Removing tribal government and tribal court jurisdiction over child custody proceedings will not improve placement outcomes for Indian children, and in fact will likely produce worse outcomes. The blaming of tribal governments and tribal courts ignores efforts by individuals who circumvent the ICWA law in state court and cause most of the pain and suffering that both adoptive and natural families experience. In addition tribal governments and courts have shown time and time again that they are in the best

position to determine what the best interest of Indian children are and consistently produce better outcomes for Indian children when compared to state courts and placing agencies.

Non-Indian adoptive homes are not the only loving homes available for Indian children. While the sponsors of this legislation state that they are just trying to provide loving homes for Indian children, they have completely ignored the fact that many wonderful, qualified Indian families, many who are relatives of these children, are being overlooked as placements.

The sponsors claim that there are "hundreds" of cases where Indian children are "snatched" from their non-Indian adoptive homes, yet experts in the field of Indian adoption and foster care find that less than one-tenth of one percent or 40 cases ICWA adoption cases since the passage of the Act in 1978 have ended up in state supreme courts. State courts deal with much larger numbers of disrupted adoption cases of non-Indian children, yet they are not being singled out for this kind of drastic change. In fact, how many other state or federal child welfare policies can claim this kind of success in placing children in foster care of adoptive homes?

The involvement of tribes in voluntary adoption proceedings ensures that young vulnerable Indian parents have balanced information available to them to help them make an informed decision regarding the potential adoption of their children. When Indian parents only receive information from adoption attorneys or agencies opportunities for placing the children with their extended family are rarely discussed or encouraged. Adoption brokers have a direct financial incentive to not encourage the involvement of extended family members or tribes decisions affecting their children.

The sponsors have falsely stated that the Indian Child Welfare Act was never intended to provide protections to off reservation Indian children or families, when in fact this was the primary group that Congress identified as most needing protections.

While the Congress of 1978 recognized the strengths of Indian families and the important connections between a tribe and its' children, the sponsors of this legislation only seem to be able to say negative things about tribes and Indian families. At a time when Congress has been so involved in ending discrimination in placement decisions of children and promoting the values of family and community control can the promotion of legislation that is so anti-Indian, anti-family, and anti-local control be justified.

Concerns with Section One - Requirement of parent - tribal affiliation

The bill has many serious flaws that will cause an explosion of new litigation on virtually every section of the bill. This will only result in delaying efforts to find good homes for Indian children awaiting adoption or foster care - the very problem that Congresswoman Pryce says she is trying to resolve. What is social, cultural, or

political affiliation? What evidence proves or disapproves such affiliation? What does it mean to be affiliated as of the time of the proceeding? Does the court consider the affiliation over the last 10 years or just within the last month? What if a child maintains such relationship through a grandparent or other relative, but the parent does not? What if the child's parent(s) are deceased? What does it mean that a determination of non-affiliation is final? Does it mean that a judge's determination cannot be appealed to a state appellate court or that a state appellate court decision which violates the ICWA cannot be reviewed in a federal court? Interestingly, determinations that uphold the application of the ICWA will be eligible to be appealed or reversed. What if a natural parent claims lack of affiliation, the judge accepts this representation and two weeks later an Indian tribe presents overwhelming evidence that the parent has substantial contacts with the tribe? Every one of these questions and many more will be litigated repeatedly.

The bill replaces a bright line political test - membership in an Indian tribe as the trigger for the coverage of the ICWA - with a multi-faceted test that transforms the classification into more of a racial identification test. This provision is likely unconstitutional since the legitimacy of Indian-specific legislation rests upon the fact that such legislation is based upon a political classification, and not a racial classification.

The arbitrary nature of Section One could result in Indian grandparents, uncles, aunts, nieces, nephews, and siblings being considered irrelevant in the lives of Indian children. In the case of an Indian child who had very meaningful, significant relationships with their tribe and extended Indian family over a period of years, but may be not within the last 3-6 months, the court could determine that this was sufficient evidence to exclude the child tribe and extended family from being any part of that placement decision.

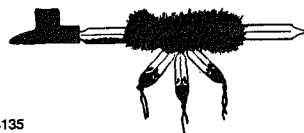
Concurs with Section Two - Tribal Membership

This section does not reflect the realities of how tribal membership mechanisms work and would likely exclude coverage of vast numbers of bona fide Indian children from coverage by the Indian Child Welfare Act. Many Indian children are not formally enrolled but are clearly members of a tribe and could be enrolled. In addition, assertions by the sponsors that tribes are trying to make members of everyone, "even with as little as 1/256th Indian blood" are simply absurd. First of all tribes reserve the right to determine their own memberships as sovereign governments. State agencies and courts are not equipped to make these kind of membership determinations and could easily make mistakes that would deny bona fide Indian children and their families from being covered by the ICWA in both foster care and adoption proceedings. Secondly, tribes have every incentive to not be enrolling children who are not legitimately connected with the tribe since ultimately these children will be eligible for benefits that the tribe provides to its members benefits which are generally limited in nature.

Section 2 would also impact Indian children and families resident or domiciled on the reservation. Typically, child custody proceedings involving these families would be under the exclusive jurisdiction of the tribal court. However, in those circumstances where a state court misinterprets the parents or child's membership status or where the parent or child have not been formally enrolled, but are clearly eligible to be enrolled, there is nothing to stop states from coming on the reservation and unnecessarily removing Indian children from their homes based on state, not tribal standards. There would be no requirement that an extended family or tribal placement for the child be sought. Tribal court authority over the voluntary and involuntary placement of such children would be lost, essentially taking us back to the types of rampant abuse which gave rise to the Indian Child Welfare Act.

Menominee Indian Tribe of Wisconsin

P.O. Box 910
Keshena, Wisconsin 54135



1-715-799-5100
FAX 1-715-799-4525

STATEMENT OF THE MENOMINEE INDIAN TRIBE OF WISCONSIN
FOR THE HEARING OF THE SENATE COMMITTEE ON INDIAN AFFAIRS
REGARDING
THE INDIAN CHILD WELFARE ACT

JUNE 26, 1996

The Menominee Indian Tribe of Wisconsin is pleased to submit this statement to the Senate Committee on Indian Affairs concerning the Indian Child Welfare Act (ICWA). We appreciate the responsible manner in which this Committee and the House Resources Committee have approached the past year's legislative attack on tribal efforts to keep Indian families together through our rights under the Indian Child Welfare Act.

The Indian Child Welfare Act amendments introduced thus far in the 104th Congress are certainly illustrative of why we should resist legislating based on anecdote. The ICWA discussion in the House by the proponents of the pending ICWA bills -- both in the House Resources Committee hearing in May of 1995 and on the House floor last month -- reveal a lack of regard for accuracy and/or a lack of understanding of how the Indian Child Welfare Act works and the ramifications of those amendments.

Perhaps we should not be too surprised by the lack of understanding generally of the Indian Child Welfare Act. It is a procedural law geared to state court proceedings. But it is also an Act which governs proceedings involving individuals from different cultures and two distinct and separate governments -- tribal and state. The Act functions well when all parties involved are knowledgeable regarding their rights and responsibilities under the Act and when all parties respect each others rights and responsibilities.

We applaud the work by tribes and Indian organizations undertaken over the past year and at the June, 1996 National

Congress of American Indians (NCAI) convention in Tulsa in developing proposed amendments to the Indian Child Welfare Act. We are supportive of the resolution and the draft amendments approved at the NCAI convention, but realize that the ICWA bills expected to be introduced by Senators McCain and Inouye and Representatives Young and Miller will not be identical to the NCAI amendments. The Menominee Tribe would certainly want to review these bills and offer comment prior to their Committee markups.

The draft amendments approved at the NCAI convention in Tulsa propose practical steps to improve the implementation of the Indian Child Welfare Act. Most problems attributed to the Indian Child Welfare Act derive from cases where tribes have not been fully informed about a case -- either because of lack of notification concerning voluntary cases or by attempted avoidance of ICWA compliance.

Draft Amendments from NCAI Conference. The draft NCAI amendments would, by providing notice to tribes for voluntary proceedings combined with time frames for intervention, address the criticism that tribes sometimes intervene in cases in an untimely manner. Under current law, a tribe can intervene in a voluntary ICWA proceeding at any time during the case. The problem is that the law requires notification to tribes only for involuntary cases, so tribes may not find out in a timely manner about voluntary proceedings. Indian parental and Indian children's rights would be protected by a requirement that attorneys and public and private agencies inform Indian parents of their rights under ICWA -- responsible attorneys and agencies already do this, but there is a need for it to be a statutory requirement. Additional certainty would be provided through time lines for tribal intervention and for withdrawal of parental consent for termination of parental rights. The amendments would also impose sanctions against those who willfully circumvent the Act.

We are concerned that the combination of the amendments which would place strict time frames on tribal intervention in voluntary cases¹ and the proposed requirement that a motion for intervention be accompanied by a certification documenting the child's membership or eligibility for membership might in some cases be unworkable. For instance, if there is question of paternity which would affect the child's membership or eligibility for membership, the process of making that determination may take longer than 30-90 days -- the Menominee Tribe has been a party to cases like this. There may be other circumstances in which the tribal membership determination may not be able to be made in such a short time frame.

¹ 30 days from receipt of termination of parental rights proceedings, 90 days from receipt of notice of an adoptive placement or 30 days from receipt of notice of a voluntary adoption proceeding, whichever is later.

Request. We ask the Committee to consider a modification which would allow some flexibility in provision of the certification of membership. We also ask that the Committee Report accompanying any ICWA legislation discuss the difference between enrollment in a tribe versus membership or membership eligibility.

Menominee/Wisconsin ICWA Agreement. The Menominee Tribe and the State of Wisconsin have had a cooperative agreement on implementation of adoptive services under the Indian Child Welfare Act since the early 1980's, an agreement which has had to be modified only twice. While tribal-state negotiations on such an agreement began prior to enactment of ICWA, it was enactment of ICWA that provided the impetus for finalization of the agreement. The agreement involves coordination and sharing of resources, including co-studying (tribal/state) of prospective adoptive families and tribal identification of available adoptive Menominee families.

This agreement works well, especially with regard to state agencies. Most of our problems with child custody proceedings arise from actions of private attorneys or state court personnel who are not fully informed about the Indian Child Welfare Act.

The ICWA amendments approved at NCAI -- in particular, the requirement to notify tribes regarding voluntary proceedings -- would improve the implementation of the Act. Under our agreement with the State, the Menominee Tribe identifies families on the Menominee reservation and throughout the State who are available as adoptive families. We are also knowledgeable about whether the child may have extended family. These are functions which the Tribe is able to undertake much more effectively than private or state agencies. The result is permanent placement of Menominee children -- often with Menominee families -- faster than could be undertaken by state or private agencies. For those children and families which meet the eligibility criteria, adoption subsidies and medical care are available. This could not happen absent a cooperative agreement as the federal Title IV-E Foster Care and Adoption Assistance Act does not provide funding to tribes.

Inter-Related Issues.

• H.R. 3286. While this hearing is focused on development of new amendments to the Indian Child Welfare Act, we still have at least one major hurdle during this Congress. That hurdle is for the conferees on H.R. 3286, the Adoption Promotion and Stability Act, to approve a final bill which does not contain the House-passed ICWA amendments -- the House needs to recede to the Senate on this matter. We know that the Senate Committee on Indian Affairs and the House Resources Committee will work for a final version of H.R. 3286 free of the Pryce-authored ICWA language -- it would be a disaster should it be adopted. In our

case, our cooperative agreement on ICWA with the State would be in shambles.

• Funding under Federal Child Protection Statutes Discriminate Against Tribes. Federal social service statutes which provide assistance to state governments for child protection and for foster care and adoption are not available to tribal governments. Not only would fair treatment of tribes with regard to funding under these acts enable tribes to more fully implement the Indian Child Welfare Act, it would assist tribes' in all their child protection efforts.

Members of this Committee are aware of the HHS Office of Inspector General's report which documents the discrimination against the tribes in receipt of federal social services funding (e.g., Title IV-E Foster Care/Adoption Assistance and Title XX Social Services Block Grant programs). Tribes do not receive money directly, and states pass through only a miniscule amount of federal social services-related funding to tribes. In fact, many, many tribes receive no funding whatsoever from the above-mentioned federal programs. (August, 1994 HHS Office of Inspector General, OPPORTUNITIES FOR ACF TO IMPROVE CHILD WELFARE SERVICES AND PROTECTIONS FOR NATIVE AMERICAN CHILDREN)

-- Title IV-E Foster Care/Adoption Assistance. The Title IV-E Foster Care and Adoption Assistance Program is an open-ended federal entitlement program which provides funding to states for foster care and adoption services. It requires that efforts be made to keep families together. It is a terribly flawed law in that it does not provide funding directly to tribes -- providing eligibility only to those children placed by state (not tribal) courts. The pending welfare reform bills would keep this program an open-ended federal entitlement program.

We are aware that Members from both parties of the Senate Committee on Indian Affairs and the House Resources Committee have urged the Ways and Means Committee to adopt an amendment to welfare reform legislation to provide direct Title IV-E funding to tribes, and thank you for that.

Request. It appears that a welfare reform bill may be enacted this year, and we ask you to redouble your efforts on getting a Tribal Title IV-E amendment.

-- Title IV-B Child Welfare Services. The Title IV-B program provides a small amount of funding to tribes -- about \$4 million annually. This is derived from a 1% statutory tribal allocation under the IV-B, Subpart 2 (Family Preservation and Support Services) and a discretionary allocation of less than 1/2 of 1% for tribes under the Subpart 1 (child welfare services) program. The welfare reform bills of the 104th Congress would have taken this funding from tribes and given it to states as part of the state block grant. We understand that the Ways and Means

Committee, in its recent markup of welfare reform legislation (H.R. 3507), reinstated tribal IV-B funding. We are pleased for that action, but ask that the Child Protection Block Grant in welfare reform provide a more reasonable level of funding for tribes. Current funding does not allow participation for all tribes, and only a very small amount of funding for the tribes that are able to participate.

Request. Welfare reform legislation should provide 2% of funding to tribes from the Title IV-B Child Welfare Services Block Grant or a Child Protection Block Grant.

- ICWA Compliance Report. The Title IV-B statute was amended in 1994 to require that states, as part of their required annual child welfare report to HHS, consult with tribes and explain the specific steps they are taking to comply with the Indian Child Welfare Act. This past year was the first year for implementation of this requirement. Because the pending welfare reform bills would repeal the IV-B program and roll it into a state block grant, this ICWA compliance reporting requirement would also be repealed.

We have seen the value of a signed ICWA agreement with the State of Wisconsin, and believe that a requirement for states to meet with tribes and report on ICWA compliance could go a long way toward heading off misunderstandings between state and tribal governments, and in fostering better working relationships. We understand that the testimony of the Intertribal Council of Arizona discusses the valuable experience of the tribes and urban Indian organizations in Arizona and the state government in working together on their ICWA compliance report.

Request. We ask that the ICWA compliance report contained in Title IV-B of the Social Security Act be retained, and not be repealed as part of welfare reform legislation.

- Indian Child Welfare Act Funding. Funding through the BIA for the Indian Child Welfare Act is now at about \$13 million for reservation-based programs. The Menominee Tribe is aggressive in protecting our children under the Indian Child Welfare Act. We intervened under ICWA authority in 100 cases in FY1994 and 99 cases in FY1995. Additionally, the tribal court handles child custody cases arising on the reservation -- cases which are not covered by the Indian Child Welfare Act.

The small amount of ICWA funding for tribes is clearly inadequate, especially when you consider that states receive federal child welfare and foster care/adoption assistance funds which are denied to tribes.

Request. Congress should increase BIA funding for Indian Child Welfare Act programs.

Termination Era. While the Indian Child Welfare Act -- whose goal is to provide a legal framework for working with states in keeping Indian children within an Indian community when appropriate -- is of great importance to all tribes, it has an added dimension for the Menominee Tribe.

The "termination" by Congress of the Menominee Tribe in 1954 had disastrous consequences for our people. Among the consequences was the harm it brought to Menominee families and thus to the tribe. As a result of the termination legislation there was a 19-year period prior to "restoration" in 1973 where there was no longer any enrollment in the Menominee Tribe. Persons born before 1954 were considered Menominee tribal members, while their brothers and sisters born after that date were not, creating confusion and conflict. Termination brought an increased movement away from Menominee lands and into cities, and sale of some Menominee lands. Use of and passing on of the Menominee language suffered greatly. We are still trying to recover from that "lost generation" of the termination period. An integral part of this effort is to maintain strong family networks. The Indian Child Welfare Act and the agreement we have with the State of Wisconsin for implementation of this Act is important to the integrity of our families and the Menominee Tribe, and we ask that you work with us to see that this Act is not compromised.

Thank you.



MENOMINEE INDIAN TRIBE OF WISCONSIN

P.O. Box 910
Keshena, WI 54135-0910

MENOMINEE NATION MENOMINEE TRIBAL LEGISLATURE RESOLUTION 96-33

WHEREAS, the Menominee Indian Tribe of Wisconsin is a federally-recognized Indian Tribe with all rights, and powers thereto pertaining which acts through its duly constituted governing body the Tribal Legislature; and

WHEREAS, the effective implementation of the Indian Child Welfare Act is important to the Menominee Tribe's efforts to maintain the Menominee culture and to maintaining strong tribal families; and

WHEREAS, the Indian Child Welfare Act (ICWA) amendments contained in Title III of H.R. 3286, the Adoption Promotion and Stability Act of 1996, which was approved by the House of Representatives on May 10, 1996, would violate tribal sovereignty, would result in many Menominee, and other Indian and Native Alaskan, children losing the protection of the ICWA, and would cause lengthened child custody proceedings in state courts; and

WHEREAS, the Menominee Tribe applauds the work of the National Congress of American Indians and the National Child Welfare Association and others on alternative Indian Child Welfare Act amendments which would serve the purpose of all parties by providing clearer procedures for child custody cases;

NOW, THEREFORE, BE IT RESOLVED that the Menominee Tribal Legislature:

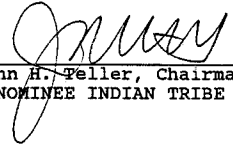
- 1) Opposes Title III of H.R. 3286;
- 2) Supports the intention of Senators McCain and Inouye to strike Title III from H.R. 3286 in the June 19, 1996, markup by the Senate Committee on Indian Affairs of that bill;
- 3) Supports Resolution TLS-96-007A concerning Indian Child Welfare Act Amendments which was approved by the National Congress of American Indians conference held in Tulsa, OK, on June 3-5, 1996;
- 4) Requests favorable consideration by the U.S. Senate and House of Representatives of the Indian Child Welfare Act proposals approved by the June, 1996, National Congress of American Indians conference in Tulsa, OK, and recognizes that Tribes may propose constructive changes to the NCAI proposals which should be given careful consideration;

MENOMINEE TRIBAL LEGISLATURE RESOLUTION 96-33 ICWA Amendment PAGE 2.

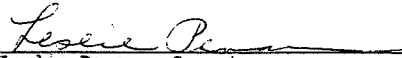
5) Expresses its appreciation to the House and Senate Committees of jurisdiction on the Indian Child Welfare Act - the House Resources Committee and the Senate Committee on Indian Affairs - and especially to Representatives Don Young and George Miller and to Senators John McCain and Daniel Inouye for their opposition to the H.R. 3286 Indian Child Welfare Act amendments and for their work with Indian and Alaska Native tribes on Indian Child Welfare Act issues.

CERTIFICATION

The Undersigned Officers of the Menominee Tribal Legislature hereby certify that the above resolution was duly adopted at a meeting held on June 20, 1996, by a vote of 7 for, 0 opposed, 0 abstentions and 2 absent. The Undersigned also certify that the above has not been rescinded or amended in any way.


John H. Peller, Chairman
MENOMINEE INDIAN TRIBE OF WISCONSIN

DATE: June 20, 1996


Leslie Penass, Secretary
MENOMINEE INDIAN TRIBE OF WISCONSIN

TESTIMONY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
 SENATOR JOHN GLENN
 JUNE 26, 1996

Mr. Chairman, I appreciate the opportunity to testify before the Indian Affairs Committee regarding revisions to the Indian Child Welfare Act (ICWA). As you and the members of the Committee know, I have introduced S. 764, the Indian Child Welfare Improvement Act. This bill addresses a very narrow change in the existing application of ICWA during adoption proceedings.

Since my bill was introduced in May 1995, the Indian Affairs Committee has received a series of amendments to ICWA developed by a number of tribal groups and others. These amendments, known as the "Tulsa agreement" deal with several issues critical to the application of ICWA to child custody proceedings including notice to Indian tribes for voluntary adoptions, time lines for tribal intervention in voluntary cases, criminal sanctions to discourage fraudulent practices in Indian adoptions and a mandate that attorneys and adoption agencies must inform Indian parents of their rights under ICWA. I commend the development of this document which addresses existing flaws in the application of ICWA. I believe that this alternative approach to refining ICWA preserves the participation of tribal interests while offering greater certainty for potential adoptive families.

Mr. Chairman, the legislation that I introduced last year was a direct response to a situation involving a family in Columbus, Ohio. The Rost family received custody of twin baby girls in the State of California in November, 1993, following the voluntary relinquishment of parental rights by both birth parents. The biological father did not disclose his Native American heritage in response to a specific question on the relinquishment document. In February, 1994, the birth father informed his mother of the pending adoption of the twins. Two months later, in April 1994, the birth father's mother enrolled herself, the birth father and the twins with the Pomo Indian Tribe in California. The adoption agency was then notified that the adoption could not be finalized without a determination of the applicability of ICWA.

My interest in reforming ICWA is to ensure that the law could not be applied retroactively in child custody proceedings. I have no intention to weaken ICWA protections, to narrow the designation of individuals as members of an Indian tribe, or to change any tribes ability to determine its membership or what constitutes that membership. My sole intention is to require that ICWA cannot be retroactively applied. To this end, my office has met with the National Congress of American Indians, the National

Indian Child Welfare Association and other tribal representatives to resolve this issue.

Mr. Chairman, all I am saying is that once a voluntary legal agreement has been entered into, I do not believe that it is in the best interest of the child for this proceeding to be disrupted because of the retroactive application of ICWA. To allow this retroactive application could have a harmful impact on the child. I know that the Chairman and other members of the Committee share my overriding concern in assuring the best interest of children awaiting placement.

As I stated earlier, I believe that the "Tulsa agreement" is a very significant step in resolving certain issues pertaining to application of ICWA in child custody proceedings. I look forward to working to incorporate language addressing the problems of retroactive application with those involved in the Tulsa agreement. I appreciate the Committee's work in this matter and this opportunity to testify on my views.

Mr. Chairman, the scope of my legislation is deliberately narrow to maintain ICWA's purpose while preventing disruption in the placement and adoption of children in cases where ICWA is retroactively applied. To do otherwise, Mr. Chairman, is not acting in the best interest of the children, and that is my principal concern—the interests of the children.

STATEMENT OF CONGRESSMAN PETE GEREN

June 26, 1996

Mr. Chairman and Members of the Committee, thank you for giving me the opportunity to appear and speak on a subject that is close to my heart. I know that the Members of this committee have heard from various Native American tribal members regarding reform of the Indian Child Welfare Act and I recognize their legitimate concerns.

The Indian Child Welfare Act was enacted to address a very real and serious problem affecting the families and culture of Native Americans. Unfortunately, the remedy created by the Indian Child Welfare Act has led to its own abuses and injustices. This Act, as currently enforced, has created uncertainty and, in many cases, heartbreak in the adoption process.

It is unreasonable for the adoption of a child, a child with no cultural ties and with remote Indian ancestry, an adoption consented to by the birth parents, approved by lawful state authorities chosen by the birth parents, to be interrupted by any third party, even a sovereign nation such as a Native American tribe or a European nation.

The Pryce language that is included in the Adoption Promotion and Stability Act passed by the House of Representatives, preserves the goals of the Indian Child Welfare Act but eliminates the potential for injustice and abuse. Under

Pryce, jurisdiction and intervention rights of Indian tribes are based not just on the blood ancestry of the child as under the Indian Child Welfare Act, but also on the involvement of a biological parent in the cultural life of the Indian tribe. Pryce recognizes the legitimate role of Native American tribes in child custody proceedings involving children where at least one of the child's biological parents is of Indian descent and maintains significant social, cultural or political affiliation with the Indian tribe, but it allows birth parents with no ties to a tribe to make the decision they believe is in the best interest of the child. This change makes the Indian Child Welfare Act more reflective of the original intent of the framers of the act: to protect the cultural life of Native Americans.

The second significant change included in the Pryce language is the requirement that individuals over the age of 18 consent to tribal membership in writing in order to be considered a member of a tribe.

Lastly, the Pryce language prohibits a birth parent from asserting tribal membership after an adoption is complete and further would require a determination of membership in an Indian tribe as of the date of child placement. This change provides certainty for adoptive parents and prevents distant relatives or tribes from asserting custody over children, sometimes years after an adoption has been completed.

I have had an opportunity to examine the preliminary language proposed by the National Congress of American Indians. While this language may be a step in the right direction, it

falls short of the reform needed for the Indian Child Welfare Act. This proposal would require that an Indian tribe be given notice of the placement of a child with Indian heritage and that the tribe assert its right of intervention within 30 to 90 days of receipt of notice or its rights would be waived. The proposed legislation would make written waivers by Indian tribes enforceable and would allow adoptive parents and Indian relatives to enter into enforceable visitation agreements.

This language does not address the underlying problem with the Indian Child Welfare Act. First it does not give birth parents the freedom to make the decision they believe to be in the best interest of their child. The tribe still has standing in consensual adoption cases to dictate how these children will be placed.

If a mother and father are American citizens and choose to subject themselves to the adoption laws of one of our 50 states, our federal law must respect that decision. What right is a more fundamental human right than the right of a mother and father to act in what they believe is the best interest of their biological child. No ancestor, certainly no great grandparent, whether he be Navajo or German, should be able to deny that right to an American citizen.

Second, the language does not address the issue of retroactivity. In order for any reform of the Indian Child Welfare Act to be meaningful, it must place prohibitions on the assertion of tribal membership after an adoption has been completed under applicable state and United States law. The Rost

case is a painful and poignant example of the injustice of the current retroactivity provisions. After the Rost children lawfully were placed for adoption, the grandmother enrolled the children and the biological father in the Pomo tribe. This action, retroactive membership, was asserted to destroy a loving family.

We must respect and honor the laws and rights of Native American tribes, but, we also must honor the God-given human rights of every person who is a citizen of the United States. Our country, the land of the free, is built on the principle that our citizens are free of the shackles of ancestry they have chosen to forsake. Neither the hand out of the grave nor of a great grandparent who is a citizen of another sovereign nation has a claim on the present and future of those who hold the privilege of American citizenship. It should not matter if that ancestor is German, Navajo, British or South African.

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STEVEN J.W. HEeley,
MAJORITY STAFF DIRECTOR/CHIEF COUNSEL
PATRICIA M. ZELL,
MINORITY STAFF DIRECTOR/CHIEF COUNSEL

United States Senate

COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC 20510-6450

August 2, 1996

The Honorable Pete Geren
2448 Rayburn Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Geren:

I just today saw a copy of your letter to the editor on the Indian Child Welfare Act (ICWA) that appeared in the July 26, 1996 edition of the *New York Times*.

Your letter was premised on several serious mis-statements of the law. First, you said ICWA gives an Indian tribe "veto power" over the adoption placement decision of a birth parent. No provisions of ICWA do this. In actual fact, Title 25, Section 1911 allows that birth mother to stop the transfer of a case from State court to tribal court if the child is not domiciled on an Indian reservation, domicile being a matter under her exclusive control.

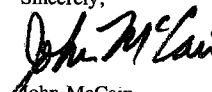
Second, you say "the tribe can require that her baby be adopted by a tribal member and removed to the reservation" many miles away. That simply is not the law. While ICWA provides what it calls a "preference" for adoptive placements of Indian children with Indian families, Section 1915 authorizes a State court to make a different placement if a judge finds good cause. ICWA also reiterates that the overriding principle is the best interests of the Indian child.

Third, you say ICWA favors abortion over adoption because, while a tribe has "no say" over a decision to abort, a birth mother "cannot place her child with a loving family without the approval of an Indian nation" under ICWA. This too is not the law. Tribes do not have "approval" rights over adoptions of Indian children in State courts. The law simply allows them to become involved in a court case as "intervenor" with the court. Their role is limited to one of providing advice to the State court judge on what is in the best interests of the Indian child. An intervenor's advice is a far cry from what you call "veto power."

Finally, you estimate that "15 million American citizens have sufficient Indian heritage to trigger" the application of ICWA. I know of no basis in fact or law for this estimate. In truth, ICWA applies to the approximately one million American Indians and Alaska Native who are, by statute, members of, or eligible to be members of, the 557 Federally-recognized tribal governments.

As I said in our discussion when you testified before this Committee's hearing on June 26, 1996, I respect your right to disagree but I know you would want to know what is the law on these issues. In view of this, I would encourage you to reconsider your views in light of American history and of the fundamental principles of Federal-Indian law that have been crafted over the years.

The parties to these Indian child welfare disputes, not politicians like you and me, have come up with a compromise that furthers the best interests of Indian children. It deserves your support.

Sincerely,

John McCain
Chairman

Indian Heritage Law Saps Adoption System

To the Editor:

Unfortunately, tragically, there is much more to the Indian Child Welfare Act than presented by "Blood Ties" (Op-Ed, July 19). This law is more than a protector of Indian children. As currently applied, it denies a fundamental right to millions of American women and undermines the adoption system in our country.

Say a 14-year-old girl in Texas, the state I represent in Congress, becomes pregnant by a fellow eighth-grader. They, their parents and grandparents were born and reared in Texas. None have had any contact with any Indian tribe. They prepare to deal with this family crisis consistently with the laws of their state and nation. The laws of the Indian nations

scattered around our country never cross their minds.

They make the heart-breaking decision that it is in the best interest of the baby to place her for adoption. They work through their church and identify a local family to adopt her.

The adoption moves ahead until their attorney discovers that a deceased great-great-grandfather of the birth father was a member of the Oglala Sioux Indian tribe in South Dakota, making the baby 1/32d Sioux. The lawyer tells the mother that her baby is an Indian child and that the tribe has veto power over her adoption. If she chooses adoption, the tribe can require that her baby be adopted by a tribal member and removed to the reservation 900 miles away. Sud-

denly, the option of adoption is not very appealing to the girl, her family or the adopting couple.

Under this law, the girl can choose abortion or keep the baby and the tribe has no say. But she cannot place her child with a loving family without the approval of an Indian nation that once claimed an ancestor of the father of her baby.

This mother is an American, with no suffix or prefix, yet this law imposes the law of the Sioux nation between her and her baby.

Recent Senate testimony estimates that 15 million American citizens have sufficient Indian heritage to trigger the statute. This is un-American. (Rep.) PETE GEREN

Washington, July 25, 1996

SENT BY: CONGRESSMAN GEREN 9-18-96 2:15PM

COMMITTEE
NATIONAL SECURITY
SCIENCE

Congress of the United States
House of Representatives
Washington, DC 20515-4312

PETE GEREN
12TH DISTRICT, TEXAS

September 18, 1996

CCITT ECM: # 2

WASHINGTON OFFICE
2448 HAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
(202) 725-5071

DISTRICT
1000 W. 21TH STREET
SUITE 200
FORT WORTH, TEXAS 76102
(817) 338-0900
(800) 854-3738

Senator John McCain
241 Russell Senate Office Building
Washington, DC 20510

Dear Senator:

Thank you for your letter dated August 2, 1996 in response to my letter to the editor to the New York Times. I regret that we disagree on this issue.

You dispute my contention that the ICWA gives Indian tribes veto power over the adoption decisions of many American citizens. I believe a review of the case law supports my point. One needs to go no further than the Rost case for an example of the use of the ICWA and a distant tribal affiliation to disrupt a legal and otherwise enforceable adoption. Tragically, the case law is replete with examples.

Furthermore, you and other defenders of the ICWA avoid a discussion of the thorniest aspect of the ICWA with the mere assertion that its application is limited to the "Indian child," when hidden in the legal definition of that term is the heart of the injustice of the ICWA.

In your New York Times piece you glibly dismiss the Rost case with the explanation that the lawyers "failed to disclose that the children were Indians." I think most Americans would be surprised and feel misled after having read your op-ed if they knew that the children you refer to were 3/32 Indian, 29/32 something else, and neither they nor their birth parents had had any previous affiliation with the Pomo Tribe, the tribe that has come between the adopting parents and their adopted children.

Most Americans would support the application of the ICWA if it applied only to Indian children, as that term commonly is understood (and which the Pryce language attempts to codify). It is the interpretation of the ICWA that allows tribes, based on a mere trace of Indian blood, to reach well beyond their borders, across generations, and disrupt the adoption decisions of U.S. citizens that shocks the conscience of me and many others.

The basic principles of the application of the ICWA are set out in Mississippi Choctaw Indian Band v. Holyfield et al, 490 U.S. 30, 109 S.Ct. 1597 (1989) [hereinafter Holyfield]. The U.S. Supreme Court held that the Indian tribe had absolute jurisdiction over the placement of a child born to a woman who was domiciled on a reservation, but gave birth 200 miles from the reservation.

Although the case involved a birth mother domiciled on a reservation, the court offered a thorough discussion of the broader application of the ICWA. The Court said that in cases involving the voluntary adoptive placement of a child born to a parent not domiciled on an Indian reservation, Indian tribes are allowed to intervene and assert the placement preference under the act. The Court stated that, "the most important substantive requirement imposed on state courts is that of Section 1915(a), which, absent 'good cause' to the contrary, mandates that adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families." Holyfield at 1602. The principles apply regardless of whether the action is in state or tribal court.

Referring to the purpose of maintaining Indian children with Indian tribes, the Supreme Court of Montana stated: "The principal statutory method by which these purposes are achieved is the order of preferences set forth in 25 USC S. 1915(a) and (b), and the Tribe's right to intervene." Matter of Baby Girl Doe, 865 P.2d 1090, 1095 (Montana 1993).

Absent good cause, the placement preference established in the act will be given effect and the child may be removed from the original adoptive parents and placed with the tribe or relatives, thus voiding the adoption choice of the birth mother. In Matter of Coconino Cty. Juv. No. J-10175, 736 P.2d 829 (Ariz.App. 1987), involving the foster placement of an Indian child, remoteness of placement and culture shock to the child were not "good cause" to avoid the placement provisions. The court stated, "If the trial judge finds that the father is not a fit parent he must, in the absence of good cause based on something more than has been presented in this case so far, follow the placement hierarchy dictated by 25 U.S.C.A. S.1915(b)." Matter of Coconino Cty. Juv. No. J-10175, 736 P.2d 829, 833 (Ariz.App. 1987).

Good cause is a matter of discretion of the courts and is not expressly defined in the act. Courts have varied in their determinations of what is good cause for the purpose of avoiding the placement preference guidelines. The Supreme Court of Minnesota stated, "We believe, however, that a finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child's best interests." Matter of Custody of S.E.G., 521 N.W.2d 357, 362 (Minn. 1994).

By using their substantive right to intervene and asserting the placement preference of the act, Indian tribes are able to disrupt an adoption placement and either assert the placement preference or force birth parents to reassert custody of their children. See Matter of Adoption of Baby Boy L, 643 P.2d 168 (Kan.1982). In either instance the end result is that tribes are able to effectively veto the voluntary adoption placement by a birth parent.

In your letter you state that the ICWA also reiterates that the overriding principle is the best interests of the Indian child. In fact, both the statute and the case law puts the interest of the tribe on the same level as the interest of the child. The Act's declared policy is, "to protect the best interests of Indian

Children and to promote the stability and security of Indian tribes and families..." 25 U.S.C. S. 1902 (Supp.1987). As interpreted by the courts, the ICWA does not make the best interests of the child paramount but recognizes it in conjunction with the interests of the tribe. "The stated purpose of the act is to protect the best interests of the Indian child through promoting the stability and security of Indian tribes and Indian families..." Matter of Guardianship of O.G.M., 808 P.2d 684, 687 (Okla. 1991) see also Matter of Adoption of Baby Boy D, 742 P.2d 1059, 1063 (Okla.1985). "The numerous prerogatives accorded the tribes through the ICWA's substantive provisions... must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." Holyfield at 1608.

I disagree with your characterization of the Indian tribes' right to intervene under the ICWA. Clearly this right does more than simply allow tribes to give advice to a judge. As stated in Matter of Baby Girl Doe and in Matter of Guardianship of O.G.M., the right to intervene is the means by which a tribe asserts its placement preference under the act. "Intervention by the tribe insures that the child will not be removed from the Indian community and consequently lose touch with Indian tradition and heritage." Matter of Guardianship of O.G.M., 808 P.2d 684, 688 (Okla. 1991)

In reference to the figure of "15 million" people subject to ICWA, it was Senator Ben Nighthorse Campbell who used that number at the Senate Indian Affairs Committee hearing on the ICWA.

As you well know, the ICWA applies to more than just enrolled members of Indian tribes, or to Indians, as that term commonly is understood. It applies to any American child with even a minute fraction of Indian blood. Examples in the case law show that the ICWA has been asserted to disrupt the adoption of children who are only 3/32nds, 1/16th, 5/16ths and 1/64th Indian. Because the tribes are allowed to determine what constitutes an "Indian child" for purposes of the act, any child with any fraction of Indian heritage may be considered an "Indian child". The number of children to whom the act applies may expand and contract at the caprice of Indian tribes.

It is impossible to gauge the impact of the chilling effect of the ICWA on adoption decisions. Adoption attorneys will attest to the chilling effect of the act on both adoptive parents and birth parents. When informed of the perils involved in the application of the ICWA, many planned adoptions are scuttled.

When faced with the injustice of applying the ICWA, many state court judges have created their own exception to the law. These judges have determined that they will not apply the act in cases where the "Indian child" has no connection to an Indian tribe - in effect judicially enacting the Pryce language. I believe this judicially created exception represents a reaction to the inherent wrong of the ICWA and not a lack of understanding by these judges. Judges, not politicians, sitting with all of the facts before them, have recognized the ICWA's potential for injustice and have taken appropriate action.

I have no disagreement with the intent of the drafters of this act. ICWA was intended as a shield to prevent the arbitrary removal of Indian children from the reservation. As applied, it is much more than a shield. It is an offensive weapon used by Indians and non-Indians alike to intervene and disrupt the placement of children in adoptive homes. This is a law, divisive in nature, that not only pits Indians against non-Indians and birth mothers against Indian tribes, but even pits tribes against tribes. It is both ironic and unfortunate that an act intended to protect Indian families is being used to interfere in the adoptive families of others.

As I am sure you are aware, the Indian birth family in the Rost case is appealing the decision of the California Court of Appeals to the U.S. Supreme Court. If the Supreme Court upholds the decision of the California Court of Appeals, much of ICWA would be declared unconstitutional and your legislation would be moot. I would hope that you would forebear from pressing for a vote on this issue until the Supreme Court has determined whether it will grant certiorari in that case.

Thank you for your consideration and your sincere efforts to address the problems in the ICWA. Again, I regret that we disagree on this issue.

Sincerely,


Pete Geren
Member of Congress

PG:jim

Testimony of Hon. Gerald B.H. Solomon
Senate Committee on Indian Affairs
Hearing
Wednesday, June 26, 1996

Mr. Chairman:

Thank you for the opportunity to testify today on the reform of the Indian Child Welfare Act.

Mr. Chairman, as some of our sociologists and social workers negatively portray adoption and adoptive families, it is up to those of us with personal experience of adoption to relay its importance to the formation of our children and the strengthening of the family.

I am here today because I have always been a strong supporter of adoption, and the generosity of families who have sought to make homes for children who, for whatever reason, were not able to be raised by their biological parents.

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

I, myself, was blessed to be adopted by a generous stepfather and raised in a loving family. For these reasons, Mr. Chairman, I wholeheartedly supported recent adoption legislation in the House, H.R. 3286. This bill makes adoption an option for families of all income levels by offering a \$5,000 tax credit while also streamlining the process for interracial cases. This ground-breaking legislation will decrease the backlog of children in foster care and help find caring homes for all children. This legislation is extremely important in reforming adoption regulations. In the limited legislative schedule we have remaining, we must finish work and this bill to allow for the soonest relief for American families.

I am here today to also offer my full support for reform of the Indian Child Welfare Act to add to this adoption legislation. The Indian Child Welfare Act was passed in 1978 in response to a terrible problem within the Indian community: the high numbers of Indian children being placed in foster care and the breakup of many Indian families because of the unwarranted removal of their children by nontribal public and private agencies. This was clearly an unjust situation that needed to be corrected in order to protect the sanctity of the Native American family.

Though this Act was meant to remedy this situation, the reality is that the Act has been detrimental in some cases.

The problem that the Act was created to correct, namely, the inordinate number of Indian

children in foster care, has actually risen since its enactment because of the increased authority the Act can give an Indian tribe.

There have been cases of parents being blocked from adopting children because the Indian Child Welfare Act allows retroactive registration even after the biological parents have given up all legal rights to the child.

This committee is discussing compromise language to amend the Act to respond to many concerns. This compromise between the tribal governments and the adoptive community represents a step in the right direction in reforming the Act. I am encouraged at portions of this language that will limit the length of time for tribes to contest adoptions while also facilitate voluntary agreements between Indian families or tribes and non-Indian adoptive families.

However, I and many of my colleagues are concerned that this language, while commendable, will not address cases where the adoptive child is retroactively registered with an Indian tribe. With future negotiations on the adoption legislation (H.R. 3286) between the House and the Senate, these concerns can hopefully be rectified.

This legislation is extremely important to the families of this country, Indian and non-Indian. Adoption plays a vital role in strengthening the family unit and protecting the values of this great nation. We must remember that the best interests of the children must be paramount in all child custody proceedings. Congress must work diligently to remove barriers to adoption and provide a sense of security to adoptive parents and children that their adoptions will be permanent. For this reason, I hope the Chairman will continue to pursue and pass reform of the Act in this Congress. This window of opportunity can not be missed in the final weeks of this legislative session!

I urge support of full reform of the Indian Child Welfare Act and thank you for your consideration.

Thank you, Mr. Chairman.



NATIONAL INDIAN EDUCATION ASSOCIATION

121 ORONOCO STREET
ALEXANDRIA, VA 22314
PH. (703) 838-2870
FAX (703) 838-1620

STATEMENT OF
THE NATIONAL INDIAN EDUCATION ASSOCIATION
ON
AMENDMENTS TO THE INDIAN CHILD WELFARE ACT OF 1978
SUBMITTED TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

June 26, 1996

The National Indian Education Association (NIEA) is a national, non-profit membership organization with over 3,000 members, which has traditionally represented national Indian education concerns and related issues. NIEA is pleased to submit this statement on amendments to the Indian Child Welfare Act (ICWA) Amendments of 1978.

It is NIEA's position, along with many other tribes and tribal organizations, that the ICWA provides adequate procedures in protecting Indian families and tribes from the unwarranted removal of Indian children and, does not believe that the ICWA should be amended. However, in order to address specific concerns of those who feel that ICWA does not work in some areas, NIEA supports the amendments which were formulated and adopted at the Mid-year meeting of the National Congress of American Indian (NCAI) in June 1996. It is our understanding that the NCAI amendments to ICWA were drafted by tribal leaders, practitioners and experts in the field of adoption and foster care of Indian children. Assistance was also provided by the American Academy of Adoption Attorneys. These amendments, which signify the willingness of Indian tribes to address the concerns raised about the ICWA, provide the appropriate changes to the existing law while preserving and protecting tribal sovereignty.

As outlined below and thoroughly discussed in statements of the National Indian Child Welfare Association (NICWA), the Association on American Indian Affairs (AAIA), and NCAI, the National Indian Education Association supports the amendments to the ICWA as provided in the following topic areas:

1. Notice to Indian Tribes of Voluntary Proceedings.
2. Timeline for Intervention in Voluntary Cases.
3. Criminal Sanctions to Discourage Fraudulent Practices.
4. Limits for Withdrawal of Consent to Adopt.
5. Clarification of Application of ICWA in Alaska.
6. State Court Option to Allow Open Adoptions.
7. Clarifying Ward of Tribal Courts.
8. Informing Indian Parents of Their Rights.
9. Tribal Membership Certification.

NIEA believes that these amendments will decrease the amount of disrupted adoptions and protect Indian children in custody proceedings while preserving tribal sovereignty.

In conclusion, NIEA supports the positions and recommendations made by witnesses - the Honorable Don Young, the Honorable Eni Faleomavaega, the Bureau of Indian Affairs, the Department of Justice, NCAI, Oneida Chairwoman Deborah Doxtator, Gila River Governor Mary Thomas, adoption attorneys, as well as statements from interested parties, including the AAIA, and the NICWA - regarding these amendments before this Committee on June 26, 1996, in efforts to protect Indian children, tribal culture, and most importantly, tribal sovereignty.

STATEMENT ON BEHALF OF THE
ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

SUBMITTED TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS

HEARING ON LEGISLATION
TO AMEND THE INDIAN CHILD WELFARE ACT

JUNE 26, 1996

SUBMITTED BY:
JACK F. TROPE, COUNSEL
SANT'ANGELO & TROPE, P.C.
23 NORTH AVENUE EAST
CRANFORD, NEW JERSEY 07016
(908) 272-2666

I. Introduction

Mr. Chairman and members of the Senate Committee on Indian Affairs. The Association on American Indian Affairs, Inc. (AAIA) is a national non-profit citizens' organization headquartered in South Dakota, with field offices in Washington, D.C. and California. Its mission is the preservation and enhancement of the rights and culture of American Indians and Alaska Natives. The policies of the Association are formulated by a Board of Directors, all of whom are Native Americans.

The Association began its active involvement in Indian child welfare issues in 1967 and for many years was the only national organization active in confronting the crisis in Indian Child Welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of the Indian Child Welfare Act (ICWA) and, at the request of Congress, AAIA was closely involved in the drafting of the Act in 1978. Since that time, the Association has continued to work with tribes in implementing the Act including the negotiation of tribal-state agreements and legal assistance in contested cases.

The ICWA was enacted in response to a tragedy that was taking place within the Indian community. Enormous numbers of Indian children had been removed from their families and tribal communities without just cause. The Indian Child Welfare Act was landmark bipartisan legislation which, although it has been imperfectly implemented in some places, has provided vital protection to Indian children, families and tribes. It has formalized the authority and role of tribes in the Indian child welfare process. It has forced greater efforts and more painstaking analysis by agencies and courts before removing Indian children from their homes. It has provided procedural protection to families and tribes to prevent arbitrary removals of children. It has required recognition by agencies and courts alike that an Indian child has a vital interest in retaining a connection with his or her Indian heritage. Each year thousands of child custody and adoption proceedings take place in which the Indian Child Welfare Act is applied. It is worth mentioning and emphasizing that the "high profile" cases which have given rise to Title III of H.R. 3286 are but a small fraction of the cases in which the Act has been applied. For all of these reasons, Congress should not lightly tinker with the Act.

The Association is greatly concerned about the impact of Title III of H.R. 3286 which was approved by the House of Representatives. As will be explained in more detail in the remainder of this testimony, AAIA believes that Title III would exclude children who need the protection provided by ICWA from coverage under the Act, cause an enormous amount of litigation, have a serious impact upon tribal sovereignty and may be unconstitutional. AAIA believes that the alternative approach to addressing the handful of problematic ICWA cases (the so-called NCAI amendments) is far preferable to the amendments proposed in

H.R. 3286 and supports Committee action on those amendments.

II. Background:

Why the Indian Child Welfare Act of 1978 became law.

A. The problem

As the United States Supreme Court explained in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (hereinafter Holyfield), the Indian Child Welfare Act "was the product of rising concern in the mid-1970s over the consequences to Indian children, Indian families and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." Id. at 32. The evidence presented before Congress revealed that "25-35% of Indian children had been separated from their families and placed in foster homes, adoptive homes or institutions." Id.

Studies by the Association on American Indian Affairs, commissioned by Congress, reported that Indian children were placed in foster care far more frequently than non-Indian children. This was true of all 19 states surveyed with Indian placement rates ranging from 2.4 times the non-Indian rate in New Mexico to 22.4 times rate in South Dakota. "The Indian Child Welfare Act of 1977", Hearings on S. 1214 before the Select Committee on Indian Affairs, United States Senate, 95th Cong., 1st Sess. (August 4, 1977), at 539 (hereinafter "Senate 1977 Hearing"). The percentage of Indian children placed in non-Indian foster homes in those states that reported this information ranged from 53% in Wyoming to 97% in New York.

Moreover, "[t]he adoption rate of Indian children was eight times that of non-Indian children [and] [a]pproximately 90% of the Indian placements were in non-Indian homes." Holyfield, supra, 490 U.S. at 33. All but one of the states surveyed also had a greater rate of Indian children placed for adoption than was the case for non-Indians. The Indian adoption rate in the most extreme case -- the State of Washington -- was 18.8 times the non-Indian rate. Senate 1977 Hearing, supra, at 539. The percentage of Indian children placed in non-Indian adoptive homes ranged from 69% in Washington to 97% in Minnesota. Id. at 537-603.

Congress found that this extraordinary and unwarranted rate of placement in out-of-home non-Indian households was not in the best interests of Indian tribes, families and children. See Holyfield, supra, 490 U.S. at 49-50 (The ICWA is concerned about both the "impact on the tribes themselves of the large numbers of children adopted by non-Indians ... [and] the detrimental impact on the children themselves of such placements outside their culture.") See also findings of Congress' American Indian Policy Review Commission reprinted in United States Senate Report 95-597, 95th

Cong., 1st Sess. (November 3, 1977) at 52 ("Removal of Indian children from their cultural setting seriously impacts on long-term tribal survival and has damaging social and psychological impact on many individual Indian children.")

In the case of Indian tribes, the Court specifically found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children..." 25 U.S.C. 1901(3). This concern was also expressly reflected in the floor statements of "the principal sponsor in the House, Rep. Morris Udall ('Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy'), and its minority sponsor, Rep. Robert Lagomarsino ('This bill is directed at conditions which...threaten...the future of American Indian tribes...')." Holyfield, *supra*, 490 U.S. at 34, n.3 (citations omitted). As the Montana Supreme Court stated in analyzing the congressional intent underlying the ICWA:

Preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture. Absent the next generation, any culture is lost and necessarily relegated, at best, to anthropological examination and categorization.

[Matter of M.E.M., 635 P.2d 1313, 1316 (Mont. 1981)]

As the Holyfield case likewise recognized, Congress was also very concerned about "the placement of Indian children in non-Indian homes...based in part on evidence of the detrimental impact on the children themselves of such placement outside their culture". 490 U.S. at 49-50. Testimony at Congressional hearings was replete with examples of Indian children placed in non-Indian homes and later suffering from debilitating identity crises when they reached adolescence. This phenomenon occurred even when the children had few memories of living as part of an Indian community. As the Senate Select Committee on Indian Affairs noted in its report on the ICWA, "Removal of Indians from Indian society has serious long-and short-term effects...for the individual child...who may suffer untold social and psychological consequences." Senate Report 95-597, *supra*, at 43. For example, in testimony submitted by the American Academy of Child Psychiatry, it was stated that:

There is much clinical evidence to suggest that these Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough they are cared for by devoted and well intentioned foster or adoptive parents. Nonetheless, particularly in adolescence, they are subject to ethnic confusion and a pervasive sense of

abandonment with its attendant multiple ramifications. Senate 1977 Hearing, *supra*, at 114.

See also the testimony of Dr. Joseph Westermeyer, a University of Minnesota social psychiatrist, concerning patients that he had treated, cited in Holyfield, *supra*, 490 U.S. at 33, n.1

[T]hey were raised with a white cultural and social identity. They are raised in a white home. They attended, predominantly white schools, and in almost all cases, attended a church that was predominantly white, and really came to understand very little about Indian culture, Indian behavior, and had virtually no viable Indian identity. They can recall such things as seeing cowboys and Indians on TV and feeling that Indians were a historical figure but were not a viable contemporary social group.

Then during adolescence, they found that society was not to grant them the white identity that they had. They began to find this out in a number of ways. For example, a universal experience was that when they began to date white children, the parents of the white youngsters were against this, and there were pressures among white children from the parents not to date these children...

The other experience was derogatory name calling in relation to their racial identity...

[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did.

AAIA has frequently received inquiries from troubled Indian adolescents and adults who were placed outside of their communities as children and are seeking to reconnect with their tribes. Excerpts from one letter, reprinted in AAIA's newsletter, Indian Affairs, No. 124 (Summer/Fall 1991) at 4-5, illustrate the experiences of these children:

Because of our youth it wasn't obvious to us that we were missing anything in our lives, but as time passed and we began school comments were made at us that aroused our suspicions of something not being right...Neighborhood children would ask "what are you?", "who are you?...[When I] was informed that...[my brother and I] were Indians... [a]bsolute shock and confusion dominated our every thought...Burdened with the ignorance of our culture and with the hopeless change of immediate enlightening we proceeded to identify ourselves to our observant neighbors who immediately showed their ignorance with abusive name calling, offensive gestures and demeaning remarks. We lived through these times but not without emotional trauma on our hearts and minds that we carry to this day...The emotional and psychological pain of my childhood experience cannot be imagined...

In addition, Congress heard considerable testimony on the importance of the extended family in Indian culture. As the House Interior and Insular Affairs Committee Report explained:

[T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family...The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childbearing.

[House Report 95-1386, 95th Cong., 2d. Sess. (July 24, 1978) at 10, 20.]

As an example, in the Choctaw language which is still widely spoken, the words for mother and father are extended to the father's sisters and mother's brothers respectively, as well as to sons of paternal great uncles, grandsons of paternal great-great uncles, uncles by marriage on the mother's side, daughters of maternal great aunts, granddaughters of maternal great-great aunts and other relatives as well. Swanton, John R., Source Material for the Social and Ceremonial Life of the Choctaw Indians, Smithsonian Bulletin No. 103 (1931) at 87. This is indicative of the fact that responsibility for raising a Choctaw child was shared by many of the child's relatives.

Thus, Congress had before it evidence that in most Indian cultures, a child is considered part of a larger extended family and that placement of a child outside that family is a loss felt by the entire family.

Congress determined that a large part of the cause for this Indian child welfare crisis which was devastating Indian tribes, children and families rested with State agencies and courts. Congress found that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5). The House Committee Report specifically recognized "...the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of the Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future." House Report 95-1386, supra, at 19, cited in Holyfield, supra, 490 U.S. at 45, n. 18. See also statements by Rep. Morris Udall, House sponsor of the ICWA, cited in Holyfield, supra, 490 U.S. at 45, n.18, to the effect that "'state courts and agencies and their procedures share

a large part of the responsibility' for crisis threatening 'the future and integrity of Indian tribes and Indian families.'" State systems operated in virtually an unfettered fashion. As Cong. Robert Lagomarsino, Republican co-sponsor of the ICWA stated in explaining his support for the ICWA, "[g]enerally there are no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agents." 124 Cong.Rec. H 12849 (Oct. 14, 1978). The result of this systemic failure was summarized in the House Report as follows:

(1)...many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.

(2) The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law...Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments.

(3)...agencies established to place children have an incentive to find children to place [most notably Indian children not protected by the system].

[House Report 95-1386, supra, at 10-12.]

2B. Congress' Conclusions and Solutions

As a result of the testimony that it heard and the findings that it made, Congress enacted the Indian Child Welfare Act, 25 U.S.C. 1901 et seq. As was stated in Holyfield, supra, 490 U.S. at 37, 50, n.24

'The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected'...[and] 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society'. (emphasis added, citations omitted)

See also 25 U.S.C. 1902 which states that the purposes of the Act are to "protect the best interests of Indian children and to promote the stability and security of Indian tribes..."

The primary mechanism utilized by Congress to ensure the

preservation of that child-tribal relationship was to "curtail state authority", Holyfield, *supra*, 490 U.S. at 45, n.17, and to strengthen tribal authority over child welfare matters. As the Holyfield court noted, "It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-a-vis state authorities..." *Id.* at 44-45. Accordingly, the ICWA includes a number of provisions recognizing and strengthening the tribal role in making decisions about Indian children. See e.g.

- 25 U.S.C. 1911(a) (exclusive tribal jurisdiction over Indian children resident or domiciled on the reservation);
- 25 U.S.C. 1911(b) (transfer of off-reservation state court proceedings to tribal court);
- 25 U.S.C. 1911(c) (recognizing the right of Indian tribes to intervene in all state court child custody proceedings involving children who are members or eligible for membership in the tribe);
- 25 U.S.C. 1911(d) (requiring state courts to accord tribal court judgments full faith and credit);
- 25 U.S.C. 1912(a) (requiring notice to Indian tribes by state courts in involuntary child custody proceedings);
- 25 U.S.C. 1914 (providing Indian tribes with the right to challenge state placements that do not conform with the Act's requirements in federal court);
- 25 U.S.C. 1915(c) (recognizing, as a matter of federal law, tribally-established placement preferences for state placements of off-reservation Indian children);
- 25 U.S.C. 1915(e) (recognizing right of Indian tribes to obtain state records pertaining to the placement of Indian children); and
- 25 U.S.C. 1919 (authorizing tribal-state Indian child welfare agreements).

Moreover, the ICWA includes a number of other provisions, in addition to the provisions described above, which are designed to keep Indian families intact and directly or indirectly to protect the relationship between the tribe and those individuals eligible for membership in the tribe. See, e.g.,

- 25 U.S.C. 1912(e) and (f) (establishing substantive standards for involuntary foster care placement of an Indian child or termination of an Indian parent's parental rights

which exceed those provided for non-Indian parents under state law);

- 25 U.S.C. 1915(a) (requiring that adoptive placements of Indian children under state law be made preferentially with the child's extended family, other members of the Indian child's tribe or other Indian families, in that order, absent good cause to the contrary);

- 25 U.S.C. 1915(b) (requiring that foster care placements of Indian children under state law be made preferentially with the child's extended family, a tribally-licensed foster home, an Indian foster home licensed by a non-Indian entity or a tribally-approved or Indian-operated facility, in that order, absent good cause to the contrary);

- 25 U.S.C. 1915(d) (requiring that the cultural and social standards of the Indian community must be applied by the state court when it applies the placement preferences); and

- 25 U.S.C. 1917 (providing adopted Indians who have reached the age of 18 with the right to access their adoption records for the purpose of establishing their Indian tribal membership).

Many of the sections of the ICWA and a major part of the problem which Congress sought to address involved involuntary removals of children from their families and tribal communities and placement of such children into both foster care and adoptive placements. See, e.g., 25 U.S.C. 1912. However, it is also clear that "voluntary" adoptions of Indian children were likewise of great concern to Congress based upon the evidence it had heard. As the United States Supreme Court specifically found, the tribe and child have an interest in maintaining ties independent of the natural parents' interests and, thus, "Congress determined to subject such [voluntary] placements to the ICWA's jurisdiction and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." *Id.* at 49-53. As explained in In re Adoption of Child of Indian Heritage, 543 A.2d. 925, 931-933 (N. J. 1988), a case cited approvingly by the Holyfield court at 490 U.S. at 51:

The effect on both the tribe and the Indian child of the placement of the child in a non-Indian setting is the same, whether or not the placement was voluntary. Furthermore, the economic factors that led Congress to provide safeguards against induced voluntary relinquishments to state agencies are equally implicated in private placement adoptions... Finally, while an unwed mother might have a legitimate and genuine interest in placing her child for adoption outside of an Indian environment, if she believes such a placement is in the child's best interests, consideration

must also be given to...Congress' belief that, whenever possible, it is in an Indian child's best interests to maintain a relationship with his or her tribe.

[543 A.2d at 932]

See also House Report No. 95-1386, supra, at 11 (recognizing that many "voluntary" consents are not truly voluntary.); In re Adoption of Holloway, 732 P.2d 962, 969-970 (Utah 1986); In re Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187, 189-192 (Ariz. 1981), cert. den. sub nom. Catholic Social Services of Tucson v. P.C., 455 U.S. 1007 (1982).

Thus, the ICWA specifically prohibits relinquishment of an Indian child for adoption for at least ten days after birth. 25 U.S.C. 1913(a). Moreover, such consents must be executed before a court of competent jurisdiction and a Court taking a voluntary consent to the termination of parental rights must determine that the consequences of the consent "were fully understood by the parent or Indian custodian", including, if necessary, the use of an interpreter to explain the consequences of the consent in the parent's native language. 25 U.S.C. 1913(a). This is to ensure that voluntary relinquishments are truly voluntary.

Moreover, the jurisdictional provisions in 25 U.S.C. 1911(a) and (b) are fully applicable to voluntary proceedings. Holyfield indicated that this means that only the tribal court, and not the State court, is a "court of competent jurisdiction" for the purposes of taking a consent to the termination of parental rights when the child is a reservation resident or domiciliary or a ward of the court. 490 U.S. at 52, n. 26. In addition, tribes are provided with the right to intervene in voluntary proceedings, 25 U.S.C. 1911(c), and the placement preferences in 25 U.S.C. 1915 apply to voluntary proceedings. The collective intent of these sections was to ensure "that Indian child welfare determinations [including adoptive placements] are not based on 'a white, middle-class standard, which, in many cases, forecloses placement with (an) Indian family.'" Holyfield, supra, 490 U.S. at (1602). 25 U.S.C. 1914.¹

¹ The description of the provisions of the ICWA included herein is based upon the most widely accepted interpretations of what these provisions mean both in practice and as applied by the courts. It is true that there may be individual cases that have interpreted a given section differently than may be described in this testimony. Because it would be far beyond the scope of this testimony to provide an exhaustive analysis of what the courts have done with every section of the ICWA, I have limited my analysis to the summary form in the text of my testimony. However, should any testimony be submitted which raises questions which the Committee would like to have answered, I would be happy to provide such

Thus, based upon the compelling testimony that it heard, Congress enacted the ICWA in order to (1) provide for procedural and substantive protection for Indian children and families and (2) recognize and formalize a substantial role for Indian tribes in cases involving involuntary and voluntary child custody proceedings, whether on or off reservation.

III. Impact of Title III of H.R. 3286 approved by the House

The purpose of Title III of H.R. 3286 is ostensibly to eliminate a narrow category of troublesome cases which have arisen under the Act, namely, adoptive placements with non-Indian families that are challenged some time after placement has occurred by Indian tribes or by natural parents who invoke the protection of the Act. These cases have sometimes resulted in extended court proceedings which cause great distress to all concerned -- the child, adoptive parents, natural nuclear and/or extended family and the Indian tribe. Even though AAIA would emphasize that these cases constitute a very small number of the overall cases decided under ICWA each year, AAIA agrees that it would be desirable to reduce the number of such cases even further if this is possible.

Having said that, it believes that the legislative approach chosen in Title III of H.R. 3286 is fundamentally incorrect, has great potential for harm to Indian children and principles of tribal sovereignty, would cause enormous litigation and disrupt state child welfare systems thereby delaying permanent placements, and is probably unconstitutional.

Currently, although a few courts have adopted the so-called "existing Indian family exception", see Matter of Adoption of Baby Boy L, 643 P.2d 168 (Kan. 1982) wherein the test was first recognized, most courts have held that the application of the Indian Child Welfare Act itself is dependent upon the presence of two elements: (1) a state court "child custody proceeding" as that term is defined in 25 U.S.C. 1903(1), and (2) an "Indian child" as that term is defined in 25 U.S.C. 1903(4), as the subject of the proceeding. See Holyfield, supra, 490 U.S. at 42; In re the Custody of S.B.R., 719 P.2d 154, 155-156 (Wash. Ct. App. 1986); Matter of Kreft, 384 N.W.2d 843, 845 (Mich. Ct. App. 1986); Matter of Appeal in Maricopa County, 667 P.2d 228, 231 (Ariz. Ct. App. 1982); A.B.M. v. M.H., 651 P.2d 1170 (Alaska Sup. Ct. 1982), cert. den., sub nom Hunter v. Maxie, 461 U.S. 914 (1983); In the Matter of the Adoption of a Child with Indian Heritage, supra, 543 A.2d at 933. "Indian child" is defined under the ICWA to mean "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. 1903(4).

additional legal analysis as would be desired.

Title III would narrow the coverage of the Act significantly by reclassifying many children currently considered to be Indian as non-Indian for the purposes of the Act. Title III would exclude from the Act children whose parents (1) have not formally applied for membership for themselves or their children in their tribe, although eligible, or (2) do not (in the opinion of a state court or agency) maintain a significant social, cultural or political affiliation with an Indian tribe notwithstanding that they are members. By excluding such children, Title III directly undercuts the underlying premises and principles of the ICWA in very substantial ways.

A. Title III is anti-family

The ICWA recognized the vital importance of the extended family in Indian society. Yet, the main impact of this title is to make a child's relationship with his or her extended family legally irrelevant and readily terminated. Under the arbitrary Title III test to determine which children are covered by ICWA -- whether a parent has a social, cultural or political affiliation with an Indian tribe at the time of the child custody proceeding -- it does not matter if all of the child's grandparents, aunts, uncles and cousins are actively involved with both the child and the tribe. If the child's parents are not involved at the time of the proceeding, ICWA does not apply to that child. If the ICWA is not applied, the main impact is to deprive the extended family of the right to be considered as preferred placements for the child. For a Congress that has actively sought to promote pro-family policies, it would be particularly tragic, indefensible and hypocritical to so discount the role of Indian grandparents and other extended family members, particularly in view of the fact that the role of the extended family in Indian society is so critical.

Indeed, the value of maintaining relationships between an Indian child and his or her grandparents or other relatives does not become unimportant by reason of a parent's alienation from his or her tribe. Indian parents who place their children for adoption or become involved with the child welfare system may very well be alienated from their culture. However, this does not mean that continued alienation is in the best interests of their children. The empirical evidence is that maintaining extended family and tribal relationships is in the child's best interests. It is for these reasons, among others, that organizations like the American Psychological Association and National Association of Social Workers have taken a position in opposition to Title III.

B. Title III violates basic principles of tribal sovereignty

Contrary to the approach of Title III, it is a well settled principle that Indian tribes have the authority to define their membership and that this authority is integral to the survival of tribes and the exercise of their sovereignty. Thus, in a case

where an Indian woman sought to challenge her denial of tribal membership in federal court based upon the equal protection provision in the Indian Civil Rights Act, the United States Supreme Court found that the appropriate forum for such a challenge was tribal court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). As the court explained:

A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters. (citations omitted)

[436 U.S. at 72, n. 32]

See also United States v. Wheeler, 435 U.S. 313, 322 n. 18 (1978); Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218 (1897); Baciarelli v. Morton, 481 F.2d 610, 612 (9th Cir. 1973).

C. Title III will not achieve its stated purposes

1. The adoption process will not be simplified

The standard for coverage of the ICWA in Title III -- maintenance of a "significant social, political or cultural affiliation" with the tribe -- is not defined. What is social, cultural or political affiliation? What evidence proves or disproves such affiliation? What level of affiliation is significant? It is likely that the meaning of every word in this test will be litigated repeatedly and that Title III will lead to an enormous increase in litigation and not a decrease.

2. State agencies and court will be overwhelmed by implementation of the new standard

Because Title III inexplicably covers involuntary foster care and termination of parental rights cases in addition to voluntary adoptions (which are the only "problem" cases cited by the supporters of Title III) and applies to all pending cases, Title III will require the reevaluation of thousands of child welfare cases across the country to determine whether a parent of the child maintained significant social, cultural or political ties with the tribe. This will place an enormous burden upon state social services agencies and courts, thereby delaying permanent placements. Indeed, the Attorney Generals of four Western states -- New Mexico, Oregon, Washington and Nevada -- have already taken a position in strong opposition to Title III.

3. Title III goes far beyond the off-reservation adoption cases involving children of "limited" Indian ancestry which gave rise to the legislation

a. It will exclude bona fide Indian children

The provisions in Title III which impose a "parental/tribal affiliation test" and prevent "retroactive" membership in an Indian tribe would exclude many bona fide Indian children and parents from the Act. The "affiliation" test would exclude even full-blooded Indians whose extended family is fully involved in tribal affairs and whose parents may have previously been closely connected with their tribe if, at the time of the proceeding, the child's parents happen to be alienated from their tribe(s) in the view of a state court judge.

The "retroactive" membership provision shows little understanding of how membership often works "in the real world". The failure of an Indian individual to formalize his or her tribal membership is not unusual. Often, because on an informal basis, they are clearly recognized as members of the community, individuals may see no reason to formalize membership unless necessary to exercise tribal "rights" such as voting or eligibility for per capita payments that need to be protected through registration. This failure to formalize membership is likely to be particularly prevalent in terms of children or those individuals who have personal problems that may result in involvement with a child custody proceeding; thus, the result of Title III would be that some of the neediest and most vulnerable Indian individuals would lose ICWA protection.² In short, the perception on the part of the sponsors -- which appears to be that recognition of membership after commencement of a child custody proceeding is evidence that a child is not a bona fide Indian child -- is simply not reality.³

² For example, due to the intermarriage of Indian people from different tribes today, there are many children who may be eligible for enrollment in more than one tribe. Parents of such children may decide to delay making a decision on tribal membership to allow the child to decide when he or she is older. If such a child were to become a mother or father as a teenager or young adult without taking whatever action is necessary to become a member of an Indian tribe, his or her bona fide Indian child would not be covered by the ICWA.

³ Another problem is that state courts can sometime confuse enrollment with membership. Formal enrollment does not equal membership in many situations. See, e.g., United States v. Antelope, 430 U.S. 641, 646 n.7 (1977); United States v. Broncheau, 597 F.2d 1260 (9th Cir., cert. denied, 444 U.S. 859 (1979)). For example, a number of small tribes do not have updated enrollment

b. It applies to involuntary dependency proceedings

Even though the only "problem" cases cited by proponents of Title III are adoption cases, Title III applies fully to involuntary dependency cases as well as adoption cases. Depriving troubled Indian families of the support and assistance of their tribes in the involuntary context will be particularly devastating. There are many examples where troubled alienated individuals have been "saved" when they reunited with their tribe and tribal community through the application of the ICWA. For no apparent reason, the sponsors of Title III would prevent the tribe from making these positive interventions in the future by depriving coverage of the Act in an involuntary proceeding where the parent lacks a significant affiliation with the tribe at the time of the proceeding. Moreover, as noted, applying this standard to involuntary proceedings is likely to overwhelm and disrupt existing state systems and State Attorney Generals are lining up to oppose Title III.

c. It will impact on-reservation children and families

Title III would also have an impact upon children and families resident or domiciled on the reservation. If an on-reservation child and parent have not taken action to formally become members of an Indian tribe, there is nothing to prevent state child welfare agencies from coming onto the reservation, removing such children from their families under state law standards and commencing a child custody proceeding not subject to the ICWA.

d. The proponents of Title III have misunderstood or misrepresented the ICWA and the status of Indian children

1. The ICWA was always targeted at off-reservation proceedings

The proponents of Title III have asserted that Title III is consistent with the original intent of ICWA which was primarily to protect tribal jurisdiction over on-reservation children. Yet, contrary to this assertion, a primary purpose of the Indian Child Welfare Act was to curtail state authority over off-reservation

lists. Enrollment lists may regularly be "closed" and "opened for updating" only on a very sporadic basis. This is not of great concern to these tribes generally because they know through custom, tradition and kinship ties who their members are. Yet, it does not take much imagination to contemplate a state court erroneously interpreting the presence of an enrollment list and the absence of an individual on that list as evidence that the individual is "not really a member" prior to the child custody proceeding.

Indian children in state proceedings because State insensitivity to Indian cultural values had led to massive numbers of these children being placed outside of their homes. In direct contravention of this intent, Title III would restore enormous power to state social workers and courts to once again make their own determinations about Indian culture which will be determinative in deciding whether ICWA applies. Even if affiliation were to be viewed as a valid test, there is no reason to believe that state agencies and judges generally will have the experience and sensitivity to evaluate tribal identity. See Santa Clara Pueblo v. Martinez, supra, 436 U.S. at 72 n.32 wherein the United States Supreme Court recognized the "vast gulf between tribal traditions and those with which...courts are more intimately familiar."

2. Tribes cannot dictate the result in proceedings involving off-reservation Indian children.

The proponents of Title III have the inaccurate perception that once an Indian tribe intervenes in a state court proceeding, it is entitled to dictate an end result precluding placement with a non-Indian family. This is not true. While it is true that the Act requires preferential placement with extended family and tribal members in state court adoption proceedings, a state court may nonetheless place a child outside the preferences if it finds good cause to the contrary. 25 U.S.C. 1915(a). Moreover, while an Indian tribe may seek transfer of jurisdiction of an off-reservation case, either birth parent may object to the transfer which has the effect of preventing such a transfer. 25 U.S.C. 1911(b). Indeed, even where a parent does not object, a state court may deny transfer to a tribal court if it finds good cause to the contrary. Id. Finally, even if the case is transferred to tribal court, tribal courts have the authority to place Indian children with non-Indian adoptive parents and have done so on a number of occasions in the past. Thus, intervention of the tribe does not automatically result in a particular outcome in any given case.

3. It is a fallacy that Title III will free up Indian children "languishing" in foster care for adoption

Proponents of Title III have asserted that it will free up 500,000 children for adoption. Given that the total Indian population is about 2 million, this is truly an astounding claim. Even aside from the clearly erroneous numbers used by the proponents of Title III, it should be emphasized that the basic situation in terms of Indian children is not similar to that of other minority children such as has given rise to the proposal in Title II of H.R. 3286 to prevent any delays in the placement of children on the basis of race. There are not large numbers of Indian children languishing in foster care because of inadequate numbers of Indian families available to adopt these children. In the "disputed" cases which have been cited by proponents of Title

III, there have (by definition) been family and tribal members eager to adopt these children. Moreover, tribes can normally find placements for their children when given the opportunity. This is what the ICWA is all about -- in essence, it prevents discrimination against Indian people in the placement of their own children.

E. Title III is probably unconstitutional

1. It ignores that the political relationship between Indian tribes and the federal government is the basis for Indian legislation

Title III would replace a bright line political test -- membership in an Indian tribe as the linchpin for the coverage of the Act -- with a multi-faceted test that transforms the classification into more of a racial identification test, than a political test! This not only intrudes upon tribal sovereignty, but may be unconstitutional since the legitimacy of Indian-specific legislation rests upon the fact that such legislation is based upon a political classification and not a racial classification. See, e.g., Morton v. Mancari, 417 U.S. 535 (1974).

2. It is violative of due process.

Title III provides that a state trial court determination of non-affiliation with a tribe is final, but a determination of affiliation is appealable. This fundamentally unfair provision is a violation of basic due process rights.

F. Title III is the flawed product of a flawed process.

Indian tribes were never consulted in the development of Title III and are uniformly opposed to it, as are many mainstream adoption and child welfare organizations and state governments. The House Resources Committee (the Committee of jurisdiction in the House) voted to strip Title III out of H.R. 3286 and was overruled by the House Rules Committee, which is virtually unprecedented. There is compelling reason for Senate Committee on Indian Affairs to strongly reaffirm its decision of last week to strip Title III from H.R. 3286 because Title III is a hastily conceived, poorly drafted piece of legislation which will do much harm to Indian children, families and tribes.

IV. The NCAI draft proposal:

A fair and reasonable approach to refining the ICWA

The NCAI proposal, developed by Indian tribes and organizations, addresses many of the concerns which were raised by the supporters of Title III. That alternative would

Require notice to Indian tribes in all voluntary

proceedings.

- Require that if a Tribe is to intervene in voluntary termination proceedings, it must do so within 30 days of receiving notice in the case of voluntary termination of parental rights and within 90 days of receiving notice in the case of a particular adoptive placement.
- Limit parents' rights to withdraw consent to an adoption to 6 months after relinquishment of the child or 30 days after the filing of an adoption petition, whichever is later; if an adoption is finalized before 6 months, that would also end the period during which consent can be revoked.
- Clarify that Alaska Native villages are reservations for the purposes of ICWA.
- Provide for criminal sanctions for anyone who assists a person to lie about their Indian ancestry for the purposes of applying the ICWA.
- Allow state courts to enter enforceable orders providing for visitation or continued contact between tribes, natural parents, extended family and an adopted child.
- Require attorneys, public and private agencies to inform Indian parents of their rights under ICWA.
- Require that tribes certify that a child is a member or eligible for membership in the tribe when the tribe intervenes in a child custody proceeding.
- Clarify tribal court authority to declare children wards of the tribal court.

This alternative not only takes into account tribal concerns in a manner which Title III does not, but also addresses the concerns raised about the ICWA by Title III's proponents far more effectively than Title III. The process proposed in the NCAI draft would bring consistency, certainty, fairness and timeliness to the process.

Currently, because the ICWA does not include a specific notice requirement to Indian tribes in the case of voluntary adoptions, Indian tribes frequently do not learn of such adoptions until some time after the initial placement has been made. Particularly in the case of an off-reservation birth to an unwed mother -- which makes up a substantial portion of these cases -- there may be a significant delay in such information becoming known within the tribal community. Thus, even where an Indian tribe acts promptly upon obtaining the information, a situation may have developed

where the child has already spent a significant amount of time in that placement before the tribe intervened.

Providing tribes with prompt notice in all cases will greatly enhance the possibility that a prospective adoptive parent will know before placement (or within a very short time thereafter) whether a member of the child's family or tribe has an interest in adopting the child. Notice will help to ensure that "unwanted" children are provided with good homes, but will also ensure that "wanted" children are not removed from their families and tribes in cases where homes are available within their families or tribal communities. AAIA would respectfully submit that those who would oppose such notice are not really concerned about ensuring good homes for Indian children. Rather they are simply seeking to find available adoptable children for non-Indian adoptive parents. Congress has an obligation to enhance the possibility that Indian children who need placement are placed in good homes; it does not have the obligation to ensure that all persons wanting to adopt "get a child" at the expense of that child's future connection with his or her heritage and natural family. At present, several states have explicitly recognized and successfully implemented a requirement that notice be provided in voluntary proceedings. See, e.g., Wash. Rev. Code Ann. 13.34.245(3), (5); 26.33.090(2); 26.33.110(2); 26.33.240(1) (West Supp. 1989); Minn. Stat. Ann. 257.352 (2), (3); 257.353(2), (3) (West Supp. 1989); Okla. 10 O.S. 1991, section 40.1 (as amended in 1994); Mich. Court Rules 5.980(A). Moreover, in other states, it appears to be standard practice to notify tribes of voluntary proceedings. See, e.g., B.R.T. v. Executive Director of the Social Services Board of North Dakota, 391 N.W.2d 594, 595 (N.D. 1986); In re Adoption of Halloway, 732 P.2d 962, 963 (Utah 1986). Thus, notice to Indian tribes in voluntary proceedings is entirely feasible and desirable.

Likewise, requiring that parents be informed of their rights under ICWA will increase the chances that a parent fully considers his or her placement options at the very beginning of the process. The combination of notice to the tribe and full information to natural parents will help to ensure that a young, vulnerable Indian parent has the balanced information available which that parent to make an informed decision. When only an adoption attorney or agency is involved with a young parent considering adoption, there is a substantial likelihood that extended family options will not be explored. Ensuring that parents have full information from the outset will help to lessen the number of later disputes which arise because the parent was confused and unclear of the possible options that are available to her when she placed the child for adoption.

The possibility of open adoption as an option in all proceedings, another part of the NCAI proposal, may also facilitate harmonious placements of children and avoid conflict in some situations. In a number of states, courts currently have no authority to recognize open adoptions even where the parties have

reached an agreement.

At the same time, under the NCAI amendments, if a tribe does not take action within a specified period of time, the tribe will be barred from intervention. Prospective adoptive parents will have assurance that they can go forward with the adoption without later action by the tribe which may disrupt the adoption. The time limits on parental withdrawal of consent serve the same purpose in terms of a parental challenge post-placement. Under the NCAI proposal, prospective adoptive parents will know the time frames that are applicable when they agree to accept a child into their home and the fear of disruption at some unknown point in the future which, it has been asserted, is having a chilling effect upon adoptions should be alleviated.

In addition, the amendments provide more assurance that all parties will "play by the rules". The criminal sanctions will discourage corrupt attorneys and others from subverting the ICWA. There is considerable anecdotal evidence that natural parents are often told by adoption attorneys and agencies that they should not reveal that the child is of Indian heritage in order to avoid the application of the Indian Child Welfare Act. We do not know how often this occurs because it is impossible to determine how often such deception goes undetected. However, almost all attorneys working on behalf of tribes and Indian families have experienced cases where a natural parent who has changed his or her mind about the adoption has revealed that he or she was told and encouraged not to reveal the child's Indian background.

Similarly, the provisions dealing with tribal certification of membership and tribal court wardships are a measured effort to provide assurances to other parties that tribes are following a specified set of rules as well. The certification requirement will have a chilling effect upon any tribal inclination to manipulate membership requirements to obtain ICWA coverage for a child (if in fact this is a problem). Moreover, the wardship section makes clear that tribes may not reach out and make non-reservation children wards of the tribal court unless this occurs through a valid state court transfer of jurisdiction.

Thus, AAIA is very supportive of Congressional action on the NCAI amendments. It believes that the amendments will advance the valid goal of decreasing the number of extended court disputes which will arise under the ICWA.⁴

⁴ I would note, however, that I have been involved in recent discussions with tribal and Indian organization representatives, as well the adoption attorneys who have been invited to testify at the hearing. Based upon those discussions, some largely technical amendments have been developed to the NCAI draft. They are included as Appendix A and have the support of AAIA.

V. Conclusion

The NCAI proposed amendments will lessen the number of disrupted adoptions and provide the best possible placements for Indian children without impacting upon tribal sovereignty. AAIA urges you to support the NCAI amendments to the ICWA and reject Title III of H.R. 3286.

Appendix A

[] - Deletion from NCAI draft

___ - Addition to NCAI draft

Amendment 1:

1913(c) would be amended to read as follows:

NOTICE TO TRIBES - Notice shall be sent by a party seeking voluntary placement of an Indian child or voluntary termination of the parental rights of a parent of an Indian child to the Indian child's tribe, by registered mail with return receipt requested, in the following circumstances:

- (i) within one hundred days following any foster care placement,
- (ii) [within] no later than five days following a pre-adoptive or adoptive placement,
- (iii) within ten days of the commencement of a termination of parental rights proceeding, and
- (iv) within ten days of the commencement of an adoption proceeding.

Notice required under (ii) above may be provided prior to placement if a particular pre-adoptive or adoptive placement is contemplated.

EXPLANATION: This clarifies that it is permissible (and presumably desirable) that notice be provided to a tribe at the earliest possible point in time when a placement is contemplated, even before birth.

Amendment 2:

1913(e) would be amended as follows:

INTERVENTION BY TRIBES - The Indian child's tribe shall have the right to intervene at any point in any voluntary child custody proceeding in a state court only if any of the following has occurred:

Remainder of section remains the same

EXPLANATION: Technical clarifying amendment only.

Amendment 3:

1924 would be amended as follows:

(a) In connection with any proceeding or potential proceeding involving a child who is or may be an Indian child for the purposes of this Act, whoever

- (1) encourages or facilitates fraudulent representations or omissions regarding whether a child or parent is Indian, or
- (2) conspires to encourage or facilitate such representations or omissions, or
- (3) aids or abets such representations or omissions having reason to know that such representations or omissions are being made and may have a material impact on the application of this Act, or
- (4) physically removes a child from the United States in order to thwart the application of this Act

shall be fined not more than \$100,000, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined not more than \$250,000, or imprisoned not more than 5 years, or both.

(b) [No] The parents of [an] the Indian child shall not be prosecuted under this section.

Explanation: Amendment 4 is a substantive amendment which closes another "loophole" which has been used to subvert the Act. The amendment to (b) is simply technical.

Amendment 4:

Section 1903(10) should be changed in accordance with whatever agreements are reached between the Alaska Natives and the Alaska Congressional delegation.

Amendment 5:

1913(b)(ii)(C) and (b)(iii) would be amended as follows:

(C) less than thirty days have passed since the parent received notice of the commencement of the adoption proceeding.

1913(b)(iii)

(iii) If a consent has not been revoked within the time frames provided in subsection (b)(ii), a parent may thereafter revoke consent only pursuant to [under] applicable State law and such relief as may be provided thereunder or, upon petition of a parent [or the Indian child's tribe] to a court of competent jurisdiction and a finding that consent to adoption or termination of parental rights was obtained through fraud or duress[, or that notice was not provided under this section]. [In such case] Upon a finding that such consent was obtained through fraud or duress, the child shall be immediately returned to the parent and a final decree of adoption, if any, shall be vacated. No adoption which has been in effect for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under

State law.

EXPLANATION: These changes clarify that failure to notify a tribe does not extend the parents' right to revoke consent to adoption for two years after an adoption is final. Such a result was unintended. The notice language belonged in subsection (b)(ii)(C) and has now been added there.

Amendment 6:

1913(d)(ii) would be amended as follows:

(ii) the names, maiden names, addresses and dates of birth of the Indian parents and grandparents of the child, if known after inquiry of the birth parent placing the child or relinquishing parental rights and the other birth parent, if available, or if otherwise ascertainable through any other reasonable inquiry.

EXPLANATION: This change is intended to recognize that in certain circumstances the information required by this subsection may not be ascertainable even through reasonable inquiry. The subsection continues to require that known and reasonably ascertainable information be provided.



Shakopee Mdewakanton Sioux Community

2330 SIOUX TRAIL NW • PRIOR LAKE, MINNESOTA 55372
TRIBAL OFFICE: 612•445-8900 • FAX: 612•445-8906

OFFICERS
Stanley R. Crooks
Chairman
Glynn A. Crooks
Vice Chairman
Susan Tolenhagen
Secretary/Treasurer

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Statement for the Record

Hearing Before
the
United States Senate Committee on Indian Affairs
on
Amendments to the Indian Child Welfare Act (ICWA)
Held On
June 26, 1996

Mr. Chairman and Members of the Committee:

The Shakopee Mdewakanton Sioux (Dakota) Community appreciates this opportunity to present its views concerning proposed amendments to the Indian Child Welfare Act (ICWA).

We commend you for holding the June 26, 1996 hearing on this important subject. The fulfillment of your responsibilities in this way is made even more significant because the issue was not fully considered in the House of Representatives prior to its passage of H.R. 3286 on May 10, 1996. We also commend you for striking Title III of H.R. 3286 when the House-passed bill came to the Senate and was referred to this committee.

The Shakopee Mdewakanton Sioux (Dakota) Community is located in Prior Lake, Minnesota. Our Community was formally organized under federal law on November 28, 1969. There are approximately 250 tribal members of the Community; approximately one-half of all tribal members are minors.

We are a small Tribe and our experience under ICWA is limited. However, we feel strongly that weakening ICWA will cause harm to children and will damage the ability of Tribes to function successfully.

Our Tribe recently adopted a Domestic Relations Code and established a tribal Children's Court. It has addressed only one ICWA case, where the father of the subject child is a tribal member and the mother is not Indian. The Tribe asserted legal custody of the child because of family problems and will retain custody until it is certain that the baby is in a safe and loving environment. The entire custody issue has been handled from the beginning by the tribal court and the mother and her family have not disputed tribal jurisdiction. Further, the Community received cooperation and support from the local county government, Scott County, during this particular proceeding. Clearly, the Community's child welfare system functions as intended.

There is no such thing as a "typical" Tribe and ours, like all others, is unique. We are a small community and we have the financial resources to take care of each other. We believe we are typical, however, in the sense that we and all other Tribes take seriously our responsibility to our children. The procedures established by Congress in the passage of ICWA in 1978 certainly have the effect of helping to ensure our survival and of providing to children their Indian heritage and culture. However, the most basic concern of all has to be the well-being of each individual child. The survival and strengthening of the tribal community and the communication of our culture to children serve to accomplish this ultimate goal. The well-being of the individual child is greatly enhanced by the presence of the supportive greater family that is the tribal community. Similarly, the child is strengthened by personal knowledge of and connection to his or her own ancient heritage and culture -- something which is sadly missing for so many children in the adoption system.

When Congress enacted ICWA in 1978, it followed certain fundamental principles. These principles should not be abandoned now because of a small number of very unfortunate cases.

One such principle is that the objective standard of eligibility for tribal membership is a reliable and fair way to determine which children come within the protections of ICWA. A subjective standard of cultural affinity or racial identity, to be applied by numerous and varied judges and other authorities as would happen under Title

III, cannot possibly lead to the kind of fairness or certainty that Congress seeks to ensure and is at the heart of due process.

Related to that is the principle that only Tribes can and should determine eligibility for tribal membership. This has been recognized by the federal government, including the Supreme Court, for many years.

A third principle is the long-standing belief that Tribes are sovereign entities with a political and legal status that defines their relationship with the U.S. government and the states. They are not race-based organizations as seems to be the assumption for the drafters of the provisions of Title III of the House bill.

All three of these principles would be violated by the approach taken in Title III of H.R. 3286.

While we do not advocate any change to ICWA as it stands today, certain modifications to the statute may address concerns about its operation while adhering to the principles set forth above. Such modifications should be along the lines of the amendments agreed to by the National Congress of American Indians (NCAI) at its Mid-Year Conference held in Tulsa on June 3-5 of this year. As the Committee knows, those amendments would provide the following:

1. Notice to Indian Tribes for voluntary adoptions, termination of parental rights, and foster care proceedings;
2. Time lines for tribal intervention in voluntary cases;
3. Criminal sanctions to discourage fraudulent practices in Indian adoptions;
4. Clarification of the limits on withdrawal of parental consent to adoptions;
5. Application of ICWA in Alaska;
6. Open adoptions in states where state law prohibits them;
7. Clarification of tribal courts' authority to declare children wards of tribal court;
8. A duty that attorneys and public and private agencies must inform Indian parents of their rights under ICWA; and
9. Full protection of tribal sovereignty in the determination of membership, a principle which is beyond compromise.

Since Tribes do intervene in voluntary adoption proceedings, changing ICWA to require that they receive timely notice will help prevent delay and disruption of voluntary proceedings that are already underway. With the requirements for such timely notice, Tribes can then reasonably be limited to a period of 90 days during which they must make a definite decision whether they will intervene. Along with these measures, a national standard for deadlines concerning parents' withdrawal of their consent to adoption will add predictability to the process. Requiring public and private agencies and attorneys to inform Indian parents of their rights and their children's rights prior to granting consent to adoption should provide both a more humane process and one which is less likely to be disrupted later. The addition of criminal sanctions is appropriate and, had they been in effect, might well have deterred some of the conduct in the negative anecdotes which fostered the overreaching House-passed legislation.

It is important for the entire Senate to know, as this Committee already knows, that the preservation of abstract political principles is not the objective here. Rather, it is by the preservation of these long-standing principles that our tribal communities survive and are strengthened. In turn, the survival and strengthening of the tribal community serves the best interests of the children, with the community providing the children with the nurturing and the cultural identity that enhances their lives.

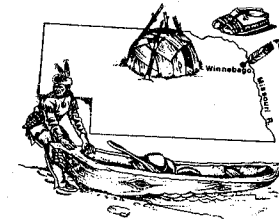
We believe ICWA works well today in the vast majority of cases. Some modifications to the law may be helpful in addressing concerns that have been raised from some quarters. We commend the Committee to opposing the approach taken in Title III of H.R. 3286. If the Senate determines that modifications to ICWA are appropriate, we urge an approach like that in the group of amendments presented by NCAI. Thank you for the opportunity to present our views.

Submitted July 9, 1996

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WINNEBAGO TRIBE of NEBRASKA

WINNEBAGO TRIBAL COUNCIL P.O. BOX 687 WINNEBAGO, NEBRASKA 68071



**Statement of the Winnebago Tribe of Nebraska
Submitted to the
Senate Indian Affairs Committee
Regarding
Amendments to the Indian Child Welfare Act**

July 10, 1996

This statement on amendments to the Indian Child Welfare Act (ICWA) is submitted on behalf of the Winnebago Tribe of Nebraska.

The Tribe wishes to advise the Committee that we are strongly opposed to the ICWA provisions authored by Congresswoman Pryce which were contained in Title III of H.R. 3286, the adoption tax credit bill, as passed by the House of Representatives. The Tribe strongly supports the Senate Indian Affairs Committee's recent recommendation that Title III be deleted from the bill before it is considered by the full Senate.

In addition, the Winnebago Tribe states our strong support for alternative amendments to ICWA as endorsed by tribal leadership at the National Congress of American Indians' mid-year conference in Tulsa, OK, in early June. The

Winnebago Tribe agrees with the provisions of this proposal and hopes the Senate Indian Affairs Committee will introduce legislation based upon this proposal.

Another concern that the Tribe wishes to call to the Committee's attention as it considers amendments to ICWA is the need to clarify the Act's definition of "domicile." In the Tribe's experience, state courts often interpret the term "domicile" differently from the way we do, and the way we believe Congress intended under ICWA. Our understanding is that where an Indian child or family is domiciled may be analogous to where persons in the military service are domiciled. Even though a serviceman may be moved from location to location in his tour of duty, his initial base is considered his domicile for the whole time of service. Similarly, we consider an Indian child's reservation as his or her domicile, even though the child may also live for periods of his or her life off the reservation.

The Winnebago Department of Human Services has on staff one Indian child welfare staff worker who handles ICWA cases both on- and off-reservation, and three child protection services staff who handle ICWA cases only on the reservation. These community members serve the Tribe not only as professionals, but they are also parents, aunts and uncles, and grandparents of the Indian children who are so important to the future of our tribe.

The Winnebago Tribe currently has some 50 active Indian Child Welfare Act cases in seven states: 19 in Iowa, nine in Minnesota, two in Montana, three in Nebraska, two in New Mexico, three in Washington, one in Wisconsin, and 11 which have been transferred to tribal court. Generally, in the Tribe's experience, the states, especially Minnesota, are working well with us in child custody and placement proceedings. The Winnebago Tribe's general experience is that state courts are willing to work with the Tribe. We have a good success rate in getting

cases transferred back to tribal court, particularly in instances where the case has not been going on for longer than one year.

Efforts at family reunification are particularly strong. We expect, for example, that two children now in New Mexico will be reunited with their Winnebago parents within the next 90 days. Also, in none of these 50 active cases are parental rights about to be terminated.

The Winnebago Tribe feels strongly that tribes should intervene in every ICWA case. This will not necessarily lead to a request to transfer to tribal court, however. We simply believe that each tribe should know when there is a placement involving a child who may be or is a tribal member; for that reason, we especially support the provisions regarding notification that are contained in the "Tulsa proposal."

In conclusion, the experience of the Winnebago Tribe has been that state courts have sometimes misunderstood or been ignorant about the provisions of the Indian Child Welfare Act. However, when state courts having jurisdiction over Winnebago children are willing to work with the Tribe in custody proceedings, we have found that to be in the best interests of the Indian child.

The Winnebago Tribe appreciates the leadership of the Senate Indian Affairs Committee in opposing ICWA amendments, such as Title III, that would be harmful to tribal communities. We applaud your willingness to consider and to support tribally-developed amendments to ICWA. Thank you.



Spokane Tribe of Indians

P.O. Box 100 • Wellpinit, WA 99040 • (509) 258-4581 • Fax 258-9243

CENTURY OF SURVIVAL
1881 - 1981

TESTIMONY OF BRUCE WYNNE, CHAIRMAN

SPOKANE TRIBE OF INDIANS

Presented to the

Senate Committee on Indian Affairs

For the Hearing on Amendments to the Indian Child Welfare Act

June 26, 1996

Mr. Chairman, recently members of the Congress have been treated to a series of horror stories about alleged abuses of the Indian Child Welfare Act. These stories have been gathered by the opponents of the Act and are designed to loudly demonstrate perceived weaknesses of the Act. While we in Indian country know there may be problems with ICWA, we also doubt the factual basis of many of the stories or the good intentions of those who have gathered and published them.

We invite members of Congress to visit our Reservation and other Indian Reservations where they would find a very different set of horror stories. These stories would come from people who were adopted into non-Indian families before there was an ICWA and who therefore did not have the Act's provisions to protect

TESTIMONY OF BRUCE WYNNE, CHAIRMAN
SPOKANE TRIBE OF INDIANS
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them. For many of these people, ICWA might have been saved them from years of grief and disorientation.

Attached to my testimony is the story of Georgia G. and her sister Geneva. Because of ICWA, stories like this need never be repeated but only if Congress can hold the line on attempts to undermine the integrity of the Act. The Act has worked well for 20 years; the so-called "abuses" of the Act are minimal compared to the abuses that preceded its enactment. We cannot turn back now and undo an Act that has worked to keep Indian children with their families, their extended families, or with other Indian foster-care families who can love and nurture them in ways that non-Indians, no matter how well-meaning, can duplicate.

That is what ICWA is about: preventing the wholesale adoption of Indian children to non-Indian families and preserving for children, while they are still children, the heritage to which they are entitled. Before enactment of ICWA, more than 25 percent of all children born to Indians were adopted by non-Indian families. This cultural removal, whether deliberate or not, followed the long line of other attempts by the United States government to terminate Indian people, either by killing them with guns, whiskey, or diseased blankets or, after attempts to kill them failed, by erasing their languages, cultures and religions.

TESTIMONY OF BRUCE WYNNE, CHAIRMAN
SPOKANE TRIBE OF INDIANS
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We very much appreciate the Committee's interest in helping to preserve Indian culture by preserving ICWA. The retention of Indian children in Indian families over the past 20 years has made an enormous difference everywhere in Indian country. We have come from a time when people were ashamed to be Indian to now, when people are not only proud to be Indian but are working diligently to prevent the further loss of Indian language and culture and to preserve what still remains. All of the members of the Spokane Tribe are grateful that we, as a Tribe, are now able to determine the placement and care of our Indian children.

We thank the Committee for recommending deletion of the House-passed amendments that would have severely weakened ICWA and look forward to working with you on amendments to strengthen the Act's provision. In this regard, the Tribe generally supports the tribal amendments agreed to by delegates to the NCAI's convention in Tulsa in early June. We have the following concerns, however, that we would like to share with the Committee.

First, in section 1913(c)(i), we believe that 100-day period for notification of the Tribe in voluntary adoption cases should be shortened. Our concern is that a 3+ month wait could allow serious attachment and bonding to take place in the pre-

TESTIMONY OF BRUCE WYNNE, CHAIRMAN
SPOKANE TRIBE OF INDIANS
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adoptive setting before the Tribe is even aware of the child's existence and could mean detrimental delays in identification of tribal relatives. If custody of the child is then changed, serious trauma could result. Whenever possible, the Tribe should be notified at the very earliest practicable date.

Section 1913(d) should be amended by adding an "s" to "affiliation" and to "tribe" to clarify that often there is more than one Tribe involved in a custody proceeding.

We recommend that the following language be added to Section 1913(g):
"Written verification that the Indian child's Tribe/s received notice must be provided prior to finalization of the voluntary termination of parental rights or the entry of an adoption decree."

At the end of section 1924(b), the following language should be added: "...in a proceeding involving their biological child." This would prevent possible interpretation of the amendment as not applying to adoptive parents of Indian children, to adoption attorneys, to agency employees, as well as to others to whom ICWA does in fact apply.

TESTIMONY OF BRUCE WYNNE, CHAIRMAN
SPOKANE TRIBE OF INDIANS
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As for amendments to section 1924 generally, we would comment that as an alternative to penalties that might interfere with attorney/client confidentiality, the Committee might consider sanctions against any agency, whether public or private, for violations of the section. The sanctions could include loss of federal funds, for example. Also, states might be required to suspend licenses for agencies that are found to violate the section or to require bonds for violators. States might also be required to include ICWA compliance procedures in examinations or licensing proceedings for employees of agencies who are going to work with foster care or adoption cases.

The Tribe is ready to work with the Committee in any way possible to insure the continuing viability and integrity of the Indian Child Welfare Act. Again, and very sincerely, we thank the Chairman, the Vice Chairman and the Committee members for their continuing commitment to this effort.



Spokane Tribe of Indians

P.O. Box 100 • Wellpinit, WA 99040 • (509) 258-4581 • Fax 258-9243

CENTURY OF SURVIVAL
1881 - 1981

THE STORY OF GEORGIA AND HER SISTER GENEVA

Daughters of the Spokane

Georgia is 37 years old. She and her sister Geneva were taken from their grandparents and placed in an orphanage when they were just 3 and 4 years old. The sisters are just two of the many thousands of Indian children who were taken from their families and placed in a system of non-Indian strangers. Georgia is enrolled now at the Spokane Tribal College and doesn't remember anything bad about living with either her grandparents or her mother when she was a small child.

After a year at the orphanage, Georgia went to live with a foster family where she was taught to eat properly, to behave, and to go to church. She didn't understand a lot of things and did not even realize that Geneva was her sister when they used to fight at the orphanage; Georgia thought Geneva was just another brown kid. She believes now that they fought with each other because each blamed the other for being taken from their home. She was once told that her mother was sick.

Georgia says that her sister and she get along but they never talk about all the things that happened to them as children. Geneva doesn't like being Indian. She has a daughter now and she doesn't like to be Indian either.

WRITTEN STATEMENT
OF THE
NAVAJO NATION
ON
PROPOSED AMENDMENTS TO THE INDIAN CHILD WELFARE ACT
SUBMITTED
TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS

JUNE 26, 1996

The Navajo Nation has already gone on record opposing the proposed amendments which were included in the H.R. 3275, a bill to amend the Indian Child Welfare Act ("ICWA"). Since it is the Navajo Nation's understanding that the Senate Committee on Indian Affairs has focused its attention on a set of alternative amendments which were developed by the National Congress of American Indians ("NCAI") on June 2, 1996, this written statement focuses on the NCAI alternative amendments. For the Navajo Nation's comments on the original proposed ICWA amendments, the Committee is referred to the Navajo Nation's Written Statement on H.R. 3275, attached.

The NCAI alternative amendments are a dramatic improvement over the original proposed language contained in H.R. 3275. However, the Navajo Nation still has several concerns about the application of the NCAI alternative. The majority of these concerns result from the Navajo Nation's unique position, being located in three states and having had active ICWA cases in every jurisdiction within the United States.

1. The NCAI proposal for a new Section 1913(b) would impose a rigid timeline of six months from receipt of notice by the tribe or 30 days from commencement of the adoption proceeding for withdrawal of consent for the adoption. The difficulty here occurs when the Indian heritage of the child is concealed or missed. It is important that the rights of the tribe and the right to withdraw consent in an adoption proceeding not be cut off until accurate information about the child has been received and the tribe has an opportunity to react. For example, a tribe should not be penalized if it first states that it will not intervene, based on information which indicates that the child is not a member, only to find out later that the tribe received erroneous information. In such a situation the tribe should have the opportunity to intervene, based on the corrected information.

2. NCAI proposed a new Section 1913(c) and(d) which require that in a voluntary placement or a voluntary termination, 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 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.

3. NCAI's proposed Section 1913(e) sets forth timelines within which a tribe may intervene in a state proceeding. While each of these timeframes 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 timelines 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 timeframes not within the tribe's control). Alternately, 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 timelines. However, depending on the adequacy and accuracy of the information received by the tribe, the 30-day timeline 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.

4. 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 together possible that some states may act officiously by requiring that a particular state form be used to meet state evidentiary standards. While the proposed amendments 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.

5. One issue completely unaddressed by the proposed alternative amendments is language which would deal with some odd state court decisions. This language would be in a proposed new section 1904, "This title shall apply whenever an Indian child is the subject of a child custody proceeding." This additional section would address the "existing Indian family" exceptions which were created by state cases in California and Oklahoma. What has occurred is that these state courts have, in effect, acknowledged the ICWA, yet determined that it

was not intended to apply to a specific case. Without a provision to address this situation, it is likely that confusion will continue.

Whatever changes may be proposed to the ICWA, it is important to recall that the effects of ICWA have not only been to preserve American Indian tribes' most precious resources -- it members, but also to prevent the type of alienation experienced by Indian children who were adopted by non-Indian families before ICWA was adopted. While during infancy and early childhood, an Indian child may adapt to and be accepted by a non-Indian family, many of these children later face difficulties in self-identification and adaptation. What may have started out as a "good" intention becomes detrimental to the child. While much has been said about children and parents, both natural and adoptive, it is 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 NCAI amendments will help clarify 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.

ROLAND E. JOHNSON, GOVERNOR
LAGUNA, NEW MEXICO
POSITION OF THE PUEBLO OF LAGUNA
ON
THE PROPOSED AMENDMENTS TO THE INDIAN
CHILD WELFARE ACT
TO

MAY 2, 1996

I am Roland E. Johnson, Governor of the Pueblo of Laguna, located in the State of New Mexico. I am submitting this position paper concerning H.R. 1448, a bill to amend the Indian Child Welfare Act of 1978 (hereinafter referred to as the "ICWA"). It is my understanding that this proposed Bill would require that any determinations regarding the status of a child as a member or potential member of an Indian tribe not be given retroactive effect, but that for purposes of any child custody proceeding involving an Indian child, membership in an Indian tribe shall be effective only from the actual date of admission to membership in the Indian tribe. As the official spokesperson for the Pueblo of Laguna, I am submitting this statement to indicate the strong objection by the Pueblo to H.R. 1448.

It appears that certain members of Congress have again taken it upon themselves to impose their own wishes upon tribes by proposing certain amendments to the ICWA, without the benefit of any type of consultation with tribes, or even clearly thinking through what damaging effects that it would have not only upon the child, but upon that child's tribe. For over two hundred years the

children of Native Americans have been the innocent victims of a cultural war waged against them by the American society. The wishes and actions of the primary sponsor of H.R. 1448 can only be likened to the motives and actions that Christian missionaries, Indian agents, school teachers and politicians have all argued that Indian children must be taught to be something other than Indian, to be something they are not and can never be.

Even in more recent years, although some progress has been made in changing American society's narrow-minded view of Indian people in general, Indian children in particular have been systematically separated from their families and tribal communities. Through largely unwritten policies that have given automatic preference to middle class, non-Indian homes and institutions in adoption, foster care and child custody proceedings, state courts and state social services agencies have made the conscious decision to sever the ties of many Indian children from their families, clans and tribal communities.

I think that it would be appropriate here to pose the question of why did the 95th Congress of the United States pass the ICWA? From a reading of the legislative history of the Act, its passage and its signing into law by President Carter on November 8, 1978, was a major step in trying to stop the abusive practices in the removal of Indian children from their parents. The enactment of the ICWA, was a direct result of an outcry from Indian country that Indian children, including those that were and are potentially eligible for enrollment in a tribe, were being lost to non-Indian foster and adoptive homes at an alarmingly disproportionate rate. This outcry became evident to Congress as they heard

testimony from several hundred witnesses in hearings from 1974 to 1977, and as they reviewed the reports of the American Indian Policy Review Commission, as well as placement statistics prepared by the Association on American Indian Affairs.

Congress included its findings from the hearings, reports and surveys in Section 2 of the Act and stated that pursuant to such findings *"that there is no resource more vital to the continued existence and integrity of Indian tribes than their children,"* and that an *"alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children"* in proceedings which fail *"to recognize the essential tribal relations of Indian people and prevailing cultural and social standards,"* Congress declared it a national policy to:

... protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. (Section 3.)

The proposed amendments to the Act will definitely have an adverse impact in that they will erode and not promote the stability and security of Indian tribes and families to their children. By adding certain preferred language in defining who is an Indian child and who a member can or cannot be is going directly against the purpose and intent of the ICWA. The Act is very clear that neither the states or

Congress can determine who is a member of a tribe: Only a tribe can make that critical determination. This exclusive, protected and unquestioned tenet of tribal government has been upheld by U.S. Supreme Court cases.

By changing the definition of an Indian Child to read "any unmarried person who is under the age of eighteen and is either (a) a member of an Indian tribe *at the time of the child's birth*, will effectively take away that basic and constitutional right of a tribe to initially determine whether a particular child is eligible to be a member of that tribe. Only a tribe can make a determination as to whether a child will or will not become a member of that tribe, but this cannot always be done at the "time of the child's birth." In this day and age when work is harder and harder to find, many tribal members or potential tribal members move off the reservation to look for jobs. Some of these individuals may have children, but never report this information to the tribe. This, however, does not immediately or necessarily mean that that child is automatically disqualified from becoming a tribal member, or that he or she will automatically become a tribal member upon his or her birth. At the Pueblo of Laguna, certain procedures are in place to make a determination on a child's status as being eligible for enrollment or not. Several cases have been submitted to the Pueblo for determination on this issue and the Pueblo was able to make a quick determination and make appropriate responses to state agencies without any undue delays.

One area that the Committee members need to be made aware of is that all tribes depend heavily upon the extended family mechanism, and even though a particular person may not want his or her child at birth, this does not, nor should

it, preclude the extended family or the tribe's interests in obtaining the care and custody of that child. This is exactly what the Act was intended to do.

In addition, the proposed amendments by Congresswoman Pryce would, in effect, establish new considerations in the determination of tribal membership for purposes of the ICWA, and would prohibit retroactive membership. These proposed amendments would limit the protections of the ICWA to only those Indian children who are living on the reservation. The Pueblo does not believe that Congress intended the Act to only apply to a limited number of eligible or potentially eligible Indian children, or to the parents of those children who may have not kept close or significant contacts with their particular tribes. Many of the reasons why Indian children may not be enrolled members or living on or near the reservation comes from the devastating affect of previous federal policies, such as forced assimilation, relocation and removal to boarding schools. And, even though a person who meets the blood quantum requirement for enrollment in a tribe does not want to be considered a member of that tribe, this should not automatically preclude his or her child from being considered a member. Too often, these parents, who are generally of a very young age, are confused and pressured into making determinations that go against their interests and those of their children. And, it is usually the tribe that loses out on this *vital resource, which it views as essential to its continued existence and integrity.*

In closing, I would like to make clear that the Pueblo of Laguna is against any changes to the Indian Child Welfare Act, especially those changes that are currently being proposed. I must remind you as well as the other members of the

Committee that the United States, through Congress, has a direct interest in this matter, as trustee, in protecting the interests of all tribes, and to take a stand against any type of legislation that would be contrary to those interests. Congress has a fiduciary responsibility to all tribes to act in their best interests and the Indian Child Welfare Act mandates that such interests remain at the forefront.

I appreciate your time and attention to this matter and sincerely hope that you will give due consideration and weight to the interests and concerns expressed herein.



PUEBLO OF LAGUNA
P.O. BOX 194
LAGUNA, NEW MEXICO 87026



(505) 552-6598
(505) 552-6654
(505) 552-6655

Office of:
The Governor
The Secretary
The Treasurer

May 3, 1996

The Honorable Jeff Bingaman
United States Senate
110 Hart Senate Office Building
Washington, D. C. 20510-3102

**RE: Pueblo of Laguna's Position on the Proposed
Amendments to the Indian Child Welfare Act**

Dear Senator Bingaman:

On or about May 8th or 9th, the House of Representatives will consider the Bill, H.R. 3286, an omnibus adoption bill. Title III of that bill, based upon the language of H.R. 3275 by Congresswoman Pryce, would adversely amend the Indian Child Welfare Act (ICWA). Congressman Don Young, Chairman of the House Resources Committee which has jurisdiction over Indian Affairs, was forced by the House leadership to consider and report this bill in only one (1) week. On or about April 25, 1996, his Committee marked up the bill and voted to strike Title III, the provision amending the ICWA. Despite this clear action by the Committee with jurisdiction over the bill, the Rules Committee intends to report a rule which will add the anti-tribe language to the bill.

Chairman Young has made clear his intention of offering an amendment on the floor to strike out Title III of the bill. Mr. Young represents the State of Alaska which has a large population of Indians, Eskimos and Aleuts and is very familiar with their problems. He was also a member of the old House Committee on Interior and Insular Affairs when the Indian Child Welfare Act legislation was considered and passed into law. As a consequence, he is very familiar with the severe erosions of Indian families which were ongoing and which the provisions of ICWA were designed to cure. It is very unfortunate that the House leadership has ignored the Committee structure and ignored the wealth of experience that Chairman Young and the other members of the Resource Committee bring to this issue.

ICWA Amendments
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Despite the horror stories being told by the proponents of the Pryce language, the Indian Child Welfare Act has stopped the raids on Indian children; is bringing stability to Indian families; and is strengthening the future of Indian tribes. The Pryce language, if enacted into law, would turn back the clock those efforts and result in more prolonged litigation to the detriment of Indian children. As you are a member of the Congressional delegation from the State of New Mexico, which as you know has a large Indian population, the Pueblo of Laguna strongly urges you to support Chairman Young's floor amendment to strike Title III from H.R. 3268. For further information, you can call David Dye, Chief Counsel of the Resource Committee (202) 225-7800, or Tim Glidden, Majority Counsel to the Subcommittee on Native American and Indian Affairs (202) 226-7393. We would also urge you to contact the other members of the New Mexico delegation and express these concerns to them and urge them to vote against the proposed amendments.

You will also find a copy of a Position Paper that the Pueblo drafted and sets out the position and concerns that the Pueblo has in reference to the proposed amendments to the Indian Child Welfare Act.

Thank you for your immediate attention to this matter. Any help that you are able to provide is greatly appreciated.

Sincerely,

PUEBLO OF LAGUNA

Mr. Roland E. Johnson
Governor

MORONGO BAND OF MISSION INDIANS
11581 POTRERO ROAD
BANNING, CALIFORNIA 92220-2965
(909) 849-4697

TESTIMONY OF MARY ANN ANDREAS
CHAIRWOMAN OF THE MORONGO BAND OF MISSION INDIANS
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
JUNE 26, 1996

Good morning Mr. Chairman and members of the Committee. Thank you for the opportunity to discuss proposed changes to the Indian Child Welfare Act. The Indian Child Welfare Act (ICWA) is a very complicated statute and any changes should be done with great deliberation to protect the best interests of Indian children.

The Morongo Band of Mission Indians are located at the foot of the San Gorgonio and San Jacinto Mountains in Southern California. Our reservation spans more than 32,000 acres and we have approximately 1000 enrolled members.

Although our participation in ICWA cases has been somewhat limited, we have successfully intervened in several cases, and have given input on the placement of Indian children in those cases. We have tried to work with local social services agencies to ensure they have a better understanding of ICWA and its requirements. Despite the fact that ICWA was enacted in 1978, it has only been recently that states and adoption agencies have made efforts to comply with it. We do not want to hinder this effort by drastically changing the law, when all that is needed is minor adjustments and better compliance.

THE INDIAN CHILD WELFARE ACT

Throughout the course of the debate on this issue, there has been a lot of misinformation about ICWA. ICWA works when it is understood and followed. It was designed to allow tribes to participate in child custody proceedings to prevent the wide scale separation of Indian children from their communities.

When the law was enacted in 1978, it was bi-partisan, long overdue and widely needed to protect the integrity of Indian families. This fact is lost on Members of Congress trying to change ICWA because of the very narrow interests of a few constituents. Many of the opponents of ICWA do not acknowledge the continuing need for ICWA, and do not acknowledge its current flexibility.

The highly publicized case that prompted the legislation in the House of Representatives started because of overt non-compliance with the Act. The

situation that resulted from this attempt at circumventing ICWA was tragic for all parties, especially since it could have been avoided. But the answer to this problem is not to drastically change ICWA without adequately considering the impact such changes will have. Instead, we should strengthen the Act to ensure compliance and take measures to avoid "problem" cases.

THE NCAI ALTERNATIVE AMENDMENTS

With these ideas in mind, I and a number of members of our Tribal Council, attended meetings about ICWA at a recent session of the National Congress of American Indians. At this session many tribes came together to discuss and offer ideas about how to enhance ICWA for everyone.

The alternative amendments developed at this meeting directly address some of the concerns about ICWA without having an overreaching effect. They work toward the goal of providing more certainty for adoptive parents and still protecting tribal sovereignty.

For example, the NCAI amendments provide better notice to tribes of adoption proceedings. Currently, notice is only required for involuntary cases, and expanding the notice to include voluntary adoptions will allow the tribe to participate in the initial adoptive placement decision. This change will help avoid future problems because all necessary parties, including the tribe, will take part in the choice of an adoptive home. The amendments also include deadlines for intervention which place a responsibility on the tribe to act in a timely fashion. This change demonstrates tribal acknowledgment of the importance of swift, certain and appropriate decision making in placing Indian children.

The NCAI alternative amendments also impose criminal sanctions against parties who knowingly violate the act. This provision will help deter parties from participating in attempts to circumvent ICWA. Finally, the NCAI alternative amendments allow courts to enforce "open adoption" agreements. "Open adoption" agreements allow the biological family to maintain contact with a child after an adoption has been finalized. Some states acknowledge these agreements and some states do not. This change will simply leave this option open in states which currently do not allow it. This amendment will help resolve current contested cases, including the one that prompted this legislation.

CONCERNS RAISED AT THE HEARING

Several witnesses testified about "retroactive application of ICWA." However, I believe this characterization is a misnomer. The need to retroactively apply the law exists only when the law is not followed in the first place. The way to address this problem is to avoid having it occur. Again, the NCAI alternative amendments

address this problem through better notice, intervention deadlines, criminal sanctions and allowing the use of "open adoption" agreements.

Finally, there was some discussion of the best interests of Indian children. When ICWA is followed it works to provide Indian children with families that are sensitive to all of their needs, including the need to remain connected to their tribe. The Act does not allow the tribe to dominate an entire case to the exclusion of the best interests of Indian children. The tribe is only one party in a case. The state court also considers the position of the biological parents, the adoptive parents and the child.

When state courts make decisions on placement of Indian children, they often do so in the context of best interests of the child. Therefore, it is important to examine how the best interests of Indian children and Indian tribes and families relate to each other. At the beginning of a case, the best interests of Indian children and tribes are closely aligned with each other. The Indian child is in need of a home and the tribe has an interest in locating a family within the community to provide that home. But if an Indian child is placed for adoption without notice to the tribe, then the best interests of the child and the tribe can become conflicting. Once the child is placed in a non-Indian home, then the bonding between the child and that family can work against the tribe's interest in keeping the child within the community. Therefore, it is crucial have the tribe involved in the decision making process as soon as possible, in order to protect the best interests of all parties. The NCAI alternative amendments accomplish this goal and I hope you endorse them.

Thank you for the opportunity of presenting this testimony.

**Testimony before the Senate Sub-Committee
on Indian Affairs
John McCain, Chairman**

Mr. Chairman, Members of the Sub-Committee:

My name is Gregg Cordova. I am the Chairman of the Dry Cree Rancheria which is located in Sonoma County, California approximately two hours north of San Francisco. The Dry Cree Rancheria is presently a party to the ICWA case In re BRIDGET R. a case which involves the issue of the "existing Indian family" doctrine. I am here today to testify on behalf of my Tribe. We are adamantly opposed to any changes in or amendments to the Indian Child Welfare Act.

If this Congress adopts the proposed amendments to the ICWA which would permit the application of an existing Indian family doctrine analysis, Tribes across the country will be faced with situations like the one my Tribe is now facing in the case of In re BRIDGET R. We know the consequences of this kind of analysis.

One does not have to go beyond the Congressional findings that were the basis for the enactment of the ICWA to understand why the proposed amendments would defeat the purpose of the Act. The findings included the recognition of the plenary power of the Congress over Indian affairs, of Congress's responsibility for the protection and preservation of Indian Tribes and their resources, that "there is no resource that is more vital to the continued existence and integrity of Indian Tribes than their children", the

an "alarmingly high percentage of Indian families are broken up by the removal" of their children, and that State courts and agencies "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities".

These findings make it clear that Congress intended to take the power to decide such fundamental issues as the definition of a Tribal member, the definition of an "Indian child", and the appropriate placement of Indian children out of the hands of the state courts. The ICWA provides strict definitions and mandatory provisions so that questions like what constitutes an Indian family will not be subject to the varying interpretations of state courts. By giving state courts the power to evaluate the nature and quality of an existing Indian family, this legislation will return Indian Tribes and Indian families to the precisely situation that the ICWA was intended to prevent.

This is clear from the words of the California Court of Appeals in In re BRIDGET R. There the court wrote:

In considering whether the biological parents maintained significant ties to the Tribe, the court should also consider whether the parents privately identified themselves as Indians and privately observed tribal customs and, among other things, whether, despite their distance from the reservation, they

participated in tribal community affairs, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, participated in Indian religious, social, cultural or political events which are held in their own locality, or maintained social contacts with other members of their Tribe.

At the time of the enactment of the ICWA, Congress did not intend that this type of intrusive examination be carried out in order for the ICWA to apply. Nor could it have been the intention of Congress to encourage the varying interpretations of these factors by state courts that the adoption of the "existing Indian family" analysis would inevitably lead to. The fate of the child, the child's family, and the child's Tribe would be dependant on what non-Indian outsiders determined to be the necessary quotient of Indian-ness or involvement in an Indian community. I do not believe that any member of this committee would submit to the determination of a judge the question of whether they are Protestant Catholic, Jewish, Moslem, Black, or Asian, according to standards set by people outside those communities, and based on an examination of how often they voted, whether they regularly went to church or synagogue or mosque, what organizations they gave their money to, what they read, and who they chose to socialize with.

This committee must recognize that the purpose of the ICWA

was, along with the preservation of the child's connections to his immediate family, the protection the interests of the child's Tribe. The Dry Creek Rancheria has a population of 484 members. Every member is significant to the survival of our Tribe. The fact that members choose to live outside the rancheria or are forced by economic circumstance to live outside the rancheria does not mean that they are not important members of our community or not, as the Congressional findings to the ICWA express it, "vital to the continued existence and integrity" of our Tribe.

A Tribe ceases to exist when it no longer has members. I hope that it is unnecessary to remind this committee that at the time that the ICWA was drafted, the Senate hearings were presented with evidence that between 1969 and 1974 25% to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions, that in 1971-1972 almost one in four children under the age of one year was placed for adoption, and that approximately 90% of those Indian placements were in non-Indian homes.

Rather than clearing up what some people apparently regard as problems stemming from an unfair exception working to the benefit of Indian people and their Tribes, the incorporation of the "existing Indian family" analysis would lead to far greater complications than are presently faced by courts in cases involving the ICWA. Every time a Tribe attempted to intervene, courts would

be confronted with the question of the extent of a Tribal member's involvement with his Tribe. Unscrupulous attorneys and adoption agencies, like those involved in our case, would use the exception to hopelessly confuse and delay proceedings so that, instead of returning the child to his Tribe quickly and without undue complication as the ICWA now requires, legal battles would stretch out long enough to allow for the kind of dishonest proclamations that the Dry Creek Rancheria has faced: that it is too late to return the children, and it is for the good of the children that they not be returned to their family and Tribe.

Is it for the "good" of the child that they be placed outside of an Indian family? Evidence presented at the ICWA hearings in 1974 revealed that Indian children raised in white communities faced severe problems of identity and adjustment in a society that did not accept them.

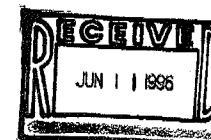
Members of Federally recognized Indian tribes have a unique legal relationship with the Federal government, and some laws have been designed to give special consideration to some Indians under certain circumstances. I doubt, however, that there is anyone in the United States who would give up their circumstances in exchange for the discrimination, poverty, and disease still common in Indian communities that accompanies the benefits of laws like the ICWA. I find it both ironic and outrageous that the moment Indians appear to derive any benefit from their status there arises a chorus that

echoes across the country: How unfair! Indians have so many advantages! Indian have a special legal and political status, but that status has rarely worked to our advantage. Laws like the ICWA were designed to help us preserve what is left of our cultures after centuries of destruction. Don't take what little we have away from us.

Jerry Anderson
Chairperson
Big Creek Ranch



AMERICAN
 PSYCHOLOGICAL
 ASSOCIATION



**ADVOCATES FOR ETHNIC MINORITY CHILDREN
 AND FAMILIES NEEDED TO RESPOND**

**Recent Amendments to the Indian Child Welfare Act of 1978
 Interfere with Native American Traditions**

ISSUE: The House recently passed the Adoption Promotion and Stability Act of 1996 (H.R. 3286) which reverses current law with respect to the adoption of American Indian and Alaska Native children. Title III of the legislation states that any child custody proceeding involving a child who does not reside or is not domiciled within a reservation would no longer be covered by the Indian Child Welfare Act (ICWA). In effect, the amendment would remove jurisdiction over Indian child custody proceedings from tribal courts and grant jurisdiction to state courts.

In addition to its impact on Native American child custody proceedings, Title III would also affect tribal determinations of membership. Title III further amends ICWA by stating that "a person who attains the age of 18 years before becoming a member of an Indian tribe may become a member of an Indian tribe only upon the person's written consent". Also, "for the purposes of any child custody proceeding involving an Indian child, membership in an Indian tribe shall be effective from the actual date of admission to membership in the Indian tribe and shall not be given retroactive effect".

PROBLEM: Title III of the Adoption Promotion and Stability Act of 1996 jeopardizes the integrity of Native American culture. If enacted into law, the Act will limit the ability of Native American tribes to retain and embrace their traditional practices and culture. Below are some of the Society of Indian Psychologists (SIP) and APA's objections to the Adoption Promotion and Stability Act.

- * Title III of the Adoption Act interferes with tribal sovereignty by allowing state courts to negate tribal membership determinations. This provision fails to consider the role of culture, heritage, and tribal relationships in determinations of tribal membership.
- * Title III of the Adoption Act focuses on the residential status of a child on the tribe's reservation or the affiliation of the biological parent as

750 First Street, NE
 Washington, DC 20002-4242
 (202) 336-5500
 (202) 336-6123 TDD

primary evidence of tribal membership in determining whether a child is Indian under the ICWA. This provision fails to consider the fact that some tribes have no reservation, and that many tribal members do not live on reservations, but nevertheless maintain social and cultural ties with their tribal community.

- * Title III of the Adoption Act only permits Indian children who are tribal members prior to a child custody proceeding to receive protections under the ICWA. However, it is not always possible to have tribal membership determinations made prior to a custody proceeding. In addition, many providers of child welfare services do not correctly identify the ancestry of Native American children in custody proceedings, and may not be familiar with the requirements of ICWA.
- * Title III of the Adoption Act could potentially deprive tribes of jurisdiction over some resident member Indian children on the reservation because they would be classified as non-Indian for the purposes of the ICWA under Title III of the Adoption Act. For example, one non-reservation tribal ICWA program reviewed their ICWA cases to discover that 70% of the children from their program would not be eligible under the ICWA as amended. This would affect both reservation and non-reservation children that are currently under tribal jurisdiction as the ICWA was passed originally.

The Indian Child Welfare Act was enacted because the historic and contemporary removal of Indian children from Indian families through foster care, adoption and boarding schools has devastated tribal communities. Current legislation will further undermine the integrity of Indian families and tribal communities.

ACTION NEEDED: Please write or call Senators who sit on the Indian Affairs Committee. Using the list provided below, contact your state's Senator as a constituent and a professional concerned with these issues. If your Senator is not on the list, address your correspondence to the Committee's chair, Senator McCain. The Committee needs to hear from you how the Adoption Promotion and Stability Act would be harmful to Native American children and families. You should try to contact them within the next two weeks, before the Senate considers the amendments to ICWA. Feel free to use the sample letter below in drafting your correspondence or talking points--

SAMPLE LETTER TO SENATORS

Republicans

John McCain, AZ, Chair
Frank Murkowski, AK
Slade Gorton, WA
Pete Domenici, NM
Nancy Kassebaum, KS

Democrats

Daniel Inouye, HI
Kent Conrad, ND
Harry Reid, NV
Paul Simon, IL
Daniel Akaka, HI

Comments On the Indian Child Welfare Act and Adoption Promotion and Stability Act of 1996 For Consideration by the Committee on Indian Affairs in the U.S. Senate

Mr. Chairman, esteemed members of the Committee on Indian Affairs:

I am writing to express my concern regarding the Adoption Promotion and Stability Act of 1996 and amendments to the Indian Child Welfare Act that will make it easier for non-Indians to adopt Indian children. The following are my comments which I hope you will enter on the record as testimony.

How often in our history have we taken an action or passed a law to help resolve a problem only to find out some years later that the action or law was the worst possible reaction? Despite all good intentions, it happens all too frequently. I am afraid the Senate is about to take one of those steps that they, or our children, will come to regret in the future.

For the record, I represent no organization; I am a U.S. citizen; and I am *technically* white, which really means somewhere deep in my family history I have a Native American ancestor. I suppose that really makes me slightly off-white to pink in terms of my race. I am unable to have children unless I adopt. I also am married to a full-blood Dakota Indian, who was born and raised in Canada, . . . a country in which adoption of First Nations (or, to us, Native American) children was greatly encouraged during the decades of the fifties and sixties. As such, I believe I am somewhat more knowledgeable than most other white people about the subject of this bill and I hope you will seriously consider my thoughts.

To provide you with an example of an Indian raised by whites let me first tell you about my husband.

My husband was one of the thousands of Canadian First Nations children taken from his home reserve (the Canadian equivalent to our reservations) in the middle sixties and placed in a white foster home. He was four years old at the time. Unfortunately for my husband, the couple essentially used him and his half-brother as a kind of "slave" labor on their farm. Often he was fed garbage and beaten with such implements as an extension cord. He was placed in an all-white school where white children taunted and bullied him because of the color of his skin. Although his home reserve was only a few miles away, no one ever attempted to teach my husband about his culture or his heritage. Instead they force-fed him white beliefs and values in an effort to "assimilate" him into the white Canadian society.

My husband always knew he was different than the people surrounding him. He knew he wasn't white no matter how hard he tried to think and act like a white person, because all he "had to do was look in a mirror" (his words, not mine). And, he certainly was not treated like other white people. By the age of 10, he was rebelling against his white foster family in large part because he was different. He had learned to lie, because he was lied to. Whatever his motives for stealing, he started at 10 with the theft of a school bus that he took for a joy ride. He also started

stealing farm equipment. In group homes, he learned how to survive on the streets of a city. Except for the color of his skin, he did not know how or why he was different and no one he met for many years could explain it to him. Today, he drinks alcohol to excess . . . so much so that twice he has been hospitalized for alcohol poisoning. He takes drugs to escape his reality . . . to find a place where he can "chill" and just be . . . a place he doesn't have to fight or be angry. He has no self-identity, so he looks to anything or anybody else to find what he can only find among his own people. A long-time friend of his told me recently that my husband used to claim he was Asian and, for many years, would fight anyone that dared to call him an Indian. To this day, he frequents all-white establishments, particularly where the actions of whites against Indians are reminiscent of the struggles between whites and blacks in the southern United States during the early part of this century. Essentially, he goes looking for fights to release some of the anger he feels, although he doesn't see it that way. He will tell you he just wants to enjoy the same things other whites enjoy and that he was supposedly taught to enjoy. But, he purposely dares people to say something to him, because he has become "what the white people made me." Most whites consider him a menace to society since he has been convicted of robbery, attempted murder, and any number of incidents in which he has beaten up people, . . . primarily white people.

It was not until the Mohawk revolt at Oka that my husband first discovered that he could take some pride in being Indian. While he has spoken to a few Indian elders to try to learn more about his own heritage and culture . . . none of those Indians have been of the Dakota people. He rarely socializes with his own people because they make him uncomfortable. Why? Because my husband is also angry with his own people for allowing him to be taken away in the first place.

Once you get to know him (he tends to intimidate just about everyone with one look), you find out that he is an intelligent, warm, good-hearted man, but one who also is angry to the very core of his being. He is trapped in a no-man's land, caught between two worlds and so angry about it that he takes it out on anyone who happens to get in the way. But his anger and frustration are slowly eating him alive . . . from the inside out. He has bleeding ulcers and his anger has already destroyed his relationships with so many people. For example, I know my husband loves me despite my white skin and I love him more than he'll probably ever know. However, I had to leave him because he beat me once too often, something he learned how to do from his white foster family.

While I was living with him in Regina, Saskatchewan, Canada, however, I learned that my husband was not alone in his feelings, nor in the way he was raised. We lived in a place known as the "hood," which was largely populated by urban Indians. Many of their stories were similar. Some of them had been adopted, others fostered out, and some were raised on their home reserves but had come to the city to find work . . . (of which there is very little for people with dark colored skin, and what jobs that are available are usually minimum wage jobs for unskilled labor). Of the thousands upon thousands of Canadian Indians fostered out or adopted during the fifties and sixties most would tell both whites and Indians to go jump in a lake today. They, too, are caught between two cultures . . . taught white values, but treated by whites to be who they are . . . Indians . . . yet they don't know what an Indian is suppose to be other than what whites tell them, by their actions, that they are supposed to be.

Some of the Indians raised on their home reserves told me a different story, however. They talked of their extended family . . . if parents for some reason had been unable or unwilling to take care of their children, the extended family took care of raising the children for them, even if they were not blood relatives. In traditional Indian societies, even today, non-blood relatives are often referred to as uncles and aunts, brothers and sisters. These people to whom I spoke knew who they were and they were proud of their heritage. Using traditional Indian beliefs and values, many of the Canadian reserves are beginning to successfully tackle problems of alcoholism, domestic violence, drug abuse and crime. It has been more difficult, however, to reach the urban and "assimilated" Indians. Sure, they still have problems on some reserves in Canada, but that is changing as First Nations people are allowed to return to their traditional way of life and to govern themselves.

Canada's policy since 1857 has been to "encourage the gradual civilization of the Indians." To do that, education was necessary and as time went on the government found that the Indian child's home life counteracted whatever was learned in school. So the government decided it would be better to remove the child entirely from the Indian environment, first by sending children to residential schools. Most Indians objected and for a time tried to prevent their children from being sent to these schools where the children "learned to be ashamed of their parents' way of life" and also because so many children "died of diseases contracted at the schools." By 1920, the government had decided that policy had failed. However, the public wanted the Indians removed from valuable lands, so the government tried again to "assimilate" the Indians, "even if they did not want to be." Beginning with the Indian Act of 1951, the government actively encouraged the adoption of Indian children by white families. This was done by force when necessary and without the permission of the children's biological parents. Also, agreements were reached with the various provinces to have Indian children educated in all-white provincial schools in return for the Federal government paying part of the capital costs for school buildings as well as tuition fees, etc. Foster parents and adoptive parents received welfare benefits to care for the Indian children. "By the mid-1960s, Indians were given the vote and allowed intoxicants. All these things, it was hoped, would promote assimilation."

Upon reviewing the success of these measures in 1969, the Canadian government saw their error. The programs had not been successful at all. More Indians than ever were on welfare. They now also had problems with the abuse of the "intoxicants." Whites resented and still resent the "special status" given Indians, which further promotes racial hatred and acts of violence against Indians. For example, I heard daily stories of Indians walking alone down streets in Regina who were jumped by a carload of whites and then beaten. My brother-in-law was one of them, and it has happened to him several times, once badly enough to hospitalize him. Efforts now are underway in Canada to allow First Nations people to govern themselves in hopes that will fix the problems caused by the government's assimilation policy. (Quotes on government policy were taken from: J.L. Tobias, "Indian Reserves in Western Canada: Indian Homelands or Devices for Assimilation?" in *Native People, Native Lands: Canadian Indians, Inuit and Metis*. Ottawa, Canada: Carleton University Press, 1987. The publication also contains an extensive list of other references on this issue.)

Specific Comments

When I started writing these comments, the Adoption Promotion and Stability Act of 1996 was still under consideration by your committee. I understand that it has been reported out, but that your hearing to amend the Indian Child Welfare Act will be tomorrow. My comments originally were directed at the first proposed bill, but my comments also apply equally well to the amendment of the Indian Child Welfare Act. Since several of your members also are members of the Senate Finance Committee, which will be reviewing the Adoption Promotion and Stability Act of 1996, and because some of my original comments also apply to the amendment of the Indian Child Welfare Act, I have not substantially changed my comments to reflect the reporting out of the Adoption Promotion and Stability Act.

The proposed bill under your consideration is an effort to try to change the problem we face in the States with foster care, and I'm sure is well-intentioned, if not well researched or well-thought out. First, the bill offers a financial incentive to adopt children, particularly minority children. While I recognize that lawyers have helped to raise the cost of adoption to outrageously high levels, should not adoption have its basis in love for the child rather than love for money? Providing a financial incentive in Canada failed. Are we doomed to make the same mistake here?

It is the lack of love and attention for the child that is at the root of the problem in foster care? A part of the problem with foster care also is tied to money now . . . if you take in a foster child, the state pays you for the child's care (and, often the money goes to pay for things that the child never sees or benefits from). How will offering a tax incentive encourage more adoptions of minority children, anyway? As it is, there are long waiting lists of anxious potential parents just waiting for a child to adopt? (Just check the number of "looking for that special child" ads in USA TODAY.) Most people want infants, not 3, 4, 5 or even 10 year olds, especially not of their own race. The only thing offering money will do is cause greedy people with no love in their hearts for children to adopt children they will never love! I really would like someone to explain to me how a monetary incentive will cause a person to love a child, particularly one from another race? How will a monetary incentive cause a person to love a 4 or 5 year old child when what they really want is an infant to mold into their own image? And, if that child does not conform to the parent's image, then what happens? The child is scolded and told he/she is bad.

I have been involved in the Native American Community for several years now. As hard as I try, I can only understand and appreciate so much of the traditional Indian values. The way I was raised . . . white, with white values . . . often has caused a great deal of conflict in my own mind about what is right and wrong where Indian people are concerned. The one thing I do realize is that because I was not raised as Indian, I may never fully appreciate or understand Native American culture and values. My husband believes that is the way it should be because white people already have stolen so much from his people. I know that if I were in a position to adopt an Indian child, I think I would find some way to move next to or onto a reservation where the child could be exposed to and learn the ways of his/her people. I do not believe most other white people would even consider doing the same. It is time we, as a nation, tried harder to give something back to Native Americans. Giving them back their children is a good place to start.

The problem in foster care and with adoption is not a matter of money. . . it is a matter of not having enough "qualified" parents. Wouldn't the money be better spent in developing training programs for new and prospective parents that would teach them how to be good parents? The only thing a tax incentive will do is help the rich get richer.

Next, the Adoption Promotion and Stability Act of 1996 would prevent states or other entities from limiting an adoption because of race, color or national origin. Also, the amendment to the Indian Child Welfare Act would make it easier for non-whites to adopt Indian children.

I know that the U.S. is the world's "melting pot." It is *suppose* to be a place where such things as race and skin color make no difference. But, that is not reality . . . that is a theory! Reality is race, color and nationality do make a difference in every day living. Why do you think there are so many hate crimes today. . . why do you think someone is going around burning black churches? *You CAN NOT legislate what people feel in their hearts!*

Color and race *must* be considered in all adoption proceedings and all efforts to find parents of the same color, race, etc. must be made before giving consideration to allowing a child to go to adoptive parents of another race. Where Native Americans are concerned, their traditional cultural system already has a structure for dealing with adoptable children. It worked for centuries before the white man came to this country and continues to work in some places today. If no Indian parents or Indian nation can be found to take care of an orphaned Indian child, then and only then should adoptive parents from another race, color, etc. be considered. If the latter does occur, it also should be a mandatory part of the adoption agreement that the child be exposed to and even educated in the cultural traditions and values of his/her birth parents while in the care of the adoptive parents.

Under Title III of the Adoption Promotion and Stability Act of 1996, there is a reference to the act being inapplicable to any child in custody proceedings unless "at least one of the child's parents maintains a significant social, cultural or political affiliation with the tribe of which either parent is a member." I am not sure I completely understand what you are trying to do here, but my first reaction is . . . "Do you also require that of whites? Does a white parent have to be socially involved in the community in which they were born, their ancestral culture or their political party in order to qualify as a custodial parent?" That portion of this bill, if I read it correctly, is racist and only perpetuates racist attitudes towards Indians and other minorities, and, basically is telling them how they must act to be "good" Indians. First of all, that is not the Senate's responsibility. That is a matter that should be left to the individual Indian nations.

I understand that the Committee on Indian Affairs has eliminated that section of the proposed bill. I really hope so. We spent years trying to assimilate Indians into white society in this country. We actually made it illegal for them to practice their own religious beliefs until just last year. We basically told them for the last 400 years or so that to be an Indian was a bad thing and that they should become more like white people . . . or, if they could not become like us, at least have the courtesy to die. Title III of the proposed bill would be like telling these same people that they are going to lose their children in a divorce proceeding because they did what we've forced them to do all these years! Not all Indians live on reservations today. We, in the United States, (just as they have in Canada) have actually encouraged Native Americans to get off

the reservations and come into our cities to get jobs since there are few jobs on reservations. Title III would have penalized these same people in any divorce proceedings for doing what we, as a nation, have forced them to do for years.

I really hope Title III of the Adoption Promotion and Stability Act of 1996 has been eliminated and that no last minute effort will be made by any Senator to restore it before a final vote on the bill.

Summary

The Republican and Democratic Parties, along with President Clinton, have been screaming about the loss of family values in this country, yet with this bill the U.S. Senate is proposing to destroy the traditional family values of Native American people. One of the problems as I see it is that most white people in the U.S., for the most part, lack any sense of cultural heritage or self-identity other than the culture of money. So many of the Indian nations in the eastern U.S. have lost much if not all of their traditional culture because of the white man's idea of what is good (i.e., being rich) and bad (e.g. being poor). The Plains and Western Indian nations struggle against enormous odds (particularly reinforced by television and advertising that promote greed) to retain some sense of their heritage, some sense of self-identity. I beg you not to destroy what is left by encouraging the adoption of Native American children by those of another race. It is wrong.

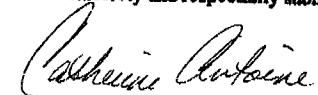
When this great country was formed in the 1700s, we fought against being told by a King what we should and should not believe, yet we keep trying to tell other people what they should and should not believe and practice. When are we going to learn?

I know that in the hearts and minds of those that proposed the amendment to the Indian Child Welfare Act and the proposed Adoption Promotion and Stability Act of 1996, they truly believe they are going to help solve a problem. But you must understand that, despite all good intentions, first the Native American community will view the actions as just another attempt to assimilate them and to destroy them as a people. They have their past experience in this country and the experience of their brothers and sisters in Canada to prove it. And, in effect, destruction . . . the final death blow to the aboriginal people . . . is just what this proposed bill will accomplish, because it will cause Native Americans to lose their self-identity and their self-esteem. Ask any psychiatrist what losing those two important elements will do to a person. I know from first hand experience just what living in a no-man's land . . . trapped between two cultures . . . can do to a person.

With all due respect, Senators, I urge you to seriously reconsider your present course. You cannot keep allowing and even encouraging Native Americans to become lost between two worlds not knowing where or how they fit into either one. You will be the cause of their final destruction, if you amend the Indian Child Welfare Act to make it easier for non-Indians to adopt Indian

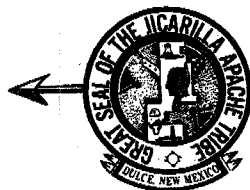
children. Further, I hope that those Senators that also serve on the Senate Finance Committee will rethink their position on the Adoption Promotion and Stability Act of 1996.

Most sincerely and respectfully submitted,



Catherine A. Antoine

cc: The Honorable Bill Clinton, President
The Honorable Bob Graham, D-FL, U.S. Senate
The Honorable Connie Mack, R-FL, U.S. Senate
The National Congress of American Indians
The National Indian Child Welfare Association


THE JICARILLA APACHE TRIBE

P.O. BOX 807 • DULCE, NEW MEXICO 87528
(505) 758-3242

June 21, 1996

VIA TELEFAX NO. (202) 224-5429

The Honorable John McCain
Chairman, Senate Committee on Indian Affairs
SH-838 Hart Senate Office Building
Washington, DC 20510-6450

Re: Amendments to the Indian Child Welfare Act

Dear Senator McCain:

I am writing to express my concerns and strong opposition to the amendments to the Indian Child Welfare Act ("ICWA") recently passed by the House of Representatives (H.R. 3286, Title III). I understand that the Senate Committee on Indian Affairs will conduct a hearing on this matter on June 26, 1996. I strongly urge you to oppose the amendments passed by the House. The amendments threaten to substantially weaken the efforts of the nation's Indian tribes to determine and preserve their membership; an issue that is crucial to our survival. In addition to the serious adverse impacts that these amendments would impose on tribes, the amendments were passed by the House of Representatives without consultation with the tribes. Given the far-reaching effect of these amendments, it is incumbent upon Congress to respect the government-to-government relationship with the tribes and provide a meaningful opportunity to the tribes to have input on this matter. The Senate should not consider these amendments until such consultation is conducted.

I believe that the ICWA amendments in H.R. 3286 would severely undermine the purposes for which the Act was initially passed by codifying the existing Indian family exception, a judicially created doctrine that some state courts, hostile to the preservation of Indian tribes, have used to undercut the Act. Essentially, the amendments would in many instances leave it to state court judges to determine which families have maintained sufficient social, cultural, religious and political ties to their tribe to qualify for the protections afforded by the Act; contrary to the very spirit and purpose of the Act. These amendments fail to consider the tragic circumstances that led to the passage of the act in 1978, described in the legislative history and

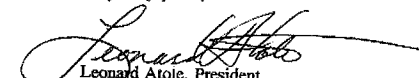


The Honorable John McCain
June 21, 1996
Page 2

Congressional findings of the ICWA. See 25 U.S.C. § 1901. The amendments would also undermine a tribe's inherent sovereign right to determine its own members, a power that is central to our survival and self-determination. Rather than undermine the ICWA as H.R. 3286 threatens to do, Congress could eliminate many, if not all, of the problems encountered in the application of the ICWA by proposing stronger measures to enforce the present Act.

The ICWA amendments in H.R. 3286 would have a serious detrimental impact on Indian tribes. I hope that we can count on your efforts to prevent their passage in the Senate and to conduct meaningful consultation with Indian tribes before these or any other amendments to the ICWA are proposed. Please don't hesitate to contact me if you have any questions on this matter.

Very truly yours,


Leonard Atole, President
Jicarilla Apache Tribe

Margo Boesch, BSW
 Kathryn M. Buder Center
 for American Indian Studies
 George Warren Brown
 School of Social Work
 Washington University
 Campus Box 1196
 One Brookings Drive
 St. Louis, Missouri 63130

July 11, 1996

Senate Committee
 On Indian Affairs
 U. S. Senate
 Room 538, Hart Building
 Washington, D. C. 20510

Re: H. R. 3286 - Title III Amendments
 Indian Child Welfare Act

Dear Senators:

I am a non-reservation American Indian adoptee. I was adopted by a non-Indian family through a private adoption, and searched for over twenty years to reunite with my tribe: White Earth Band of the Minnesota Chippewas. I am personally able to attest to the importance of maintaining the integrity of the Indian Child Welfare Act of 1978.

I ask that you please consider the fact that for many American Indian adoptees the ethnic-bond is more often than not as strong as the mother-infant bond described in John Bowlby's and Mary Ainsworth's cross-cultural work on Attachment Theory. For many children and adults, knowing "where one comes from" is an important piece of the identity pie. Research has shown that self-identity provides the foundation for self-esteem, allowing one to be empowered to make decisions that maximize his/her individual potential.

My life has been a struggle to connect the fragments of my heritage, which would have been avoided had I been adopted under ICWA (Sec. 104 & 105 (e)). Like the current ICWA headline-making proceedings, my adoption involved a series of errors, omissions, and lies. My biological father (non-Indian) refused to surrender his parental rights. My biological-mother withheld information regarding her family and heritage. In addition, my adoptive family would not have met the existing criteria for prospective parents. Finally, the adoption was never registered with the state; a situation which required fifteen years and another adoption to rectify.

Senate Committee
 On American Indian Affairs
 July 11, 1996

Page -2-

Finding my biological family was not as I had imagined. Since there were numerous unanswered questions regarding my adoption, true acceptance and family intimacy proved to be an unrealistic expectation. I was the only one of my mother's four children given up for adoption. On my meeting my siblings, I learned that they believed me to be "a child of privilege." In reality, my adopted family was very poor. Although my adopted parents were very caring, their respective families were not. I was singled out as the "adopted kid." On numerous occasions, I was informed "that I could be given back to the pigs I came from." In retrospect, I see how this remark influenced my desire to learn about my people. In the end, my only comfort and constant was knowing that I had descended from a proud culture of which I could one day become a member. This knowledge enabled me to continue.

Last August, I came to Washington University, in St. Louis, as a Kathryn M. Buder American Indian Scholar. I am currently enrolled in the George Warren Brown School of Social Work. Last November, I was enrolled by my tribe. This coming December, I will receive my Masters in Social Work (MSW) in my area of specialization: American Indian Studies.

Today, I am a woman who beat the odds and survived the system. Under the current language of the proposed Title III Amendments of H. R. 3286, the state might have ruled that I not be placed on my tribal rolls, and this letter would tell a much different story. To that end, I respectfully request the Committee to recommend that the Tulsa Amendments replace the current language in Title III of H. R. 3286.

I hope when the time comes to vote on H. R. 3286 that you remember my story (one of many), and know that your vote has the power to change the direction of our lives.

Respectfully submitted by,

Margo Boesch

Margo Boesch, BSW
 Kathryn M. Buder Scholar
 Masters of Social Work Candidate



NORTHWEST INTERTRIBAL COURT SYSTEM

121 FIFTH AVE. NORTH
SUITE #305
EDMONDS, WASHINGTON 98020

July 23, 1996

Phone: (206) 774-5808
FAX: (206) 778-7704

ELBRIDGE COOCHISE
Administrator & Chief Judge

The Honorable John McCain
Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510
ATTN: Phil Baker-Shenk, General Counsel

Dear Chairman McCain:

On behalf of the Northwest intertribal Court System, I thank the Committee on Indian Affairs for redefining the Congressional intentions of 1978, in your mark-up of the proposed amendments to the Indian Child Welfare Act. It is appropriate that such an undertaking would occur given the attacks on the Indian child, Indian family and Tribal government by the 104th Congress.

In S. 1962, the Indian Child Welfare Act Amendments of 1996, you have attempted to address the weaknesses that have been revealed with the implementation of ICWA over the last twenty years. However, Title III of H.R. 3682, Adoption Promotion and Stability Act of 1996, although deleted by the SCIA during mark-up, has been and still is ever so prominent in the discretionary decisions of state judges in Indian child adoption proceedings with the use of the "Existing Indian Family Doctrine". This Doctrine, as well as Title III, attempts to impose state judicial authority over the rights of Tribal governments to be a part of any adoption proceeding involving an Indian child. Both of these non-Indian authorities seek to:

- 1) To permanently deprive an 'Indian child' of his/her cultural heritage;
- 2) To permit state courts and private agencies to remove children from their cultures with impunity;
- 3) To provide state courts the discretion to ascertain who is and who is not an 'Indian' enough to satisfy those discretions of the non-Indian judicial officer; and,
- 4) To increase litigation surrounding the issues of who is and who is not an 'Indian child' for the purposes of ICWA.

It is also my understanding that according to your staff, Tribal requests to insert, "The Provisions of this Title shall apply to all custody proceedings involving an Indian child as defined herein", could possibly jeopardize the passage of this bill. To that I say we must give it a shot. For unless we strive to adequately protect the rights of Indian families and the Indian culture from certain extinction, our heritage will continue to become prey to such vicious attacks as this Doctrine and the Pryce Amendment. Help us to protect our family structure, the rights of our youths and the culture that is precious to our future generations.

Gratefully,


Judge Elbridge Coochise
Executive Director

cc: The Honorable Daniel Inouye, Ranking Minority, SCIA
LMS1962.nvc

MEMBER TRIBES 2/1/96
Chinook, Hoh, Muckleshoot, Kookach, Port Gamble, Salk-Sulatin, Shooswain Bay, Skokomish, Swinomish, Tulalip. Affiliates: Silligwanush



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 23 1996

The Honorable John McCain
Chairman
Committee on Indian Affairs
United States Senate
Washington, D.C. 20510-6450

Dear Mr. Chairman:

Thank you for the opportunity to provide the Department of Justice's views on S. 1962, The Indian Child Welfare Act Amendments of 1996.

The Department of Justice has only a limited role in the litigation of Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* ("ICWA") cases, so our knowledge of how, and how well, ICWA works is premised largely on the reports of the Departments of Health and Human Services and the Interior. They report that the ICWA has generally worked well, especially when parties are informed about ICWA and it is applied in a timely manner. Consistent with our institutional role, we have reviewed S. 1962 based on our experience with civil and criminal enforcement, the United States' commitment to supporting tribal sovereignty, and basic principles of statutory construction. We hope the following comments will assist the Committee in considering the bill.

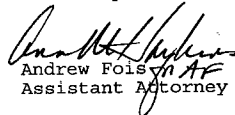
The Department supports S. 1962 and the important goals of ICWA to promote the best interests of Indian children and the stability and security of Indian tribes and families. We support the bill because it would clarify ICWA, establish some deadlines to provide certainty and reduce delay in adoption proceedings, and strengthen federal enforcement tools to ensure compliance with ICWA. We understand that S. 1962 is, to a large extent, based on the carefully crafted compromise agreement between Indian tribes and adoption attorneys.

Regarding the provision in Section 4, "Voluntary Termination of Parental Rights," which would require courts to certify that attorneys who facilitate adoptive placements have advised the natural parents of an Indian child concerning the scope of ICWA, *see* Sec. 4(B), the Department has reservations about this provision to the extent that it might be construed to limit an attorney's ability to discuss the feasibility of various options with his or her client.

Otherwise, the Department believes S. 1962 represents a sound approach to amending ICWA to address the concerns of its critics without compromising tribal self-government or the best interests of Indian children.

If we may be of additional assistance, please do not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,


Andrew Fois
Assistant Attorney General



MODOC TRIBE OF OKLAHOMA

515 G Southeast
Miami, Oklahoma 74354
918-542-1190 • FAX 918-542-5415

September 11, 1996

The Honorable John McCain
United States Senate
Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510-6450

Dear Senator McCain:

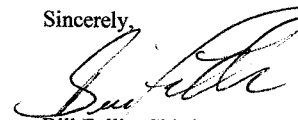
I have received your letter dated September 10, 1996, regarding NRLC opposition of S. 1962, and would like to express my gratitude to you for your efforts to insure the Tribes receive this valued information and the opportunity to push this bill forward.

I would like to assure you that the Modoc Tribe is currently contacting the Senate leadership on this issue and will stress that the intervention was unwarranted and based upon misinterpretation. Our opinion is that by holding up S., 1962, Senator Lott and Senator Nickles are unnecessarily putting at jeopardy a bill that if not promptly enacted could effect the protection of tribal sovereignty and Indian Child Welfare, in a way that retards the very efforts the tribes have given to streamline this issue.

Once again, I would like to thank you for your concerns and time given to this subject, and assure you that the Modoc Tribe is on hand to address these issues.

Please feel free to contact me if you should have further questions or information to share.

Sincerely,


Bill Follis, Chief

BF/tmg

Fond du Lac
Human Services Division

Director, Phil Norrgard, MSW
Associate Director, Chuck Walt, MPH

AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

We, the members of the Minnesota Indian Child Welfare Advisory Council, representing the Minnesota Tribes and urban Indian communities, entrusted with the responsibility to care for Indian children through the preservation of cultural values and beliefs which have been taught to us by our relatives and our elders; believing that by protecting and teaching our children we assure the continuation of our Native sacredness of values and traditions, and that the United State's Constitution has guaranteed the inherent rights of Native American people to continue an existence congruent to Native sovereignty, culture and philosophy, do hereby establish and submit the following resolution; and

WHEREAS, The Minnesota Indian Child Welfare Advisory Council was established in 1986 through the Minnesota Indian Family Preservation Act; and

WHEREAS, on May 10, 1996, the House of Representatives passed the "Adoption Promotion and Stability Act of 1996," and Title III of the bill contains provisions to amend the Indian Child Welfare Act (ICWA) that will undermine the ability of Indian tribes to intervene in adoptions and child protection proceedings involving Indian children living off reservation; and

WHEREAS, Title III was developed without consultation with Indian tribes, passed without hearing and over the objection of the House Resources Committee, and is not supported by a single tribe; and

WHEREAS, the bill was passed by the House in response to perceived problems with ICWA and in the absence of constructive alternatives stands a good chance of passage in the Senate; now

THEREFORE BE IT RESOLVED, that the Minnesota Indian Child Welfare Advisory Council hereby forwards the NCAI workshop draft (June 3, 1996 version) Amendments to the Indian Child Welfare Act for favorable consideration by the Senate Indian Affairs Committee, which constructively responds to the issues raised by Title III of HR 3286 by providing;

- 1) notice to Indian tribes for voluntary adoptions, termination of parental rights and foster care proceedings;
- 2) time lines for tribal intervention in voluntary cases;
- 3) criminal sanctions to discourage fraudulent practices in Indian adoptions;
- 4) clarification of the limits on withdrawal of parental consent to adoptions;
- 5) application of ICWA in Alaska;

- 6) open adoptions in states where state law prohibits them;
- 7) clarification of tribal court's authority to declare children wards of tribal court;
- 8) a duty that attorneys and public and private agencies must inform Indian parents of their rights under ICWA;
- 9) Tribal determination of membership is beyond compromise. Any method of addressing membership must be done with full protection of tribal sovereignty.

CERTIFICATION

The foregoing resolution was adopted at a special meeting Monday, June 24, 1996 held at the Fond du Lac Human Services Division, Cloquet, Minnesota.


Julie Jaakola, Chairperson

MICHAEL O. FREEMAN
COUNTY ATTORNEY



PHONE
(612) 348-3000

OFFICE OF THE HENNEPIN COUNTY ATTORNEY

2000 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

June 25, 1996

The Honorable Paul D. Wellstone
U.S. Senator
717 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Wellstone:

I am writing, as one public representative to another, to urge you to work against any weakening amendments to the Indian Child Welfare Act, 25 USC 1911 et seq. The amendments added in the House of Representatives to H.R. 3286, The Adoption Tax Credit legislation and removed in the Senate Indian Affairs Committee on June 19, would seriously undermine the spirit and intent of the Indian Child Welfare Act.

Hennepin County has the largest urban Indian population in the country outside of the County of Los Angeles. We have a large number of cases that involve the Minnesota Chippewa Tribe, Red Lake Band of Chippewa Indians, and other various Tribes both within and outside of the state of Minnesota. We strive to work closely with the Tribal Representatives to ensure that the Act and its mandates are closely followed. We have found that the procedures that are set out in the Act are not a burden but an added protection to a sovereign nation.

Hennepin County meets regularly with Tribal Representatives to work closely together in resolving cases involving Indian children. The Tribes act as an appropriate third parent willing and able to make decisions regarding their children's welfare. Clear and consistent communication between the County and the Tribes has resulted in better protection and services for Indian children.

The proposed amendments would greatly damage Indian children as it would remove decision-making from a third appropriate parent. The Tribes have consistently demonstrated that their only concern is for the future of their culture and their children. To take away that ability would truly not be in the best interests of Indian children.

I strongly urge you to work against any weakening of the Indian Child Welfare Act. It does not serve the interests of the people of Minnesota or America -- Indian or non-Indian -- to allow the proposed amendments to move forward.

Sincerely yours,

MICHAEL O. FREEMAN
Hennepin County Attorney

Area Code (206)
598-3311
Fax 598-6295



THE SUQUAMISH TRIBE

P.O. Box 498 Suquamish, Washington 98392

July 23, 1996

The Honorable John McCain
Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510
Attn: Phil Baker-Shenk, General Counsel

Dear Chairman McCain:

As Chairman of the Suquamish Indian Tribe, I am appealing to the Senate Committee on Indian Affairs to consider additional amendments to the Indian Child Welfare Act Amendments of 1996. There are states with Indian populations of significant number, e.g., Washington, California, Oklahoma, as well as other states, whose courts are invoking an exception to ICWA that avoids application in all Indian child custody proceedings.

Such instances occur when state court judges invoke the "existing Indian family" doctrine to avoid application of the ICWA in cases involving Indian children. We seek your leadership to add language to S.1962 to protect the intent of the bill you have introduced to correct these deficiencies in adoption proceedings. We recommend that you include **"The provisions of this Title shall apply to all custody proceedings involving an Indian Child as defined herein."**

We thank you for your continued support and leadership on behalf of Indian people.

Sincerely,

Lyle Emerson George
Chairperson

cc: Daniel K. Inouye, Vice-Chairman



American Indian Services, Inc.

1110 Southfield Road
Lincoln Park, Mi 48146

Ph 313 388-4100

Fx 313 388-6566

June 18, 1996

Senate Committee on Indian Affairs
838 Hart Building
Washington, DC 20510-6451

Attn: The Honorable John McCain
Chairman

Dear Senator McCain and Committee Members,

American Indian Services is concerned about the changes proposed regarding the Indian Child Welfare Act, under H.R. 3275. We ask that our written testimony be included as part of the hearing record of June 26, 1996.

American Indian Services, Inc. is located in the Detroit Metropolitan area. We have provided services to Native American families in Wayne County, Michigan since 1972.

The legislators proposing the changes in the I.C.W.A. apparently know very little of Native American history. The legislation requiring significant social, cultural or political affiliation with your tribe fails to consider the following issues:

- (A) Many Native Americans live a great distance from their reservations.
- (B) Native people were forced into the cities by the policies of the federal government during the termination, relocation period of the 1950s and the 1960s.
- (C) 90% of the Native people, both on and off the reservations lack reliable transportation, making it difficult to go short distances, much less long distances to maintain close contact.

Page 2
Honorable John McCain
and Senate Committee

- (D) Few, if any, state judges would be qualified to determine if significant "social, cultural or political affiliation" were being maintained. They lack the knowledge to make this kind of determination.
- (E) Under the proposed changes, state courts rather than Indian Nations could decide who is an Indian.
- (F) The legislation fails to consider the rights of Indians as sovereign nations.
- (G) H.R. 3275 seeks to make who is an Indian an issue of geography rather than culture. Those who have decent transportation and money that can afford to go home periodically, would be considered to have "close ties."

An Indian family that lives far removed from their reservation is not any less Indian—just further away. The staff at American Indian Services is made up of members of many Indian nations. We live far from our reservations, but come together as a family of Indian people and maintain our cultural ways within the context of a big city. Most of us are not able to go home too often, but we band together as a community of Indian people, as we have historically done. To tie membership to a geographical location, reveals how little these legislators know about Indian customs.

Our professional experience in Wayne County indicates that the I.C.W.A. has not and is not being followed today in many cases in the Juvenile Division of the Probate Court in Wayne County. If the Act is followed from the inception in a child custody proceeding, the problems such as those of the Rost twins would not be an issue today. If private attorneys were disbarred for placing Indian children in non-Indian homes, which violates the I.C.W.A., perhaps it would be followed.

If non-Indian families were made aware that Indian children are covered by a unique set of federal statutes, perhaps they would defer to the tribe at the earliest moment if the possible outcome was known.

The question that concerns us is what gives Congresswoman Pryce the right to even contemplate changes in the I.C.W.A. without in-put from the people most affected? Her behavior is typical of the arrogance we have faced in the past. Decisions have been made for us-and about us, without any consultations with us! There is no democracy in this.

Legislators Pryce and Tiahrt are attempting to make this a simple issue, which it is not. State courts do not and should not have jurisdiction over sovereign Indian nations within their boundaries. What right do these legislators have to limit appeals, or restrict-when an Indian child is determined to be a member? The determination regarding who and when a person is eligible should rest solely with the tribe.

The stories of denial of due process, duress and sale of Indian children is well documented. This legislation if passed would deny Indian families the right to appeal such injustice.

Legislator Pryce's vision is only through the eyes of the Rost family that she is involved with. The private attorney that arranged for the placement of the Rost twins had no respect for the I.C.W.A., no regard for Indian people, the adoptive family or the children themselves. Where is he now? There has been no price that he has had to pay for his deceit, while everyone else has suffered.

When Congress passed the I.C.W.A. in 1978, its purpose was clear-to preserve Indian families. Indian people who were adopted out as children come into our agency everyday. The prisons and institutions house many of them. They have been robbed of their identity and they are angry. To view this matter as a simple one is to deny what we know is true.

The Rost twins will come looking for us when they grow up. (They all do.) They are Indian in the white world and white in the Indian world. They will be depressed and will have twenty times more likelihood of committing suicide than any group in America. They will have little if any understanding of who they are. They will be in crisis when they find us. We will provide mental health services, they will need it at a rate of 200%, more than any other group. Some come to us in their teens with serious emotional problems, substance abuse, teen pregnancy, and all the problems related to low self-esteem. Regardless of their problems they will receive fewer services that they need because they are "Indian". Early "Chief Wanoo" experiences will contribute to their low self esteem when they see Native American culture ridiculed.

The sacred "Sundance" for them will be a car. The proud Cherokee people will be a four wheel drive recreational vehicle. Television programming will fill in the cultural gaps with various segments on savage scalping, wagon burnings and drunken Indian displays. They will have no elders to combat the stereotypes. Will this produce Indians with positive self-esteem and pride?

Society will continue to pay the price for the injustice to Native people. Efforts to rob us of our children is the worst in a long stream of injustice. We urge you to oppose any changes in the I.C.W.A. until after consultation and in-put from Indian Nations, agencies and concerned parties. Our children are our future.

Respectfully,



Fay Givens
Executive Director

DANIELLE GLENN-RIVERA
8205 WAKEFIELD AVE
PANORAMA CITY, CA 91402
(818) 904-9764

August 29, 1996

The Honorable John McCain
United States Senate
Senate Office building
Washington, D.C. 20510

Dear Senator McCain:

I am writing to thank you for your efforts to help us and to support S.1962.

I am aware of your letter to Ms. Karen Millett, Chair of our Indian Child Welfare Task Force. I am grateful for your help. I am pleased to know of your support and efforts to help American Indian people. This has been a difficult and shocking issue. It has threatened our existence as a people because it threatened our children.

Please remember and remind your colleagues, that many of our children are and have been lost to us. There are adults and children, (American Indians brought up by non-Indians) who know nothing about their people, tribe/s, heritage or culture. The Indian Child Welfare Act is to protect us and our children from vanishing.

The Indian Child Welfare Act is especially critical in an urban area like Los Angeles because to non-Indians we seem to blend in with every other ethnic group, we become invisible. This is dangerous because our children easily slip through the red tape as social workers tend to avoid "extra paper work" and disregard the Federal law.

Please continue your good work and efforts for our people with S. 1962.

Respectfully:

Danielle Glenn-Rivera
Osage/Cherokee

sent/1962/tr



State of Minnesota
Department of Human Services

Human Services Building
444 Lafayette Road
St. Paul, Minnesota 55155

June 25, 1996

The Honorable John McCain
Chair, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510-6450

Dear Senator McCain:

The Minnesota Department of Human Services (MDHS) submits this letter in support of the underlying principles of the Indian Child Welfare Act 25 U.S.C. § 1901 - 1963 (ICWA). In section 1902 of ICWA, Congress declared the policy underlying the Act and stated that "it is the policy of the Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs."

The MDHS believes that Indian tribes should play the primary role in determining the best interests of Indian children and that the principles underlying ICWA assist the tribal governments in carrying out this role. In Minnesota, this agency has worked cooperatively with the tribal governments to increase the enforcement and application of the requirements of ICWA to assure that Indian children are raised in a permanent, loving environment that fosters and supports their unique identity as Indian children. Therefore, MDHS submits this letter of support for the underlying principles of ICWA.

Sincerely,

MARIA R. GOMEZ
Commissioner

Pyramid Lake Paiute Tribal Council

Post Office Box 256
Nixon, Nevada 89424
Telephone: (702) 574-1000 / 574-1801 / 574-1002
FAX (702) 574-1008

June 25, 1996

The Honorable John McCain
Attn: Phil Baker-Schenk
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

RE: Indian Child Welfare Act Amendments

Dear Senator McCain:

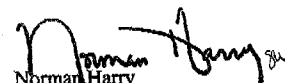
On behalf of the Pyramid Lake Tribe, I am writing to commend you for your leadership and efforts to provide stand alone legislation on amendments to the Indian Child Welfare Act. Please accept our thanks for holding a hearing tomorrow which will provide a forum for tribal involvement. We understand that you received over one hundred requests from tribal leaders and others to testify at this hearing. Pyramid Lake also requested to testify but was informed that the witness list was full. We will submit written comments for the record within the next two week time frame.

Senator, the Indian Child Welfare Act is a law that is very precious to tribal governments, because it helps insure that our children have a right and ability to be raised as members of our tribal communities. If any amendments are to be adopted during this Congress it should be with consultation of those who will be most affected - Indian people.

It has been our experience that ICWA works. If it becomes necessary to make changes, we fully support the Alternative ICWA Amendments as developed and approved by NCAI tribal membership at it's June meeting, which we attended. With these amendments as a guideline, we are sure that a stand alone bill can be developed that will enhance and strengthen the Act to the agreement of Indian county and the non-Indian family adoption attorneys, and hopefully, Congresswoman Deborah Pryce.

We look forward to the results of the hearing on ICWA amendments.

Sincerely,


Norman Harry
Tribal Chairman

NH/gw



SOUTHERN INDIAN HEALTH COUNCIL, INC.

4058 Willows Road • Alpine, CA 91901-1620
Mailing: P.O. Box 2128 • Alpine, CA 91903-2128
(619) 445-1188 • FAX (619) 445-4131

6-27-96

The Honorable John McCain
United States Senate
Washington D.C. 20510

RE: ICWA TESTIMONY

Dear Senator McCain,

Many Tribes met to discuss various issues that concerned Indian country, at the National Congress of American Indians, in Tulsa Oklahoma, June 2 to June 5 1996.


The most urgent topic was the issue of the proposed amendments, to the Indian Child Welfare Act (ICWA). Tribes responded to the request by Congress to develop Tribal amendments that reflected the needs of Tribes. Resolution TLS-96-007 (a) Titled: Amendments to the Indian Child Welfare Act and (b) Titled: Protection of Public Law 280 Tribes regarding Amendments to the Indian Child Welfare Act, were passed by the Tribes.

The California State-wide ICWA Conference was held in San Diego the week of June 19th. Many Tribal leaders, Tribal social worker, Tribal attorneys, California Indian Legal Services staff attorneys, and U.C.L.A. Professor Carol Goldberg/Ambrose (an expert on P.L. 280) met to discuss and develop alternative amendments to ICWA.

The following proposed alternative language (see attached) is the result of that meeting. We are requesting your support of the proposed 280 changes and other language which combats the "Existing Indian Family Doctrine" created by the Bridgit R. decision. This case is a threat to all Indian families not domicile on the reservation. Also, requesting you to take into consideration changes to NCAI's proposed amendments, Section 1913 (e) and Section 1913 (H) (see attached).

Please do not hesitate to call me if you have questions or need clarification.

Sincerely,


Virginia Hill, MSW
SIEC Director Social Services

Proposed 280 language for
ICWA Amendments

To address the confusion caused by P.L. 280

Amend Section 1911(a) after 1st sentence.

(a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, ~~except where such jurisdiction is otherwise vested in the State by existing Federal law.~~ Where an Indian child who resides or is domiciled within the reservation of an Indian tribe is made a ward of a tribal court or where an Indian child becomes a ward of a tribal court following a transfer of jurisdiction pursuant to subsection (b) of this section, the Indian tribe shall retain exclusive jurisdiction over any child custody proceeding involving such ward, notwithstanding any subsequent change in the residence or domicile of the child.

~~Delete in its entirety, Section 1918, re Resumption of jurisdiction.~~

To address the issue of the "EXISTING INDIAN FAMILY DOCTRINE."

In Section 1903, Definitions:

Add in Sections 1903(2)(4), "Indian Child"" Add "The provisions of this Title shall apply to all custody proceedings involving and Indian child as defined herein. There shall be no exception to the applicability of this Title based upon the family structure or cultural practices of the Indian child's biological parents, current or past caretakers, or extended family members."

Regarding NCAI's Proposed Amendments

In Section 1913(e)(1) and (ii):

Change "30 days" to "60 days." In the area of Juvenile dependency litigation, 30 days is impracticable for many tribes to respond. The state court system itself usually manages the notice and response provisions because of continuances and extensions that are liberally given to the other parties. The Tribes may not be so fortunate in being granted necessary extensions of time to respond.

Additionally, NCAI's "Alternative #9" - requires that the Tribe must provide certification of enrollment or eligibility for enrollment within this short frame of time. The

Re Section 1913(h):

This section lacks any enforcement provision. If an adoptive parent denies visitation, the biological parents or relatives have no recourse. Therefore, this provision should:

1. Not be added to the ICWA;
2. Strike not from the last sentence of this provision; or
3. NCAI construct enforcement language or consequence provisions when there is a denial of visitation by the adoptive parents..



Lynne Jacobs, Executive Director
 A Non-Profit Agency
 Licensed by the States of California and Hawaii

September 26, 1996

Senator John McCain, Chair
 Senate Committee on Indian Affairs
 U.S. Senate Hart Building Room 838
 Washington, D.C. 20510

Dear Senator McCain:

As your Committee considers S. 1962, amendments to the Indian Child Welfare Act, we are sure you are aware of the wide range of views in the adoption community regarding this bill.

I am the Executive Director of Adopt International, an agency licensed for domestic and international placements. I am also the Vice President of the Northern California Association of Adoption Agencies, and am the President of the Board of Directors of the Joint Council on International Children's Services from North America which is the oldest and largest affiliation of licensed, non-profit international adoption agencies in the world. Many of our nearly 100 member agencies have domestic adoption programs as well.

There is no single, official organization that can speak on behalf of adoption or adoption agencies in the United States.

Although our agency supports the amendments, those agencies which I represent have not taken an official position on S. 1962. The amendments have not yet been presented to either organization in order to establish their position.

Thank you very much, Senator McCain.

Sincerely,

Lynne Jacobs
 Executive Director

LJ:rp

121 Springdale Way, Redwood City, California 94062
 Fax: (415) 369-7400 Tel: (415) 369-7300

900 Fort Street Mall, Pioneer Plaza, Suite 1700, Honolulu, Hawaii 96813
 (808) 523-1400 (800) 969-8865

Internet: 74734.3044@COMPUSERVE.COM

Michelle L. Jenkins
 6322 Tarna Lane
 Houston, Texas 77074

(713) 266-0775

96 MAY 16 PM 2

May 13, 1996

Senator John McCain
 Senate Russell Building, Room 241
 Washington, D.C. 20510-0303

RE: House Bill 3286 - Interracial Adoption Act

Dear Senator McCain:

I am requesting your support of House Bill H.R. 3286. It is vital to families across the country that it be passed with Title III intact, amending the Indian Child Welfare Act. Because of the law's tremendous ambiguity, it is being used inappropriately at an alarming frequency. Families are being torn apart simply to suit special interest.

I have been embroiled in a custody case for over three years trying to adopt children who are my own relatives! The children are one-half Yavapai Apache. They are native Texans who have never had any relationship with the Tribe. Despite the fact that we are related on the paternal side, and have been involved with the children all their lives, this vague law is being used to tear the children from the only home they have ever known.

Perhaps it would make some sense if the maternal relatives were seeking custody, but they have shown no interest. The Tribe would place the children in foster homes on the reservation with total strangers, rather than allow our custody and adoption. According to them, "no family" is better than a non-Indian family.

I understand the reasons for the initial passage of the I.C.W.A. However, it is now being used in cases that have nothing to do with the removal of Indian children from reservations. This blatant abuse must be corrected.

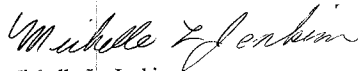
With tribal legal expenses being provided by the government, families that are not wealthy cannot possibly hope to protect their adopted children when such a suit is filed. The only reason we have been able to continue is that we were finally able to obtain pro bono counsel. Unfortunately, this was after two years of legal battles had depleted our savings and even our retirement plans. It is not right for legislation to put such an unfair burden on taxpayers.

Our case has involved four ad litem attorneys, our attorney, the Tribe's attorney and the County, Appellate and State Supreme courts during three years of legal battles, at countless expense to the county and state. After all of this expenditure of time and money, we are at the same point as when it all began. We anticipate at least another year in court.

During all this time, three little boys named Michael, Mark and Matthew have learned to love and trust, and call two loving parents Mommy and Daddy. How can anyone justify ripping them from their home and family for the sake of special interest! We must take a serious look at the I.C.W.A. It does not just deal with Indian rights -- it affects the lives of children! Their well-being must be given equal consideration under the law.

I hope you will work to assist in the passage of H.R. 3286, keeping Title III intact. Countless families across the country are being destroyed emotionally and financially by the abuse of the I.C.W.A. Thank you for your support of adoptive families and your work in righting this situation.

Sincerely,



Michelle L. Jenkins

mlj
Enclosure

The Houston Post

Houston owned, Texas proud

SUNDAY, January 8, 1995

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Special Report

Cultural Tug-of-War

Michael, Mark and Matthew are half-Apache Indian. The Houston couple who want to adopt them are white. The Yavapai Apaches of Arizona say the boys belong with them.



In a typical morning family scene, Michelle Jenkins gets, from left, Michael Johnson, 5; Matthew White, 2; and Mark White, 4, ready for their day.

King Chou Wong/The Houston Post

BY TERRI WILLIAMS
OF THE HOUSTON POST STAFF

Weekday mornings at Charles and Michelle Jenkins' house begin chaotically.

At 6:30 a.m., the Jenkinses' three boys — Michael, 5; Mark, 4; and Matthew, 2 — are awakened from their bunk beds and the arduous task of preparing for school starts.

That means tripping over the dog Mooch, moving Legos and other toys out of the way and bathing each sleepy, cranky boy.

It's not an easy task, but it's an everyday one for most Houston parents who have young children.

But the Jenkinses' situation is unlike those of most other families.

Nearly 800 miles away from the Jenkinses' Bellaire-area home is the Yavapai Apache Tribe in Camp Verde, Ariz. Living on picturesque mountain terrain be-

tween Flagstaff and Phoenix, the nearly 2,000-member tribe says the boys should live where they belong — with it.

The three boys' mother is Apache. However, Matthew and Mark's father is Michelle Jenkins' nephew, who is white. Michael's dad is unknown.

Later this month, a Harris County appellate court will decide whether the Yavapai tribe has the right to decide who should have custody rights to the boys.

Last September, a Harris County district court judge found that state courts had jurisdiction because it would be in "the best interests of the child" to remain in a stable environment — meaning the Jenkins home, court documents show.

But the tribe, invoking the 1978 federal Indian Child Welfare Act, asserts the American Indian population already has been historically decimated and the children belong with it.

The Indian Child Welfare Act allows

Indian tribes exclusive jurisdiction over Indian children in adoption proceedings.

The act also is currently being tested in Chicago and in Pikeville, Ky.

A 26-year-old Sioux woman recently petitioned to get her son returned from an Illinois private adoption agency using the act. The woman, known as Jane Doe, had consented to turn her son over to the agency but changed her mind.

In Kentucky, Kayla American Horse, an 11-year-old Sioux girl, is the subject of a bitter custody battle between a woman who raised her since she was 8 and the tribe, which says she belongs with it.

The Indian Child Welfare Act came about after studies showed that more than 35 percent of Indian children up for adoption were being placed in non-Indian homes.

Toby Grossman, a senior staff attorney

Please see BOYS, A-25

BOYS: Tribe says 3 youngsters belong, with it

From A-1

for the New Mexico-based American Indian Law Center, a policy and advocacy organization, said the act was created as a means for tribal survival.

Meanwhile, the Jenkinses contend they've already bonded with the boys since they've lived with them for the past two years. The Jenkinses also say they're related to two of the boys, and the jurisdictional question shouldn't matter in their case.

"I understand on the one hand that the Apaches want to keep their heritage," said Charles Jenkins, who works as a wine specialist at Spec's Liquor Store.

"But there's a greater issue here. We're risking the lives of three children. We've been the best alternative for them. I wouldn't say we're perfect. But when my wife brought that little baby home, that's when I said it's enough," he added.

Michelle Jenkins, who works for a local insurance firm, puts it more bluntly: "If it takes moving heaven and Earth, we're going to fight to keep them."

But Grossman is not so sure that the Jenkinses' contention of love is more important than cultural identity.

"Love doesn't overcome everything, unfortunately," said Grossman. "Some people have to understand where they come from and sometimes that need overcomes love."

But Rodolfo Mares, who represents the tribe, insists the issue is a political one — not a race question.

"When we're dealing with the placement of Indian children, we're not dealing with race," said Mares. "We're dealing with a political issue. We're talking about the continuation of Indian tribes."

The story of Mark, Michael and Matthew began in April 1993 when Harris County Children's Protective Services moved in and removed one of the boys from their mother's apartment in southwest Houston.

Yvette Johnson, the boys' biological mother, could not be reached for comment.

Johnson's lawyer, Miriam Riskin, would only say that her client "wants her children back. Right now she's in the process of getting herself together."

Johnson and her boyfriend Monterey White lived a life on

the edge, according to the Jenkinses, White's aunt and uncle.

When the burden of parenthood was too hard to handle, the couple, they often dropped the boys off with the Jenkinses. Michelle Jenkins said they've kept the boys on two occasions amounting to six months each.

According to Harris County CPS Director Judy Hay, in April Johnson settled into an apartment but shortly afterward left her son Matthew with a neighbor. Abandoning Matthew, she then left her two other sons with the Methodist Home for Children in Waco, Hay said.

Shirley Secrest, Michelle Jenkins' mother, said she remembers when Johnson lived at the Houston apartment. She said she as well as her daughter and son-in-law made efforts to help Johnson by providing her groceries. They also tried to get Johnson drug treatment, says Michelle Jenkins.

"I found them in that apartment, and I just couldn't stand it. There was nothing in that apartment except a mattress," said Secrest.

CPS then moved in and took emergency temporary custody of Matthew. CPS officials then learned that Matthew's brothers were in Waco and moved them to Houston. At that point, the Jenkinses requested custody of the boys and it was granted to them, Hay said. The boys have been in their care now for nearly two years.

The boys' biological father could not be reached for comment. However, his lawyer, Barry Hards, said White has requested the Jenkinses have custody of the boys. Hards also admits his client is not a responsible person.

"Monterey has a history of chemical dependency. It takes all he can muster to stay clean and out of jail," said Hards.

The fact that the boys' father has requested his two sons stay with the Jenkinses should allow the state courts to supersede, said the Jenkinses' lawyer, Steve McLaughlin, who works for the firm Fulbright & Jaworski.

McLaughlin decided to do the Jenkinses' case pro bono after he met them through a local child advocacy group called Justice for Children.

However, McLaughlin concedes the jurisdictional matter will be a battle in light of the strong federal law. But he's hop-

ing the fact that the children have never resided on the reservation will play into the equation.

"Those children are citizens of Texas and Texas state courts and agencies are obligated to protect those children and perhaps the tribe has overlooked that," said McLaughlin.

Meanwhile, Mares, who represents the tribe, said CPS and the state courts blatantly ignored the Indian Child Welfare Act.

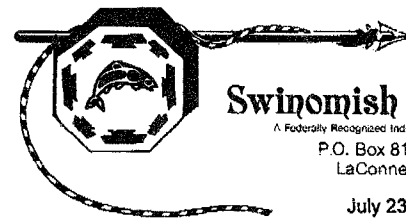
"There is no recognition of the state courts or agencies that this federal act even exists," said Mares.

But child advocacy groups, such as Justice for Children and the DeBoer Committee for Children's Rights, say the best interests of the child should be maintained.

Star Boone, a spokeswoman for the DeBoer Committee, said the children are already in a loving home.

"We advocate legislative and judicial reform so that children like Michael, Mark and Matthew will be protected from being used as pawns in the problems of jurisdiction," said Boone.

"Children are not property but human beings."



Swinomish Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant To 25 U.S.C. § 476

P.O. Box 817 • 950 Moorage Way
LaConner, Washington 98257

July 23, 1996

The Honorable John McCain
Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510
ATTN: Phil Baker-Shenk, General Counsel

Dear Chairman McCain:

We are most appreciative of the leadership and compassion you have displayed in working to ensure that the Indian Welfare Act Amendments of 1996 - S. 1962, provide Tribal governments with the jurisdiction and authority to protect the welfare of their children and families.

However, once again, Tribal families and ultimately Tribal cultures are facing a serious threat of extinction. The "existing Indian family" doctrine being used by certain state courts in adoption proceedings of Indian children will undo the excellent work you and the Committee have done thus far. We urge the Committee to once again come to the aid of our children by providing Tribal governments with the legal authority to deal with Indian children adoption proceedings for the child's best interest. Thus, we respectfully request that you consider including the following language in the legislation: "The provisions of this Title shall apply to all custody proceedings involving an Indian child as defined herein".

Again, thank you for helping us protect and ensure the perpetuation of the Indian family and Indian culture.

Sincerely,

Robert Joe, Sr.
Chairman

cc: The Honorable Daniel K. Inouye, Ranking Minority, SCIA

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Suite 500, 419 7th Street, N.W.
Washington, D.C. 20004-2203 -- (202) 626-8800 (FAX) 737-9189 or 347-6907

(202) 626-8820

August 1, 1996

The Honorable Trent Lott
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Senator Lott:

The National Right to Life Committee (NRLC) urges you to oppose S. 1962, a bill sponsored by Senator McCain to make extensive revisions in the 1978 Indian Child Welfare Act (ICWA).

The ICWA has been applied in ways that ignore the best interests of the child, and in some cases the prospect of the law's application may have the effect of encouraging abortion. That is why NRLC endorsed the modest reforms contained in Title III of the House-passed adoption-reform bill, H.R. 3286, which would establish that for purposes of the ICWA, membership in a tribe is determined from the time of admission to a tribe and cannot be applied retroactively. The House-passed provision also establishes that the ICWA does not apply to voluntary adoptions in which neither birthparent has a significant tie to a tribe.

Unfortunately, Senator McCain's S. 1962 would greatly compound the existing problems. The National Council for Adoption has concluded:

If S. 1962 becomes law, it would be the end of voluntary adoptions of children with any hint of Indian ancestry. No prudent agency or attorney is going to expose themselves to the risk of criminal prosecution under the bill because one or more of the over 500 Indian tribes may consider a child to be an Indian for the purposes of the ICWA— each tribe having its own unpublished and ever-changing definitions of membership and secret membership rolls. Senator Campbell recently indicated that some anthropologists suggest that up to 15 million U.S. citizens have some trace of Indian ancestry. Of these, an unknown number may have ancestry from more than one tribe.

Therefore, NRLC urges no action on S. 1962 this year. With the well-being and even the very lives of so many children at stake, the maze of issues involved in reforming the ICWA deserve more careful consideration in the next Congress.

Sincerely,

Douglas Johnson
Legislative Director



PORT GAMBLE S'KLALLAM TRIBE
31912 Little Boston Road NE • Kingston, WA 98346

July 23, 1996

The Honorable John McCain
Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510
ATTN: Phil Baker-Shenk, General Counsel

Dear Chairman McCain:

In the mark-up of S. 1962, Indian Child Welfare Act Amendments of 1996, the Port Gamble S'Klallam Tribe ask that you consider inserting the following language which will remove the state court judges' ability to exempt ICWA in adoption proceedings of Indian children:

"The provisions of this Title shall apply to all custody proceedings involving an Indian child as defined herein".

Not to include the above language would approved the state courts usage of "Existing Indian Family Doctrine", which allows states the judicial authority to impose their discretion as to who is and who is not Indian; the intention of the Pryce amendment. We applaud the Committee for deleting this language in H.R. 3682, Adoption Promotion and Stability Act of 1996, and ask that you strongly consider inserting the above language to ensure the Indian adoption process will no longer be subjected to the prejudices of non-Indians judicial officers.

Sincerely,

Gerald J. Jones
Chairman

cc: The Honorable Daniel Inouye, Ranking Minority, SCIA

LJMS1962.ICW



Catholic
Charities
USA

September 24, 1996

The Hon. John McCain, Chair
Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510

Dear Chairman McCain:

On behalf of Catholic Charities USA's 1,400 local agencies and institutions, I am writing to commend you for your efforts to reform problems in the current system of adoption of Native American children. Last year, our agencies provided adoption services for 42,134 people.

After consultation with our agencies in "Indian Country," we have concluded that your bill to amend the Indian Child Welfare Act of 1978 (S. 1962) would improve the current rules for adoption of Native American children.

As you know, Catholic Charities USA's member agencies have a strong and unwavering commitment to the sanctity of every human life. Catholic Charities USA would not support any bill that we believe has potential for increasing abortions. We are convinced that your bill will make adoption a more attractive option than abortion to the women and families affected.

Please let us know how we can be helpful in assuring passage of your bill in this Congress.

Sincerely,

Fred Kammer SJ

Rev. Fred Kammer, SJ
President

Episcopal Liaison
The Most Reverend
Joseph M. Sullivan

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1731 King
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Suite 200 •
Alexandria
Virginia
22314 •
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(703) 549-1380
Fax:
(703) 549-1656

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August 17, 1996, Saturday, Late Edition - Final

SECTION: Section 1; Page 18; Column 5; Editorial Desk

LENGTH: 332 words

HEADLINE: Indian Adoptions Aren't Blocked by Law

BODY:

To the Editor:

Assertions by Representative Pete Geren that the Indian Child Welfare Act applies to anyone with the remotest ancestry and supplies tribes with veto power over off-reservation adoptions are wrong (letter, July 26)

Ancestry alone does not trigger the provisions of the law. The law applies only when a child is a member of an Indian tribe or is the child of a member and eligible for membership. The notion that a person whose family has had no contact with an Indian tribe for generations would suddenly become subject to the law is not reality.

Even if a child is covered by the law, a tribe cannot veto a placement sought by a birth parent. If the law applies, the tribe may intervene in the state court proceeding. It may seek to transfer the case to tribal court, but an objection by either birth parent would prevent that.

Even where a parent does not object, a state court may deny transfer for good cause. If the case remains in state court, the tribe may seek to apply the placement preferences in the law (extended family, tribal members and other Indian families, in that order), but the state court may place a child outside the preferences if it finds good cause to do so.

The Indian Child Welfare Act was enacted in response to a tragedy. Studies revealed that 25 percent to 30 percent of Indian children had been separated from their families and communities, usually without just cause, and placed mostly with non-Indian families. The act formalized the authority of tribes in the child welfare process in order to protect Indian children and provided procedural protections to families to prevent arbitrary removals and placements of Indian children.

The law is based upon a conclusion, supported by clinical evidence, that it is usually in an Indian child's best interest to retain a connection with his or her tribe and heritage.

BRADFORD R. KEELER
Sisseton, S.D., Aug. 9, 1996

President, Association on
American Indian Affairs

CWLA Child Welfare League of America, Inc.
440 First Street, NW, Suite 310, Washington, DC 20001-2085 • 202/638-2952 • FAX 202/638-4004

September 10, 1996

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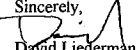
The Honorable John McCain, Chairman
Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator McCain:

I am writing in support of the amendments to the Indian Child Welfare Act outlined in both S. 1962 and H.R. 3828 as an alternative to earlier amendments outlined in H.R. 3286.

As you know the Child Welfare League of America is national organization that is committed to preserving, protecting, and promoting the well-being of children and families. As such we believe that the principles outlined in the Indian Child Welfare Act provide an appropriate and necessary framework for addressing the permanency and child welfare needs of Indian children. We likewise believe that the ICWA amendments proposed in S. 1962 and H.R.3828 support reasonable and effective improvements that will strengthen the implementation of ICWA in voluntary adoptions involving Indian children. First, they will help to strengthen the responsibility of agencies and individuals to conduct timely and time-limited notification to tribes and family members thereby promoting speedy movement toward adoption. Second, we believe that the amendments will discourage the dissolution of existing adoptions and provide greater security for Indian children and for their adoptive families.

We are encouraged that the process for developing these amendments has involved representatives from Indian Country and private adoption attorneys and that the proposed changes balance the needs of prospective adoptive parents and tribes while maintaining a focus on the permanency needs of Indian children. CWLA is optimistic that this bill will promote successful adoptions for Indian children who are in need of permanent families.

Sincerely,

David Liederman
Executive Director



Salt River
PIMA-MARICOPA INDIAN COMMUNITY
ROUTE 1, BOX 216 / SCOTTSDALE, ARIZONA 85256-8722 / PHONE (602) 874-8000

July 3, 1996

The Honorable Chairman John McCain
838 Senate Hart Office Building
Washington, D.C. 20215

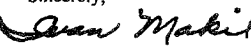
Dear Chairman McCain:

On behalf of the Salt River Pima-Maricopa Indian Community, I would like to thank you for the leadership displayed by your committee to strike Title III of the House of Representatives approved "Adoption Promotion and Stability Act of 1996. Enclosed is a copy of our opposing arguments.

Enclosed you will also find a copy of the Salt River Pima-Maricopa Indian Community's Resolution No. SR-1703-96 entitled Supporting National Congress of American Indians Amendments to the Indian Child Welfare Act.

We are gravely concerned about the most recent Congressional deliberations on Indian affairs in a political climate which tends to abruptly abandon the historical, constitutional, and statutory foundation of Congress. Therefore, we strongly recommend no amendments to the Indian Child Welfare Act occur at this time, however, if there are current deliberations, we prefer consideration be given to the NCAI proposed amendments.

Again, thank you for your personal leadership and understanding of the negative ramifications to our children should amendments as those proposed by the Pryce Title III language be approved without tribal consultation or extensive Congressional deliberations.

Sincerely,

Ivan Makil
President

**SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY**

Route 1, Box 216
Scottsdale, Arizona 85256

RESOLUTION OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY SUPPORTING NATIONAL CONGRESS OF AMERICAN INDIANS AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

RESOLUTION NUMBER: SR-1703-96

WHEREAS, The United States House of Representatives approved the ill-conceived and poorly crafted Pryce Title III amendments to the Indian Child Welfare Act in the "Adoption, Promotion and Stability Act of 1996" (H.R. 3286), despite nationwide tribal opposition, including the Salt River Pima-Maricopa Indian Community; and

WHEREAS, on June 3-5, 1996, the National Congress of American Indians (NCAI) met and approved Resolution No. TLS-96-007A entitled Amendments to the Indian Child Welfare Act in response to House approved amendments; and

WHEREAS, on June 19, 1996, the Senate Committee on Indian Affairs approved a motion to strike Title III from the House approved "Adoption, Promotion and Stability Act of 1996" (H.R. 3286); and

WHEREAS, in light of the political climate which tends to abruptly abandon the historical, constitutional and statutory foundation of Congress in its recent deliberations on Indian Affairs, the Salt River Pima-Maricopa Indian Community prefers not to amend the Indian Child Welfare Act at this time, however, if there are current deliberations about amendments to this act, we prefer consideration be given to the NCAI proposed amendments.

NOW, THEREFORE, BE IT RESOLVED by the Salt River Pima-Maricopa Indian Community that it hereby supports and adopts the Indian Child Welfare Act Amendments proposed by the National Congress of American Indians.

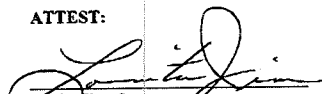
CERTIFICATION

Pursuant to the authority contained in Article VII, Section 1 (c) of the Constitution of the Salt River Pima-Maricopa Indian Community, ratified by the Tribe, February 28, 1990, and approved by the Secretary of the Interior, March 19, 1990, the foregoing resolution was adopted this 26th day of June, 1996, in a duly called meeting held by the Community Council in Salt River, Arizona at which a quorum of 9 members were present by a vote of 9 for, 0 opposed.

**SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY COUNCIL**


Ivan Makil, President

ATTEST:


Lonita Jim, Secretary

**LAW OFFICES
SONOSKY, CHAMBERS, SACHSE & ENDRESON**

SUITE 1000
1250 EYE STREET, N.W.
WASHINGTON, D.C. 20005
(202) 682-0240
TELECOPIER (202) 682-0240

ANCHORAGE OFFICE
SUITE 700
900 WEST FIFTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 258-6377
TELECOPIER (907) 272-8932

JUNEAU OFFICE
229 FOURTH STREET
JUNEAU, ALASKA 99801
(907) 588-5880
TELECOPIER (907) 588-5882

July 9, 1996

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OF COUNSEL
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TASSIE M.K. HANNA
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LINDSAY R. NAAS (MD, MN)

Steve Heeley, Esquire
Majority Staff Director
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Steve:

We greatly appreciate the Committee's work in promoting amendments to the Indian Child Welfare Act to protect its fundamental principles. Along these lines, we urge the Committee to consider a clarifying amendment to 25 U.S.C. 1918 - the provision regarding jurisdiction in Public Law 280 states. We urge the Committee to amend that section to remove its current ambiguity, as set forth below.

Section 1918(a) permits those tribes whose reservations were made subject to Public Law 280 to reassume jurisdiction over child custody proceedings. The issue that needs to be clarified is whether a tribe under Public Law 280 maintains concurrent child custody jurisdiction over its own children, in the absence of a reassumption petition being granted under section 1918. Put differently, the question is whether Public Law 280 divested tribes of their concurrent authority over child custody matters.

Certainly there is no express language in Public Law 280 that strips tribes of their preexisting authority over child custody matters. Moreover, the Supreme Court has clearly ruled that Public Law 280 was a grant of jurisdiction to the states, but was not intended to divest the tribes of their authority. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-12 (1987); *Bryan v. Itasca County*, 426 U.S. 373, 379, 383-90 (1976). See also, *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990). In accordance with these rulings, the United States Court of Appeals for the Ninth

Steve Heeley, Esq.
July 9, 1996
Page 2

Circuit has held that Public Law 280 does not prevent tribes from exercising concurrent jurisdiction over child custody matters. Native Village of Venetie v. State of Alaska, 918 F.2d 797 (9th Cir. 1990). As the Ninth Circuit properly ruled, the reassumption provision in section 1918 permits tribes to reassume exclusive or referral jurisdiction under section 1911(a) and (b), but reassumption is not a condition to tribes exercising concurrent jurisdiction.

While the Ninth Circuit's ruling should have ended the matter, unfortunately that has not been the case. One state court has chosen to ignore the Ninth Circuit's ruling, and has construed Public Law 280 to remove all jurisdiction from tribes with regard to child custody matters. In the Matter of F.P., 843 P.2d 1214 (Alaska 1992). According to the Alaska Supreme Court's ruling, unless a petition is granted under section 1918, tribes have no authority at all to handle child custody proceedings involving their own children.

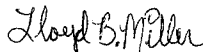
As a result of the Alaska court's ruling, Village custody actions regarding their own children are not being afforded full faith and credit, and state child custody proceedings involving Native children are not being transferred to the Villages. The current situation has significant real life consequences for a number of Native children and their Villages each year.

We have drafted proposed language to address this situation. Our draft would clarify that tribes under Public Law 280 retain concurrent jurisdiction over child custody proceedings, and that the reassumption provision of section 1918 is a mechanism for tribes to assume exclusive or referral jurisdiction under ICWA. A copy of our draft language is enclosed.

We appreciate your consideration of this matter. Please let us know if we may be of assistance to you.

Best regards.

Sincerely,



Lloyd Benton Miller
William R. Perry
Mary J. Pavel

Enclosures

LBM/WRP/MJP/slh

Proposed Amendments to 25 U.S.C. § 1918(a)

Any Indian tribe which became subject to concurrent State jurisdiction pursuant to the provision of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other federal law, may reassume exclusive or referral jurisdiction over child custody proceedings. Before any Indian tribe may reassume exclusive or referral jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

Explanation

This amendment clarifies that, consistent with applicable case law, Public Law 280 did not divest tribes of their concurrent jurisdiction over child custody matters involving Indians. The amendment reflects the interplay between Public Law 280 and ICWA, as set forth in the case of Native Village of Venetie I.R.A. Council v. Alaska, 918 F.2d 797 (9th Cir.1990).

ALABAMA/QUASSARTE TRIBAL TOWN

P.O. BOX 537
Henryetta, OK 74437
Ph. 918-652-8708

September 11, 1996

Sen. John McCain
United States Senate
Committee On Indian Affairs
Washington, DC 20510-6450

Mr. McCain:

I am writing regarding the National Right to Life Committee's stance on the passage of S. 1962. NRLC's attempt to try to correlate S. 1962 with abortion is outrageous. It has never been and will never be the Indian belief to terminate life before birth. As a matter of fact, Indian families are known for their ability to love and nurture children, their own, as well as extended family members and often children outside of their family. There are Indian families available to adopt Indian children and having worked in the social work field for twelve years, I can assure you the tribes make every effort to work with unwed mothers to ensure the child is matched with a caring family, if adoption is the mother's choice.

NRLC's interpretation of this bill is erroneous; the "Tulsa" agreement has nothing to do with encouraging abortions, we were simply trying to reach an agreement that is beneficial to our Indian children, namely to keep Indian children with Indian families where possible and exercise efforts to strengthen Indian families and maintain cultural integrity of Indian Nations. This agreement neither encourages nor condemns adoption, but rather deals with the issue of an already existing problem which involves non-Indians attempting to exercise jurisdiction over Indian adoptions.

I urge you to move forward with the passage of S. 1962 which will both protect tribal sovereignty and facilitate Indian adoptions.

Thank you for your continuing concern for the Indian people and your untiring efforts to help us protect our most valuable resources, our children.

Sincerely,

Redeena Minyard
Redeena Minyard, Social Worker
Indian Child Welfare
Alabama Quassarte Tribal Town

The Honorable John McCain
United States Senate
Washington, DC 20510-2203

24 July 1996

Sir:

On behalf of the members of the Shingle Springs Rancheria I must express our dismay over the continued attacks on the Indian Child Welfare Act. I am also shocked at the arrogance and ignorance implicit in the position taken by those who seek to weaken the Act.

For centuries Indians were murdered, starved, and denied the practice of our customs and religions. Our children were taken to schools where they were forbidden to speak their languages and were taught that the values and beliefs of White society were superior to their own. Our inability or disinclination to accept this was said to show that they were failures. The pervasiveness of these assaults resulted in great numbers of Indians being scattered and confused - physically and culturally cutoff from their heritage.

To be sure some of these policies were thought to be in the Indian's best interest but, as noted in the House Report when ICWA was being framed, "One of the effects of our national paternalism has been to so alienate some Indian (parents) from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family." Too many of these abandoned children and other Indian children whose parent's rights were terminated were then taken by non-Indians and completely removed from their culture.

The very existence of Tribes became threatened by these overwhelming losses.

Finally, the Congress, recognizing that it 'has assumed responsibility for the protection and preservation of Indian tribes and their resources' passed the ICWA. Implicit in the Congress' goal of preserving Tribes is preserving their culture. Unfortunately the Re-location and Assimilation policies of one hundred and fifty years had shattered the cultural identity of many. With ICWA these people and Tribes were finally able to begin efforts to re-learn and rebuild what had been being torn apart for so long.

Now, after a mere eighteen years, some wish to punish those who don't seem Indian enough. Here is arrogance.

And here is ignorance: to not know that the ICWA was written as much for Tribes as for parents. In the Holyfield case the Supreme Court stated that the Supreme Court of Utah expressed this well, "The protection of this Tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents." If this is understood the false doctrine of 'existing Indian family' has no validity on whether a child qualifies under the Indian Child Welfare Act. We urge you to denounce this spurious dogma.

We further urge you to support striking the reference to Public Law 280 from ICWA. The confusion this causes and the license state courts and agencies have taken to divest California tribes of jurisdiction over child custody proceedings undermines the Congressional intent.

Sincerely,

William David Murray, Sr.
Chairperson

Alec John A-Hiokatoo
ICWA Specialist

▲ SHINGLE SPRINGS RANCHERIA

P.O. BOX 1340, SHINGLE SPRINGS, CALIFORNIA 95882
TELEPHONE (916) 676-8010



September 27, 1998

Dear Senator McCain,

I am contacting you wearing two hats...one of an adoptive parent of a son and daughter and the other as the National Legislative Director of the American Adoption Congress. I saw you on the Larry King Show and I'm glad to know you are an adoptive parent, also. I know that Bill #1982 passed in the Senate 9/28 and is expected to pass in the House today.

I am aware that there was a committee meeting with you and your Counsel on September 18, 1998 where Bill Pierce from the NCFA was in attendance with attorney Michael Bentzen, Doug Johnson (NRLC) and Jackie Ragan (also NLRC)

I truly hope that you and your colleagues have come to understand that Mr. Pierce does NOT speak for any majority of the adoption triad (adoptive parents, birth parents and adoptees). He represents, at most, less than 7% of private adoption agencies (total of over 1,550 in the U.S.) and NO public agencies. Of NCFA's current 109 agency members, only 38 are primary agencies - the remaining numbers are merely branches of those agencies. At least 50% of those agencies represent a particular religious view - Latter Day Saints/Mormon Church - and most advocate secrecy and sealed records in adoption. We believe that the lack of openness and honesty in adoption causes life-long and unnecessary anguish for millions of adopted adults as well as adopted children and their parents.

In his communication to you Mr. Pierce states, "we must decline to give you a list of all the agencies and attorneys who have concerns with your bill." This is a common Piercian play because, if the list were made public, it most likely would be embarrassingly short and very narrow in its viewpoint, as is the membership of his organization.

Bill Pierce tells you in his letter of September 19, that "NCFA labored with many others for more than six years to hammer out the details of the Uniform Adoption Act". That statement is partially true, because a good deal of the "labor" was the result of having to work over the continuing protests of organizations representing thousands of children, adoptees, birthparents, and adoptive parents. Today the UUA is in trouble because now those thousands of voices are not being ignored before legislative committees across the land. The UUA (as does NCFA) serves the interests of small but powerful, moneyed, and well-connected groups.

An amazing example of Mr. Pierce's favorite strategies is to take two unrelated phenomena and put them together as though one causes the other. His most current implication is that openness in adoption causes abortion. It is a fear-inspiring fantasy that seems to be believed. However, it bit the dust in a Tennessee Federal District Court Decision by Judge John T. Nixon on August 23, 1998. If you are not aware of this Federal Court case and the decision, I will be happy to furnish your office with details.

The vast majority of adoptees and birthparents have been opposed for years to what Mr. Pierce represents. Today those constituents are being joined by an ever-increasing population of adoptive parents who have come to realize that the best interests of their children involve openness and honesty in adoption and access to their records. We are not yet a high-powered lobby - but we hope that we can alert you and your colleagues that we are here, we are mobilizing and we are speaking out.

The days of Mr. Pierce and his kind are limited.

Sincerely, *Jane Nast*

Jane Nast, Legislative Director, American Adoption Congress
3 Harding Terrace Morristown, NJ 07960-3252 201-267-98 Fax 201-267-3356



June 24, 1996

Mr. Steve Heeley
Majority Staff Director
Senate Indian Affairs Committee
Fax: 224-5429

Dear Mr. Heeley,

I am writing to you regarding the hearings you are scheduling to look at the Indian Child Welfare Act. Specifically, regarding the House passed changes to that act in H.R. 3286.

The National Council For Adoption (NCFA) is a non-sectarian, non-profit organization which has worked to promote adoption and ethical practices and policies for 16 years.

NCFA has followed the difficulties many families and birthparents have encountered in trying to navigate ICWA as it is presently interpreted by the courts. We have spoken often with Representative Deborah Pryce as she has worked to correct ICWA.

Frankly, NCFA was surprised that we were not asked to testify regarding ICWA at the hearings you will hold this Wednesday. And, I wanted to be sure that you were aware of our desire to present a side of the ICWA story which may not have been adequately explained by those who are not in the adoption field.

I look forward to hearing from you at your earliest possible convenience and hope that all sides of the issue will be given a fair and open airing.

Sincerely,

William I. Pierce
President

1930 Seventeenth Street, N.W.
Washington, D.C. 20009-6207
202-328-1200
FAX 202-332-0935



September 19, 1996

Sen. John McCain
SR-241
Washington, DC 20510

Dear Sen. McCain:

Thank you for inviting us to meet with you yesterday. We appreciate the fact that you were so generous with your time. Thank you also for inviting the two adoption attorneys from the American Academy of Adoption Attorneys to be present, so we could have a candid discussion about our differences of opinion. I was pleased that Jane Gorman and Mark Gradstein confirmed that several of our concerns were also problems to them, although they believe the problems cannot be resolved because of the tribes' opposition while we believe the Congress should resolve them regardless of what the tribes desires might be.

I was happy that we finally had a chance to exchange views about ICWA and I look forward to the written response you mentioned would be coming. We look forward to receiving your written response to the many issue we have raised, including the proposed amendments we hope will be offered if your bill goes to the Senate floor.

I do wish that you had been able to stay with us a bit longer so that we could have gone through the list of concerns other Members of Congress, NCFA and other groups – including many adoption attorneys – have with your bill. I had hoped to explain why we believe our amendments are needed if your bill is to improve the current situation in regard to the Indian Child Welfare Act.

As you suggested, I will brief the others who oppose your bill on our meeting but, as I told Mr. Baker-Shenk, we must decline to give you a list of all the agencies and attorneys who have concerns with your bill. The fact is that at least one attorney, who is a member of the American Academy of Adoption Attorneys and who currently is representing clients who are in conflict with a tribe over an adoption, has told me that the tribe that is on the other side has attempted to pressure their law firm to withdraw from the case by

contacting other clients of the firm that the tribe has business dealings with, asking them to consider dropping the firm unless the firm withdraws from its efforts in opposition to the tribe. We cannot reveal the names, without their express permission, of those agencies and attorneys who could be subject to similar retribution from the tribes, were their support of our position to be revealed.

The issues are very clear, it seems to me. You clearly believe, as you said, that NCFA stands alone in the adoption community in opposition to your bill. Although being the only voice in opposition does not mean that one's position is wrong, the fact is that we are not alone. The American Academy of Adoption Attorneys, and its board's endorsement of your bill, does not represent "all the adoption attorneys," as you stated. It represents about 300, some of whom disagree with their organization's view. There are prominent adoption attorneys – in New York and elsewhere – who have written to you with their objections. The largest infertility support group in the U.S., RESOLVE, continues, as NCFA does, to call for true reform of ICWA in its alerts. A number of important public policy and advocacy organizations also support the proposition that ICWA needs to be reformed in ways that are different from what you propose.

I hope that you understood me clearly when I stated that, on balance, your bill would make the situation with ICWA worse. This is not to say that some of what is in your bill would not be better than what we now have in ICWA. The problem is the other provisions – mainly new departures – which overwhelm the positive elements.

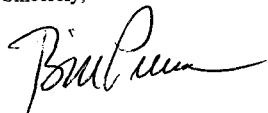
In terms of Jane Gorman's points, we will review them with our legal and agency advisors. In particular, we will see whether her contention that non-Indian birth mothers would not be covered under your bill is confirmed by others' reading. We do understand how much Jane Gorman hopes that your bill will help her settle the Rost case. Frankly, we see the scenario differently than Jane Gorman, even though we have joined the case and filed an amicus brief on the side of the Rosts.

I genuinely regret that I was unable to convince you about the serious nature of the provision allowing for court-enforced visitation and communication agreements, and the fact that we feel committed to the language of the Uniform Adoption Act in this regard. NCFA, like the American Academy of Adoption Attorneys, labored with many others for more than six years to hammer out the details of the Uniform Adoption Act before NCFA and the American Academy of Adoption Attorneys agreed to jointly endorse it. NCFA cannot back away from this provision that is so important, especially when there is nothing in your bill to require the judges to allow any such agreements only if it is in the best interests of the child.

We would have had much more to say, had you not needed to leave the meeting for a vote. Let me conclude by repeating what I said to you: we deeply appreciate the sincere belief that you have that your bill would make ICWA better. Your advisors and experts have told you that the bill is the best you can get from the tribes and that it constitutes a step forward. Our advisors and experts have told us that ICWA is deeply flawed and your

bill would not improve matters. You said, as you left your office, that you would be attempting to move your bill forward. For our part, we believe your controversial bill should not be approved by the Senate unless our perfecting amendments are accepted. We will continue to support those amendments being added because without them we believe your bill would worsen the situation with ICWA and therefore we will ask the Senate and the House to oppose it.

Sincerely,



William L. Pierce
President

JM091996



DATE: August 9, 1996

RE: Proposed ICWA Amendments--Analysis for NCFA

INTRODUCTION

You requested an analysis of the main problems with ICWA, how they are addressed by the McCain bill, problems with the bill, cases that illustrate the problems with ICWA, status of the California case, and how the proposed Title III affects ICWA.

PROBLEMS WITH ICWA

The overarching problem with ICWA is its over-broad application to situations never intended by Congress. Congress stated specifically that the purpose of ICWA is to protect the best interests of Indian children and preserve the existence of Indian tribes by restricting the adoptive or foster placement of Indian children with non-Indian families. 25 USC §§ 1901-1902. The battle cry from the tribes has been that "the white man stole our land and our wealth, and now they are stealing our children." However, ICWA has been applied to children who have only a modicum of Indian blood and who have no connection with any Indian tribe or Indian culture. Indian tribes seek to extend the Act to all children with any Indian blood, regardless of prior contacts with the tribe or culture. The result is that the best interest of Indian children is ignored under the guise of preserving Indian tribes. Tribal interests have become paramount to those of the children. Tribes have asserted a virtual ownership over Indian children, superseding even the rights of the parents or child involved. If the federal government has any interest or authority in this area at all, it should be to protect the best interests of Indian children, not to blindly perpetuate Indian tribes at the expense of the children. The act sanctions and fosters racism under the pretext of preserving Indian tribes.

The specific problems, which all tend to lead to over-broad application of ICWA, are as follows:

1. Ambiguous and over-broad definition of "Indian child." Section 1903(4). Status as an Indian child turns on whether the child is a member of, or eligible for membership in, an Indian tribe. Tribal membership rules are either nonexistent, vague, or subject to changing interpretation and enforcement. Some tribes maintain written membership roles, while others claim that any person with any tribal blood is automatically a member.

1930 Seventeenth Street, N.W.
Washington, D.C. 20009-6207
202-128-1200
FAX 202-332-0995

or at least eligible for membership, from birth. Tribes tend to expand their definition of membership to include as many children as possible, regardless of their actual affiliation with the tribe.

2. Allowing a tribe to establish or assert membership after a child has already been placed for adoption. This belated assertion of tribal membership can result in tearing the child away from an established family relationship. Status as an Indian child must be objectively determinable at birth, or at least before the child is placed and begins bonding with a new family.

3. Ambiguous definition of "parent" in the context of unwed parents. Section 1903(9). Is the child of an unwed Indian father an "Indian child" when the father has failed to establish paternity according to state law? "Parent" is defined as the parent of an "Indian child," but "Indian child" can be defined as the child of the member of a tribe. So the definitions become circular, one depending on the other. Can the child be an "Indian child" when the parent is not a "parent?" The definitions need to be clarified.

4. Unclear distinction between "involuntary" and "voluntary" proceeding. The tribe is entitled to notice of only an "involuntary proceeding." Section 1912(a). But does that include an adoption proceeding in which the mother consents but the father cannot be identified or located?

5. The standard for termination of parental rights in section 1912(f) creates a double standard for state actions that must also comply with state termination standards.

6. Section 1913 permits an Indian parent to withdraw adoption consent at any time prior to the final decree, or for up to two years if based on fraud. This creates terrible uncertainty for adoptive parents and disruption for the child. The consent should be irrevocable, as under state law, with the challenge period for fraud shortened to no more than six months.

7. The placement preferences under section 1915 fail to consider the best interests of the child. Moreover, the preferences should have no application to a child who has no prior ties to Indian culture. For example, the non-Indian mother of an Indian child should not be required to place her child with an Indian family when neither she nor the child have any ties to the tribe or Indian culture. The tribe should not be permitted to dictate placement of the child over the wishes and judgment of the child's parent. Placement should be determined by the needs and interests of the child, not by race.

8. ICWA has not accomplished its stated objectives. Instead, it has served only to complicate, delay, and even prevent the adoption process. The Act should be repealed, with the adoption of Indian children left to state law.

McCain Bill

The McCain bill addresses none of the problems with ICWA identified above. In fact, the McCain bill exacerbates the problems, as follows.

1. The proposed changes to section 1911 apparently expand the exclusive jurisdiction of Indian tribes over custody proceedings.

2. Proposed section 1913(a) imposes additional certification requirements for voluntary placements.

3. Proposed section 1913(b) further confirms and defines the right to revoke adoption consent long after placement.

4. Proposed section 1913(c) expands the requirements of notice to Indian tribes, requiring that tribes now be notified of all voluntary placements and terminations. Presumably, the purpose of such notification is to allow the tribe to intervene and override the wishes of the child's parents.

5. Proposed section 1913(d) imposes extensive requirements for the content of notice to tribes, including the names and address of adoptive parents, thus requiring a breach of state confidentiality laws and precluding closed adoptions.

6. Proposed section 1913(e) creates the right of tribes to intervene in voluntary adoption proceedings, presumably to contest the wishes of the child's parents. The tribe can intervene at any time, presumably even after a decree is entered. These provisions thus expand and strengthen tribal paternalism.

7. Proposed section 1913(h) authorizes a court to award visitation rights to birth parents and even the tribe, notwithstanding a final decree of adoption. The bill thus encourages open adoptions.

8. The bill also proposes stiff criminal sanctions for violations of the act, with penalties comparable to those for drug trafficking. The procedural pitfalls and heavy sanctions would simply end placement of Indian children because of the risks involved.

ILLUSTRATIVE ICWA CASES

The recent California case, *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (App. 1996), illustrates some of the problems with ICWA. There, the parents of newborn twins voluntarily relinquished the twins for adoption, expressly denying any Indian heritage. Three months later, after learning of the birth and relinquishment, the paternal grandmother and the Pomo Indian tribe sought to block the adoption and return the twins to the extended family. The grandmother enrolled the biological father as a member of the tribe, even though he was only three-sixteenths Indian, had no significant

contact or relationship with the tribe, and lived several hundred miles from the reservation. The biological parents sought to revoke their adoption consent on the basis that the twins were Indian children, and the requirements of ICWA were not followed in taking the consents. The trial court granted the revocation and ordered the twins removed from the adoptive family and returned to the father's extended family. However, the court of appeals stayed the order pending appeal and ultimately reversed the trial court.

The court of appeals applied the "existing Indian family" doctrine to conclude that ICWA does not apply where the biological parents have no significant social, cultural or political relationship with the tribe. To apply ICWA under such facts would violate the due process rights of the children by disrupting the only family relationship they had known. *Id.* at 526. Application of ICWA would also violate the equal protection rights of the children by excluding them from the adoption rights of other children solely on the basis of race. *Id.* at 527-28. Such a broad application of ICWA would also violate the Indian Commerce Clause and the Tenth Amendment by impermissibly intruding on powers reserved to the states. *Id.* at 528-29. The court remanded for a factual determination of whether the twins were part of an existing Indian family. However, the court made clear that such a finding would be unlikely under the evidence in the record. For example, the father's lack of contact with the tribe or other family members in the tribe, as well as his denial of Indian heritage and total absorption in non-Indian culture indicated absence of an existing Indian family. Moreover, neither the belated tribal enrollment nor the tribal ties of other family members could satisfy the relationship required for application of ICWA. The determination of whether the children were removed from an existing Indian family must be made as of the time of relinquishment. *Id.* at 531. The court of appeals also held that, even if ICWA is found to apply, precluding the adoption, the adoptive parents would still be entitled to a custody hearing to determine whether a change of custody would be detrimental to the children. *Id.* at 534-35.

The California Supreme Court apparently denied review of *Bridget R.* on May 15, 1996.

Accordingly, the ultimate outcome in *Bridget R.* is good and correct, and ICWA need not be amended to change the result of that particular case. In any event, the McCain bill does nothing to prevent such cases in the future. If ICWA is to be amended, the purpose of such amendments should be to codify the result in *Bridget R.*, not to change the result.

EFFECT OF PROPOSED TITLE III AMENDMENTS

Title III of HR 3286, as passed by the House, is an apparent attempt to codify part of the holding in *Bridget R.* Proposed section 114(a) provides that ICWA does not apply to a child custody proceeding unless one of the child's parents "maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a

member." Subsection (b) states that this factual determination of tribal affiliation is to be made as of the time of the custody proceeding. These changes are good, but the affiliation determination should be made, as held in *Bridget R.*, as of the time of relinquishment or the filing of a petition. 49 Cal. Rptr. 2d at 531. Otherwise, indicia of affiliation can be manufactured after-the-fact as a basis to remove the children from families to which they have already bonded.

The changes proposed in section 115 are also good. Subsection (a) requires the written consent of an adult to become enrolled in an Indian tribe, and subsection (b) states that admission to membership shall not be given retroactive effect. These changes would render immaterial the post-relinquishment maneuvers by the tribe and extended family in *Bridget R.*

CONCLUSION

In summary, ICWA has numerous problems, both as conceived and as applied. It is over-reaching, unnecessary legislation that empowers tribes to delay and prevent child placements without regard to the best interests of the children. The McCain bill does nothing to improve ICWA, and in fact would make matters worse. As illustrated by *Bridget R.*, some courts are attempting to correct the excesses in the act in accordance with its stated purposes. These judicial corrections should be codified. Title III of HR 3286 takes positive steps toward resolving some of the problems identified in *Bridget R.* and other cases.

AMENDMENTS TO ICWA

Following are some possible amendments to ICWA. The "[]" show deletions of current language. Underlined words are additions.

1. Section 1902- Insert "involuntary" before ". . . removal of Indian children from their families. . ." (Clarifies that it is the intent of Congress that ICWA applies only to involuntary proceedings.)

2. Section 1903 - (Definitions)- (4) "Indian child" means any unmarried person who is under eighteen, who resides or is domiciled on the reservation of an Indian tribe, and who is either, (a) a member of an Indian tribe or, (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe; (A residence or domiciliary standard would solve myriad of problems in connection with non-Indian birth mothers. If domicile becomes a consideration, there probably wouldn't be a need for amendments 3, 4 or 5 below.)

3. Section 1903 - (Definitions) - (4) "Indian child" means any unmarried person who is under age eighteen, who resides or is domiciled on the reservation of an Indian tribe, and who is either, (a) [a] an enrolled member of an Indian tribe or, (b) is eligible for enrollment [membership] in an Indian tribe and is the biological child of an enrolled [a] member of an Indian tribe. [;] It does not include a child who is born outside of marriage to a birth mother who is not an enrolled member of an Indian tribe where paternity of the child has not been established under state law. In cases where a child is placed for adoption, the determination of whether the child is an Indian child shall be made as of the date the child is placed in the prospective adoptive home. (This is an alternative to #2 above. It clarifies current law that ICWA should not apply in cases where the birthmother of an out of wedlock child is not an Indian and the father has not established paternity. If the Indian father does not have any standing or rights, the tribe should not have any rights either. The law that is in effect at the time of placement, relinquishment etc., should govern the adoption proceeding. This is only common sense.)

4. Section 1903 - (Definitions) - (3) "Indian" means any person who is an enrolled [a] member of an Indian tribe. . . (Some tribes try to get around ICWA by trying to distinguish between membership and enrollment. It is hard enough to understand a tribe's enrollment policies, let alone some unwritten "membership" policies.)

5. Section 1903 - (Definitions) - (9) "Parent" means. . .It does not include the unwed father where paternity has not been [acknowledged or] established under state law, [;] or a non-Indian mother of a child born outside of marriage where the paternity has not been established under state law. (ICWA should

not apply to a non-Indian mother where paternity has not been established under state law. If the Indian father does not have any rights, the ICWA relinquishment procedures etc., should not apply to non-Indian birth mothers. The term "acknowledged" in the current law is too vague. Adoption law must be clear and certain.)

6. Section 1913 - "Where any Indian parent or Indian child voluntarily consents. . ." (Clarifies that ICWA procedures don't apply to non-Indian, i.e., why should a non-Indian be required to always appear before a court for certification that the non-Indian speaks English etc.)

7. Section 1915 (a) - "In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; [or] (3) other Indian families [.] or any other family. The best interest of the child shall be considered "good cause" in applying these preferences. (This amendment doesn't need explanation, however I suspect the Indian community will resist. It will be interesting to hear why tribal interest should override the child's best interest.

8. Section 1915(c) - "In the case of placement under (a) or (b) of this section, . . . [Where appropriate, the preference of the Indian child or parent shall be considered: provided, that where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such a desire in applying the preferences.] The preference of the Indian child or parent, shall be deemed to be "good cause" for purposes of this Section. The child's best interest shall also be deemed to be "good cause" for purposes of this Section. (This amendment protects the fundamental rights of parents, whether they are Indian or non-Indian. Particularly in the case of the non-Indian, why would a tribal interest override the parent's interest? It also seems fundamentally wrong that an Indian should lose his or her fundamental rights with regard to their children because of their race.)

9. A new part needs to be added to Section 1903 (Definitions) which reads: "Tribal membership and enrollment. Although the intent of Congress is not to interfere with the right of a tribe to decide and to designate, for "tribal purposes," which individuals may or may not qualify for membership and enrollment in the tribe, for purposes of the Indian Child Welfare Act and its proper implementation, it is necessary for a tribe's membership and enrollment information to be published so as to be available for inspection by the general public, including attorneys representing persons who may come under the purview of the Indian Child Welfare Act. Therefore, for purposes of the Indian Child Welfare Act, compliance shall be measured by

meeting, on the date of the signing of relinquishment papers, those requirements which are in effect because as of that date a tribe has published in English in the Federal Register a copy of its current procedures for membership and enrollment, along with a listing of those individuals who are currently enrolled in the tribe. If a tribe has not published in the Federal Register the required information, for purposes of the Indian Child Welfare Act, that tribe shall not be informed of the proposed placement and that tribe shall have no standing under the Indian Child Welfare Act."

(No one can be expected to comply with non-published and non-defined requirements. Nor can one check to see if a relative is an enrolled member of a tribe unless the tribes agree to publish the names of those who are enrolled members. This change would simply respond to the concerns raised, including during the hearings process, that tribes are not making it possible for people to engage in good-faith compliance with the Act.)

10. A new section needs to be added to provide for the recognition of the right of individuals to resign from tribal membership or to have their names deleted from the list of enrolled members. This is a right to disaffiliate or expatriate oneself through attrition, through assimilation over time or through a mere formal resignation. It is a clear principle of law that individuals should not be classified without their acquiescence. The new language should read: "Notwithstanding any other provision of the Indian Child Welfare Act, nothing in the Act shall be read to prevent an individual from resigning from tribal membership or removing their names from the list of those who are enrolled members."

11. During Senate hearings, the Department of Justice testified concerning Justice's views about making certain acts a criminal offense. In light of that testimony, where Justice said that existing penalties were sufficient, the following changes should be made: "Sec. 114 (a) shall be amended by deleting the words "...a criminal sanction under subsection (b)..." and inserting in lieu thereof the words "...the sanctions currently existing in the United States Code..." Sec. 114 (b) shall be deleted."

12. S. 1962 would provide for a radical departure from the recommendations of the National Conference of Commissioners on Uniform State Law (NCCUSL) regarding an enforceable right of visitation in a non-relative adoption. According to the written statement and the testimony of Jane Gorman, an attorney for the appeal being filed on behalf of the Rost twins, this change may make it possible for her to settle her case. Ms. Gorman has said that this change is needed because the tribe does not trust the Rost family to keep its word about visitation and communication. Since the case is currently on appeal, and at this point the highest court to rule has ruled in favor of the Rost family, it is by no means clear that there is any need to negotiate on behalf of the Rost twins. Even if such negotiation were seen as necessary because the tribe had won at the highest court level to

hear the case, the tribes themselves have said that the children will not be removed from the custody of the Rosts. Therefore, no such negotiation is necessary. In the event that such negotiation were necessary, it seems improper to put in jeopardy many other cases involving tribes and ICWA in order to settle a case involving two children. Further, it seems highly questionable whether ICWA in the future should be changed so as to imperil the adoption choices for as many as 1,500 children of Indian heritage each year in exchange for the one-time rescue of two children from the legal hostage situation imposed by the Pomo. NCCUSL debated and considered such an approach and decided against it. The Uniform Adoption Act does not allow such a provision, and neither should such a drastic change be put in place for ICWA. The following change should therefore be made: "Delete the language in the new Section 103 (h)."

13. If Section 103 (h) cannot be deleted by amending S. 1962, then there are two alternatives. The first alternative is to allow such enforceable visitation and communication agreements in the case of relative adoptions, as follows: "Delete the language in the new Section 103 (h) and insert in lieu thereof the following: VISITATION AGREEMENT AND ORDER (1) Upon the request of the petitioner in a proceeding for adoption of a minor Indian stepchild, the court shall review a written agreement that permits another individual to visit or communicate with the minor after the decree of adoption becomes final, which must be signed by the individual, the petitioner, the petitioner's spouse, the Indian minor if 12 years of age or older, and if an agency placed the Indian minor for adoption, an authorized employee of the agency. (2) The court may enter an order approving the agreement only upon determining that the agreement is in the best interest of the minor Indian adoptee. In making this determination, the court shall consider: (a) the preference of the Indian minor, if the minor is mature enough to express a preference; (b) any special needs of the Indian minor and how they would be affected by performance of the agreement; (c) the length and quality of any existing relationship between the Indian minor and the individual who would be entitled to visit or communicate and the likely effect on the Indian minor of allowing this relationship to continue; (d) the specific terms of the agreement and the likelihood that the parties to the agreement will cooperate in performing its terms; (e) the recommendation of the Indian minor's guardian ad litem, lawyer, social worker, or other counselor; and (f) any other factor relevant to the best interest of the Indian minor. (3) In addition to any agreement approved pursuant to subsections (1) and (2), the court may approve the continuation of an existing order or issue a new order permitting the Indian minor adoptee's former parent, grandparent, or sibling to visit or communicate with the Indian minor if: (a) the grandparent is the parent of a deceased parent of the Indian minor or the parent of the Indian adoptee's parent whose parental relationship to the Indian minor is terminated by the decree of adoption; (b) the former parent, guardian, or sibling requests that an existing order be permitted to survive the decree of

adoption or that a new order be issued; (c) the court determines that the requested visitation or communication is in the best interest of the Indian minor. (4) in making a determination under subsection (3) (c), the court shall consider the factors listed in subsection (2) and any objections to the requested order by the adoptive stepparent and the stepparent's spouse; (5) An order issued under this section may be enforced in a civil action only if the court finds that enforcement is in the best interest of a minor Indian adoptee. (6) An order issued under this section may not be modified unless the court finds that modification is in the best interest of a minor Indian adoptee and: (a) the individuals subject to the order request the modification; or (b) exceptional circumstances arising since the order was issued justify the modification. (7) Failure to comply with the terms of an order approved under this section or with any other agreement for visitation or communication is not a ground for revoking, setting aside, or otherwise challenging the validity of a consent, relinquishment, or adoption pertaining to a minor Indian stepchild, and the validity of the consent, relinquishment, and adoption is not affected by any later action to enforce, modify, or set aside the order or agreement."

The second alternative is to delete the words from the above language pertaining to stepchild or relative adoption from the proposed amendment. This would at least meet the concerns of Joan Hollinger and others that the best interest of the child be referenced in the section.

icwaamen.ame



July 15, 1996

Sen. John McCain, Chairman
Senate Committee on Indian Affairs
Washington, D. C.

Dear Chairman McCain:

As I am sure you know from your Counsel, our organization is very interested in the Indian Child Welfare Act (ICWA). That was why we sought to testify before your Committee.

Our organization has members all across the U.S. and has contacts with many non-profit adoption agencies in addition to our members with long experience in dealing with Native American issues. Based on our analysis of the issues, we were and remain a strong supporter of the goals of Title III of H.R. 3286, which is the result of the efforts of Rep. Pryce and others in the House to improve the ICWA. We strongly supported Title III, which your Committee has struck from H.R. 3286.

Although it would appear that the views of our organization differ significantly from yours and the majority of your Committee, we believe that it is important to stay in communication so that as you work on your bill and prepare for markup, you are aware of our concerns.

Our review of the draft bill that you circulated last week, along with the accompanying materials, is what prompts this letter. From your comments in the Committee hearing and your letter to potential co-sponsors, it seems clear that you have a genuine desire to reach a reasonable compromise on ICWA and, at the same time, to address the heart-rending cases related to ICWA that have been brought to the attention of the American public.

The draft bill which we saw does not solve the problems that nearly all agree exist with ICWA. The bill, in our view, does not respond to the concerns raised in your recent Committee hearing by those who support the general thrust of the tribes' proposal. The bill certainly does not represent real compromise between what the tribes want and what the adoption community wants, because the American Academy of Adoption Attorneys, important and involved as that group is, does not speak for the adoption community or even all of the attorneys who are actively involved in adoption practice. The bill would, in the view of some of the agencies and attorneys we have consulted, essentially end any possibility for the non-relative, voluntary adoption of any child with Native American blood. It is not even certain,

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1930 Seventeenth Street, N.W.
Washington, D.C. 20009-6207
202-328-1200
FAX 202-332-0935

despite the hopeful words of Jane Gorman, that enacting a bill that meets the tribes' conditions -- including court-enforced visitation and communication -- would settle the Rost case.

Indeed, some of the questions we have received have been focused on the Rost case and we have asked Senators and their aides to carefully look at the facts before endorsing a piece of legislation that purportedly would allow the Rost case to settle.

Presently, the Rost twins are with their adoptive parents. As we understand it, the highest California court to hand down a decision has ruled for the Rost family. The tribes may appeal and a higher court may eventually rule against the Rosts.

But even then, based on our understanding of what tribal officials have said, what is at stake is not custody of the twin girls. Native American officials have said that they do not wish to disturb the lives of the twins by removing them at this late stage from the only parents they have ever known.

So, what is really at issue is whether the Rosts will be able to be the twins' adoptive family under law or whether they will be guardians or have some other permanent custodial status. Jane Gorman, in her testimony before your Committee, seemed to suggest that the Pomo were discussing visitation and communication arrangements but the Pomo did not trust the Rost family to keep its word. Thus, Jane Gorman said, the tribes want court-enforced visitation and communication written into ICWA. We believe, on the other hand, that the position taken by the Uniform Adoption Act on court-enforced visitation, limiting to step-parent adoptions only and then only if the best interests of the child or children are carefully examined, is the preferred stance. We would also point out that the American Academy of Adoption Attorneys, like our organization, is on record as endorsing the Uniform Adoption Act.

All of us, whether adoptive parents or not, can feel empathy for the torture the Rost family is going through. That is why our organization can understand why some in Congress, and perhaps your Committee, are considering accepting ICWA amendments which appear to have the effect of a private bill, because the Rost twins would be rescued.

The concern that our organization and others have are several.

First, is it appropriate to use a massive re-write of ICWA to solve the problems presented by any one case if, in so doing, the result would be to endanger tens of thousands of other children and families who are being or may in the future be confronted by ICWA problems? We think not, much as we sympathize with the Rost situation.

Second, is it appropriate for the same attorney who is representing the Rost family in their appeal to be negotiating with the tribes and the Congress, in effect pitting the current and legitimate interests of her clients, the Rosts, against thousands of future potential clients? We think not. We believe this debate about ICWA would be less muddled if Jane Gorman were speaking solely as one representing the Rosts as a private attorney, not mixing up her roles as litigator and negotiator on behalf of AAAA and other groups.

Third, is it necessary to pass any new laws to solve the Rost situation? As we understand it, the children will be remaining with the Rosts. What is at issue is whether there will be visitation and communication, what the nature of that visitation and communication will be, and whether it is court-enforced. A solution will be found to the Rost case that will allow the twins to be reared by the only parents they have ever known without any action by the Congress.

Finally, there is the question of amending ICWA itself. Here, there is, as you know, intense debate and ongoing conflict. The Committees of jurisdiction have generally had one view, while many others -- including the majority of those who voted in the House -- have had another. The result has been a hearings process in both the House and the Senate that has been very unbalanced. To the extent that a record has been established, it is extremely contradictory, as the House floor debate reflects.

ICWA is one of the most complex laws Congress deals with in the family law arena. Those who support it "as is," and from your hearing it would appear this includes many of the tribes, said in your hearing that they would just as soon leave ICWA alone this year. Those who see the current debate, spurred largely by interest in the Rost twins and similar high-profile cases, as providing the opportunity to change ICWA are intrigued. Some among the tribes see this as the rare opportunity to broaden ICWA's scope and to achieve changes tribes have long sought. Others among the adoption community see this as the chance to narrow ICWA's scope so that it works better for children and for parents who voluntarily wish to place their children for adoption. Still others, and this number is growing, question ICWA's very existence and want ICWA repealed.

Congress has very few days left before it goes out of session. Given the complexity of the issues surrounding ICWA and the strongly-held views of key Members like you, it would appear that any legislation that would be acceptable to the tribes and to you would not be acceptable to many of us in the adoption community -- and many in Congress. On the other hand, if the Senate were to take the same action as the House and push through Title III, the Administration has signalled that it has objections and the bill (either as a stand-alone piece of legislation or along with the

rest of H.R. 3286) could earn a Presidential veto.


In this regard, you said in your hearing and we have heard general agreement that the debate over ICWA should not threaten the viability of the non-ICWA portions of H.R. 3286. Putting something this controversial on a bill that has broad bipartisan support and the endorsement of the President seems ill-advised to us.

All this leads me to conclude that there is no possibility of achieving a reasonable compromise on ICWA in the time remaining in this Congress. Those who want ICWA's focus to be narrowed cannot achieve their goal because of a probable Presidential veto. Those who want ICWA's focus broadened cannot get a bill through Congress. Therefore, since the bill is probably not needed to solve the matter of custody in the Rost case, the best course of action seems to be to revisit this issue in the next Congress, when there is adequate time for several days of hearings on both sides of the Hill so that all of the witnesses who desire to testify -- both those hundreds from the tribes that you mentioned in your hearing and those of us who have differing views -- can be heard.

I respectfully suggest that this approach would save a great deal of time, expense and struggle.

We would be pleased to speak with you or members of your staff about these issues at any time, either by phone or in person. Meanwhile, I am sure you understand that in our advocacy efforts, pending any possible mutually-acceptable compromise between the tribes' position and our position, on July 18 I will be seeking continued authority from my Board to work to block any legislation that does not properly refocus ICWA.

Sincerely,



William Pierce
President

cc: Board of Directors, National Council For Adoption

WP/ms

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July 25, 1996

Sen. John McCain (R-AZ)
by fax

Dear Sen. McCain:

A July 25 piece from National Journal states the following: "How it [S. 1962] will move through Congress is still a question, however. The Molinari adoption bill is awaiting senate floor action, Baker-Shenk said, if it begins to move, McCain may try to attach his bill to it. That provision would then have to be reconciled with the House version in conference."

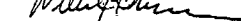
If this news article accurately reflects what Mr. Baker-Shenk said, and if Mr. Baker-Shenk is correct in saying that you may try to attach S. 1962 to H.R. 3286, then that is in direct contradiction to what you said in the hearing you held in Indian Affairs. You said then that although you strongly supported the tribes' amendments, you would do nothing to hinder H.R. 3286 from passing. Rep. Pryce said essentially the same thing.

S. 1962, despite the claims by its supporters to be "non-controversial" and a "compromise" is neither and if you try to attach it to H.R. 3286, you will almost certainly spark a lengthy debate in the Senate. Our organization knows of at least 15 proposed amendments, which we have provided comments on to those in the Senate who do not support S. 1962. Those who disagree with S. 1962 will insist on time to debate their amendments fully and to have a roll call vote on each amendment.

Further, if H.R. 3286 should pass the Senate with S. 1962 as reported out of your Committee, it will go to a conference with Title III of the House bill, which is diametrically opposed, as you, the tribes and every other person who has been following this debate knows. The upshot is that the conference is likely to get hung up.

Adding S. 1962 to H.R. 3286 would constitute a reversal of your previous statement and could very well doom H.R. 3286, because our organization, among others, cannot and will not support any legislative package, even one we desire as much as H.R. 3286, if the price is to further erode basic rights of birth parents and U.S. citizens in favor of tribal "ownership" of children. I respectfully ask you to immediately clarify your position with the media and with us.

Sincerely,



William Pierce, President

jmc72596

1930 Seventeenth Street, N.W.
Washington, D.C. 20009-6207
202-328-1200
FAX 202-332-0935



SCHOOL OF LAW
UNIVERSITY of SOUTH DAKOTA
414 EAST CLARK STREET • VERMILLION SD 57069-2390

(605) 677-5361
FAX (605) 677-5417

Testimony before the Committee on Indian Affairs
United States Senate
June 26, 1996

Dear Senator McCain and Members of the Committee:

Pursuant to your cordial invitation, please accept the following remarks as my abbreviated testimony relative to proposed amendments to the Indian Child Welfare Act of 1978. Due to the relative short notice and prior commitments, I deeply regret that I will be able neither to personally present my testimony nor to provide in depth commentary. Nevertheless, I do want to take this opportunity to provide testimony about what I regard as the most problematic and potentially deleterious amendments as passed by the House of Representatives.

My name is Frank Pommersheim and I am a Professor of Law at the University of South Dakota School of Law where I am a long-time teacher of Indian law. I am a well-known Indian law scholar and also serve as Chief Justice of the Cheyenne River Sioux Tribal Court of Appeals and an Associate Justice on the Rosebud Sioux Supreme Court. As a result of these experiences, I have a wide-ranging understanding both as a matter of policy and practice concerning the Indian Child Welfare Act of 1978.

Title III of H.R. 3288, the "Adoption Promotion and Stability Act of 1996", contains several ill-defined proposed amendments that, if passed, will severely gut and eviscerate the Indian Child Welfare Act. The most egregious of these is the attempt in Sec. 301 to create a limitation on the coverage of the statute by requiring that "at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member."

The problems here are manifold. Let me briefly discuss two of them. Without defining "significant social, cultural, or political affiliation," there will only be interminable litigation about the proposed language's scope and meaning. This likely delay and uncertainty cannot benefit any Indian child or party involved in a child custody proceeding under the Act. More broadly, this proposed limitation completely undermines the thrust of the Indian Child Welfare Act to protect Indian children within the context of their being members (or eligible for membership) in a tribe. This overriding tribal interest ought not to be made contingent on the "significant social, cultural, or political affiliation with the Indian tribe" of a parent.

As noted in the original congressional findings:

"There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 USC § 1901 (3)

This human tribal resource will be placed at substantial risk if its identity and fate is subject to the over-broad criteria to determine parental involvement with the tribe. Indeed, this is the very same analysis rejected by the Supreme Court in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989):

Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves.

The tribal interest is a primary tenet of the Indian Child Welfare Act of 1978 and should not be so heedlessly or thoughtlessly dislodged.

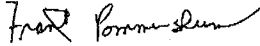
Equally problematical is the attempt in proposed Sec. 302 to limit and set restrictions on a tribe's ability to determine membership requirements (e.g., children 18 or older must consent, tribal membership is strictly prospective in nature). The right to determine membership is essential to tribal sovereignty and ought not be displaced by Congress. As noted by the U.S. Supreme Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978): "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."

These proposed amendments, whether advertently or inadvertently, seek to improperly invade tribal sovereignty and to upset the already proper balance established by the U.S. Congress and confirmed by the U.S. Supreme Court in harmonizing the interests of Indian children, their parents, and their tribes. The proposed amendments appear to seek to advance the potential for Indian children to be adopted by non-Indians and everything else be damned in the process. This is, once again, repugnantly redolent of too much of U.S.-Indian relations--as scholars Jack Trope and Walter Echo-Hawk have noted in another context--whether it be land, or sacred objects and cultural artifacts or as here Indian children as a "one-way transfer of Indian property to non-Indian ownership." That there are important issues to discuss in the area of the adoption of Indian children is certainly not to be denied. Unfortunately, these proposed amendments eschew discussion and

demonstrate little, if any, understanding of the tribal interests involved. The Congress--and the Indian Child Welfare Act--must remain a bulwark against such potential harm.

Again, please accept my sincere thanks for the opportunity to testify on these important matters.

Respectfully submitted,



Frank Pommersheim
Professor of Law

FP:cwh



Ferrell H. Secakuku
CHAIRMAN

Wayne Taylor, Jr.
VICE-CHAIRMAN

July 31, 1986

BY FACSIMILE

The Honorable John McCain
United States Senate
111 Russell Senate Office Bldg.
Washington, D.C. 20510

Dear Senator McCain:

The Hopi Tribe reluctantly supports, with minor exception, S. 1962, a bill to amend the Indian Child Welfare Act. The purpose of the bill is to achieve greater speed and certainty in adoption proceedings involving Indian children by restricting the time in which an Indian tribe or family may intervene in adoption proceedings involving an Indian child. The Hopi Tribe believes that the bill's thirty-day time-frame for intervention in adoption and termination of parental right proceedings is unduly restrictive and would only encourage Indian tribes to intervene automatically to preserve their options. The Hopi Tribe believes that a more reasonable time-frame for intervention would be sixty (60) days. This would allow an Indian tribe or family time to investigate the merits of intervention and would promote deliberate rather than automatic intervention. With this amendment, the Hopi Tribe lends it support to S. 1962.

Sincerely,

THE HOPI TRIBE



Ferrell Secakuku, Chairman
Chief Executive Officer

June 24, 1996

Chairman Senator McCain
Senate Indian Affairs Committee
Senate Hart Building, 838
2nd and C Streets, NE
Washington, DC 20510

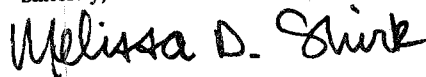
Dear Senator Chairman McCain,

We understand that the SIAC voted to strike Title III from the adoption tax credit bill. We thank you for your support and work with this committee to protect tribal sovereignty in future legislation concerning the Indian Child Welfare Act (ICWA).

We would like our letter to be included in the record of the SIAC hearing on June 26, 1996. We want to show our support to the Committee and for the tribes who have worked together to draft alternative amendments to the ICWA.

Thank you for your leadership on this important issue.

Sincerely,



Melissa D. Shirk
Legislative Advocate for
Native American Affairs
Friends Committee on National Legislation

June 24, 1996

Chairman Senator McCain
Senate Indian Affairs Committee
Senate Hart Building, 838
2nd and C Streets, NE
Washington, DC 20510

Dear Senator Chairman McCain,

As members of the Washington interfaith community, we are writing to thank you for holding a hearing on proposed amendments to the Indian Child Welfare Act on June 26.

The Indian Child Welfare Act (ICWA) PL-95-608 became law in 1978, due to tragic circumstances. In years before the passage of ICWA, the Association on American Indian Affairs (AAIA) conducted studies to document the problems associated with the adoption and foster care for Indian children. It found that in many Native American communities, Indian children were being placed in foster care more often than non-Indian children. Case workers from state welfare agencies and state courts were separating Indian children from their families, tribes and cultural heritage and placing them in non-Indian households without the consent of the tribe or family. As a result, Congress acted to remedy the many years of widespread separation of Indian children and families through the passage of ICWA. Many of us worked to support this legislation in Congress, and we continue to remember the painful circumstances that made ICWA a necessity.

We join with tribes and strongly oppose the language in Title III by Representative Pryce that was passed by the House on May 10. This language is unacceptable, and the process of its passage was less than fair. Several proposals to amend ICWA—H.R. 1448, earlier legislation introduced by Congresswoman Pryce, as well as Title III of H.R. 3286—have met with the clear and united opposition of tribes and national groups like the National Indian Child Welfare Association and National Congress of American Indians, as well as the Bureau of Indian Affairs. The language amending ICWA as included in H.R. 3286 was an unprecedented act of the House. In an act that Committee on Resources Chairman Representative Young called "a first," the House Rules Committee overruled the recommendation of the committee of jurisdiction to drop the Pryce language.

We commend the good faith efforts of tribes to present alternative language to Title III of H.R. 3286, the Adoption Promotion and Stability Act. They have worked diligently to produce amendments that will not dismantle the protections of ICWA, and we will continue to support them in their endeavors. We also express our appreciation to the Senate Indian Affairs Committee for your efforts to develop a stand-alone bill to make needed improvements and clarifications to the Indian Child Welfare Act that would be based on recommendations made by Indian tribes and tribal child welfare workers.

Sincerely,

Ruth Flower
Legislative Education Secretary
Friends Committee on National Legislation

Nancy Chupp
Director
Church Women United

Reverend Elenora Giddings Ivory
Director
Presbyterian Church (USA), Washington Office

Tom White Wolf Fassett
General Board of Church and Society
United Methodist Church

Rabbi David Saperstein
Director
Union of American Hebrew Congregations

Albert Pennybacker
Director
National Council of Churches

Kevin and Marie Stulp
49 Briar Hollow Lane #1801
Houston TX 77027-9309
713-552-0410

96 MAY 17 PM 2: 34

May 13, 1996

Senator John McCain
Senate Russell Building, Room 241
Washington, DC 20510-0303

RE: House Bill 3286 - Interracial Adoption Act

Dear Senator McCain,

I am requesting your support of House Bill H.R. 3286, especially in regards to Title III which modifies the Indian Child Welfare Act of 1978.

We request this because of personal experience. We are currently involved in an open adoption. The birthmother's heritage is 31/64^{ths} White Earth Chippewa, and the rest is Anglo and the birthfather is Anglo. The parents have little to no contact with the Tribe and found us, a non Native American family, and after the usual phone calls and letters had chosen us to be the adoptive parents. A couple of weeks after this initial contact the adoption agency said, there may be a little problem, the birthmother has some Native American heritage.

After frantically contacting lawyers, researching libraries, the Internet, etc., we discovered that even if there is no cultural contact, or desire to do so on the birthparents part, the child is really the child of a tribe, a sovereign, non-US law based entity against whom there is little hope of winning legally, even though the birthparents and adoptive parents have a clear independent desire for the child to be placed in adoptive parent's household.

I don't know all the ramifications of Title III, I do know that the Indian Child Welfare Act as it stands now, does not support the desires of a birthmother and father when their wishes do not coincide with the tribe. I think in any case an adult, informed, intelligent set of birthparents should be able to decide which family is the best one in which to place the child, independent of the tribe's wishes. It amazes me that in the United States of America, we can override parents wishes, and have a governmental group decide what is right for that child, based on a racial distinction, to the exclusion of any other factor.

If you could have been on the phone with us when we called our birthmother to inform her it was our belief that she would not be able to choose us as our family, but would need to relinquish the child to the Chippewa tribe of White Earth who would be deci

where her child would be placed (who would never place with us, as a non Native American family), you would be highly motivated to amend the ICWA.

Our story does have a happy ending: the Tribe the birthmother was registered in at birth recently changed the blood quantum requirement to be defined as an Indian child was raised from 1/8 to 1/4. And so, by just the smallest of margins, the quantum of Indian blood was insufficient to have this baby boy to be defined as an Indian for this tribe. Therefore, we are currently pursuing this as a "normal" agency adoption.

If we had been dealing with almost any other tribe, however, the tribe would have made the decision on where the baby went, forcing the birthparents to either try to parent when they feel they are not ready, since they would not be able to participate in the choice of adoptive parent, and have no relationship whatever with the Tribe which currently has every authority to do this for them. Or they would go against their better judgment, and release to a tribe they do not know or trust to do the best for this most personal and emotionally wrenching of decisions, or we could attempt to try this in court, and spend six figures on legal costs for an unknown outcome, with the biggest issue of a child potentially being taken out of our home after 3 or 4 grueling years of court battles. (Not a likely path from our perspective, too much liability for the baby, emotional cost and financial cost).

Please take these thoughts into account as you look at this bill and especially Title III, as it relates to open adoption, since this is far more prevalent than it was in 1978 when this law was passed.

Respectfully,



Kevin Stulp

Osage Executive Department

P.O. Box 53
Pawhuska, OK 74056
(918) 287-1128

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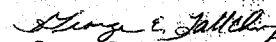
September 23, 1996

Honorable John McCain, Chairman
United States Senate
Committee on Indian Affairs
Washington, D.C. 20510-6540

Dear Senator McCain,

The Osage Nation is in support of passage S. 1962, a bill that embodies the "Tulsa" agreement amendments to the Indian Child Welfare Act of 1978 (ICWA) developed by the Indian tribes and adoptive families.

Sincerely,



George E. Tallchief
President, Osage Nation

cc: Senator Don Nickles
Senator James Inhofe

AMERICAN ACADEMY OF ADOPTION ATTORNEYS

P.O. BOX 33053
WASHINGTON, D.C. 20033-0053
(202) 632-2222

PLEASE REPLY TO:

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Samuel C. Totaro, Jr., President
Four Greenwood Square, Suite 100
Bensalem, PA 19020
(215) 244-1045
Fax (215) 244-0641

August 21, 1996

United States Senate
Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator McCain and the Honorable Members of the Senate
Committee on Indian Affairs:

This letter is to reaffirm our support of S.1962 notwithstanding the recent letter of Douglas Johnson (dated August 1, 1996) to Senator Lott asking that the bill be halted. Mr. Johnson does not explain in his letter how the bill might impact abortion, but instead quotes National Council for Adoption for the proposition that "it would be the end of voluntary adoptions of children with any hint of Indian ancestry." Presumably, NCFCA bases this assertion on the theory that agencies and attorneys would be so fearful of the criminal provisions of the amendments that they would refuse to work with birthparents of Indian ancestry. NCFCA believes that the resultant projected inability of such birthparents to find professionals willing to help them place their children for adoption, would lead to more abortions. Though this reasoning is not spelled out it is the only connection to abortion we can possibly infer.

Our continued support of the bill is not based on a desire to see more abortions. Rather, we seriously question the basic premise of Mr. Johnson's letter that S.1962 would have any impact on abortion.

The bill is intended to encourage the adoption of children of Indian ancestry by making such adoption safer for adoptive parents. The one or two percent of the children of Indian ancestry who are "Indian children," as defined by the I.C.W.A., would be identified early in the process (likewise, the remaining 98% would be promptly identified as not subject to the I.C.W.A.).

Within a short time (compared to the present situation) tribes would be required to give adoptive parents notice of a potential problem and their failure to do so would eliminate the possibility of a problem. Because the bill would make adoption safer for adoptive parents, we support it.

The criminal sanctions contained in the bill deal with fraudulent efforts to avoid the law. Reputable agencies and attorneys do not commit fraud and have nothing to fear. The fact that adoption attorneys and agencies willing to comply with the I.C.W.A. support this bill, refutes the entire thrust of NRLC and NCFCA's position.

Adoption attorneys and agencies should be more willing to work with birthparents of Indian ancestry if S.1962 passes, then under present law. Pregnant women exploring adoption will find that more families will be desirous of adopting their children than they are today, and thus, they will have more alternatives to abortion.

Please do what you can to make S.1962 the law immediately and count on our continued support.

Yours truly,

Samuel C. Totaro, Jr.
President

SCT:ejn



SQUAXIN ISLAND TRIBE

July 23, 1996

The Honorable John McCain
Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510
ATTN: Phil Baker-Shenk, General Counsel

Dear Chairman McCain:

The Squaxin Island Tribe is appreciative of the efforts of the Committee on behalf of Indian families, children and Tribal governments regarding the amendments to the Indian Child Welfare Act of 1978. However, we are greatly concerned that S.1962 will not address the intentions of the House Title III language.

We have learned of state judges imposing state court created doctrines which allows them to determine what constitutes an Indian family" This is being carried out in state courts of jurisdiction under a not so well known "Existing Indian Family Doctrine".

The Squaxin Island Tribe requests that the Committee consider inclusion of language that would alleviate this overshadowing nemesis in Indian Country once and for all. Such language could read as follows:

"The Provisions of this Title shall apply to all custody proceedings involving an Indian child as defined herein."

As always, we look to this Committee to hear our pleas for fair treatment of our Indian children and we thank you for all that you have already accomplished on this issue.

Sincerely,

David Whitener
Chairman

cc: Daniel K. Inouye, Vice-Chairman

LWS1962.ICW

SQUAXIN ISLAND TRIBE / S.E. 70 Squaxin Lane / Shelton, WA 98584 / Phone (206) 426-9781
Tribal Council (206) 426-9783 Natural Resources (206) 426-9783 Health Clinic (206) 427-9006

Sac and Fox Nation

Route 2, Box 246

Stroud, OK 74079

Principal Chief DORA S. YOUNG
Second Chief MERLE BOYD
Secretary MARY F. McCORMICK
Treasurer CANDACE HOWARD
Committee Member EDWARD CHARLES SPOON

July 23, 1996



The Honorable John McCain
Chairman
Senate Committee on Indian Affairs
SH-838 Hart Senate Office Building
Washington, DC 20510

Re: S.1962 Indian Child Welfare Act Amendments of 1996

Dear Chairman McCain:

The Sac and Fox Nation has greatly appreciated the collective efforts of the Senate Committee on Indian Affairs, Tribal Leaders and Adoption Attorneys under your leadership as Chairman in addressing the amendments to the Indian Child Welfare Act of 1978. Such cooperation among all parties is to be commended.

However, it has come to our attention that certain state courts, including Oklahoma, are applying the "existing Indian family" doctrine to avoid application of ICWA in cases involving Indian children. Too much effort has been put forth to create amendments to ICWA to fall short of resolving these type of issues. We ask that the Committee give full consideration to adding language that will bring final resolution to matters of jurisdiction whenever an Indian child is the subject of a child custody proceeding. We recommend that the language include "The provisions of this Title shall apply to all custody proceedings involving an Indian Child as defined herein."

We thank you for the continued support of our children.

Respectfully,

Dora S. Young
Principal Chief

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2021 H Street, N. W. -- Washington, D.C. 20006 4207

September 4, 1996

Senator Trent Lott
 Majority Leader, U. S. Senate
 United States Congress
 Washington, DC 20510

Dear Senator Lott,

I am writing in support of the amendment, S. 1962, to keep in effect the basic provisions of the Indian Child Welfare Act of 1978. Those who are opposed to that act for fear that Indian women will be driven to seek abortions, I believe, are without grounds. It was not the attitude of Indians to seek abortions. Indians welcomed infants. As tribal people they see infants as the promise of the future.

As this legislation stands, it provides the efficiency, speed and certainty of adoption. Delays and prolonging of the process are excluded now that the time limits are reduced. The birth-mother does not have the uncertainty that the old law mandated. It is efficient and speedy. For mothers, unfortunately forced by circumstances to give up their children for adoption, this present bill provides the surest means for adoption.

Thank you!

Sincerely yours,

T. F. Zuern
 Theodore F. Zuern, S.J.
 Legislative Director

cc: Sen. John McCain



Congressional Research Service • The Library of Congress • Washington, D.C. 20540

July 2, 1996

TO : Senate Indian Affairs Committee
 Attention: Steven Heeley

FROM : Roger Walke
 Analyst in American Indian Policy
 Government Division *RW*

SUBJECT : Indian Children in State Substitute Care in Selected States,
 1982-1993

This memorandum responds to your request for information on the number of Indian¹ children in selected states who were in state substitute care, for the years 1982 to 1993, based on data provided by the American Public Welfare Association (APWA). APWA's data come from its annual Voluntary Cooperative Information System (VCIS) survey of states, which began with the figures for 1982.

The memo first discusses definitions, some of the problems in the data, and the source. The memo then reviews the data table and its associated graphs.

DATA DEFINITIONS AND APWA SOURCES²

Substitute care generally refers to 24-hour care that occurs outside a child's own home, and includes foster family care, group homes, institutional care (but not boarding schools), and residential treatment. Different reporting agencies, however, may use somewhat different definitions. Most typically, children are placed in substitute care because they have been removed from their homes as a result of parental abuse, neglect, or, in some cases, abandonment. Less often, children are placed in substitute care because their parents have voluntarily

¹ As used in this report, "Indian" refers to American Indians and Alaska Natives (who may be Indians, Inuit (Eskimos), or Aleuts).

² This section was prepared with the assistance of Karen Spar, Specialist in Social Legislation, Education and Public Welfare Division, CRS.

relinquished their rights. (Data are not available on the number of Indian children whose parents have voluntarily relinquished them to substitute care.)

Substitute care can be provided by several different types of agencies, including state and local governmental agencies, the Bureau of Indian Affairs (BIA), Indian tribal governments, and private agencies, either Indian or non-Indian.

The data in this memo were provided to APWA by state agencies only, and hence cover only substitute care provided by state and local public agencies. Such public agencies usually gather information on the race of a child in care, but generally do not report a child's tribal membership status. State statistics on the number of Indian children served, then, refer to children classified by the public agency as *racially* Indian, whether on the basis of self-reporting (by parents, guardians, the children themselves, or others) or of classification by the caseworkers involved.³

The APWA data are incomplete. Not all states return data to the VCIS survey in any one year, and a number of states who do reply to the VCIS survey do not reply every year. Moreover, states who do send in data may not always provide a racial or ethnic breakdown of children in substitute care in the state. Hence APWA was not able to provide data on Indian children in state substitute care for all the years between 1982 and 1993; data for 1984 and 1986 are absent. Of the eight states profiled in this memo, only California had data for every year for which APWA provided data. Nationally, the number of states reporting to APWA with data on Indian children varied from 31 to 38. For APWA data on Indian children in substitute care in all states, see the appendix table at the end of this memo.

DATA ANALYSIS

Table 1 presents data on the number of Indian children in state substitute care, the number of all children in state substitute care, and the percentage of all children in state substitute care who are Indian, for all reporting states as a whole and for the following eight states: Arizona, California, Minnesota, New Mexico, North Dakota, South Dakota, Washington, and Wisconsin. The table also shows that the number of states reporting data on Indian children to APWA varied between 31 and 38 during the years 1982-1990, but fell to 20 for 1991-1993.

Graphs 1 through 6 highlight various aspects of these data. Graph 1 shows the national total of Indian children in state substitute care for reporting states.

³ The degree to which racial Indian classification coincides with tribal membership has not been determined; the Bureau of the Census does not gather data on enrolled membership in federally-recognized tribes, and the Bureau of Indian Affairs does not report the racial classification of its service population.

The years 1982-1990, for which data are more complete, suggest a slight general upward trend. Graph 2 shows a steeper upward trend in the national total number of children, of any race, in state substitute care.

Graph 3 displays the trends in the number of Indian children in state substitute care for each of the eight selected states. Some states, such as California, Minnesota, and Washington, show a marked upward trend over the period 1982-1993. Graphs 4A and 4B present the trends for each state's total number of children, of any race, in state substitute care. (Separating California data in its own graph allowed better display of other states' variations over time.) Here the upward trends appear most marked for California, Washington, and Wisconsin.

The last two graphs show Indian children as a percentage of all children in state substitute care, for all reporting states (Graph 5) and for each of the selected states (Graph 6). Graph 5 indicates a general downward trend in the percentage of Indian children, for 1982-1993 and for the better-reported years 1982-1990. Graph 6 shows that individual states were more varied in the trends they exhibited, but suggests that none of the states displayed a marked upward trend in the percentage of children in state substitute care who were Indian.

Because of the limitations of the data used, any trends that appear in the graphs should be taken only as an estimate or a possibility, not as a definitive fact. It should especially be kept in mind that the data are about Indian children whose classification was more likely to be by race than by tribal membership, and that no data are provided for Indian children in the substitute care of the BIA, tribal governments, or private organizations.

Please call me at 707-8641 if you have any questions regarding this request.

RW/jcd

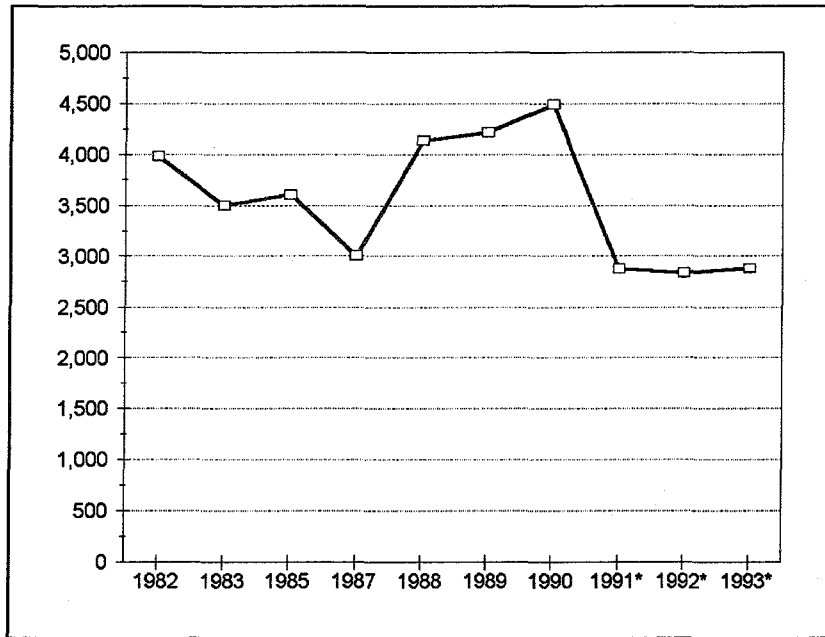
	1982	1983	1985	1987	1988	1989	1990	1991	1992	1993
Total Number of States Reporting to APWA	38	37	37	31	34	32	31	20	20	20
UNITED STATES TOTAL										
Indian Children	3,984	3,501	3,604	3,003	4,131	4,213	4,489	2,876	2,833	2,879
Total Children	199,433	173,566	210,832	212,546	258,766	243,815	306,035	233,676	249,451	257,362
Indian Percent of Total	2.00%	2.02%	1.71%	1.41%	1.60%	1.73%	1.47%	1.23%	1.14%	1.12%
Arizona										
Indian Children	83	80	127	n/a	109	127	107	n/a	n/a	n/a
Total Children	1,146	1,882	3,290	n/a	3,057	3,338	3,589	n/a	n/a	n/a
Indian Percent of Total	7.24%	4.25%	3.86%	n/a	3.57%	3.80%	2.98%	n/a	n/a	n/a
California										
Indian Children	378	410	485	589	671	753	828	870	919	954
Total Children	31,288	35,862	43,344	51,821	62,509	73,986	79,482	80,744	83,836	89,145
Indian Percent of Total	1.21%	1.14%	1.12%	1.14%	1.07%	1.02%	1.04%	1.08%	1.10%	1.07%
Minnesota										
Indian Children	622	471	503	685	690	819	809	n/a	n/a	n/a
Total Children	6,281	5,982	5,731	5,904	6,517	6,875	6,868	n/a	n/a	n/a
Indian Percent of Total	9.90%	7.87%	8.78%	11.60%	10.59%	11.91%	11.78%	n/a	n/a	n/a
New Mexico										
Indian Children	73	n/a	144	110	123	118	137	n/a	n/a	n/a
Total Children	947	n/a	2,251	2,088	1,983	1,873	1,976	n/a	n/a	n/a
Indian Percent of Total	7.71%	n/a	6.40%	5.27%	6.20%	6.03%	6.93%	n/a	n/a	n/a

	1982	1983	1985	1987	1988	1989	1990	1991	1992	1993
North Dakota										
Indian Children	226	214	n/a	185	n/a	237	n/a	248	236	261
Total Children	713	715	n/a	609	n/a	720	n/a	738	768	822
Indian Percent of Total	31.70%	29.93%	n/a	30.38%	n/a	32.92%	n/a	33.60%	30.73%	31.75%
South Dakota										
Indian Children	488	346	428	318	281	279	512	n/a	n/a	n/a
Total Children	790	546	671	461	446	456	787	n/a	n/a	n/a
Indian Percent of Total	61.77%	63.37%	63.79%	68.98%	63.00%	61.18%	65.06%	n/a	n/a	n/a
Washington										
Indian Children	497	397	521	n/a	n/a	1,108	1,292	830	948	928
Total Children	5,982	4,533	5,751	n/a	n/a	12,757	13,302	7,026	8,470	8,934
Indian Percent of Total	8.31%	8.76%	9.06%	n/a	n/a	8.69%	9.71%	11.81%	11.19%	10.39%
Wisconsin										
Indian Children	238	262	248	233	209	228	235	263	n/a	n/a
Total Children	4,058	4,841	4,757	4,826	5,108	5,700	6,316	7,201	n/a	n/a
Indian Percent of Total	5.86%	5.41%	5.21%	4.83%	4.09%	4.00%	3.72%	3.65%	n/a	n/a

NOTES: APWA = American Public Welfare Association
n/a = not available

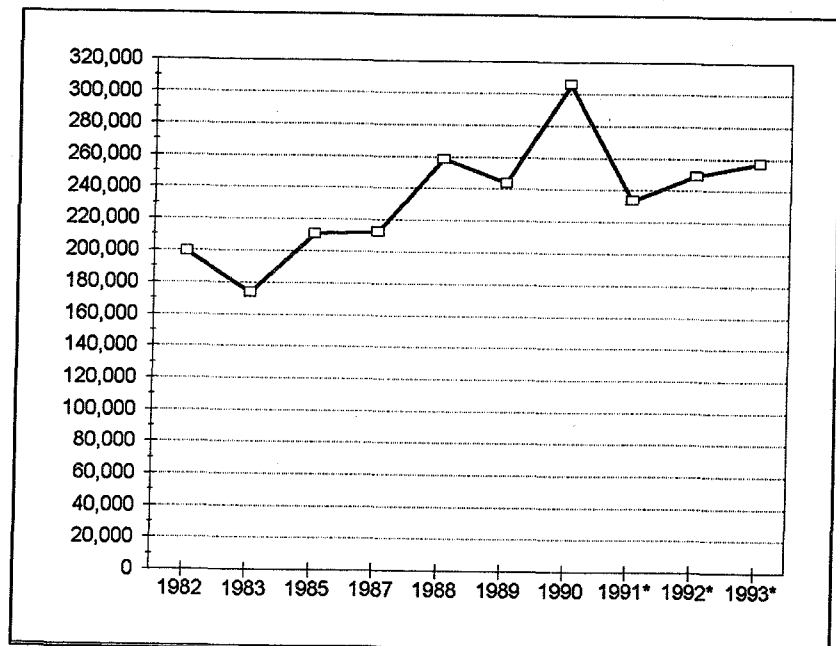
SOURCE: American Public Welfare Association, unpublished data on ethnicity, transmitted May 21, 1996.

Graph 1. Total Number of Indian Children in State Substitute Care, for All States Reporting to American Public Welfare Association (APWA), for Various Years, 1982-1993

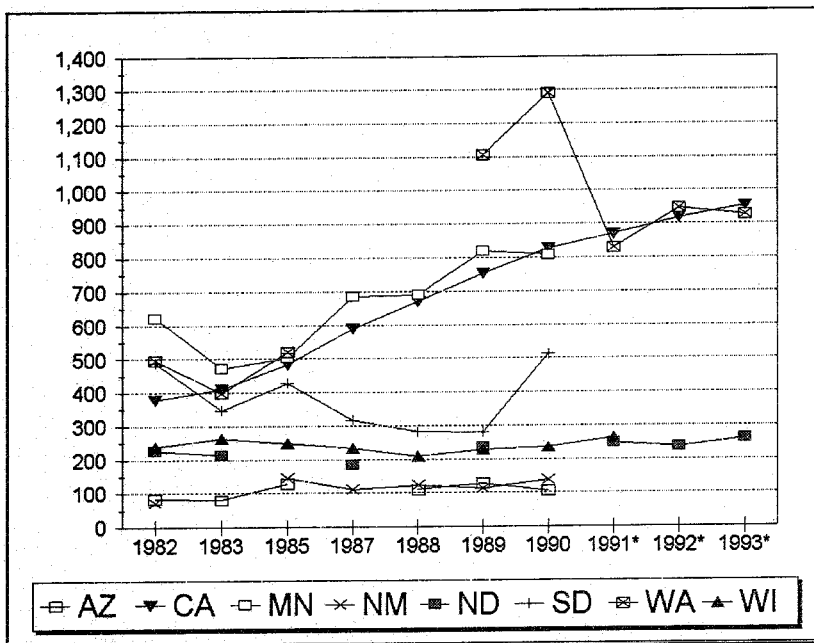


* Only 20 states reported for 1991-1993. For earlier years, 31-38 states reported. See Table 1 for details.

Graph 2. Total Number of Children of Any Race in State Substitute Care, for All States Reporting to American Public Welfare Association (APWA), for Various Years, 1982-1993

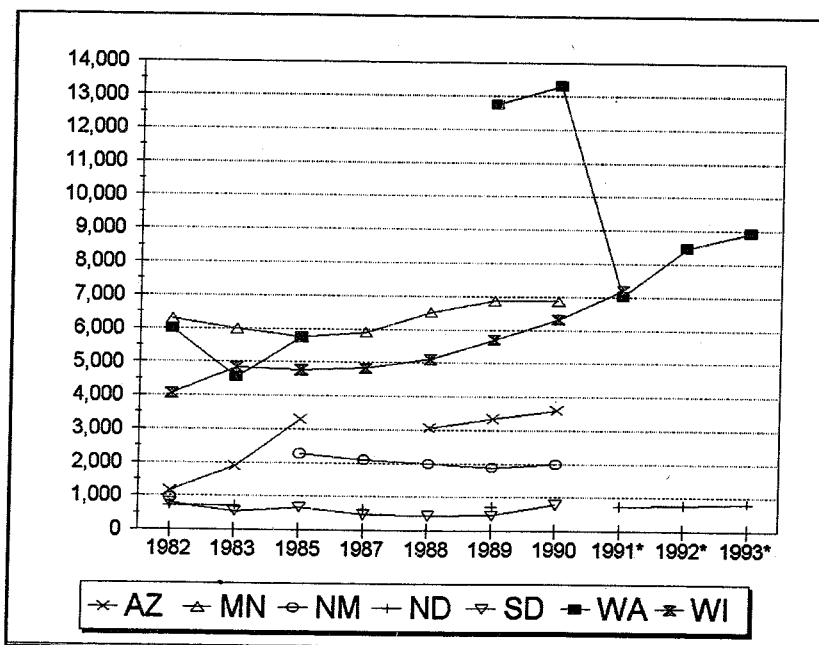


Graph 3. Number of Indian Children in State Substitute Care in Eight Selected States Reporting to American Public Welfare Association (APWA), for Various Years, 1982-1993



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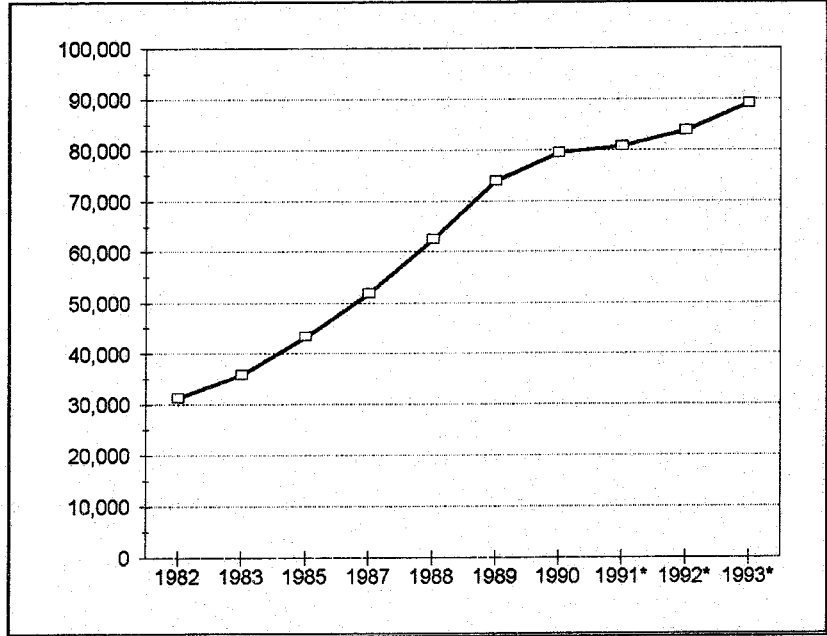
Graph 4A. Total Number of Children of Any Race in State Substitute Care, for Seven Selected States Reporting to American Public Welfare Association (APWA), for Various Years, 1982-1993



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* Only 20 states reported for 1991-1993. For earlier years, 31-38 states reported. See Table 1 for details.

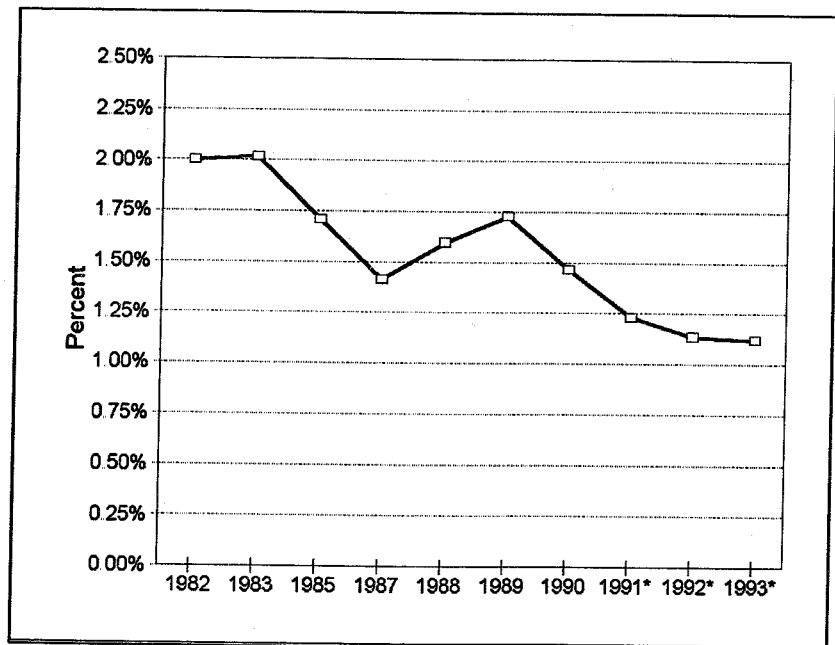
Graph 4B Total Number of Children of Any Race in State Substitute Care, for California (Report to APWA), for Various Years, 1982-1993



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* Only 20 states reported for 1991-1993. For earlier years, 31-38 states reported. See Table 1 for details.

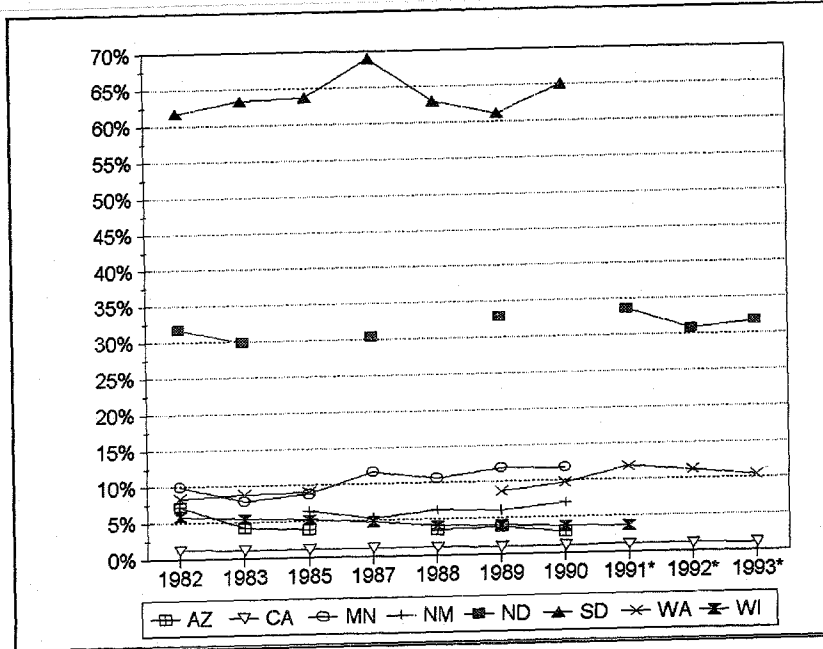
Graph 5 Indian Children as a Percentage of All Children in State Substitute Care, for All States Reporting to American Public Welfare Association (APWA), for Various Years, 1982-1993



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* Only 20 states reported for 1991-1993. For earlier years, 31-38 states reported. See Table 1 for details.

Graph 6. Indian Children as a Percentage of All Children in State Substitute Care in Eight Selected States Reporting to American Public Welfare Association (APWA), for Various Years, 1982-1993



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* Only 20 states reported for 1991-1993. For earlier years, 31-38 states reported. See Table 1 for details

	1982	1983	1985	1987	1988	1989	1990	1991	1992	1993
Alabama	1	6	6	9	14	7	8	5	11	5
Alaska	n/a	n/a	n/a	n/a	942	n/a	n/a	n/a	n/a	n/a
Arizona	83	80	127	n/a	109	127	107	n/a	n/a	n/a
Arkansas	6	n/a	5	2	n/a	3	1	7	5	2
California	378	410	485	589	671	753	828	870	919	954
Colorado	40	43	67	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Connecticut	14	9	13	13	12	10	10	n/a	n/a	n/a
Delaware	n/a	n/a	1	n/a	n/a	n/a	n/a	n/a	n/a	n/a
District of Columbia	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Florida	n/a	n/a	17	n/a	11	13	13	n/a	n/a	n/a
Georgia	11	23	14	11	12	17	19	n/a	17	11
Hawaii	0	0	1	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Idaho	n/a	n/a	n/a	45	25	22	24	28	20	22
Illinois	57	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Indiana	n/a	7	9	3	10	n/a	n/a	15	47	66
Iowa	n/a	25	n/a	n/a	66	n/a	n/a	n/a	n/a	n/a
Kansas	36	60	59	53	n/a	n/a	n/a	n/a	n/a	n/a
Kentucky	n/a	3	12	14	9	9	4	n/a	n/a	n/a
Louisiana	18	20	22	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Maine	38	32	32	n/a	33	38	38	n/a	n/a	n/a
Maryland	37	31	6	6	12	7	7	6	6	5
Massachusetts	n/a	25	24	25	18	19	24	23	15	11
Michigan	71	46	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

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Appendix Table. APWA Count of Indian Children in State Substitute Care, by State, for Various Years, 1982-1993										
	1982	1983	1985	1987	1988	1989	1990	1991	1992	1993
Minnesota	622	471	508	685	690	819	809	n/a	n/a	n/a
Mississippi	3	4	7	4	1	3	4	3	3	3
Missouri	7	12	6	12	17	19	23	17	13	20
Montana	171	165	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Nebraska	147	146	110	112	121	n/a	n/a	200	228	223
Nevada	19	10	21	26	77	74	n/a	90	63	60
New Hampshire	0	0	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
New Jersey	n/a	6	15	n/a	n/a	n/a	n/a	n/a	n/a	n/a
New Mexico	73	n/a	144	110	123	113	137	n/a	n/a	n/a
New York	0	n/a	49	31	39	n/a	73	82	74	63
North Carolina	118	121	204	146	150	161	175	171	204	223
North Dakota	226	214	n/a	185	n/a	237	n/a	248	236	261
Ohio	n/a	n/a	5	n/a	12	14	n/a	n/a	n/a	n/a
Oklahoma	257	243	212	255	339	n/a	n/a	n/a	n/a	n/a
Oregon	114	122	89	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Pennsylvania	n/a	n/a	n/a	n/a	n/a	n/a	11	n/a	n/a	n/a
Rhode Island	6	n/a	2	29	30	26	26	n/a	n/a	n/a
South Carolina	0	n/a	n/a	0	0	0	0	0	0	0
South Dakota	488	346	428	318	281	279	512	n/a	n/a	n/a
Tennessee	0	0	0	n/a	1	1	1	2	2	3
Texas	38	30	24	15	21	22	23	n/a	n/a	n/a
Utah	145	108	98	56	64	64	61	n/a	n/a	n/a
Vermont	9	10	15	10	12	9	9	9	10	9

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Appendix Table. APWA Count of Indian Children in State Substitute Care, by State, for Various Years, 1982-1993										
	1982	1983	1985	1987	1988	1989	1990	1991	1992	1993
Virginia	3	2	3	6	0	11	15	7	12	10
Washington	497	397	521	n/a	n/a	1,108	1,292	830	948	928
West Virginia	n/a	n/a	0	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Wisconsin	238	262	248	233	209	228	235	263	n/a	n/a
Wyoming	13	12	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
National Total for Indian Children for Reporting States	3,984	3,501	3,604	3,003	4,131	4,213	4,489	2,876	2,833	2,879
National Total for All Races for Reporting States	199,433	173,556	210,832	212,546	258,766	243,815	306,035	233,676	249,451	257,362
Indian Percentage of National Total for Reporting States	2.00%	2.02%	1.71%	1.41%	1.60%	1.73%	1.47%	1.23%	1.14%	1.12%
National Total for All Races Extrapolated to All States	262,000	269,000	276,000	300,000	340,000	383,000	407,000	429,000	442,000	445,000

NOTES: n/a = not available

* Figures for this year are CRS estimates and should be used with great caution. See discussion in text.

SOURCES:

Toshio Tatara, American Public Welfare Association, 810 First St., N.E., Suite 500, Washington, D.C. Unpublished data from the VCIS on children in substitute care by race/ethnicity of the children, by state, 1982-1983, 1985, 1987-1993. Transmitted May 21, 1996.

United States. Congress. House of Representatives. Committee on Ways and Means. *Overview of Entitlement Programs: 1994 Green Book. Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means.* 103d Cong., 2d Sess., Committee Print WMCP: 103-27. Washington: U.S. Govt. Print. Off., 1994, pp. 639-640.

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