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 2 6 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 consulation 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.

Oneidas bringing several hundred bags of corn to Washington's starving army at Valley Forge, after the colonists had consistently refused to aid them.

Oneida Tribe of Indians of Wisconsin

Post Office Box 365

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UGWA DEMOLUM 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 inquires 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 Milwuakee 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.

Oneidas bringing several hundred bags of corn to Washington's starving army at Valley Forge, after the colonists had consistently refused to aid them.

Oneida Tribe of Indians of Wisconsin

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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?

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.

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 Walleri, 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

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 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?

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

The Honorable John McCain
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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 Doxtator

Deborah Doxtator
Chairperson
Oneida Tribe of Indians of Wisconsin

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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 Implemention 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 unecessarily placed in non-Indian homes. As a result, many suffer great emotional and phsychological 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

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.

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 it's 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 involve 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 take place 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.

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.

§ 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.

[(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 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;

(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 childs 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;

(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 then 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

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W. Ron Allen
Jamestown S'Klallam Tribe

First Vice President
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Oneida Nation of Wisconsin

Recording Secretary
S. Diane Kelley
Cherokee Nation

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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 gaiashkibos 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.

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[1] 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.

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[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 staunch 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 --- Indian children --- and this quite literally jeopardized the future existence of Indian tribes and Indian people.

This sad reality, combined with the special trust relationship of the United States, demanded that federal legislative action be taken. The ICWA recognizes that the interests to be served by the procedural safeguards in the Act are that of the Indian child, *and* that of the Indian tribe. As the Supreme Court stated in *Mississippi Band of Choctaw Indians v. Holyfield*, [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]

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[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.

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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 resolutions [8] 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 notice [9] 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 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]

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[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.

* * *

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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.