NCAI Resolution TLS-96-007A -- Official Attachment

NCAI WORKSHOP DRAFT AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

JUNE 2, 1996

"underlined words" - additions to existing law

["words in brackets"] - deletions to existing law

25 U.S.C. § 1903(10)

NCAI Proposed language: *#5 under Summary*

"reservation" means Indian country as defined in section 1151 of Title 18, United States Code, any lands not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation, and to the extent, if any, not otherwise included in this definition, any lands located within an Alaska Native village;

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25 U.S.C. § 1911(a)

NCAI Proposed language: *#7 under Summary*

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child who resides or is domiciled within the reservation of an Indian tribe is made a ward of a tribal court or where an Indian child becomes a ward of a tribal court following a transfer of jurisdiction pursuant to subsection (b) of this section, the Indian tribe shall retain exclusive jurisdiction over any child custody proceeding involving such ward, notwithstanding any subsequent change in the residence or domicile of the child.

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25 U.S.C. § 1911(c)

NCAI Proposed language: *#2 under Summary*

(c) Except as provided in section 103(e)[25 U.S.C 1913(e)], in any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian

custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

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25 U.S.C. § 1913

NCAI Proposed language: *#8 under Summary*

§ 1913(a) CONSENTS TO FOSTER CARE, ADOPTION, TERMINATION OF PARENTAL RIGHTS - Where any parent or Indian custodian of an Indian child voluntarily consents to a foster care or adoptive placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian and that any attorney, public or private agency facilitating the voluntary termination or adoptive placement has informed the natural parents of their placement options and the applicable provisions of this Act. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

#4 under Summary

§ 1913(b) WITHDRAWAL OF CONSENT - (i) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and upon such withdrawal, the child shall be immediately returned to the parent or Indian custodian.

(ii) Except as provided in subsection (b)(iii), a consent to adoption or voluntary termination of parental rights may be revoked and the child shall be immediately returned to the parent only if no final decree of adoption has been entered and

(A) less than six months have passed from the date the Indian child's tribe received notice of the adoptive placement pursuant to § 1913(c) and (d), or

(B) the adoptive placement specified by the parent ends, or

(C) less than 30 days have passed since the commencement of the adoption proceeding.

(iii) If a consent has not been revoked within the time frames provided in subsection (b)(ii), a parent may thereafter revoke consent only under applicable State law or, upon petition of a parent or the Indian child's tribe to a court of competent jurisdiction and a finding that consent to adoption or termination of parental rights was obtained through fraud or

duress, or that notice was not provided under this section. In such case, the child shall be immediately returned to the parent and a final decree of adoption, if any, shall be vacated. No adoption which has been in effect for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

[(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.]

[(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.]

#1 under Summary

ADD § 1913(c) NOTICE TO TRIBES - Notice shall be sent by a party seeking voluntary placement of an Indian child or voluntary termination of the parental rights of a parent of an Indian child to the Indian child's tribe, by registered mail with return receipt requested, in the following circumstances:

(i) within one hundred days following any foster care placement,
(ii) within five days following a pre-adoptive or adoptive placement,
(iii) within ten days of the commencement of a termination of parental rights proceeding; and
(iv) within ten days of the commencement of an adoption proceeding.

#1 under Summary

ADD § 1913(d) CONTENT OF NOTICE - The notices required under section 1913(c) shall contain

(i) the child's name and actual or anticipated date and place of birth;
(ii) the names, maiden names, addresses and dates of birth of the Indian parents and grandparents of the child;
(iii) the names and addresses of the child's extended family members having a priority in placement under Sec. 1915, if known;
(iv) the reasons why the child may be an Indian child;

(v) the names and addresses of the parties to the state court proceeding;
(vi) the name and address of the state court in which the proceeding is pending or will be filed, and the time and date of such proceeding;
(vii) the tribal affiliation, if any, of the prospective adoptive parents;
(viii) the name and address of any social services or adoption agency involved;
(ix) the identity of any tribe in which the child or parent is a member;
(x) a statement that the tribe may have the right to intervene;
(xi) an inquiry as to whether the tribe intends to intervene or waive any right to intervene;
(xii) a statement that any right to intervene will be waived if the tribe does not respond in the manner and within the time frames required by section 1913(e).

#2 under Summary

ADD § 1913(e) INTERVENTION BY TRIBES - The Indian child's tribe shall have the right to intervene at any point in any voluntary child custody proceeding in a state court if any of the following has occurred:

(i) In the case of a termination of parental rights proceeding, the tribe has filed a notice of intent to intervene or a written objection to termination within 30 days of receiving notice of such proceeding,

(ii) In the case of an adoption proceeding, the tribe has filed a notice of intent to intervene or a written objection to the adoptive placement within 90 days of receiving notice of the adoptive placement or within 30 days of receiving notice of the voluntary adoption proceeding, whichever is later,

(iii) In any case where the tribe did not receive notice that complies with subsections (c) and (d), Provided, that a tribe shall be precluded from intervention if it gives written notice of its intent not to intervene in a specific proceeding or gives notice that neither the child or parents are members of that tribe.

#2 under Summary

ADD § 1913(f) Any action by a tribe pursuant to subsection (e) shall not
(i) affect the rights of any person having a placement preference or other right under this Act,
(ii) preclude intervention by the Indian child's tribe in the event that the proposed adoption placement is changed, or
(iii) otherwise affect the applicability of this Act.

#1 under Summary

ADD § 1913(g) No voluntary termination of parental rights or adoption proceeding under State law shall be held until at least 30 days after receipt of notice by the Indian child's tribe.

#6 under Summary

ADD § 1913(h) Any State law to the contrary notwithstanding, a court may approve, as part of an adoption decree, an agreement that the birth parents, extended family and Indian tribe of an Indian child shall have an enforceable right to visitation or continued contact with such child after the entry of a final decree of adoption. Failure to comply with the provisions of any court order regarding such continued visitation or contact shall not be grounds for setting aside a final decree of adoption.

Add 25 U.S.C. § 1924

NCAI Proposed language: *#3 under Summary*

Add § 1924 (a) In connection with any proceeding or potential proceeding involving a child who is or may be an Indian child for purposes of this Act, whoever

(1) encourages or facilitates fraudulent representations or omissions regarding whether a child or parent is Indian, or
(2) conspires to encourage or facilitate such representations or omissions, or
(3) aids or abets such representations or omissions having reason to know that such representations or omissions are being made and may have a material impact on the application of this Act

shall be fined not more than $100,000, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined not more than $250,000, or imprisoned not more than 5 years, or both.

(b) No parent of an Indian child shall be prosecuted under this section.

National Congress of American Indians

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Washington, DC 20036
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202.466.7797 *facsimile*

RESOLUTION TLS-96-007B

Title: PROTECTION OF PUBLIC LAW 280 TRIBES REGARDING AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) is the oldest and largest national organization established in 1944 and comprised of representatives of and advocates for national, regional, and local Tribal concerns; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity and preservation of cultural and natural resources are primary goals and objectives of NCAI; and

WHEREAS, Indian tribes, which are subject to Public Law 280, have experienced significant difficulties exercising tribal jurisdiction under the Indian Child Welfare Act; and

WHEREAS, these difficulties have negatively impacted their ability to protect their children, families and tribes.

NOW THEREFORE BE IT RESOLVED that the National Congress of American Indians is hereby directed to work with experts in the field of Public Law 280 to explore potential legislative proposals to remedy any negative impacts on Indian child custody proceedings resulting from Public Law 280.

NCAI Resolution TLS-96-007B

CERTIFICATION

The forgoing resolution was adopted at the 1996 Mid-Year session of the National Congress of American Indians, held at the Adam's Mark Hotel at Williams Center in Tulsa, Oklahoma, on June 3-5, 1996 with a quorum present.

W. Ron Allen, President

ATTEST:

S. Diane Kelley, Recording Secretary

Adopted by the General Assembly at the 1996 Mid-Year session held at the Adam's Mark Hotel at Williams Center in Tulsa, Oklahoma on June 3-5, 1996.

National Congress of American Indians

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Washington, DC 20036
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25 June 1996

United States Senator
Attention Legislative Director

Re: The Truth About the Indian Child Welfare Act

Dear Senator:

The Indian Child Welfare Act (ICWA) works and it works well. Despite this fact, Congresswoman Deborah Pryce has proposed amendments to the ICWA (Title III of HR 3286) that will eviscerate the act and do significant harm to Indian tribal governments and Indian children. On June 20, the Committee on Indian Affairs stripped Title III from HR 3286 and plans on crafting reasonable, stand-alone legislation that addresses the concerns of adoptive families without violating tribal sovereignty and fundamental federal Indian law and policy.

Indian tribes have developed **Alternative ICWA Amendments** which will be the subject of a Committee on Indian Affairs hearing on 26 June 1996. Both Indian Affairs Committee Chairman John McCain and House Resources Committee Chairman Don Young have stressed the need for tribal involvement in the ICWA debate and have pledged to bring a free-standing ICWA bill to a vote in Congress. The purpose of this letter and enclosures is to present the true story of the ICWA and to ask your support for the **Alternative ICWA Amendments**, which have been reviewed and endorsed by non-Indian family adoption attorneys. To aid in your decision, enclosed you will find the following documents:

1. ICWA Myth vs. ICWA Facts: Addressing Rep. Pryce's Propaganda
2. Indian Child Welfare Act Summary: How The Act Works
3. A View From the States: The Attorneys General and Governors Perspective
4. Summary of Alternative ICWA Amendments
5. Alternative ICWA Amendments (TLS-96-007A and 007B)

Thank you for your thoughtful consideration of these materials. We respectfully urge your support for the **Alternative ICWA Amendments** and your continued support of Indian tribes and Indian people across the United States.

Sincerely,

W. Ron Allen
President

ICWA Myth vs. ICWA Fact: Addressing Rep. Pryce's Propaganda

MYTH: ICWA fails to take into consideration the wishes of biological parents or the Indian child.
FACT: ICWA identifies placement preferences for Indian children and explicitly states that "(w)here appropriate the preference of the Indian child or parent *shall* be considered." (25 USC 1915(c). The act has real flexibility in that it states that placement preferences shall be followed absent "good cause to the contrary". Accompanying BIA guidelines, as well as the legislative history of the Act, indicate that the use of the term "good cause" was designed to give state courts discretion in determining the placement of an Indian child. Case law identifies several factors to be taken into consideration to establish "good cause": the best interests of the child, the wishes of the biological parents, the suitability of persons referred for placement, the child's ties to the tribe, and the child's ability to make cultural adjustments made necessary by a placement.

MYTH: Under ICWA, Indian tribes can only place Indian children with Indian families.
FACT: The Act specifically states that "in the case of a placement under subsection (a) (involving adoptions) or (b) (involving foster care or pre-adoption), if an Indian child's tribe shall establish a different order of preference...the agency or court effecting the placement shall follow such order..." 25 USC 1915(c). Indian tribes can and do place Indian children with non-Indian parents when it is in the best interests of the child. An example of such placements is the *Holyfield* case, where the tribe, after successfully assuming jurisdiction over the case, agreed to the pending adoption by non-Indian parents as in the best interest of the child --- the adoption **did** take place.

MYTH: The Act is to blame in delays in placements of Indian children.
FACT: The problems experienced are not with the Act itself, but rather with a lack of compliance with the Act. In many of the alleged ICWA "horror stories" legal mistakes or outright deceptions occurred that resulted in tragedies for everyone involved. In addition, the amendments offered by Congresswoman Pryce could result in even more litigation, thereby delaying placement of Indian children because they use a different, subjective test for determining whether the Act applies in the first instance. The proposed test is unworkable and will create a litigation explosion.

MYTH: The Pryce ICWA amendments are "minor" or "technical changes" to the Act.
FACT: The Pryce ICWA amendments represent radical changes to the ICWA by changing the legal definition of "Indian child". The amendments also place membership restrictions on tribes and would require every state that currently has custody of children in foster care to re-evaluate whether ICWA applies to those cases using the proposed subjective test.

MYTH: Every member in the Congress has an ICWA "horror story" in his or her district.
FACT: The National Indian Child Welfare Association has determined that since 1979, only 40 cases have been. This number represents 1/10 of 1% of the total number of placements and cases since the Act was implemented. The proper way to avoid problems in administering the law is first, to comply with the requirements of the law by fostering better legal and social work practices to ensure that all requirements of the ICWA are met. Many tribes across the nation have made significant strides and efforts in working with local social service agencies and in developing policies that ensure compliance with the ICWA.

Indian Child Welfare Act Summary: How The Act Works

Purpose of the Act: To protect the integrity of Indian families by creating a procedural framework for tribes to participate in custody proceedings involving Indian children.

When The Act Is Applicable: The Act is applicable in voluntary adoptions, and child abuse / neglect proceedings initiated by the State, when either parent is a tribal member and the child is a tribal member or is eligible for tribal membership.

The Act Triggers Certain Events: The Act establishes minimum standards for removal of Indian children, and placement preferences for Indian children in foster care and adoptive homes. The Act has several procedural mechanisms that allow a tribe to participate in the proceeding.

A. Intervention: The Act allows a tribe to intervene in the state court proceeding and participate as a party.

B. Transfer: The Act allows a tribe or a biological parent to request a transfer to tribal court, but either parent may block the transfer by objecting . Also, state courts decide whether or not transfer is appropriate and can decline to transfer for "good cause". State courts have frequently declined to transfer when the transfer petition is received late in the proceeding, or when the tribal forum would be inconvenient for the parties.

C. Preference: The Act establishes preferences for placement of Indian children with extended family, other members of the child's tribe and other Indian families. However, the Act contains a "good cause" exception to these preferences. The accompanying BIA guidelines identify situations that establish good cause not to follow the preferences, including the wishes of the biological parents or the child; the physical or emotional needs of the child; or the unavailability of suitable families meeting the preference criteria after a diligent search.

Impact of the Pryce Proposals: The proposed amendments would make the determination of when ICWA applies much more subjective. The new test would require state courts to have an evidentiary hearing to determine whether either parent has "significant social, cultural, or political affiliation" with the Indian tribe of which either parent is a member at the time of the custody hearing. It also creates more opportunity for adoption agencies and private attorneys to circumvent ICWA by focusing the inquiry solely on the biological parents at that particular time without considering extended family or the relationship either parent may have had with the tribe in the past. The proposed amendments would also apply to all cases "in which a final decree has not bee entered." As a result of this, every state that has children in foster care would have to re-evaluate whether the ICWA applies using the new subjective standard, thereby delaying the permanent placement of children.

* * *

Christine O. Gregoire
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

May 31, 1996

The Honorable Slade Gorton
U.S. Senator
730 Hart Senate Office Building
Washington, DC 20510

Re: Proposed Indian Child Welfare Act Amendments

Dear Senator Gorton:

As Attorney General for the State of Washington, I have given much attention and priority to children's and family issues. It has recently come to my attention that the House of Representatives has passed legislation which significantly amends the Indian Child Welfare Act (ICWA).

I am concerned that the proposed amendments to ICWA contained in Title III of HR 3286, the Adoption Promotion and Stability Act of 1996, will add uncertainty to the applicability of the ICWA. This uncertainty will likely result in a delay in the permanent placement of the children involved. This clearly is not in the children's best interest.

Under the current law, ICWA applies if (1) a child is a member of a tribe or (2) eligible for membership in a tribe and the biological child of a member. Membership is determined by the tribe. If ICWA applies, the placement preferences in the Act are followed.

The proposed amendments add the requirements that one of the parents of the child be of tribal descent and one of the parents have significant social, cultural, or political affiliation with the tribe. Who would make these determinations - the tribes, the social workers, or the courts? How far back is a parent's ancestry searched? What standards are applied to determine if there is adequate affiliation? These uncertainties would lead to increased litigation on whether or not ICWA applies in a child's case. In the meantime, the permanent placement of the child would be delayed.

The policy stated in ICWA is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. *25 USC 1902*. The amendments do not further this policy. ICWA was enacted in 1978 after much careful deliberation, with extensive input from tribes and others. It should not be amended without an opportunity for all affected to study the proposed changes and to provide input.

It is our experience that problems involving the permanent placement of Indian children are most likely prevented through complete and timely compliance with ICWA. The key is early determination of whether a child is an Indian child under the Act. That can be accomplished quickly and finally by the tribe if it is given proper and timely information. The proposed amendments would make such a determination more difficult and uncertain.

I urge you to remove the ICWA amendments from H.R. 3286 when it comes before the Senate. Thank you for your attention to this important matter.

Sincerely,

Chris

CHRISTINE O. GREGOIRE
Attorney General

STATE OF NEVADA
EXECUTIVE CHAMBER
Capitol Complex
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BOB MILLER
Governor

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May 8, 1996

The Honorable Newt Gingrich
Speaker
The House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I am writing in opposition to H.R. 3286, which is designed to amend the Indian Child Welfare Act (ICWA). This legislation strives to redefine which off-reservation child custody cases should be considered under the Indian Child Welfare Act. As the Governor of a state that has taken several proactive steps to guarantee efficient enforcement of the ICWA, I feel compelled to express my opposition to this legislation.

As you know, the ICWA grants tribal governments the option to hear Indian child custody cases for families they recognize as having a relationship to the tribe but do not live on the tribe. It is the intent of the ICWA to give Indian children every opportunity to maintain their cultural background and give them the ability to grow up as Indian people. Trying these cases in Indian courts is a significant measure for ensuring these goals.

H.R. 3286 changes the definition of off-reservation families who may be able to have their case heard by a tribal government. Under this amendment, one of the parents of the child must be of "Indian descent." In addition, the amendment requires a subjective determination as to whether the parent of the child has "significant social, cultural, or political affiliation with the Indian tribe." It would no longer be up to the Indian family and the tribe to determine if a bona fide relationship between the two exists. Instead, state and private custody workers would have to interpret the guidelines outlined in H.R. 3286 to determine if the case could be heard in a tribal court. This interpretation will undoubtedly be challenged in court. Rather than decreasing litigation under the ICWA, this amendment will likely increase litigation.

When fully complied with, the ICWA effectively places Indian children with caring families. The State of Nevada has worked hard to ensure that the ICWA is complied with, and proper compliance has

successfully placed indian children in proper homes. I do not support he passage of H.R. 3286, which will complicate the placement and adoption of indian children.

Thank you for your consideration.

Sincerely,

Bob Miller

BOB MILLER
Governor

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FRANKIE SUE DEL PAPA
Attorney General

BROOKE A. NIELSEN
Assistant Attorney General

May 6, 1996

VIA FACSIMILE
AND U.S. MAIL

The Honorable Newt Gingrich
Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

One of my major priorities as the chief law enforcement officer for the State of Nevada has been in the area of family law and child protection. It has recently come to my attention there is an effort to amend the Indian Child Welfare Act (ICWA) which will significantly alter the definitions and likely result in increased litigation for the State. See Title III of H.R. 3286.

It should be noted that currently litigation under ICWA is few and far between. Litigation usually occurs when there is a failure to comply with the Act rather than over the meaning of the Act. The proposed amendment, however, changes ICWA from an objective standard for qualification under the Act to a subjective standard. The only result can be increased litigation.

Under the current law, ICWA applies to those children who are eligible for tribal membership. Eligibility for tribal membership may vary from tribe to tribe, but this determination can be made objectively and relatively easily through contact with the tribe and through the assistance of the Bureau of Indian Affairs.

The amendment will throw uncertainty into the law. The amendment requires that one of the parents of the child be of "Indian descent." This could be much more far-reaching than a requirement of eligibility for tribal membership. How far back in genealogy must one go to make this determination?

In addition, the amendment requires a subjective determination as to whether the parent of the child has "significant social, cultural, or political affiliation with the Indian

tribe." It is unclear who would make this determination. If the determination is made by a social worker, who is the likely first contact with an Indian child, this determination is likely to result in litigation with the tribe. If the determination is to be made by the court, an evidentiary hearing would have to be held. Rather than decreasing litigation under ICWA, this amendment is much more likely to increase such litigation.

In Nevada, we have found that when state and private agencies and officials fully understand and comply with the provisions of the ICWA, there has been no need for litigation. Through their cooperative efforts, state and tribal officials are able to effectively place Indian children with loving families without harming Indian families or causing any hardship to prospective adoptive parents. Litigation occurs when ICWA is ignored or attempts are made to circumvent it. I hope that the positive results we have experienced in Nevada through the vigilant enforcement of ICWA will serve as a guide to those who wish to promote adoptions that benefit Indian children and their families.

Thank you for your attention to this important matter. Should you have any additional questions, please do not hesitate to contact me or Chief Deputy Attorney General Nancy Angres at (702) 687-7335.

Cordially,

Frankie Sue Del Papa

FRANKIE SUE DEL PAPA
Attorney General

FSDP/rc
cc: Senator Harry Reid
Senator Richard Bryan
Congresswoman Barbara Vucanovich
Congressman John Ensign
Congressman Dick Armey
Congressman Richard Gephardt
Congressman David Bonior
Congressman George Miller
Congressman Don Young
Nevada Governor Bob Miller

SUMMARY OF ALTERNATIVE ICWA AMENDMENTS

There are ways to address the concerns expressed by the sponsors of the House bill without violating the original intent of Congress in enacting the ICWA. The National Congress of American Indians met recently to address these concerns and drafted proposed legislation that will effectively place requirements on all parties in voluntary proceedings.

These alternative amendments signify the willingness of Indian tribes to address the specific concerns of those who feel that ICWA does not work. But more importantly, the amendments meaningfully address the concerns raised about ICWA. The proper way to effectively handle this issue is to propose amendments that will actually provide more security for prospective adoptive parents and still allow for meaningful praticipation of Indian tribes where it is appropriate.

What follows is a summary of the tribal proposals with an explanation of what issues they address.

1. NOTICE TO INDIAN TRIBES FOR VOLUNTARY PROCEEDINGS

Explanation. This provision would extend the notice provision to voluntary as well as involuntary proceedings. It also clarifies what should be included in the notice so that a tribe can make an informed decision as to whether the child is a member or eligible for membership.

Rationale. Currently, notice is mandatory for involuntary cases only. One of the problems with voluntary cases is that the tribe would move to intervene after the child had been placed in adoptive or pre-adoptive home because it received late notice. Extending the notice provisions would allow potential adoptive parents to know immediately whether an extended family member and / or the tribe has an interest in the child. It would also expand the pool of potential adoptive parents because frequently the tribe knows of adoptive or foster families that the state and / or private adoption agencies are not aware of. Finally, expanded notice provisions combined with a deadline for intervention go a long way in addressing concerns about certainty of intervention.

2. TIME LINES FOR TRIBAL INTERVENTION

Explanation. This provision would institute a deadline for when a tribe could intervene in a voluntary proceeding. The time would start running from the time of notice of the proceeding. If a tribe did not intervene within the time period, then it could not intervene in the proceeding.

Rationale. One of the criticisms of ICWA is that the tribe was intervening in cases after the child had been placed for adoption. Usually the reason for the delay in intrevention in voluntary cases is the lack of notice to the tribe. By extending the notice requirement and placing a deadline on tribal intervention, all parties will have a more definite understanding early in placement cases.

3. CRIMINAL SANCTIONS

Explanation. This provision imposes criminal sanctions on attorneys or adoption agencies that knowingly violate the Act by encouraging fraudulent misrepresentations or ommissions.

Rationale. This amendment will help deter attorneys and adoption agencies from counseling the deliberate evasion of ICWA. Many problem cases that have prompted the legislation in the House began with knowing violations of the Act. This amendment directly addresses the problem.

4. WITHDRAWAL OF CONSENT

Explanation. This provision places a time limit for when a parent can withdraw consent to a foster care placement or adoption. Currently, a parent can withdraw consent to an adoiption at any point up until the adoption is finalized. This change would place an additional requirement that the child be in the adoptive placement for less than 6 months or less than 30 days has passed since the commencment of the adoption proceeding.

Rationale. There is a perception that many of the problem cases began when the biological parents withdrew consent to the adoption under the ICWA. It is important to note that the issue of withdrawal of consent occurs in non-Indian adoptions as well as Indian adoptions, but this amendment will provide more clarity when an Indian parent can withdrawal consent to adoptions.

5. APPLICATION OF ICWA IN ALASKA

Explanation. This provision would clarify that Alaska Native villages are included in the definition of "reservation" under the Act.

6. OPEN ADOPTIONS

Explanation. This provision allows state courts to approve open adoptions where state law prohibits them.

Rationale. Some states prohibit a court in an adoption decree from allowing the biological parents to maintain contact with the child after an adoption is finalized --- even if all the parties agree. This provision would simply leave this option open, even if state law prohibits it.

7. WARD OF TRIBAL COURT

Explanation. This provision clarified that the tribe shall retain exclusive jurisdiction over children who become wards of the tribal court following a transfer of jurisdiction from state court to tribal court.

8. DUTY TO INFORM OF RIGHTS UNDER ICWA

Explanation. This amendment imposes a duty on attoneys and public and private agencies to inform Indian parents of their rights under ICWA.

Rationale. Although the number of fiercely litigated ICWA cases is low, many of those cases began because Indian parents were not informed of their rights under the ICWA at the beginning of the proceeding. This change would allow parties to be aware of whether ICWA applies in the beginning of the case so that all appropriate parties can provide input on the initial placement decision.

9. TRIBAL MEMBERSHIP CERTIFICATION

Explanation. This provision requires that any motion to intervene in a state court proceeding be accompanied by a tribal certification detailing the child's membership or eligibility for membership pursuant to tribal law or custom.

Rationale. This amendment directly responds to the criticism that the determination of whether a child is eligible for membership is "arbitrary". The certification would also explain the child's relationship to the tribe.

National Congress of American Indians

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15 July 1996

Honorable John McCain
Chairman - Committee on Indian Affairs
United States Senate - 838 SHOB
Washington, D.C. 20510

Dear Chairman McCain:

I am writing in follow-up to my letter of 11 July regarding amendments to the Indian Child Welfare Act (ICWA). This letter addresses question 10 regarding the experience of the Jamestown S'Klallam Tribe in handling ICWA matters.

Since 1991, my tribe has operated a comprehensive Indian Child Welfare program by utilizing funding identified under ICWA and included as part of the tribe's self-governance Annual Funding Agreement. The flexibility provided under self-governance has allowed the tribe to design a program which better addresses and serves the needs if Indian children in our service area. Child welfare activities are provided as part of the tribe's overall "Family Services Program" under the Social Services Department. Ongoing support services include counseling, intervention, family reconciliation, mediation, legal advocacy, and referral services. The tribe employs one full-time Child Welfare Assistant who currently handles a caseload of approximately 56 families on a quarterly basis. Additionally, other support services provided through the tribe's child welfare program include coordination and shared management with the Department of Social and Health Services, Division of Children and Family Services, and Office of Support Enhancement for cases involving Native American families in Washington State.

The Social Services Department remains one of the fastest growing of the tribe. Existing staff have been overwhelmed in attempting to provide all the diverse areas of services needed by tribal members and other Indian people within our service area. By utilizing the flexibility provided under self-governance and by coordinating funding with other federal and state resources, the tribe has successfully designed an effective child welfare program as part of a holistic approach towards meeting the overall health, safety, and welfare needs of tribal membership.

Sincerely,

W. Ron Allen

W. Ron Allen
President

National Congress of American Indians

Executive Committee

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W. Ron Allen
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11 July 1996

HAND DELIVERED
Honorable John McCain
Chairman - Committee on Indian Affairs
United States Senate - 838 SHOB
Washington, D.C. 20510

Dear Chairman McCain:

Thank you for your letter of 27 June regarding amendments to the Indian Child Welfare Act (ICWA). On behalf of the National Congress of American Indians (NCAI) I am pleased to submit the following answers to the questions raised in that letter.

Q.1. In your view, is the compromise the product of good faith efforts on the part of the adoption community?

A.1. In May, 1995, the House Native American and Insular Affairs Subcommittee held a hearing on HR 1448, proposing amendments to the Indian Child Welfare Act. In the wake of the hearing informal discussions regarding ICWA were held between tribal representatives and members of the adoption community. Many in the tribal community were skeptical of the process and doubtful that any initiative involving the adoption community would protect the interests of Indian children and Indian tribes. Nonetheless, the suggestions borne of this and other efforts were considered and debated by tribal representatives in Tulsa, Oklahoma, in June, 1996. It is the considered opinion of Indian tribes across the nation that the "compromise" reflects good faith efforts by the adoption community to remedy what it views as inefficiencies with the act, and simultaneously to give consideration to the concerns of Indian parents and tribal governments.

Q.2. In what ways would the compromise advance the goals of certainty, speed, and stability in adoptions involving Indian children?

A.2. The recurring concern expressed by the adoption community centers on a perceived fundamental unfairness in tribal ICWA interventions. One of the current problems is that by not requiring notice in voluntary proceedings, Indian tribes may invoke their right to intervene at a date considered late or untimely by the adoption agency, state authority, and / or the non-Indian adoptive family. The Tulsa Amendments would provide needed certainty by including timely and substantive notice to tribes in voluntary proceedings. This notice will enable a tribe to make reasoned decision regarding its right to intervene in the proceeding. In addition,

the Tulsa Amendments provide rather strict time lines for tribal intervention that set some parameters for tribal action beyond which intervention will not be permitted except in extraordinary cases. If a tribe, armed with the descriptive notice mentioned above, chooses not to intervene within this time period, then it is precluded from doing so at a later date. This limitation combined with the notice provision will go a long way in making available a clear, more definitive framework of the rights and obligations of all parties to an ICWA-related adoption.

Q.3. How would the compromise amendments encourage timely involvement by an interested tribe and prevent tribal intervention late in a child placement arrangement?

A.3. As I indicated in response to question 2, the goals of certainty and stability are served by the notice requirement, the limitation on tribal intervention, and the spirit of the Tulsa Amendments which encourages full and timely disclosure of all pertinent information so that enlightened decisions can be made with regard to the best interests of Indian children.

Q.4. Other witnesses today have expressed concern about the "retroactive application of ICWA". How would the compromise proposal address this issue?

A.4. There has been confusion generated about the so-called "retroactivity problem" of ICWA in general. "Retroactivity" is a pejorative term and has a largely negative connotation. Those that have, frankly, misused the term retroactivity are in reality concerned with what they perceive to be "unfair" or "late" interventions by Indian tribes in adoption and foster care proceedings that are already progressing or, more frequently, already completed. In those instances when a tribe does intervene "late" under current law, the factor most often responsible is the lack of notice and / or fraudulent adoption practices by adoption professionals undertaken in an attempt to circumvent the requirements of ICWA to "expedite" the case. Most often these ill-advised attempts to expedite the case actually leads to protracted litigation and needless pain for all parties involved. The Tulsa Amendments recognize that by not requiring notice to tribes in voluntary proceedings, for example, there is a greater probability that a given tribe will at some point choose to invoke its rights under ICWA and intervene in the matter. Under the amendments, the degree to which intervention is "certain" is increased.

Q.5. In your testimony you (page 5) indicate that the compromise amendments should be "taken together". Does this mean that each of the provisions are essential to hold the compromise together?

A.5. In my testimony I stated that "(it) is anticipated that, taken together, the Tulsa Amendments will significantly strengthen the Act and minimize the 'retroactively applied' situations to those involving fraudulent practices by adoption attorneys." In Tulsa, the tribes met to discuss tribal concerns, as well as areas of concern expressed by the adoption community. The ICWA provides a complex series of procedural requirements that is incumbent on all parties to an adoption involving Indian children. The act cannot be departmentalized --- it is a legally-mandated process rather than a legally mandated result. To paraphrase, the Tulsa document as a whole is better

than its component parts. That is, each of the amendments, taken alone, would probably serve to enhance the Act, but taken together buttress and strengthen each and every key facet of the Act. By the same token, while discreet, technical changes can be made to the Tulsa Amendments, the weaknesses of the act have been addressed. The essence of the document and the intent of the tribes should be preserved in whatever final version is introduced in the Congress.

Q.6. Why do you believe that the tribal certification of membership requirement will allay the concerns of those who charge that Indian tribes readily confer tribal membership on people who simply are not very connected to the Indian community?

A.6. The Tulsa Amendments require that after receiving notice, an Indian tribe has a time certain within which to alert the party seeking placement that it has an interest in the placement and that it may intervene to protect that interest. As part of the notice the tribe is required to provide, a tribal certification of membership made *pursuant to tribal law and custom* is mandated. The determinations will remain with the tribe, pursuant to criteria determined by the tribe. At the same time, the certification serves to provide the party seeking placement with a formal document containing information on the child's membership or eligibility for membership pursuant to tribal law and custom. Such certification will bolster the certainty provided by the Tulsa Amendments in general and serves to demonstrate that membership determinations are not made arbitrarily or without objective basis. I am not certain that tribal certification of membership will allay these individuals, but I am sure that tribal certification does satisfy their stated concerns regarding an up-front, and timely notice by the tribe that a given child is or may be Indian and that the tribe will or will not intervene in the pertinent proceeding.

Q.7 Despite our best efforts, Federal Indian spending is being reduced at the same time that the demand for services on the reservations increasing. In your view, do these factors encourage Indian tribes to loosen or tighten their tribal membership criteria?

A.7. Membership criteria is not a mechanism tribes use to increase or decrease the impact of federal appropriations. Indian tribes, as nations, have differing standards for membership and I dare say that those standards *do not* include a cost-benefit analysis as to whether any given tribe will be better or worse off by manipulating its membership criteria. As you know, there are many factors determining membership criteria including heritage, religion, culture, kinship, and a host of others. The availability of federal appropriations is assuredly not one of those factors.

Q.8. You say in your testimony (page 3) that ICWA "has worked well". In what ways has ICWA worked for the best interests of Indian children?

A.8. The ICWA *has* worked well when we look at the severe problems the act was intended to remedy. The history of pre-ICWA days has been discussed many times in recent months, but no discussion can fully relay the pain and injury done to Indian children, Indian families, and Indian tribes in the days before the enactment of ICWA. Before 1978 Indian tribes were hemorrhaging our most vital resource, our children, and since then the unwarranted removal of Indian children

has been stanched largely by the requirements contained in the act. The intent of Congress in enacting the ICWA was to provide fundamental procedural guarantees and requirements that had to be complied with before an Indian child could be removed. One of those requirements permits an Indian tribe to intervene in certain instances to safeguard the interests of the child and the family.

Make no mistake, the best interests of Indian children remain the focus of the act. The intent of the Congress was to allow a deliberate, reasoned adoption and foster care procedure to afford Indian tribes the right to intervene to protect these vital interests. It should also not be lost on anyone that the Congress saw fit to enact the *Indian Child* Welfare Act, *not* the "Adoptive Families Welfare Act", *or* the "State Adoption Agencies Welfare Act" The act was intended to allow tribes to intervene to guard against unfettered and unwarranted removal of children. The Congress wisely recognized that in so doing, the tribe was protecting the best interests of Indian children, *and* the continued survival of the tribe itself. Seen in this light the act has worked well.

Q.9. How does current law balance the best interests of Indian children and the interests of Indian families and tribes?

A.9. The ICWA strives to protect the best interests of the Indian child and simultaneously preserve the rights of Indian families and tribes to ensure their interests are also served. Contrary to the assertions of some, the ICWA does not provide an Indian tribe with the ability to "block" any given adoption or proceeding. Indeed, the act specifically provides that the preference given to place the Indian child with an Indian family can be set aside if it would be in the best interests of the child. This scenario was played out in the Supreme Court case of *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1988), where the court stated that the protection of the tribal interest is at "the core of ICWA", which recognizes that the tribe has an interest in the child which is distinct but on a parity with that of the parents. Nonetheless, the practical result of *Holyfield* was the placement of the Indian child with non-Indian adoptive parents precisely because it would be in the best interests of that child.

Q.10. I know you are the elected chairman of a tribe with very few members. How does your tribe handle ICWA cases?

A.10. To smaller tribes the ICWA issue is particularly pertinent and critical. In order to provide a thorough answer to this question, I would like to submit it in the near term under separate cover.

Q.11. What is your experience with how the State of Washington has implemented the ICWA? How do you feel this could be improved?

A.11. The State of Washington has implemented a progressive ICWA policy and has reduced that policy to writing. Recognizing that the interests sought to be protected by the ICWA are best served by strict adherence to the requirements of the act, the State has been very cooperative and has worked to ensure that tribes and tribal courts be afforded their rights under the law.

5

Q.12. I note that the State Attorney General from Washington has provided a letter to the Committee expressing opposition to Title III of HR 3286. In your experience, would the State courts of Washington be properly equipped to make determinations of tribal membership in the Jamestown S'Klallam tribe? Would the State courts of Washington want the responsibility for these types of determinations?

A.12. In my experience state courts are rarely, if ever, "properly equipped" to make enlightened decisions on Indian issues. The institutional mandate and bias of state courts precludes them from rendering decisions that take adequate consideration of tribal factors and the many factors that imbue federal law and policy with regard to Indian tribes and Indian people. The prevention of depredations against Indians and Indian lands, and indeed the unattractiveness of having state-by-state determinations of Indian policy led the United States to deal with Indian tribes on the federal, government-to-government basis that continues to the current era --- at least theoretically.

As you note, the Attorney General for Washington State did go on record as opposing Title III to HR 3286 noting that it would "add uncertainty to the applicability of the ICWA...", and result in "...delay in the placement of the children involved..." Attorney General Gregoire also states that determinations regarding tribal affiliation are not likely to be made with any certainty resulting in increased litigation. I would add that Governor Gary Johnson of New Mexico, Governor Bob Miller of Nevada, and Attorney General Frankie Sue Papa of Nevada have all weighed in against Title III for the very reasons you suggest in your question. As these officials state, if given the opportunity, state courts would prove ill-equipped to make these types of determinations under the ICWA. I am also equally sure that these same courts would probably not want the added burdens of Title III-mandated tribal membership determinations.

Thank you for the opportunity to appear before you on 26 June, and this chance to flesh out my answers to the Committee regarding this mot important issue. Please contact me or JoAnn K. Chase at (202) 466-7767 if you have any further questions.

Sincerely,

W. Ron Allen

W. Ron Allen
President

Jane A. Gorman
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June 20, 1996

United States Senate Committee on Indian Affairs
Washington, D.C. 20510

Re: Proposed Amendments to the ICWA
Hearing Date: June 26, 1996

Honorable Senators:

Thank you for your invitation to speak before the Senate Committee on Indian Affairs regarding the Indian Child Welfare Act. On behalf of the American Academy of Adoption Attorneys, the Academy of California Adoption Lawyers, and on my own behalf as an adoption litigator and advocate, I urge your approval of the NCAI draft of proposed amendments to the Indian Child Welfare Act if four technical changes, outlined below, are made to the language.

I am the attorney for Ohio adoptive parents Jim and Colette Rost, whose case prompted the flurry of proposed amendments to the ICWA which began last year and is continuing to this day. Let me begin my written testimony by making it clear that both adoption organizations I represent continue to be supportive of the Pryce bill, Title III of the Adoption Reform Act, but also support the compromise amendments now before this committee. These proposed amendments are not inconsistent with the Pryce bill, but would also stand alone as a significant improvement to the Act.

I am a California attorney, and my practice is solely adoption-related litigation. Some of my cases involve ICWA issues, and I have represented birth parents and adoptive parents in dozens of cases which have actually gone to trial. The lack of clarity in the Act, particularly the absence of notice requirements in voluntary placements coupled with the tribe's right of intervention in such cases, have caused placements to be disrupted when the children are several months to several years old, and has caused my clients -- and more importantly the children involved -- great distress and uncertainty.

My colleague Marc Gradstein and I have been working for more than a year with representatives of the Native American community in order to reach some sort of consensus on amendments which would give the act greater clarity. The process began in May of last

Jane A. Gorman
attorney at law

year when we testified in support of H.R. 1448 before the House Subcommittee on Native American and Insular Affairs. One of the testifying attorneys for the Native American community, Jack Trope, called the committee's attention to the fact that H.R. 1448 had been written and introduced with no input from the very people it would affect. He was correct, and more importantly he was right.

We spoke with him after the hearing, and began the process which has brought us here today. After a year of meetings, conference calls and faxes, the joint group created a final draft of "compromise language" at a several-day meeting in Phoenix earlier this year.

At the NCAI meeting this month, a substantial portion of our agreed-upon language was stricken, but a core agreement remains: If the NCAI draft were enacted into law, adoption attorneys and agencies would be required to give tribes notice of adoptive placements, and tribes in turn would be required to exercise their rights or lose them. Further, adoptive parents would be able to rely on a tribe's waiver of their right to intervene and could proceed with an adoption with the knowledge that it was secure from disruption by a tribe. Finally, tribes and adoptive parents could agree to leave children in adoptive placements with enforceable agreements for visitation between the child and other family or tribal members. I will address each of these areas separately.

I. Significance of the notice/cutoff portion of the proposed amendments to the tribes:

The importance of requiring tribes to be given notice of placement for adoption of children with Native American heritage cannot be overstated. The Act as it now stands allows, and perhaps even encourages, adoptive parents to keep secret the ethnicity and culture of the children they are adopting. When notice is not given, the tribes are deprived of the right to enforce the placement preferences of the Act.

II. Significance of the notice/cutoff portion of the proposed amendments to the adoption community:

As the Act now reads, no notice is required to tribes in voluntary placements. Yet tribes are allowed to intervene in adoption proceedings, and quite possibly to bring them to a halt, at any point in the adoption process. Further, if a parent, a child, or a tribe can show a violation of sections 1911, 1912 or 1913 of the Act, they can petition to set aside the action the court has taken at any time during the child's minority.

By requiring notice to tribes, and providing criminal sanctions against those adoption attorneys and agencies who wilfully disregard this requirement, notice will be given in most cases. And where notice is given, the tribe's right to disrupt an adoption

Jane A. Gorman
attorney at law

ends as soon as 30 days after the child's birth. Adoptive parents can also rely on a tribe's written waiver of its right to intervene. Under current law, even if a tribe is notified of a pending adoption, and writes back to the adoption attorney or agency that it does not want to intervene, the tribe can change its mind at any point during the adoption process.

III. Significance of the "open adoption" provision in the proposed amendments to both the adoption and Native American communities:

One of the proposed amendments would make legally enforceable an agreement between a tribe and an adoptive family that the child would be allowed to visit with members of his biological family and tribe.

Often a tribe does not want to disrupt an adoptive placement of one of its children, but does wish to maintain contact with that child in order to let the child become connected with his heritage. Such an agreement benefits the child immensely, as he is able to remain in his stable placement while having ready-made access to other children and adults who are "like" him ethnically. The benefit to adoptive parents is obvious: They stand to keep a child they want to adopt.

If this amendment is enacted, an agreement between a tribe and adoptive parents will be legally enforceable, thus making such agreements more palatable to tribes. Although informal arrangements for post-adoption contact can be made without legal sanction, if adoptive parents decide to ignore the agreement, the tribe has no remedy and is hence less likely to enter into an agreement.

Interestingly, this provision, if enacted, may provide the vehicle by which the Rost case can be settled.

Necessary changes to the NCAI draft:

In order for the adoption community to support the NCAI draft legislation, four technical changes need to be made. I believe that each of these problems is a drafting error, not a deliberate change in the agreed-upon language, but the changes are nevertheless necessary.

I. 1913(b)(ii)(C) and 1913(b)(iii) should be replaced as follows:

1913(b)(ii)(C): "less than thirty days have passed since the parent received notice of the commencement of the adoption proceeding."

1913(b)(iii): "If a consent has not been revoked within the time frame provided in subsection (b)(iii), a parent may

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thereafter revoke consent only pursuant to applicable State law and such relief as may be provided thereunder or, upon petition of a parent to a court of competent jurisdiction and a finding that consent to adoption or termination of parental rights was obtained through fraud or duress. Upon a finding **that such consent was obtained through fraud or duress, the** child shall be immediately returned to the parent and a final decree of adoption, if any, shall be vacated. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law."

This change is necessary so as to preclude a final adoption decree being attacked for failure to comply with the notice requirements.

II. 1913(d)(ii) should read as follows:

"the names, maiden names, addresses and dates of birth of the Indian parents and grandparents of the child if known, after inquiry of the birth parent placing the child or relinquishing parental rights and the other birth parent if available, or if otherwise ascertainable through any other reasonable inquiry." (new language is in bold face type)

The necessity for this additional language is that this information may not be available to the adoption attorney or agency, and as the NCAI draft reads, the cutoffs would not apply if this information is not given. The additional language would require the agency or attorney to ask the placing parent and the other parent, if that parent is available, for the information needed for the notice, but would not nullify the cut-off provisions if the information is not available.

III. In 1913(e) the word "only" should be added as follows:

1913(e): Intervention by Tribes - The Indian child's tribe shall have the right to intervene at any point in any voluntary child custody proceeding in a state court only if any of the following has occurred:

(I) In the case of a termination of parental rights proceeding, the tribe has filed a notice of intent to intervene or a written objection to termination within 30 days of receiving notice of such proceeding.

(ii) In the case of an adoption proceeding, the tribe has filed a notice of intent to intervene or a written objection to the adoptive placement within 90 days of receiving notice of the adoptive placement or within 30 days of receiving notice of the voluntary adoption proceeding, whichever is later;

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(iii) In any case where the tribe did not receive notice that complies with subsections (c) and (d), Provided, that a tribe shall be precluded from intervention if it gives written notice of its intent not to intervene in a specific proceeding or gives notice that neither the child or parents are members of that tribe.

Although this section as written in the NCAI draft, coupled with the notice requirements of the previous section, implies that a tribe can only intervene if one of the three specified circumstances occurs, the word "only" is necessary in order to clarify the meaning of this subsection.

IV. Section 1913(c)(ii) should be amended as follows:

(ii) no later than five days following a pre-adoptive or adoptive placement. [the word "within" is deleted and replaced with the words "no later than."]

An additional sentence should be added at the end of section 1913(c):

"The notice required in subsection (ii) may be given prior to placement if a particular adoptive or pre-adoptive placement is contemplated."

The necessity for this additional language is to clarify that notice to the tribes can be given pre-birth.

Thank you for the opportunity to address this group and urge passage of these important amendments. If the ICWA can be amended in such a way that adoptive placements can be more secure at an earlier time, everyone benefits. The Indian community will have knowledge about and access to more of their children, and adoptive parents will have the assurance that children placed in their homes are not going to be removed from their care far into the adoption.

I truly believe that had these amendments been in place in 1993 when Lucy and Bridget were placed with the Rost family, the tragedy which ensued would never have happened. I also hope that these amendments may provide the vehicle necessary to settle the Rost case. I encourage this honorable committee to amend the Act to help provide quicker security for adoptive placements.

Sincerely,

Jane A. Gorman
Attorney at Law

AMERICAN ACADEMY OF ADOPTION ATTORNEYS
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PLEASE REPLY TO:

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June 24, 1996

United States Senate
Committee on Indian Affairs
Washington, D.C.

Attn: Philip Baker-Shenk

Dear Chairman McCain and Honorable Committee Members:

The American Academy of Adoption Attorneys is an organization composed of over 300 attorneys throughout the United States and Canada who practice predominantly in the field of adoption law. Specifically, we represent individual adoptive parents as well as adoption agencies and birth parents. The purpose of the Academy is to study, encourage, and promote and improve the laws and practice of law pertaining to the adoption of children throughout the United States and abroad.

On behalf of the Academy, I wish to express our organization's support for the proposed draft amendments which have been developed by adoption attorneys and tribal representatives, including the National Congress on American Indians.

Although we recognize that no bill actually has been drafted, and that technical amendments may be necessary to the preliminary drafts, the idea that notice be given to tribes in voluntary adoptive placements and that tribes either intervene or waive intervention in a timely manner is a good one.

This support is not intended to indicate any change in our previous position in support of the I.C.W.A. amendments proposed by Congresswoman Pryce (R. OH.). We believe that the two different approaches to amending the I.C.W.A. are both positive.

Yours truly,

Samuel C. Totaro, Jr.

SCT:ejn

Jane A. Gorman
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September 27, 1996

Honorable Don Young, Chairman
Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515

Honorable Deborah Pryce
Member of Congress
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Young and Congresswoman Pryce:

I urge you to seek the immediate consideration and adoption by the House of S. 1962, a bill to amend the Indian Child Welfare Act, which has passed the Senate and is at the desk of the House.

I strongly support S. 1962. In my adoption law practice, I have represented many adoptive families who have become embroiled in litigation with Indian tribes over the adoption of Indian children. For example, I am the attorney for Jim and Colette Rost, an adoptive family couple in Ohio who have been involved in litigation (*In re Bridget R.*), a case involving their adoption of two Indian children.

I have reviewed the "Dear Colleague" letter from Congressmen Todd Tiahrt and Pete Geren dated September 24, 1996. While it is correct that a petition for certiori is pending before the U.S. Supreme Court in the Bridget R. case which addresses the constitutionality of ICWA as applied to children who are not members of an "existing Indian family," Congressmen Tiahrt and Geren are mistaken in their assertions that "it would be imprudent to consider legislation which ignores this issue " and that the amendments would "strengthen the reach" of the Act.

These amendments, if passed, would likely prevent the tragedy which befell the Rosts and the twin girls they are seeking to adopt from ever happening again for the following reasons:

1) If these amendments are enacted, notice of adoptive placements to tribes would be required. As the law now stands, a tribe may intervene in an adoptive placement at any point prior to the finalization of the adoption, yet no notice is

Jane A. Gorman
attorney at law

required. Most adoption attorneys and agencies give notice now to protect the adoptive parents and the child, however some do not. Hence, those attorneys who ignore the spirit of the Act and overlook the absolute right of tribal invention put their clients and the children they seek to adopt at risk for the entirety of the children's minority. This practice would end.

2) Criminal penalties would attach to attorneys who knowingly and willfully fail to disclose a child's Indian heritage. These amendments would, in large part, stop the practice of "looking the other way" or in fact even advising birth parents to fail to disclose Indian heritage. If these amendments had been in effect in 1993 when the birth father in the Rost case disclosed his Indian heritage to the adoption attorney, that attorney would doubtless have given notice to the tribe and the tragedy which ensued would not have happened.

3) If these amendments are passed, once a tribe is given notice it would have a very brief time to respond. Under existing law, a tribe has until the adoption is finalized to make up its mind. In the Rost case, once the father's Indian heritage was disclosed to the adoption agency, it gave the tribe notice. Almost six months passed, and the tribe did not respond, yet were able to successfully seek intervention when the twins were a year old. If these amendments had been the law at the time the Rost case began, the time for the tribe's right to intervene would have passed.

4) The proposed amendments do not strengthen the ICWA beyond its present scope. It still applies to children who are tribal members or whose parent is a tribal member (if the child is eligible for membership). While it may be the purpose of future legislation to change the scope of the ICWA, these amendments do not attempt to do so.

5) To oppose S. 1962 because of what it does not accomplish ignores the fact that it does accomplish a great deal. In the (statistically) unlikely event the U.S. Supreme Court takes the Rost case, it can still rule on the constitutionality of the ICWA regardless of Congressional action on S. 1962.

If you have any questions that you feel need further clarification, I would be happy to assist you. Again, I urge that S. 1962 be supported to protect the rights of not only the adoptive families, but more importantly, the children themselves.

Sincerely,

Jane A. Gorman
Attorney at Law
JAG/sab

ACADEMY OF CALIFORNIA ADOPTION LAWYERS

1450 Frazee Road, Suite 409
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June 21, 1996

United States Senate
Committee on Indian Affairs
Washington, D.C.

Facsimile #202-224-5429

Attention: Philip Baker-Shenk

Dear Chairman McCain and Honorable Committee Members:

The Academy of California Adoption Lawyers has reviewed the proposed draft amendments regarding the Indian Child Welfare Aot. It was the unanimous vote of the Academy members to support these proposed draft amendments. The Academy understands that this proposed legislation will be reviewed separately from the ICWA bill sponsored by Congresswoman Pryce (R.OH.) which has already passed in the House. The Pryce bill is also supported by the Academy.

Particular support was expressed for those changes which provide that an interested tribe must intervene within 30 days of notice and that a tribal waiver of intervention be binding.

We appreciate the hard work accomplished by the adoption attorneys and the tribal representatives in proposing changes that will improve adoption practice involving children of Indian ancestry.

Very truly yours,

JANIS K. STOCKS
President of the Academy of California Adoption Lawyers

JKS:bs

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June 30, 1996

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

Dear Chairman McCain:

Thank you for the opportunity to testify before the Committee on June 26, and for allowing me the opportunity to provide this additional written testimony. I will attempt to answer each of your questions, and welcome further inquiry.

QUESTION 1. You have said that if these compromise amendments had been law in 1993, the "tragedy" which ensued in the Rost case would never have happened. Is it your view that similar cases in the future would also be precluded by the compromise language?

Cases similar to the Rost case would be precluded if the amendments were enacted for two major reasons:

A. If the compromise language were enacted, notice in voluntary proceedings would be required, and criminal sanctions would attach if an attorney ignored this mandate. In the Rost case, the attorney had reason to believe that the father was of Native American descent, as he wrote down on his initial intake form that he was Pomo Indian. However, after the attorney explained the Act to the parents, and the Act's requirements that placement preferences be followed which would cause the tribe and the father's family to receive notice of the adoption and be considered as people appropriate to take care of the twins, the father "changed his mind" about his ethnicity, and filled out a new intake form denying his Indian heritage.

On the basis of the father's later statements that he was not Indian, the attorney did not disclose the Indian heritage to the Rosts or to the adoption agency. Unfortunately for the Rosts, the father also lied to them and to the agency, ensuring that his heritage not be known and the tribe and the family not receive notice.

Jane A. Gorman
attorney at law

The amendments would <u>not</u> preclude a parent from lying, but would certainly put a chilling effect on attorneys telling birth parents the consequences of disclosing their Indian heritage before the attorney asks the questions about ethnicity.

B. If the compromise language were enacted, a tribe would have a very limited time to act before its right to intervene was cut off. In the Rost case, the father's Indian ancestry became known when the girls were about three months old. The tribe wrote to the adoption agency saying that it had been contacted by the father's family, who may be eligible for membership. No request for any action whatsoever was made by the tribe. The adoption agency immediately wrote back to the tribe, giving them notice that the twins were in a non-Indian home and essentially asking the tribe what it wanted to do.

More than six months elapsed, and the Agency and the Rosts had no further contact from the birth family or from the tribe. The Rosts and the Agency, <u>not the tribe or the birth family,</u> then brought an action in the California court to determine the applicability of ICWA to the adoption. Only <u>then</u> did the tribe respond, passing a resolution "declaring" the whole family members since birth, and asking to intervene.

If the proposed amendments had been in place in 1993, the original attorney would almost certainly have given the tribe and the family notice of the adoption before the twins were born, and the tribe would only have had as little as 30 days after the twins were placed to make up its mind what it wanted to do. Had it not acted within that time frame, its right to later declare the children members would presumably have been waived, thereby giving the parents no grounds to rescind their relinquishments.

QUESTION 2. Do you have reason to believe that enactment of the compromise proposal would open the door to settlement of the Rost case?

Settlement negotiations, initiated by the twins' biological family, are in progress in the Rost case. However, the two families have an obvious lack of trust of one another, given two years of intensive, high-profile litigation. Even if the Rosts and the Adams family and the tribe were able to reach an agreement whereby the Rosts would raise the twins and the biological family and tribe would have contact, the laws of California do not provide a mechanism for enforcing such an "open adoption" agreement. If these amendments were enacted, the Rost case would be more likely to settle because the biological family would have <u>legal</u> assurance that the Rosts would follow through in allowing whatever contact was agreed upon.

Jane A. Gorman
attorney at law

QUESTION 3. In your view, is the compromise the product of good faith efforts on the part of tribal governments?

Yes, I believe the agreement is the product of a good faith effort on the part of both the adoption community and the tribal governments. When Marc Gradstein and I first proposed sitting down with tribal attorneys to see if we could reach a compromise after the May, 1995 House Resources Committee hearing on the Pryce amendments, the attorneys we approached -- Jack Trope and Bert Hirsh -- were wary, but willing to talk. Bert Hirsh was heavily involved in drafting the 1978 Act, and Jack Trope was the principal drafter of the failed 1987 amendments, so we quickly realized how deeply attached they were to the language of the Act.

I had some personal knowledge of both these men, as I represented the birth mother and they represented the tribe in a high profile ICWA case in California about a decade earlier. (Baby Girl A. (1991) 230 Cal.App.3d 1611) We had some general basis for a trusting working relationship, as we had all been surprised and shocked when my client, along with the baby whose adoption was at issue, had been whisked out of the jurisdiction to another country by an adoption attorney not involved with the case without my knowledge or court consent. One of the proposed changes to the NCAI draft (which was proposed by AAIA) would address this issue by making it a crime to move a child out of the country to avoid application of ICWA.

Mr. Gradstein and I went to New York a few weeks later and spent two full days with Trope and Hirsh to feel out areas of possible agreement. At first, we almost walked out and returned to California, as agreement on anything seemed impossible, but as they knew we had traveled across the country to try to work out a compromise, we all took a step back and decided to move slowly through the Act and see if we could at least identify areas we all agreed were problematic, and then see if we could agree on how to fix them.

After the initial attempt by the four of us to draft language, they expanded their group to include a broader base of Indian attorneys and tribal leaders. We met several more times during the year, and had multiple conference calls of several hours each, culminating in a three-day meeting in Phoenix in December of 1995 at which we finished the proposed amendments. They then circulated the proposal through the tribes and tribal organizations, and we circulated it though the adoption community, and we all met in Washington in late January 1996 to try to "sell" the amendments to the staffs of various Congressional members.

Jane A. Gorman
attorney at law

A short answer to your question is "yes": I do not believe that the tribal attorneys and representatives would have given so generously of their time and energy if this were anything but a good faith effort on their part.

QUESTION 4. In what ways would the compromise advance the goals of certainty, speed and stability in adoptions involving Indian children?

With notice to tribes being mandatory in voluntary placements, coupled with criminal penalties as a "stick" and speedy cut-offs as a "carrot," adoption attorneys and agencies will have every reason to obtain as much information as possible and to give notice as early as feasible in order to fully represent their clients' interests.

We have every reason to believe that if a tribe says it opposes a proposed placement, the adoptive parents will walk away from the proposed adoption then. The earlier that time can be, the better for all concerned. If, however, a tribe either does not respond, or writes back saying that it waives its right to intervene, the placement should be made and go forward. These amendments will ensure that the "at risk" period for adoptive parents and for children is much shorter.

QUESTION 5. Should Indian biological families and Indian tribes be involved in the adoptive placement of Indian children? If so, to what degree, and how?

As Indian biological mothers and fathers make the initial decision themselves of who will adopt their children in virtually every state, I presume you mean by your question should the "extended Indian biological families and Indian tribes" be involved? I believe that biological parents should have the unfettered right to chose by whom their child will be raised. I do not believe that this right should be intruded upon by their parents, much less their extended family.

The ICWA as it is currently written imposes placement preferences on adoptive placements of Indian children. If the amendments were enacted, and the tribe would be given notice of each placement, the mother's right to chose the adoptive family would still be preserved, but could be overridden by the tribe if the tribe thought the placement were inappropriate. By putting tight time frames on this intervention right, the mother would quickly know if her plan can go forward and could then choose whether to allow the alternative placement advocated by the tribe, or to keep the child.

Jane A. Gorman
attorney at law

QUESTION 6. Do you have reason to believe the Indian tribes will find acceptable the modifications you have proposed?

Yes. We spoke with a fairly large and representative group of tribal leaders and attorneys before coming to Washington last week, and got verbal approval. Jack Trope incorporated our proposed modifications into his testimony at the June 26 hearing (Appendix A of his testimony) and said that the Association on American Indian Affairs supports these technical amendments. (fn. 4, page 19)

QUESTION 7. On page one of your statement, you say the "lack of clarity" on notice and intervention in current law has disrupted placements. How would the compromise address this problem?

Under current law, no notice is required in voluntary placements. However, tribes have the right to intervene. Several California court of appeal decisions have implied a notice requirement in the Act, finding that the right to intervention, absent notice, is meaningless.

How this apparent conflict in provisions of the Act can cause disrupted placements is exemplified by the frantic calls I received after the Rost case became national news. As I testified last week, dozens of adoptive parents--some of them with completed adoptions, some with adoptions in progress--called and told me that both they and their attorneys knew that the children were Indian (some were even tribal members) but that no notice had been given to the tribes.

They all wanted to know what to do. All I could tell them were the risks involved in either course of action, and that the only way I could represent them is if they chose to belatedly give notice. The risks, obviously, to giving the tribe notice far into an adoption is that the placement can be disrupted then. The risk, just as obvious, of not giving notice at all is that the placement may forever be in jeopardy. What a Hobson's choice those poor people face.

These amendments would help eliminate this dilemma in future cases.

QUESTION 8. Based on your experience, do you agree with Mr. Gradstein's statement that the number of controversial cases is "few."

My practice consists solely of adoption litigation, so my experience is skewed. Every ICWA case I see is controversial. The ones in which adoptive parents decide to not proceed over the tribe's opposition, and the ones in which the tribes are either

Jane A. Gorman
attorney at law

given no notice or do not oppose the placement, never come my way.

However, I am aware that Mr. Gradstein took an informal survey of other placement attorneys to see if his statement was correct, and I believe he is discussing the results in his testimony.

I am sure that in the overall number of adoptions, those cases in which adoptive parents decide to try to adopt a child over a tribe's opposition are very few. However they are all tragic, and all stem from a placement being made, time elapsing during which the child is bonding to the adoptive parents and they to him, and then the tribe later trying to stop the adoption. The proposed amendments would preclude virtually all of these problems from happening.

QUESTION 9. How would the compromise lead to the early identification of those cases that will be controversial? And, how would this serve the "best interests" of the Indian children involved?

If a tribe is given notice pre-birth that an adoptive placement is contemplated which does not comport with the placement preferences, it has the opportunity right then to say it does not agree. These amendments would serve the best interests of Indian children no matter what happens: If a tribe wants the child, then the child will be placed at birth in compliance with the preferences or be raised by the birth mother. As Indian children being raised by Indian families is the primary purpose of the Act, the statutory purpose of the Act would be fulfilled. If, however, the child does not come under the provisions of the Act, or if the tribe does not want to intervene in the placement, then the child could be placed according to the birth parents' wishes, and the adoptive parents could begin at birth to fully bond with the child, secure in the knowledge that the placement will continue.

We hope that most of the problems can be identified pre-birth so no placements, or very few, will be disrupted at any time.

QUESTION 10. I note that you support making it a crime for professionals like yourself to wilfully disregard the obligation to provide proper notice to a tribe. Is this an indication of how strongly you support the notice requirement?

Yes. If the notice requirement had no "teeth," attorneys and agencies could disregard it just as they occasionally ignore the implied requirement in the Act as it currently reads.

The members of the two adoption academies we represented at the hearing (American Academy of Adoption Attorneys and Academy of

Jane A. Gorman
attorney at law

California Adoption Lawyers) have no desire to protect attorneys who encourage fraud. Thus we had little opposition to this provision. The only concern expressed was the fear of having to defend against baseless claims.

QUESTION 11. What issues have been addressed in Title III of H.R. 3286 that are not addressed in the NCAI compromise language? How would you propose to address these issues, given widespread tribal and Administration opposition to Title III?

A. Title III would make ICWA applicable only to children from existing Indian families. Although this is a hotly contested issue, I don't believe anyone in Indian country believes the Act should apply to children who are not really Indian or are not from Indian families. To argue otherwise would be to confer extra-territorial jurisdiction on tribes, by making children members who have no social, political or cultural connection with the tribes. No purpose would be served by making the Act applicable to children with no Indian heritage to protect.

The issue, then, becomes how to define Indian children. All tribes require some quantum (perhaps unspecified as to amount) of Indian blood. As specified blood quantum requirements appear to work quite well in determining the applicability of other federal Indian legislation, why would they not work equally well in ICWA? By applying the ICWA to tribal members who are also at least 25% Indian, there would be an objective standard that is not related to the volatile issue of "sovereignty."

The tribes respond that being Indian is a political classification, not a racial classification. If so, then in order for ICWA to apply, a child or his family should have some social, cultural or political connection with Indian culture in order to have a heritage worth preserving.

It seems to me that in order for the Act to withstand constitutional challenge, it needs to apply only to the population to whom it was meant to apply: children of existing Indian families.

In our compromise discussion with the tribes' attorneys, we learned during the first 10 minutes in New York last June that this was an issue we couldn't discuss. So we left it alone.

B. The second issue that Title III addresses is retroactive membership. I believe that to a certain degree, the compromise legislation addresses this issue in that it would require that when a tribe intervenes it has to declare that the child on whose behalf it is intervening is either a member or eligible for membership.

Jane A. Gorman
attorney at law

Just as our attorney groups do not want to protect fraudulent conduct among our members, we do not believe that tribes want to protect fraudulent conduct in Indian country either. The "wrong" that Title III seeks to remedy is a tribe wanting to stop an adoption for some reason and late into the placement retroactively declaring a child a tribal member in order to have ICWA apply and stop the adoption.

Our discussion group had formulated provisions which better addressed this issue than does the NCAI proposal, but those provisions did not survive the NCAI conference.

These provisions would have required a tribe to follow its own rules in making a child or a parent a tribal member, and would have provided a federal cause of action for "arbitrary and capricious" actions of a tribe when it inappropriately declared a child a tribal member. I would suggest that you look at these provisions and consider them. These were the product of the joint thinking of a fairly large group of tribal attorneys.[1]

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[1] Add 25 U.S.C. § 1923.

Proposed Language:

Add § 1923(a): PUBLICATION OF TRIBAL MEMBERSHIP CRITERIA - Within one hundred and eighty days after the enactment of this Act, and on an annual basis thereafter, the Secretary shall publish in the Federal Register the membership requirements of each Indian tribe which elects to have such requirement published.

Add § 1923(b): In any voluntary child custody proceeding in a state court in which an Indian tribe, which elects to not publish its membership requirements as provided in this section, seeks to intervene or file a notice of objection, such tribe shall append a copy of its membership requirements or statement disclosing the basis the tribe believes it is the Indian child's tribe to such notice.

Add § 1923(c)(1): REVIEW OF MEMBERSHIP DETERMINATION - For purposes of applying this Act to any voluntary child custody proceedings under State law, the United States district courts shall have original and exclusive jurisdiction over all civil actions to declare whether a determination by an Indian tribe that a child or biological parent of a child is or is not a member of such Indian tribe is contrary to the membership requirements of such tribe: Provided that the district courts shall exercise such jurisdiction only after the party seeking to invoke the jurisdiction of the district court has exhausted the procedures of

Jane A. Gorman
attorney at law

Again, I appreciate the opportunity to provide this additional input. I am looking forward to seeing the draft of the bill, and hope to be able to give further input.

Sincerely,

Jane A. Gorman, Esq.

JAG/sab

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such Indian tribe, if any, for the review of such tribe's determination. The plaintiff in any such civil action shall have the burden of proving, by a preponderance of the evidence, that there is no objective basis for the tribal determination under the membership requirements of such tribe. In the absence of a finding that there is no objective basis for the tribe's determination, the district court shall defer to the tribe's determination. Any tribe whose membership determination is the subject of a civil action brought pursuant to this section shall be notified of such action and shall be given an opportunity to participate either as a party or as amicus curiae in such action.

Add § 1923(c)(2): NOTICE REQUIREMENT - The court shall have no jurisdiction to determine a cause of action brought under this subsection where a plaintiff who knew or had reason to know that child may be of Indian ancestry has not provided notice, in compliance with the requirements of sections 1913(c) and (d), to the Indian tribe prior to filing such action.

Add § 1923(d): FULL FAITH AND CREDIT - In any voluntary child custody proceeding under State law, the court, in determining the applicability of this Act to such proceeding, shall give full faith and credit to a judgment in an action brought pursuant to subsection (a) of this section.

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June 21, 1996

United States Senate
Committee on Indian Affairs
838 Hart Building
Washington, D.C. 20510

RE: HEARING, JUNE 26, 1996, PROPOSED AMENDMENTS TO THE INDIAN CHILD WELFARE ACT (I.C.W.A.)

Dear Chairman McCain and Honorable Committee Members:

I am writing in support of the concepts set forth in the proposed draft amendments which have been developed by adoption attorneys and tribal representatives including the National Congress on American Indians (N.C.A.I.). Because no bill has been drafted as of this writing, and because the language approved by the N.C.A.I. needs "technical" (rather than "substantive") changes, I must condition my support on the final draft containing the modifications set forth in the testimony of my colleague, Jane Gorman.

The proposed amendments are intended to:

1. require notice to tribes in voluntary placements;
2. give the tribes as little as 30 days after the child's birth to intervene or lose the opportunity to do so;
3. make a tribal waiver of the right to intervene binding; and
4. make it a crime to aid and abet fraudulent misrepresentations by a birth parent regarding her/his Indian ancestry.

My perspective is that of a lawyer whose practice is primarily devoted to representing would-be adoptive parents. My clients are people who are seeking to adopt a baby or a young child in <u>voluntary</u> circumstances. They are highly motivated to avoid contested situations involving the pain and costs of litigation. My clients are not desperate, acquisitive baby-snatchers, but unluckily infertile people who seek to share their lives and love with a child whose birth parents are not in a position to take on the burdens of child-rearing. They enter into the world of adoption with high hopes and hearts overflowing.

I discovered this area of the law, after practicing in other fields, because my wife and I were unable to carry a pregnancy to term and we adopted a baby boy who is now in college. I know that adoption is a very good social institution and doubt that there is a more "politically correct" issue to endorse.

Likewise, it is hard to oppose the purposes of the I.C.W.A. Indian children need protection against the loss of their heritage and culture. Tribes must safeguard their most precious "resource" - their children - if they are to remain in existence.

The problems these amendments seek to address are several:

(1) As written, the I.C.W.A. does not clearly require notice to tribes other than for the involuntary termination of parental rights;
(2) Tribes cannot intervene in adoptions or voluntary termination of parental rights cases unless they know that such cases exist;
(3) Children who could be "Indian," as defined by the I.C.W.A., are "high risk" to potential adoptive parents and are, themselves, at risk of having their placements disrupted long after they have become attached to their adoptive families;
(4) Children who are "Indian" are even more risky to adopt and "at risk" themselves.

These amendments would further the purposes of the I.C.W.A. and at the same time enable children of Indian heritage to be adopted with a much shorter period of uncertainty for the adoptive parents and the children alike.

Those few cases that involve controversy could be identified early. Settlement of such cases would be promoted by making visitation agreements enforceable.

For the foregoing reasons, I believe it will be an improvement for all concerned if these ideas can become the law.

Sincerely,

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/e

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July 1, 1996

United States Senate
Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator McCain and Honorable Members
of the Senate Committee on Indian Affairs:

This is in reply to your letter of June 27, 1996 asking additional questions. Before answering, please accept my thanks for inviting me to comment on these matters, both at the hearing and again at this time.

1. In your view, is the compromise the product of good faith efforts on the part of the tribal governments?

The simple answer is "yes." The most significant and far-reaching product of the draft legislation produced at our joint meetings in Phoenix, last December, is embodied in the N.C.A.I. proposal.

Although I took the opportunity at the hearing to advise the Committee that my "pet" provision of our work in Phoenix had not been approved by the N.C.A.I., I did not intend to question the "good faith" of those who voted it down. I was not present at the N.C.A.I. meeting, but I have been told that the debate was lively and lengthy and that the broader issue of "sovereignty" was believed by those who opposed the measure to be at stake.

The provision I had hoped to see enacted would have given a clear legal remedy for persons seeking to question the "good faith" of a tribal membership determination. It would have given Federal District Courts jurisdiction to hold the I.C.W.A. inapplicable to a child where the child's membership was granted in arbitrary and capricious disregard of the tribe's own membership rules.

Fortunately, I do not believe that tribes often ignore or stretch their membership requirements to bring children

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within the I.C.W.A. Therefore, the proposals which the N.C.A.I. did endorse, and which apply to all potential voluntary I.C.W.A. adoption cases, are of much more widespread importance and impact than the one I regretted to see voted down. I mentioned my concern over the federal remedy provision to the Committee in the context of the broader issues of due process and constitutionality of the I.C.W.A. raised below at question number 7.

2. In what ways would the compromise advance the goals of certainty, speed and stability in adoptions involving Indian children?

By requiring notice to tribes and by requiring prompt intervention by tribes, contested I.C.W.A. cases would be identified much sooner than at present. Likewise, uncontested I.C.W.A. cases would be able to proceed with the assurance that they would remain uncontested.

Adoptive parents dread litigation. The early knowledge that a tribe intended to go to court to try to block their prospective adoption would send all but the rarest adoptive parents running to locate a different child. Under the present law, the likelihood is much greater that by the time tribal intervention occurs, the attachment between the child and the adoptive parents is too great to sever without a court order.

3. Should Indian biological families and Indian tribes be involved in the adoptive placement of Indian children? If so, to what degree and how?

This question calls for a value judgment that I must make as the non-Indian person who I happen to be. Except for I.C.W.A. cases, voluntary adoptive placement decisions are usually made by the birthparents, sometimes in consultation with their families, sometimes over the objection of their families, and sometimes without the knowledge of their families. This is based on the concept that it is the parents' unique right to place their child (subject, of course, to court approval that the home is "suitable").

Indian tribes, as Senator Inouye pointed out at the hearing,

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have no direct analog among other ethnic, racial or religious groups in our society. It is my humble, non-Indian belief that Indian children are viewed by their tribal members as being a part of a larger "family unit" than the so-called "nuclear" family. Presumably, they have a right, as children, not to be adopted out of this "family" solely on the basis of their parents' wishes. If this is correct, then for the child's sake, the larger tribal unit must be consulted and offered an opportunity to be heard.

The I.C.W.A. attempts to balance parental, tribal, relative and children's interests by giving each some voice in the decision. Assuming that these interests should be each given weight, the I.C.W.A. probably has enough checks and balances to be fair to each.

However, two of these underlying assumptions are worthy of examination and have led, I believe, to questions of constitutional magnitude in the courts:

(1) Is tribal membership, alone, a sound standard by which to determine that a child should be included within the I.C.W.A.? Is a child who has a very small percentage of Indian heritage (and, thus, a very large percentage of non-Indian heritage) and no real social, cultural, religious and/or political ties to the tribe of ancestry, sufficiently "Indian" so that the I.C.W.A. should apply? Should the child's parents or the child himself or herself have the right to opt out of this "family," who may be strangers?

Questions such as these have led some courts to embrace the so-called "existing Indian family" doctrine held, thus far, in the Rost case to be the only way to save the I.C.W.A.'s constitutionality. Included with these answers as "Exhibit A" is a copy of a recent appellate decision that goes beyond the Rost case on this issue.

(2) In my oral testimony I made reference to a second constitutional argument against the "tribal membership"

standard which determines I.C.W.A. applicability. That argument was made on behalf of the twins in the Rost case and I will quote it in full:

"In the ICWA, Congress has delegated the power to determine who is an Indian child and subject to the ICWA to the tribe. The determination is conclusive and not subject to attack. (In re Junious M., supra, 144 Cal.App.3d at 793.) Congress has provided no standards -- including a minimum percentage of Indian blood -- by which to guide the tribe's determinations. As Congress has provided no guidelines to the tribe in the ICWA, the delegation of authority cannot be deemed reasonable as there is no manner by which abuse of the decision making power by a tribe may be prevented or challenged.

In order to constitutionally delegate the power to determine who is an Indian child to a tribe, Congress must establish some policies for that determination. From those policies, Congress must create a framework or guidelines to guide the empowered tribe. For example, in Morton v. Mancari, Congress made a specific policy determination that Indians were to be given a preference in hiring at the BIA. "To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a federally recognized tribe." (Morton v. Mancari, supra, 417 U.S. at 553 n. 24 [emphasis added].) From this fundamental policy decision made by Congress, the agency charged with executing this policy was able to issue rules and policies toward promoting the congressional policy. Thus, whether the BIA's decisions were consistent with the congressional mandate was a matter with sufficient standards for evaluation by others outside of the BIA.

By contrast, the ICWA provides no yardstick by which to measure compliance with legislative policy. Congress has set no minimum guidelines with the ICWA and provided unbridled power to a tribe to determine a child's Indian status. Presumably, a child with no Indian blood or a very small percentage of Indian blood could be deemed an Indian

child under the ICWA without challenge by anyone -- including that individual. This oversight by Congress virtually places the most important decisions about the ICWA -- whether it applies at all -- in the hands of the Indian tribe with no right of review and no standards by which to judge the tribe's determination.

While a tribe may have the power to govern its internal affairs and determine membership for tribal purposes, a determination of an Indian child's status is not a decision affecting only the internal political workings of a tribe. It is one thing to define tribal membership for internal purposes only. It is quite another to define tribal membership for purposes of applying a federal statute.

Congress' lack of standards in the ICWA to define "Indian child" creates the potential for abuse as Congress did not delegate its authority consistent with constitutional principles. For example, a situation could exist where a child is placed in foster care or an adoptive placement and an Indian tribe later "conclusively" determines that the child is an Indian child. The child may have been in his or her placement for years before the child's Indian status is conclusively determined by the tribe.

In such a situation, where an Indian Child's status is determined after a child has been in a placement for a period of time, the child's fundamental liberty interests are impacted. Even where a child is old enough and perhaps mature enough to voice a preference for his or her placement, where an Indian tribe has determined that a child is an Indian child subsequent to placement, the child's desires may be ignored under the federal statute if his or her current placement is outside of the placement scheme dictated by the ICWA.

Further, the principle that "[a]ny member of an Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses," cannot be said for children. (Cohen, Handbook of Federal Indian Law 135 (1971).) Under the ICWA, a child has no option but to be considered an I Indian child and subject to the ICWA if the tribe so determines.

Moreover, to the extent the ICWA provides conclusive