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authority to the tribe to determine a child's status as an Indian child without any articulated standards, it provides the child with no procedural safeguards or right of review.[21] As the ICWA is premised on the assumption that it is in an Indian child's best interests to be placed within their tribe, it is clear Congress was not concerned about procedural due process and safeguards. Where a minor has not been represented and heard in the tribal determination regarding the child's status as an Indian child, the child should be able to attack the judgment."

My answer to this question is murky because I believe that the use of the term "Indian children" for the purpose of I.C.W.A. applicability requires serious reconsideration. I have no illusions that this Committee will undertake such a huge, controversial inquiry this year in the context of the N.C.A.I. proposals. However, to honestly address this question, I must condition my wish to see the purposes of the I.C.W.A. promoted on my belief that the statute, as written, is constitutionally defective.

4. Do you have reason to believe the Indian tribes will find acceptable the modifications you and Ms. Gorman have proposed?

Yes. All of our proposed modifications have been thoroughly discussed with representatives of the group that drafted the N.C.A.I. language in Tulsa. As stated by Jack Trope in his written testimony on behalf of Association on American Indian Affairs, Inc., at p. 19, footnote 4, the modifications, though important, are clarifying and not in conflict with the intent of the N.C.A.I. draft. Nevertheless, failure to make these changes would sufficiently undermine the purposes of the proposal so that we and the organizations we represent could not support it.

21 Such power delegated to an administrative body, for example, would be subject to the procedural protections afforded to an individual under the Administrative Procedures Act. (5 U.S.C. sec. 501, et seq.)

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5. On page two of your statement, you say cases that involve controversy are "few" in number. Based on your experience, can you estimate the number of these cases?

I based my statement on the fact that the I.C.W.A. is part of any adoption in which a child is of Indian ancestry. This is true because the threshhold question: "Is this child subject to the I.C.W.A.?" must be answered in every such case.

In my experience, and that of many other adoption attorneys with whom I have consulted, the estimated numbers are as follows:

(1) Children of Indian ancestry: 10-20%
(2) Children of Indian ancestry who are "Indian children" as defined by the I.C.W.A.: 1-2%
(3) "Indian children" as defined by the I.C.W.A. whose voluntary adoption is opposed by the tribe and results in litigation: less than 1%

The reasons for this very low estimated number of cases involving controversy are:

(1) Adoption attorneys and agencies are dealing with the population-at-large, of which only a small percentage are "tribal members" or "children of tribal members who are, themselves, eligible for membership;"
(2) Most tribes do not choose to intervene in voluntary placements to thwart the birthparents' wishes;
(3) When a tribe indicates that it will intervene early in the process, adoptive parents back off.

Unfortunately, it is important to remember that in as many as 20% of all adoptions (based on these numbers) the adoption is "at risk" because of the presence of any Indian ancestry and the possibility of intervention for years after the placement. The reality of possible risk and the common perception that the risk is substantial make children of Indian ancestry less desirable to many would-be adoptive

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parents than if that risk were reduced or eliminated.

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

If enacted, the "compromise" legislation would cause tribes to get notice as soon as possible of known potential "Indian children." Lawyers and agencies planning adoptive placements would have a huge incentive to notify tribes at least 60 days before the child's birth (or placement). This would limit the time that the child would be "in limbo" in the adoptive home to a maximum of 30 days.

The tribe seeking to block a potential adoption would, likewise, have every reason to act promptly. I believe that tribes would give notice of intent to intervene as soon as they were to decide that that is their plan, in order to possibly preclude a placement and to minimize harm to the child.

Early awareness of which cases will be controversial is of immeasurable benefit to the children in question. At best, the adoptive placement could be avoided. If litigation did ensue, it would be concluded as soon as possible. This would be advantageous to the child regardless of the result.

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

Title III of H.R. 3286 codifies the "existing Indian family" doctrine as articulated in the decision in the Rost case. Nothing in the N.C.A.I. language addresses this issue. As I stated in my answer to question number 3 above, I believe that the question "To which children <u>should</u> the I.C.W.A. apply?" is a highly controversial policy issue of constitutional dimension. Were Title III to become the law, courts across the country would decide I.C.W.A. applicability on a case-by-case

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basis. I cannot tell this Committee that I believe that courts would not act wisely and appropriately.

Both groups of attorneys who have authorized me to speak on their behalf support Title III. Personally, based on my perhaps naive <u>political</u> assessment that Title III cannot be enacted into law, I believe that Congress should carefully reexamine the breadth of the "membership" basis for I.C.W.A. applicability in a future legislative session.

I do believe that the "retroactivity" problem addressed in Title III will be ameliorated if the N.C.A.I. draft becomes law. The relatively short time lines for membership and/or intervention determinations will solve the most egregious "retroactivity" horror stories by forcing tribes to take action in a timely manner or forego intervention.

I have tried to answer your questions thoroughly, but not too technically or tediously to be read easily. I continue to be at the Committee's disposal if I need to expand or explain my answers or if I can be of any further service.

While we have used words like "compromise draft" a good deal, this effort is more an attempt to do the "right" thing for all concerned than a battle of forces. All of us who have worked on this project want to see children of Indian ancestry well served and kept out of court battles as much as possible.

Thank you again for inviting my views.

Sincerely,

MARC GRADSTEIN
Attorney at Law

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ALEXANDRIA Y., A Person Coming Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES AGENCY,

Plaintiff and Respondent,

v.

SEMINOLE NATION OF OKLAHOMA,

Defendant and Appellant.

G018179

(Super. Ct. No. J-423844)

OPINION

Appeal from a judgment of the Superior Court of Orange County, James P. Gray, Judge. Affirmed.

Sylvia L. Paoli and Paoli & Paoli, Inc., under appointment by the Court of Appeal, for Defendant and Appellant.

Laurence M. Watson, Chief Assistant County Counsel, and Michelle Ben-Hur, Deputy County Counsel, for Plaintiff and Respondent.

John L. Dodd and Harold La Flamme, under appointment by the Court of Appeal, for the Minor.

The Seminole Nation of Oklahoma (the SNO) appeals from the judgment terminating the parental rights of Renea Y., an enrolled tribal member, to her daughter, Alexandria. The SNO contends the trial court violated the Indian Child Welfare Act (hereinafter "ICWA" or "Act") by failing to transfer jurisdiction of the proceedings to the SNO and failing to follow the ICWA placement preferences. We find the trial court properly refused to apply the provisions of the ICWA because neither Alexandria nor Renea had any significant social, cultural or political relationship with Indian life; thus, there was no existing Indian family to preserve.

Facts

Alexandria Y. was born in December 1990 with cocaine in her system. She was immediately taken into custody by the Orange County Social Services Agency (SSA) and was placed in an emergency shelter home. She was declared a dependent of the juvenile court under Welfare and Institutions Code section 300, subdivisions (a) and (b) in February 1991. In August, when Alexandria was seven months old, she was moved to the home of the T.'s, an Hispanic family,[1] where she has lived ever since. In September, the six-month review hearing was held. SSA had been unable to locate either parent and neither of them had contacted or visited Alexandria. The trial court terminated reunification services and set a selection and implementation hearing for December 1991.

In October, SSA discovered that Renea was an enrolled member of the SNO, making Alexandria eligible for enrollment and potentially subject to the ICWA. It was determined that Renea is one-eighth Seminole Indian; she was adopted as a toddler by a non-Indian family. The selection and implementation hearing was continued several times to accommodate the notice requirements of the ICWA, and the SNO indicated its intent to intervene in the proceedings by letter dated February 11,

[1] Alexandria's father is Hispanic.

1992. It expressly stated it did "not wish to transfer these state court proceedings to tribal court," but requested that the trial court follow the placement preferences of the ICWA. The SNO (and, for the first time, Renea) appeared on March 31. The SNO again requested the placement preferences be followed, and in May counsel was appointed to represent it. In June, the trial court held a hearing to determine whether Alexandria was an Indian child as defined by the ICWA.[2] After several days of testimony, the trial court concluded that she was, but found the ICWA inapplicable because the SNO's criteria for membership was not based on a quantum of blood analysis and was, therefore, unreasonable.[3]

The SNO filed for writ relief in this court, arguing that once a minor is determined to be an "Indian child" as defined by the ICWA, the juvenile court has no jurisdiction to consider the reasonableness of such determination. This court agreed, and issued a peremptory writ of mandate directing the trial court to recognize "SNO's determination that Alexandria is an Indian child and therefore entitled to placement preference under section 1915, subdivision (b) [fn. omitted]." (***Seminole Nation of Oklahoma*** v. ***Superior Court*** (July 31, 1992) G012836.)[4]

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2 An Indian child is defined as "any unmarried person who is under age eighteen and is . . . eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903, subd. (4)(b).)

3 Membership in the SNO is open to those who can prove their blood relationship, no matter what the degree, to one of the Seminole Indians named on a tribal list prepared around 1900.

4 The SNO claims this holding is law of the case and dispositive of the question whether the trial court should have applied ICWA's placement preferences. But the doctrine of law of the case does not apply where the appellate court is considering a ground that was not raised in the prior appellate proceeding. (***Searle*** v. ***Allstate Life Ins. Co.*** (1985) 38 Cal.3d 425, 435.) The issue before us in the writ proceeding was narrowly framed: "Once a minor is determined to be an 'Indian child' as defined by the ICWA, does the juvenile court have jurisdiction to inquire into the reasonableness of such determination?" (***Seminole Nation of Oklahoma*** v. ***Superior Court***, ***supra***, G012836.) The "Indian child" determination was a threshold issue in this case; none of the considerations involved in applying the placement preferences or other provisions of the ICWA had yet been presented to the trial court, let alone this court, at the time of the writ proceeding.

When proceedings resumed, the mother filed a petition to transfer Alexandria's case to the tribal court. (25 U.S.C. § 1911, subd. (b).) The trial court set a hearing on the issue of whether good cause existed to deny the transfer petition, followed by the trailing selection and implementation hearing, for September 21. The trial court notified the SNO of the transfer petition by letter, stating, "Please be advised that the mother of [Alexandria] . . . has . . . filed a PETITION FOR TRANSFER OF CASE TO TRIBAL COURT . . . . [¶] Pursuant to the Indian Child Custody Guidelines, C. 4. (b), you have twenty days from the receipt of this notice of proposed transfer to decide whether to decline the transfer. [¶] You may inform this court, per the Guidelines, of your decision orally, or in writing." SNO petitioned the tribal court to accept jurisdiction, and Chief Magistrate Tah-Bone, thinking the trial court had already transferred jurisdiction, issued an order accepting jurisdiction on September 8.

On September 21, the SNO orally joined in Renea's petition to transfer, and Renea orally joined in the SNO's motion to enforce the ICWA placement preferences. The hearing on the transfer motion commenced and continued for several days over a three-month period. Dr. Roberto Flores de Apodaca, a clinical child psychologist, testified he had performed a bonding study on Alexandria and her foster parents when Alexandria was about 15 months old. He observed that a "secure bonding or attachment had taken place" between them, providing Alexandria with a sense of security which was critical to her optimum development. Removing her from her placement with the T. family would probably cause her to "suffer negative emotional consequences" manifested by "emotional withdrawal . . ., indiscriminate friendliness or provocative behavior . . . ." Dr. Apodaca performed a supplemental bonding study in November, and testified there was still a strong bond between Alexandria and her foster parents. He opined she was even more vulnerable to emotional damage from a separation than he had initially thought, and it was likely she would suffer detrimental effects if she were to be removed from the T. family.

Dr. Dixie Noble, a Native American psychologist, testified that she believed, based on reading studies performed by others, "Native American children who grow up in non-Indian homes have greater difficulties later on when the issue of identity becomes important in adolescence." After hearing the testimony and argument, the trial court denied the petition for transfer, finding the petition was untimely and that transfer would result in an inconvenient forum for the hearing on termination of parental rights and would be contrary to the best interests of the child.

The selection and implementation hearing concluded in March 1993. The trial court selected adoption as Alexandria's permanent plan and terminated Renea's parental rights. The trial court then found there was good cause, beyond a reasonable doubt, not to enforce the ICWA placement preferences. Its determination was based on the record of all proceedings in the case since December 1991, specifically including the prior testimony of Drs. Apodaca and Noble. Both Renea and the SNO appealed.

In January 1994, this court filed an unpublished opinion reversing the judgment terminating Renea's parental rights. We found it was error to terminate reunification services and schedule the selection and implementation hearing after the six-month review hearing when jurisdiction over Alexandria had not been based on abandonment. (Welf. & Inst. Code, § 300, subd. (g), § 366.21, subd. (e).) We remanded the case for a new six-month hearing and noted: "Our disposition of this issue eliminates the need to address several of the other issues raised by Renea and the Seminole Nation of Oklahoma." (***In re Alexandria Y.*** (January 31, 1994) G013944.) Both SSA and Alexandria filed petitions for rehearing, urging us to address the ICWA issues because they would be relevant on remand. Both petitions were denied. A

petition for review in the Supreme Court was also denied. The remittitur issued on May 9, 1994.[5]

After several continuances to accommodate the reappointment of counsel, the adoption of a reunification plan for Renea, and notice requirements, a new 12-month hearing was held in February 1995. Shortly before the hearing, Renea filed a petition for transfer of jurisdiction to the tribal court. At the hearing, the SNO expressly declined to join in the petition. The trial court denied the petition, erroneously finding the October 1992 order denying transfer was res judicata and thus could not be reconsidered; it also reaffirmed the previous bases for denial, finding the petition was untimely, and that transfer would result in an inconvenient forum and be contrary to Alexandria's best interests. The trial court then addressed the 12-month review issues. The social worker reported she had received a letter from Renea expressing her desire to relinquish her parental rights to Alexandria and to have the child adopted by her present caretakers. The trial court terminated reunification services and set a selection and implementation hearing for June 1995.

On June 15, the SNO filed a motion requesting a change in Alexandria's placement based on the ICWA preferences. On June 20, the court denied the motion on several grounds: (1) no Indian family existed to which the provisions of the ICWA could be applied; (2) the preferences were unconstitutional in that they denied Alexandria equal protection of the law based on race; (3) the issue of placement preferences was res judicata, having been previously decided by the trial court and not

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[5] Both Alexandria and SSA argue because we did not order Alexandria removed from the T. family home and placed with an Indian family in the first appeal, we impliedly approved her placement. Thus, they claim, the propriety of her placement is now law of the case. But the effect of our reversal was to place the case back at the six-month hearing stage, before the SNO became involved and any of the ICWA issues were raised. The posture of the case was as if none of the subsequent hearings had been held. (***Barnes*** v. ***Litton Systems, Inc.*** (1994) 28 Cal.App.4th 681, 683-684.) Although we could have addressed the issue for the guidance of the trial court on remand, we chose not to. Our refusal to speak gratuitously to an issue does not render it law of the case.

ruled on by this court in the prior appeal; (4) neither the original nor the present request to apply the ICWA preferences was filed in a timely manner.

The trial court then conducted the selection and implementation hearing. All parties stipulated the permanency issues would be decided based on the 12-month review findings, the prior testimony of Dr. Apodaca, and the most current SSA report. The trial court made the necessary findings, terminated Renea's parental rights and ordered Alexandria to be placed for adoption.

Discussion

The SNO levels a host of challenges at the trial court proceedings, but the most significant is the viability of the judicially created "existing Indian family doctrine." There is a split on this issue, both nationally and in California. For the reasons explained below, we follow those cases refusing to apply the ICWA unless the Indian child or at least one of his parents has a significant social, cultural or political relationship with Indian life.

The ICWA (25 U.S.C. § 1901 et seq.)[6] was enacted in 1978. It "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (***Mississippi Band of Choctaw Indians*** v. ***Holyfield*** (1989) 109 S.Ct. 1597, 1600.) Testimony of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, at congressional hearings indicated that tribal sovereignty in the socially and culturally determinative area of family relationships was being undermined by authorities who lacked an understanding of the Indian way of life. "'One of the most serious failings of the present system is that Indian children are removed from the custody of their natural

6 All further statutory references are to the United States Code, ICWA.

parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.' [(Hearings on Sen. Bill No. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978) at pp. 191-192.)]" (*Id.* at p. 1601.)[7]

The ICWA sets forth a congressional declaration of policy: "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." (§ 1902.) The Act provides an Indian tribe shall have exclusive jurisdiction over custody proceedings involving an Indian child who resides or is domiciled within the reservation (§ 1911, subd. (a)), and the state court shall, upon petition and in the absence of good cause to the contrary, transfer proceedings for foster care placement or termination of parental rights involving a non-domiciliary Indian child to the tribe (§ 1911, subd. (b)). If the proceedings remain in state court, the tribe has the right to

7. Congress enacted findings in the ICWA that reflect the gist of the testimony: "Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

"....

¶ "(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and ¶ (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." (§ 1901)

intervene. (§ 1911, subd. (c).) The Act provides that no involuntary termination of parental rights to an Indian child may be ordered unless the court determines, based on proof beyond a reasonable doubt, including the testimony of expert witnesses, that continued custody of the child by the parent is likely to result in serious emotional or physical damage. (§ 1912, subd. (f).) Absent good cause to the contrary, placement preference shall be given to: (1) a member of the Indian child's extended family; (2) a foster home approved by the child's tribe; (3) an Indian foster home approved by a non-Indian authority; or (4) a children's institution approved by an Indian tribe. (§ 1915, subd. (b).)

Cases following the "existing Indian family doctrine" refuse to apply the ICWA to situations where an Indian child is not being removed from an existing Indian family, because in that situation the underlying policies of the ICWA are not furthered. The perception of "Indian family" has differed from court to court. One group of cases has refused to apply the ICWA where the Indian child himself has never lived in an Indian family and has had no association with Indian culture, even though his biological parent has had such associations. (See, e.g., ***Matter of Adoption of Baby Boy L.*** (Kan. 1982) 643 P.2d 168; ***Matter of Adoption of T.R.M.*** (Ind. 1988) 525 N.E.2d 298; ***In Interest of S.A.M.*** (Mo. 1986) 703 S.W.2d 603; ***Adoption of Baby Boy D.*** (Okla. 1985) 742 P.2d 1059.)

In ***Baby Boy L.***, the first case to articulate the doctrine, the baby was the illegitimate child of a non-Indian mother, who voluntarily surrendered him to a non-Indian family for adoption on the day of his birth. The biological father, who was incarcerated, objected to the adoption and requested custody. Because the father was five-eighths Kiowa Indian, the Kiowa Tribe of Oklahoma was notified, and it petitioned to intervene and to transfer jurisdiction. The Kansas Supreme Court stated, "A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the

maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother. Section 1902 of the Act makes it clear that it is the declared policy of Congress that the Act is to adopt minimum federal standards 'for the removal of Indian children from their (Indian) families.' Numerous provisions of the Act support our conclusion that it was never the intent of Congress that the Act would apply to a factual situation such as is before the court." (***Matter of Adoption of Baby Boy L., supra***, 643 P.2d at p. 175.)

In ***Baby Boy D.***, the Oklahoma Supreme Court likewise found the ICWA inapplicable to an unwed Indian father who sought to invalidate an adoption accomplished with the non-Indian mother's consent. Although the father had attended an Indian school and had other contacts with his tribe, the court found the child was not being removed from an existing Indian family unit. "Here we have a child who has never resided in an Indian family, and who has a non-Indian mother." (***Adoption of Baby Boy D., supra***, 742 P.2d 1059, 1064.) In ***In Interest of S.A.M.***, a Missouri court also followed ***Baby Boy L.*** and refused to apply the ICWA where an unwed "full-blooded" Kickapoo Indian father sought custody of his seven-year-old daughter after the non-Indian mother's parental rights were involuntarily terminated. The father was not aware of the child's existence until she was almost seven, and the two had visited only twice before the litigation. She had severe emotional problems and was mentally handicapped. The court found the relationship between the father and daughter "does not constitute an 'Indian family' of the type mentioned in [ICWA]." (***In Interest of S.A.M., supra***, 703 S.W.2d at p. 608.) And in ***Adoption of T.R.M.***, the Indiana Supreme Court found the ICWA inapplicable to an attempt by the Oglala Sioux Indian

Tribe and the Indian mother to revoke her consent to the adoption of her daughter by a non-Indian couple. Although the child had not been formally adopted by the couple until the mother sought her return, she had lived with them as their daughter for seven years. The court held, "In the case before us, the child's biological ancestry is Indian. However, except for the first five days after birth, her entire life of seven years to date has been spent with her non-Indian adoptive parents in a non-Indian culture. While the purpose of the ICWA is to protect Indian children from improper removal from their existing Indian family units, such purpose cannot be served in the present case before this Court. . . . [W]e cannot discern how the subsequent adoption proceeding constituted a 'breakup of the Indian family.'" (***Matter of Adoption of T.R.M.***, ***supra***, 525 N.E.2d at p. 303.)

Other cases have looked beyond the Indian ties of the child to those of the parents when considering the existing Indian family exception to the applicability of the ICWA. In ***Matter of Adoption of Crews*** (Wash. 1992) 825 P.2d 305, the mother, who discovered some Indian heritage after the birth of her child, sought to revoke her consent to the child's adoption. The Washington Supreme Court reviewed the purposes of the ICWA and concluded there was no existing Indian family unit where "[n]either [the mother] nor her family has ever lived on the . . . reservation in Oklahoma and there are no plans to relocate the family . . . . [The father] has no ties to any Indian tribe or community and opposes [the child's] removal from his adoptive parents. Moreover, there is no allegation by [the mother] or the [tribe] that, if custody were returned to [the mother], [the child] would grow up in an Indian environment. To the contrary, [the mother] has shown no substantive interest in her Indian heritage in the past and has given no indication this will change in the future." (***Id.*** at p. 310.) In ***Hampton*** v. ***J.A.L.*** (La. App.2 Cir. 1995) 658 So.2d 331, the mother was 11/16th Indian and was a member of her father's tribe. She was born on the reservation of her mother's tribe and lived there for nine years, but had not since maintained any ties to

either tribe. She agreed to the adoption of her child by a non-Indian couple, who took custody the day after the birth. Six months later, the mother sought to revoke her consent under the ICWA. Citing ***Baby Boy L.***, ***Crews***, and ***T.R.M.***, the Louisiana appellate court found the adoption would not cause the breakup of an existing Indian family or removal of a child from an Indian environment. "The child has never participated in Indian culture or heritage and more importantly based on the evidence presented, would not be exposed to such culture in the future even if returned to her biological mother or her family." (***Hampton*** v. ***J.A.L.***, ***supra***, 658 So.2d at p. 337.)

In re Bridget R., ***supra***, 41 Cal.App.4th 1483, the most recent case on the existing Indian family doctrine, involved a voluntary relinquishment of twins for adoption. The mother was not a Native American, but the father was recognized as a member of the Pomo Indian tribe, whose reservation is in northern California. The parents lived in Los Angeles County at the time of the births. Upon the execution of the relinquishment documents, the twins were immediately placed with their adoptive family, who returned with them to their home in Ohio where they have remained ever since. The father subsequently petitioned to have his voluntary relinquishment rescinded as not in compliance with the ICWA. (§ 1913, subd. (a); § 1914.) Declining to apply the existing Indian family doctrine; the trial court invalidated the relinquishments, and ordered the twins removed from their adoptive family and returned to the custody of the father's extended family.

After extensive analysis, the appellate court reversed, holding that recognition of the existing Indian family doctrine was necessary to preserve the ICWA's constitutionality. "We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or

political relationship with their tribe." (***In re Bridget R.***, ***supra***, 41 Cal.App.4th at p. 1492.) The court concluded that the application of the Act under these circumstances would thwart its purpose of preserving Indian culture through the preservation of Indian families and would violate the Constitution by: (1) impermissibly intruding upon a power ordinarily reserved to the states; (2) interfering with Indian children's fundamental due process rights respecting family relationships; and (3) depriving Indian children of equal opportunities to be adopted and exposing them to an unequal chance of having non-Indian families torn apart based solely on race, in the absence of a compelling state purpose. Because the trial court had not taken evidence on whether the biological parents maintained "significant social, cultural or political relationships" with the tribe, the case was remanded for a determination on that issue.[8]

We agree with ***Bridget R.*** that recognition of the existing Indian family doctrine is necessary to avoid serious constitutional flaws in the ICWA. But we disagree with its holding that the doctrine *cannot* come into play unless the child *and* both his parents lack a significant relationship with Indian life. We are not willing to so limit the doctrine. As demonstrated by our review of the cases, whether there is an existing Indian family is dependent on the unique facts of each situation.

Nor must the existing Indian family be limited as suggested in ***Bridget R.***. Contrary to the view of the ***Bridget R.*** court (41 Cal.App.4th at p. 1500), a broader interpretation of the doctrine has not been impliedly rejected by the Supreme Court in ***Mississippi Band of Choctaw Indians*** v. ***Holyfield***, ***supra***, 109 S.Ct. 1597. ***Holyfield***

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[8] Two additional California cases have recognized the doctrine, but neither relied on it as a basis for the decision. (***In re Baby Girl A.*** (1991) 230 Cal.App.3d 1611; ***In re Wanomi P.*** (1989) 216 Cal.App.3d 156.) And two California cases have refused to apply the doctrine where only the child's Indian contact was considered. (***Adoption of Lindsay C.*** (1991) 229 Cal.App.3d 404; ***In re Junious M.*** (1983) 144 Cal.App.3d 786.) Several other states have rejected the doctrine. (See, e.g., ***Matter of Adoption of T.N.F.*** (Alaska 1989) 781 P.2d 973; ***Matter of Baby Boy Doe*** (Idaho 1993) 849 P.2d 925; ***Matter of N.S.*** (S.D. 1991) 474 N.W.2d 96.)

involved twin babies whose parents lived on the reservation and were enrolled members of the tribe. The babies were born 200 miles from the reservation and were voluntarily relinquished for adoption to a non-Indian couple, who adopted them in state court. The trial court found the twins' were not domiciled on the reservation because they had never been physically present there; thus, the tribal court did not have exclusive jurisdiction of the proceedings under § 1911, subdivision (a). The Supreme Court disagreed. It held that the domicile of minors is generally the domicile of their parents; thus, the twins were domiciled on the reservation and the tribal court had exclusive jurisdiction.

Holyfield did not reject any form of the existing Indian family doctrine. It dealt with reservation-domiciled Indian parents who had left the reservation temporarily for the birth of their children so they could relinquish them for adoption and avoid the application of the ICWA. The Supreme Court held the application of the exclusive jurisdiction provisions of the ICWA could not be defeated by the acts of the parents. (*Id.* at pp. 1608-1609.)

Furthermore, the facts of the case before us do not require us to hold, in the abstract, that the existing Indian family exception will *not* apply (in other words, the ICWA *will* apply) if one of an Indian child's biological parents, no matter how removed from the child's life, has maintained a connection to Indian life that a trial court deems significant. Here, the ICWA is not applicable under any version of the doctrine. Neither Alexandria nor Renea has any relationship with the SNO, let alone a significant one. Renea was raised by a non-Indian family, and her extended family is non-Indian. The issue of the existing Indian family doctrine was fully litigated below, but no evidence was presented to suggest Renea had ever been exposed to her Indian heritage as a child or pursued such an interest as an adult. The father is Hispanic, and Alexandria is placed in a preadoptive Hispanic home where Spanish is spoken. Under

these circumstances, it would be anomalous to allow the ICWA to govern the termination proceedings. It was clearly not the intent of the Congress to do so.

On the basis of the existing Indian family doctrine, we affirm the trial court's refusal to transfer jurisdiction to the SNO and to apply the ICWA's placement preferences.[9] The judgment terminating Renea's parental rights is affirmed.

CERTIFIED FOR PUBLICATION.

WALLIN, J.

I CONCUR:

SILLS, P. J.

[9] The SNO argues the case was actually transferred to it in September 1992 when the trial court notified the tribal court of the mother's petition and the tribal court issued an order accepting jurisdiction. This argument must fail because the letter from the trial court could not function as an order. Chief Magistrate Tah-Bone thought the trial court was transferring jurisdiction, and the trial court thought it would see if the tribal court wanted jurisdiction before it held a good cause hearing. This was a misunderstanding and does not elevate a letter to the status of a binding order.

CROSBY, J., concurring:

While I concur in the result in this case and some of the court's reasoning, I decline to endorse the majority's gratuitous criticism of ***In re Bridget R.*** (1996) 41 Cal.App.4th 1483. (Maj. slip opn. pp. 13-14.)

CROSBY, J.

Statement of

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Testimony before the

SENATE COMMITTEE ON INDIAN AFFAIRS

on

AMENDMENTS TO THE INDIAN CHILD WELFARE ACT PROPOSED BY THE NATIONAL CONGRESS OF AMERICAN INDIANS

Washington, D.C.
June 26, 1996

Chairman McCain, Members of the Committee, Good Morning.

My name is Michael J. Walleri, from Fairbanks, Alaska. For the last 17 years, I have represented the Tanana Chiefs Conference, a consortium of 34 Indian tribes in Interior Alaska. I am currently, general counsel for the TCC and the tribes. The member tribes have a combined tribal population of a little over 15,000 people, and our office manages an active ICWA case load comprised of between 120-160 children's cases, one half of which are in tribal courts. Over the last year and a half, I participated with several tribal and adoption attorney's in a national workgroup to develop amendments to the Indian Child Welfare Act, which culminated in the proposal submitted for your consideration by the National Congress of American Indians (NCAI).

HOW THE PROPOSAL WAS DEVELOPED

The NCAI proposal is the product of discussions over the last year and a half between the National Indian Child Welfare Association (NICWA), the Association on American Indian Affairs (AAIA), Tanana Chiefs Conference, (TCC) and the American Academy of Adoption Attorney's (AAAA). The effort was intended to develop a consensus package of amendments which would address mutually perceived problems with the Indian Child Welfare Act. These problems tend to destabilize Indian child adoptive placements by protracted and avoidable litigation over ambiguous language in the Act. The goal was to clarify and improve various provisions of the Act to bring more stability to Indian child adoptive placements in a manner consistent with the underlying policies of the Act.

The need for this legislation is not new. In 1988, the Committee considered several amendments advanced by tribal groups. In recent years, new accounts of contentious and prolonged litigation, and the adoption of different interpretations of this federal law by various states, has highlighted problems with the Act.

Last year, several proposals to amend ICWA were filed in the House and Senate. The House held a subcommittee hearing on one of the proposals in May, and several tribal groups and adoption practitioners testified. After the hearing, representatives of the AAAA contacted representatives of NICA and TCC to explore the possibility of developing consensus legislation. A national workgroup was formed and met over the following summer to discuss and develop such an approach.

The national workgroup produced several drafts of possible language, and finally presented a draft proposal to the Alaska Federation of Natives (AFN) in October of 1995. The AFN endorsed the package at its annual convention, and in November of 1995 the package was presented to NCAI at its annual convention in San Diego. NCAI gave the process a "yellow light" by endorsing the draft, and encouraging the process to continue, including consultation with a broader cross -

section of tribes on the national level. Substantive concerns within the adoption attorney community required further modification of the proposal, which was developed at a meeting in Phoenix in December, 1995. AAAA endorsed the Phoenix draft, which contained substantive changes and required resubmission to NCAI at its mid-year meeting in Tulsa in June, 1996. NCAI offered a further revision of the draft proposal at that time, which is before you now. Last week, the AAAA endorsed the NCAI proposal.

In the interim, the House passed amendments to ICWA contained in Title III of H.R. 3286, without benefit of a hearing process. There was no tribal consultation without a hearing process, and not a single tribe in the nation supported the proposal. The bi-partisan leadership of the House Resources Committee strongly objected to the provisions, and expressed its support for a more balanced and reasoned process such as the national workgroup involving meaningful participation by the tribes and adoption professionals. The action by this Committee, last week, to strike Title III of H.R. 3286 demonstrates an equal commitment to a more balanced and reasoned approach to the problem.

ANALYSIS OF NCAI PACKAGE

The amendments to the Indian Child Welfare Act (ICWA) proposed by NCAI are an attempt to promote stability and certainty of Indian child adoptive placements, by addressing the causes of protracted and needless litigation. The litigtion has been caused by efforts of some adoption practitioners to evade the application of the Act, and some tribal agencies to extend the provisions of the Act improperly.

The House version attempts to simply reclassify certain Indian children to no longer be Indian. The approach is a disingenuous slight of hand premised upon a rude image of Indian people and society captured in the 19th century reservation system. The test harkens back to a discredited policy in place prior to extending the right to vote to Indians generally, when individual Indians could apply to become reclassified as non-Indian, if they could demonstrate that they were"civilized". Moreover, the House version goes beyond addressing problems with voluntary adoptions by limiting Indian tribes from intervening and providing services in child abuse and neglect cases which arise off reservation.

The NCAI draft suggests a different approach which focuses upon specific problems within the area of Indian child welfare practice. It proposes certain reforms of ICWA intended to promote stability and certainty in the adoption process for Indian children, adoptive parents, extended Indian family and Indian tribes by providing:

* clarification of ICWA provisions and procedures,
* incentives for early dispute resolution, and
* penalties for efforts by all parties to violate ICWA provisions.

The NCAI draft also avoids the adverse consequences of the House draft which would prevent tribes from providing services to Indian children in involuntary child protection proceedings and needlessly interfere with tribal membership determinations which would deny other tribal benefits to off - reservation Indian children.

The specific provisions of the NCAI proposal address the following points:

1. NOTICE TO INDIAN TRIBES (VOLUNTARY) [refer to pages 4 and 6 of NCAI draft]

PROBLEM STATEMENT: Currently, ICWA requires that tribes receive notice of involuntary foster care placements, but does not require tribal notice of voluntary adoptions. This has resulted in a serious dichotomy illustrated by two Alaskan cases which have set national precedence. In In Re IRS, 690 P.2d 10 (Alaska 1984) and Catholic Social Services v C.A.A., 783 P.2d 1159 (Alaska, 1989) the Courts held that tribes could intervene into voluntary adoption proceedings to enforce ICWA placement preferences, but were not entitled to notice of these proceedings. Consequently, tribes depend upon learning of proposed adoptions by word of mouth, which needless delays the development of tribal responses and interventions. This has been unnecessarily disruptive of adoptive placements and prolonged litigation .

PROPOSED SOLUTION: Provide notice to tribes for voluntary adoptions. The NCAI proposal also specifies the content of the notice to assure that tribes have adequate information to identify the child and the child's extended family and respond in a timely manner

2. TIMELINESS FOR INTERVENTION (VOLUNTARY) [refer to pages 2,3 and 5 of NCAI draft]

PROBLEM STATEMENT: Under ICWA, Tribes can intervene at any time in the proceedings. This can be disruptive of an adoptive family placement if the intervention occurs after physical placement of the child in the adoptive home. Since tribes do not currently receive notice of the adoption, and their intervention is delayed, this can be a common problem.

PROPOSED SOLUTION: If tribes receive early notice, it is reasonable that tribes be limited to file their intent to intervene, or objection to the adoption within 90 days, or be precluded from further intervention. Additionally, the NCAI draft provides that if the tribe files a determination within the 90 days that the child is not a member, the court and adoptive parents can rely upon that representation in the adoption proceedings.

3. CRIMINAL SANCTIONS [refer to pages 6 of NCAI draft]

PROBLEM STATEMENT: In the Rost case [In re Bridget R., 49 Cal. Rpt. 2d 507 (1996)] the attorney for the adoptive parents counseled the biological parents to not disclose that they were tribal members. This issue became a central part of the litigation. That attorney is now being sued by the Rosts, the tribe, and the biological family, but the practice is still common among some adoption attorney's. These deceptive practices, by some unethical adoption practitioners, destablize adoptive placements and stimulate needless litigation between tribes, Indian extended family members and the adoptive families, and irreparably harm Indian children. These practices are a fraud upon adoptive parents, Indian children, and Indian extended families, which is destructive to all the involved parties.

PROPOSED SOLUTION: Efforts intended to evade application of federal law, committed by attorney's, and public or private agencies facilitating adoptions, should be a crime.

4. WITHDRAWAL OF CONSENT [refer to pages 3 and 4 of NCAI draft]

PROBLEM STATEMENT: The current ICWA does not provide specific time lines for a parent to withdraw his/her consent to adoption. Instead, ICWA precludes withdrawal of parental consent to adoption based on one of several procedural benchmarks in the termination of parental rights or adoption process. In its current form, it is very unclear as to when a parent may or may not withdraw consent, since various states have differing adoption procedures that may or may not trigger the applicable sections of ICWA. The interplay between various state laws has led to litigation in several states with varying outcomes. Additionally, the time lines between entry of consents to adoptions and the actual commencement of an adoption procedure varies with the laws and practice patterns of the various states. The longer time between parental consent to adoption and commencement of the adoption proceeding increases the potential for problems. This may become more complex with inter-state adoptions in which consents to adopt are obtained in one jurisdiction and the adoption proceedings are initiated in another state. There is a need for a national standard as to when an Indian parent may withdraw consent to an adoption to provide more predictability and stability to the adoption process.

PROPOSED SOLUTION: The NCAI proposal establishes a national standard for the withdrawal of parental consent to adoption by providing that a parent may withdraw a consent to adoption up to 30 days after commencement of adoption proceedings, six months after notice to the tribe if no adoption proceeding is commenced, or entry of a final adoption order, whichever occurs first.

5. CLARIFICATION OF APPLICATION OF ICWA IN ALASKA [refer to page 2 of NCAI draft]

PROBLEM STATEMENT: Much of the litigation in Alaska over ICWA involves the issue of Indian country . The concern over the issue continues to drive protracted litigation based upon the implication of such decisions on non - ICWA concerns. This has impeded implementation of the primary goals of ICWA. Consequently, Indian children suffer the trauma of such needless litigation.

PROPOSED SOLUTION: The NCAI draft proposes to define reservations to include Alaska Native villages for ICWA purposes.

6. OPEN ADOPTIONS [refer to page 6 of NCAI draft]

PROBLEM STATEMENT: Much of the litigation over Indian children is related to the winner-take-all characteristic of child custody/adoption litigation. In many states, adoptions must totally terminate the relationship between children and biological parents. In states that allow open adoptions, this option has provided a basis for settlement of contentious litigation which allows Indian children to maintain contact with their family and/or tribe, while remaining in an adoptive placement to which the child has emotionally bonded.

PROPOSED SOLUTION: The NCAI proposal would authorize open adoptions for Indian children in all states. This would also reflect traditional customs of many Native American cultures which generally permit open adoptions by custom and tradition.

7. WARD OF TRIBAL COURT [refer to page 2 of NCAI draft]

PROBLEM STATEMENT: Ambiguity over who is a ward of a tribal court has led to some confusion and litigation. The issue is important since wards of a tribal court are subject to the exclusive jurisdiction of tribal courts.

PROPOSED SOLUTION: The NCAI proposal would clarify that for ICWA purposes, a child may become a ward of a tribal court only if the child was domiciled or resident within a reservation, or where proceedings were transferred from state court to tribal court.

8. INFORMING INDIAN PARENTS OF RIGHTS [refer to page 2 of NCAI draft]

PROBLEM STATEMENT: Currently, ICWA only provides that an Indian parent is advised of his/her rights respecting the adoption of his/her child by the court. This usually occurs long after the parent has decided to consent to the child's adoption, and for the most part is perfunctory. It is not required that the parents be advised about his/her rights before the decision respecting adoption is made. This

has resulted in Indian parents changing their minds after they have consulted a lawyer and been advised of their rights.

PROPOSED SOLUTION: The NCAI proposal would provide that attorney's, and public and private agencies must inform Indian parents of their rights and their children's rights under ICWA prior to the entry of a consent to adoption. Hopefully, this will reduce the number of parents who change their minds about adoption after consulting an attorney subsequent to signing a consent to adoption.

9. TRIBAL MEMBERSHIP.

PROBLEM STATEMENT: The most contentious ICWA litigation involves whether a particular child is a member of a tribe or eligible for membership, and therefore included within the coverage of ICWA. A central premises of US Indian self-determination policy provides that tribes have the right to determine their membership, and that different Indian tribes are free to have different membership criteria. Tribal critics have accused tribes of extending their tribal membership beyond permissible boundaries, while tribes have resisted efforts by state courts to unduly restrict tribes from employing modern tribal membership determinations adopted by the tribes.

Critics of the tribes have called for federal review of such determinations by the tribes, however, an emerging body of case law is addressing the matter. One line of cases has treated the matter as an evidentiary question capable of determination by State courts, with some cases going so far as to hold that State courts can determine tribal membership determinations without regard to established tribal membership determination processes.

On the other hand, another line of cases is emerging which holds that tribal membership must be determined by the tribe, and that review is available in by state and federal courts, after exhaustion of tribal remedies, in determining whether the tribe exceeded its lawful powers, or violated the due process provisions of the Indian Civil Rights Act, and the tribal decisions is entitled to State court full faith and credit.

PROPOSED SOLUTION: The NCAI proposal provides that tribal membership be determined by a certification by the tribe to be filed upon intervention. The proposal does not disturb emerging case law which allows state and federal court review of such determinations after exhaustion of tribal remedies.

OTHER AMENDMENTS

Last week members of the national workgroup continued to meet to discuss various concerns being raised by tribal and adoption advocates. The most recent set of concerns are

1) allowing pre-birth notice to a tribe of a planned adoption,

2) futher clarifying standards of tribal intervention,

3) prohibiting removal of a child from a jurisdiction to evade application of ICWA,

4) need for more specific language regarding Alaska,

5) further clarification of language respecting parental withdrawal of consent, and

6) language requiring information in notice to tribe only if known after a reasonable inquiry,

The national workgroup has developed language to address these concerns and transmitted the proposed language to the committee in a letter by Mr. Jack Trope of AAIA. These amendments are consistent with both the NCAI and AAAA endorsements and merely clarify the drafters understandings of the proposal.

CONCLUSION

I hope this helps the Committee understand the logic and background behind the NCAI proposal. I believe that the proposal will greatly improve the stability and certainty of Native child adoptive placements, and will reduce the litigation which has plagued the area. I have been impressed with the improvements which have occurred as a result of ICWA when tribal, state and private agencies work together to provide safe and appropriate homes for Indian children, who might not otherwise have an opportunity to be raised in a healthy Indian family environment. On the other hand, there is too much litigation between multiple families seeking to raise the same child. These battles do as much harm to a child as might occur if no body wanted the child. I would urge the committee to take action to adopt the NCAI proposal as a rational, well balanced and thoughtful attempt to curb such destructive litigation.

federal register

Monday
November 26, 1979

Part III

Department of the Interior

Bureau of Indian Affairs

Guidelines for State Courts; Indian Child Custody Proceedings

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Guidelines for State Courts; Indian Child Custody Proceedings

This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

There was published in the Federal Register, Vol. 44, No. 79/Monday, April 23, 1979 a notice entitled Recommended Guidelines for State Courts—Indian Child Custody Proceedings. This notice pertained directly to implementation of the Indian Child Welfare Act of 1978, Pub. L. 95–608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.* A subsequent Federal Register notice which invited public comment concerning the above was published on June 5, 1979. As a result of comments received, the recommended guidelines were revised and are provided below in final form.

Introduction

Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect. Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. To the extent that the Department's interpretations of the Act are correct, contrary interpretations by the courts would be violations of the Act. If procedures different from those recommended in these guidelines are adopted by a state, their adequacy to protect rights guaranteed by the Act will have to be judged on their own merits.

Where Congress expressly delegates to the Secretary the primary responsibility for interpreting a statutory term, regulations interpreting that term have legislative effect. Courts are not free to set aside those regulations simply because they would have interpreted that statute in a different manner. Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance. *Batterton* v. *Francis*, 432 U.S. 416, 424–425 (1977).

In other words, when the Department writes rules needed to carry out responsibilities Congress has explicity imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding. Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Portions of the Indian Child Welfare Act do expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language. For example, under 25 U.S.C. 1918, the Secretary is directed to determine whether a plan for reassumption of jurisdiction is "feasible" as that term is used in the statute. This and other areas where primary responsibility for implementing portions of the Act rest with this Department, are covered in regulations promulgated on July 31, 1979, at 44 FR 45092.

Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S. Rep. No. 95–597, 95th Cong., 1st Sess. 17 (1977). The Department's interpretation of statutory language of this type is published in these guidelines.

Some commenters asserted that Congressional delegation to this Department of authority to promulgate regulations with binding legislative effect with respect to all provisions of the Act is found at 25 U.S.C. 1952, which states, "Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.

Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.

Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act. Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect.

Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court. That approach has not been adopted because the Department has an obligation not to assert authority that it concludes it does not have.

Each section of the revised guidelines is accompanied by commentary explaining why the Department believes states should adopt that section and to provide some guidance where the guidelines themselves may need to be interpreted in the light of specific circumstances.

The original guidelines used the word "should" instead of "shall" in most provisions. The term "should" was used to communicate the fact that the guidelines were the Department's interpretations of the Act and were not intended to have binding legislative effect. Many commenters, however, interpreted the use of "should" as an attempt by this Department to make statutory requirements themselves optional. That was not the intent. If a state adopts those guidelines, they should be stated in mandatory terms. For that reason the word "shall" has replaced "should" in the revised guidelines. The status of these guidelines as interpretative rather than legislative in nature is adequately set out in the introduction.

In some instances a state may wish to establish rules that provide even greater protection for rights guaranteed by the Act than those suggested by these guidelines. These guidelines are not intended to discourage such action. Care should be taken, however, that the

provision of additional protections to some parties to a child custody proceeding does not deprive other parties of rights guaranteed to them by the Act.

In some instances the guidelines do little more than restate the statutory language. This is done in order to make the guidelines more complete so that they can be followed without the need to refer to the statute in every instance. Omission of any statutory language, of course, does not in any way affect the applicability of the statute.

A number of commenters recommended that special definitions of residence and domicile be included in the guidelines. Such definitions were not included because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act. Recommending special definitions for the purpose of this Act alone would simply provide unnecessary complications in the law.

A number of commenters recommended that the guidelines include recommendations for tribal-state agreements under 25 U.S.C. 1919. A number of other commenters, however, criticized the one provision in the original guidelines addressing that subject as tending to impose on such agreements restrictions that Congress did not intend should be imposed. Because of the wide variation in the situations and attitudes of states and tribes, it is difficult to deal with that issue in the context of guidelines. The Department is currently developing materials to aid states and tribes with such agreements. The Department hopes to have those materials available later this year. For these reasons, the provision in the original guidelines concerning tribal-state agreements has been deleted from the guidelines.

The Department has also received many requests for assistance from tribal courts in carrying out the new responsibilities resulting from the passage of this Act. The Department intends to provide additional guidance and assistance in that area also in the future. Providing guidance to state courts was given a higher priority because the Act imposes many more procedures on state courts than it does on tribal courts.

Many commenters have urged the Department to discuss the effect of the Act on the financial responsibilities of states and tribes to provide services to Indian children. Many such services are funded in large part by the Department of Health, Education, and Welfare. The policies and regulations of that Department will have a significant impact on the issue of financial responsibility. Officials of Interior and HEW will be discussing this issue with each other. It is anticipated that more detailed guidance on questions of financial responsibility will be provided as a result of those consultations.

One commenter recommended that the Department establish a monitoring procedure to exercise its right under 25 U.S.C. 1915(e) to review state court placement records. HEW currently reviews state placement records on a systematic basis as part of its responsibilities with respect to statutes it administers. Interior Department officials are discussing with HEW officials the establishment of a procedure for collecting data to review compliance with the Indian Child Welfare Act.

Inquiries concerning these recommended guidelines may be directed to the nearest of the following regional and field offices of the Solicitor for the Interior Department:

Office of the Regional Solicitor, Department of the Interior, 510 L Street, Suite 406, Anchorage, Alaska 99501, (907) 265–5301.

Office of the Regional Solicitor, Department of the Interior, Richard B. Russell Federal Building, 75 Spring St., SW., Suite 1328, Atlanta, Georgia 30303, (404) 221–4447.

Office of the Regional Solicitor, Department of the Interior, c/o U.S. Fish & Wildlife Service, Suite 306, 1 Gateway Center, Newton Corner, Massachusetts 02158, (617) 628–6258.

Office of the Field Solicitor, Department of the Interior, 686 Federal Building, Fort Snelling, Twin Cities, Minnesota 55111, (612) 725–3540.

Office of the Regional Solicitor, Department of the Interior, P.O. Box 25007, Denver Federal Center, Denver, Colorado 80225, (303) 234–3175.

Office of the Field Solicitor, Department of the Interior, P.O. Box 549, Aberdeen, South Dakota 57401, (605) 225–7254.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1538, Billings, Montana 59103, (406) 245–6711.

Office of the Regional Solicitor, Department of the Interior, Room E–2753, 2800 Cottage Way, Sacramento, California 95825, (916) 484–4331.

Office of the Field Solicitor, Department of the Interior, Valley Bank Center, Suite 280, 201 North Central Avenue, Phoenix, Arizona 85073, (602) 261–4756.

Office of the Field Solicitor, Department of the Interior, 3610 Central Avenue, Suite 104, Riverside, California 92506, (714) 787–1560.

Office of the Field Solicitor, Department of the Interior, Window Rock, Arizona 86515, (602) 871–6151.

Office of the Regional Solicitor, Department of the Interior, Room 3068, Page Belcher Federal Building, Tulsa, Oklahoma 74103, (918) 581–7501.

Office of the Field Solicitor, Department of the Interior, Room 7102, Federal Building & Courthouse, 500 Gold Avenue, S.W., Albuquerque, New Mexico 87101, (505) 766–2547.

Office of the Field Solicitor, Department of the Interior, P.O. Box 337, W.C.D. Office Building, Route 1, Anadarko, Oklahoma 73005, (405) 247–6673.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1508, Room 319, Federal Building, 5th and Broadway, Muskogee, Oklahoma 74401, (918) 683–3111.

Office of the Field Solicitor, Department of the Interior, c/o Osage Agency, Grandview Avenue, Pawhuska, Oklahoma 74056, (918) 287–2431.

Office of the Regional Solicitor, Department of the Interior, Suite 6201, Federal Building, 125 South State Street, Salt Lake City, Utah 84138, (801) 524–5677.

Office of the Regional Solicitor, Department of the Interior, Lloyd 500 Building, Suite 607, 500 N.E. Multnomah Street, Portland, Oregon 97232, (503) 231–2125.

Guidelines for State Courts

A. Policy

(1) Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own

families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

(2) In any child custody proceeding where applicable state or other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

A. Commentary

The purpose of this section is to apply to the Indian Child Welfare Act the canon of construction that remedial statutes are to be liberally construed to achieve their purpose. The three major purposes are derived from a reading to the Act itself. In order to fully implement the Congressional intent the rule shall be applied to all implementing rules and state legislation as well.

Subsection A.(2) applies to canon of statutory construction that specific language shall be given precedence over general language. Congress has given certain specific rights to tribes and Indian children. For example, the tribe has a right to intervene in involuntary custody proceedings. The child has a right to learn of tribal affiliation upon becoming 18 years old. Congress did not intend 25 U.S.C. 1921 to have the effect of eliminating those rights where a court concludes they are in derogation of a parental right provided under a state statute. Congress intended for this section to apply primarily in those instances where a state provides greater protection for a right accorded to parents under the Act. Examples of this include State laws which: impose a higher burden of proof than the Act for removing a child from a home, give the parents more time to prepare after receiving notice, require more effective notice, impose stricter emergency removal procedure requirements on those removing a child, give parents greater access to documents, or contain additional safeguard to assure the voluntariness of consent.

B. Pretrial requirements

B.1. Determination That Child Is an Indian

(a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's indenity to become publicly known.

(b)(i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.

(ii) Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

(c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:

(i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.

(ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.

(iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.

(iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.

(v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

B.1. Commentary

This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets those criteria. *Cohen, Handbook of Federal Indian Law* 133 (1942). Because of the Bureau of Indian Affairs' long experience in determining who is an Indian for a variety of purposes, its determinations are also entitled to great deference. *See, e.g., United States* v. *Sandoval*, 231, U.S. 28, 27 (1913).

Although tribal verification is preferred, a court may want to seek verification from the BIA in those voluntary placement cases where the parent has requested anonymity and the tribe does not have a system for keeping child custody matters confidential.

Under the Act confidentially is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 U.S.C. § 1912 with 25 U.S.C. § 1913. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. § 1915(c) The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless.

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative. *United States* v. *Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979).

The guidelines also list several circumstances which shall trigger an inquiry by the court and petitioners to determine whether a child is an Indian for purposes of this Act. This listing is not intended to be complete, but it does list the most common circumstances giving rise to a reasonable belief that a child may be an Indian.

B.2. Determination of Indian Child's Tribe

(a) Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.

(b) The court shall send the notice specified in recommended guideline B.4. to each such tribe. The notice shall

specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.

(c) In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:

(i) length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;

(ii) child's participation in activities of each tribe;

(iii) child's fluency in the language of each tribe;

(iv) whether there has been a previous adjudication with respect to the child by a court of one of the tribes;

(v) residence on or near one of the tribes' reservation by the child's relatives;

(vi) tribal membership of custodial parent or Indian custodian;

(vii) interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these guidelines; and

(viii) the child's self identification.

(d) The court's determination together with the reasons for it shall be set out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.

(e) If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even though the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

B.2. Commentary

This guideline requires the court to notify all tribes that are potentially the Indian child's tribe so that each tribe may assert its claim to that status and the court may have the benefit of the views of each tribe. Notification of all the tribes is also necessary so the court can consider the comparative interest of each tribe in the child's welfare in making its decision. That factor has long been regarded an important consideration in making child custody decisions.

The significant factors listed in this section are based on recommendations by tribal officials involved in child welfare matters. The Act itself and the legislative history make it clear that tribal rights are to be based on the existence of a political relationship between the family and the tribe. For that reason, the guidelines make actual tribal membership of the child conclusive on this issue.

The guidelines do provide, however, that previous decisions of a court made on its own determination of the Indian child's tribe are not invalidated simply because the child becomes a member of a different tribe. This provision is included because of the importance of stability and continuity to a child who has been placed outside the home by a court. If a child becomes a member before a placement is made or before a change of placement becomes necessary for other reasons, however, then that membership decision can be taken into account without harm to the child's need for stable relationships.

We have received several recommendations that "Indian child's tribe" status be accorded to all tribes in which a child is eligible for membership. The fact that Congress, in the definition of "Indian child's tribe," provided a criterion for determining which is *the* Indian child's tribe, is a clear indication of legislative intent that there be only one such tribe for each child. For purposes of transfer of jurisdiction, there obviously can be only one tribe to adjudicate the case. To give more than one tribe "Indian child's tribe" status for purposes of the placement preferences would dilute the preference accorded by Congress to the tribe with which the child has the more significant contacts.

A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe had proved unsuccessful. So long as the special rights of *the* Indian child's tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act.

Determinations of the Indian child's tribe for purposes of this Act shall not serve as any precedent for other situations. The standards in this statute and these guidelines are designed with child custody matters in mind. A different determination may be entirely appropriate in other legal contexts.

B.3. Determination That Placement Is Covered by the Act

(a) Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.

(b) Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.

(c) Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

B.3. Commentary

The purpose of this section is to deal with some of the questions the Department has been receiving concerning the coverage of the Act.

The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child—whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses.

Placements based on status offenses (actions that are not a crime when committed by an adult), however, are usually premised on the conclusion that the present custodian of the child is not providing adequate care or supervision. To the extent that a status offense poses any immediate danger to society, it is usually also punishable as an offense which would be a crime if committed by an adult. For that reason status offenses are treated the same as dependency proceedings and are covered by the Act and these guidelines, while other juvenile delinquency placements are excluded.

While the Act excludes *placements* based on an act which would be a crime if committed by an adult, it does cover terminations of parental rights even

where they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed.

The Act excludes from coverage an award of custody to one of the parents "in a divorce proceeding." If construed narrowly, this provision would leave custody awards resulting from proceedings between husband and wife for separate maintenance, but not for dissolution of the marriage bond within the coverage of the Act. Such a narrow interpretation would not be in accord with the intent of Congress. The legislative history indicates that the exemption for divorce proceedings, in part, was included in response to the views of this Department that the protections provided by this Act are not needed in proceedings between parents. In terms of the purposes of this Act, there is no reason to treat separate maintenance or similar domestic relations proceedings differently from divorce proceedings. For that reason the statutory term "divorce proceeding" is construed to include other domestic relations proceedings between spouses.

The Act also excludes from its coverage any placements that do not deprive the parents or Indian custodians of the right to regain custody of the child upon demand. Without this exception a court appearance would be required every time an Indian child left home to go to school. Court appearances would also be required for many informal caretaking arrangements that Indian parents and custodians sometimes make for their children. This statutory exemption is restated here in the hope that it will reduce the instances in which Indian parents are unnecessarily inconvenienced by being required to give consent in court to such informal arrangements.

Some private groups and some states enter into formal written agreements with parents for temporary custody (*See e.g.* Alaska Statutes § 47.10.230). The guidelines recommend that the parties to such agreements explicitly provide for return of the child upon demand if they do not wish the Act to apply to such placements. Inclusion of such a provision is advisable because courts frequently assume that when an agreement is recuced to writing, the parties have only those rights specifically written into the agreement.

B.4. Determination of Jurisdiction

(a) In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section B.7. of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.

(b) If the Indian child has previously resided or been domiciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Section B.7. of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.

B.4. Commentary

The purpose of this section is to remind the state court of the need to determine whether it has jurisdiction under the Act. The action is dismissed as soon as it is determined that the court lacks jurisdiction except in emergency situations. The procedures for emergency situations are set out in Section B.7.

B.5. Notice Requirements

(a) In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.

(b) In any involuntary Indian child custody proceeding, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:

(i) The name of the Indian child.

(ii) His or her tribal affiliation.

(iii) A copy of the petition, complaint or other document by which the proceeding was initiated.

(iv) The name of the petitioner and the name and address of the petitioner's attorney.

(v) A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.

(vi) A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them.

(vii) A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.

(viii) The location, mailing address and telephone number of the court.

(ix) A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.

(x) The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.

(xi) A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

(c) The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which the notice was received to prepare for the proceeding.

(d) The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.

9e) Notice may be personnally served on any person entitled to receive notice in lieu of mail service.

(f) If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

(g) If the court or a petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau of Indian Affairs personnel arrange to have the notice explained to that person in the language that he or she best understands.

B.5. Commentary

This section recommends that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian. If anyone asserts that the child is an Indian or that there is reason to believe the child may be an Indian, then the court shall contact the tribe or the Bureau of Indian Affairs for verification. Refer to sections B.1 and B.2 of these guidelines.

This section specifies the information to be contained in the notice. This information is necessary so the persons who receive notice will be able to exercise their rights in a timely manner. Subparagraph (xi) provides that tribes shall be requested to assist in maintaining the confidentiality of the proceeding. Confidentiality may be difficult to maintain—especially where small tribes are involved and the likelihood that the family involved is well known by tribal officials is great. Although Congress was concerned with confidentiality, it concluded that the interest of tribes in the welfare of their children justified taking some risks with confidentiality—especially in involuntary proceedings. It is reasonable, however, to ask tribal officials to maintain as much confidentiality as possible consistent with the exercise of tribal rights under the Act.

The time limits are minimum ones required by the Act. In many instances, more time may be available under state court procedures or because of the circumstances of the particular case.

In such instances, the notice shall state that additional time is available.

The Act requires notice to the parent *or* Indian custodian. At a minimum, parents must be notified if termination of parental rights is a potential outcome since it is their relationship to the child that is at stake. Similarly, the Indian custodians must be notified of any action that could lead to the custodians' losing custody of the child. Even where only custody is an issue, noncustodial parents clearly have a legitimate interest in the matter. Although notice to both parents and Indian custodians may not be required in all instances by the Act or the Fourteenth Amendment to the U.S. Constitution, providing notice to both is in keeping with the spirit of the Act. For that reason, these guidelines recommend notice be sent to both.

Subsection (d) requires filing the notice with the court so there will be a complete record of efforts to comply with the Act.

Subsection (e) authorizes personal services since it is superior to mail services and provides greater protection or rights as authorized by 25 U.S.C. 1921. Since serving the notice does not involve any assertion of jurisdiction over the person served, personal notice may be served without regard to state or reservation boundaries.

Subsections (f) and (g) provide procedures to increase the likelihood that rights are understood by parents and Indian custodians.

B.6. Time Limits and Extensions

(a) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional twenty days from the date upon which notice was received to prepare for participation in the proceeding.

(b) The proceeding may not begin until all of the following dates have passed:

(i) ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;

(ii) ten days after the Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;

(iii) thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding; and

(iv) Thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.

(c) The time limits listed in this section are the minimum time periods required by the Act. The court may grant more more time to prepare where state law permits.

B.6. Commentary

This section attempts to clarify the waiting periods required by the Act after notice has been received of an involuntary Indian child custody proceeding. Two independent rights are involved—the right of the parents or Indian custodians and the right of the Indian child's tribe. The proceeding may not begin until the waiting periods to which both are entitled have passed.

This section also makes clear that additional extensions of time may be granted beyond the minimum required by the Act.

B.7. Emergency Removal of an Indian Child

(a) Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.

(b) When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:

(i) The name, age and last known address of the Indian child.

(ii) The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.

(iii) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.

(iv) The tribal affiliation of the child and of the parents and/or Indian custodians.

(v) A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.

(vi) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.

(vii) A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

(c) If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case—whichever is earlier.

(d) Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness,

that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

B.7. Commentary

Since jurisdiction under the Act is based on domicile and residence rather than simple physical presence, there may be instances in which action must be taken with respect to a child who is physically located off a reservation but is subject to exclusive tribal jurisdiction. In such instances the tribe will usually not be able to take swift action to exercise its jurisdiction. For that reason Congress authorized states to take temporary emergency action.

Since emergency action must be taken without the careful advance deliberation normally required, procedures must be established to assure that the emergency actions are quickly subjected to review. This section provides procedures for prompt review of such emergency actions. It presumes the state already has such review procedures and only prescribes additional procedures that shall be followed in cases involving Indian children.

The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end. State action shall also end as soon as the tribe is ready to take over the case.

Subsection (d) refers primarily to the period between when the petition is filed and when the trial court renders its decision. The Act requires that, except for emergencies, Indian children are not to be removed from their parents unless a court finds clear and convincing evidence that the child would be in serious danger unless removed from the home. Unless there is some kind of time limit on the length of an "emergency removal" (that is, any removal not made pursuant to a finding by the court that there is clear and convincing evidence that continued parental custody would make serious physical or emotional harm likely), the safeguards of the Act could be evaded by use of long-term emergency removals.

Subsection (d) recommends what is, in effect, a speedy trial requirement. The court shall be required to comply with the requirements of the Act and reach a decision within 90 days unless there are "extraordinary circumstances" that make additional delay unavoidable.

B.8. Improper Removal From Custody

(a) If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

(b) If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

B.8. Commentary

This section is designed to implement 25 U.S.C. § 1920. Since a finding of improper removal goes to the jurisdiction of the court to hear the case at all, this section provides that the court will decide the issue as soon as it arises before proceeding further on the merits.

C. Requests for Transfer to Tribal Court

C.1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.

C.1. Commentary

Reference is made to 25 U.S.C. 1911(b) in the title of this section in order to clarify that this section deals only with transfers where the child is not domiciled or residing on an Indian reservation.

So that transfers can occur as quickly and simply as possible, requests can be made orally.

This section specifies that requests are to be made promptly after receiving notice of the proceeding. This is a modification of the timeliness requirement that appears in the earlier version of the guidelines. Although the statute permits proceedings to be commenced even before actual notice is received by parties entitled to notice, those parties do not lose their right to request a transfer simply because neither the petitioner nor the Secretary was able to locate them earlier.

Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoi such disruptions.

The Department received a number c comments objecting to any timeliness requirement at all. Commenters pointec out that the statute does not explicitly require transfer requests to be timely. Some commenters argued that imposing such a requirement violated tribal and parental rights to intervene at any point in the proceedings under 25 U.S.C. § 1911(c) of the Act.

While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention.

Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

C.2. Criteria and Procedures for Ruling on 25 U.S.C. § 1911(b) Transfer Petitions

(a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

(b) If the court believes or any party asserts that good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer. The petitioners shall have the opportunity to provide the

court with their views on whether or not good cause to deny transfer exists. C.2. Commentary

Subsection (a) simply states the rule provided in 25 U.S.C. § 1911(b).

Since the Act gives the parents and the tribal court of the Indian child's tribe an absolute veto over transfers, there is no need for any adversary proceedings if the parents or the tribal court opposes transfer. Where it is proposed to deny transfer on the grounds of "good cause," however, all parties need an opportunity to present their views to the court.

C.3. Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.3. Commentary

All five criteria that were listed in the earlier version of the guidelines were highly controversial. Comments on the first two criteria were almost unanimously negative. The first criterion was whether the parents were still living. The second was whether an Indian custodian or guardian for the child had been appointed. These criteria were criticized as irrelevant and arbitrary. It was argued that children who are orphans or have no appointed Indian custodian or guradian are no more nor less in need of the Act's protections that other children. It was also pointed out that these criteria are contrary to the decision in *Wisconsin Potawatomies of the Hannahville Indian Community* v. *Houston*, 397 F. Supp. 719 (W.D. Mich 1973), which was explicitly endorsed by the committee that drafted that Act. The court in that case found that tribal jurisdiction existed even through the children involved were orphans for whom no guardian had been appointed.

Although there was some support for the third and fourth criteria, the preponderance of the comment concerning them was critical. The third criteria was whether the child had little or no contact with his or her Indian tribe for a significant period of time. The fourth was whether the child had ever resided on the reservation for a significant period of time. These criteria were criticized, in part, because they would virtually exclude from transfers infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant previous contact with the tribe or the reservation. Some also argued that these criteria invited the state courts to be making the kind of cultural decisons that the Act contemplated should be made by tribes. Some argued that the use of vague words in these criteria accorded state courts too much discretion.

The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more evenly divided and many of the critics were ambivalent. They worried that young teenagers could be too easily influenced by the judge or by social workers. They also argued that fear of the unknow would cuase many teenagers to make an ill-considered decision against transfer.

The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe is not advised. The circumstances under which it may be proper for the state court to take such considerations into account are set out in the revised subsection (iv).

It is recommended that in most cases state court judges not be called upon to determined whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.

This reasoning does not apply, however, where there is no parent available to make that decision. The guidelines recommend that state courts be authorized to make such determinations only in those cases where there is no parent available to make it.

State court authority to make such decisions is limited to those cases where the child is over five years of age. Most children younger than five years can be expected to adjust more readily to a change in cultural environment.

The fifth criterion has been retained. It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives.

The existence of a tribal court is made an absolute requirement for transfer of a case. Clearly, the absence of a tribal court is good cause not to ask the tribe to try the case.

Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "The subsection is intended to permit a State court to apply to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation. This problem may be alleviated in some instances by having the court come to the witnesses. The Department is aware of one case under that Act where transfer was conditioned on having the tribal court meet in the city where the family lived. Some cities hav substantial populations of members of tribes from distant reservations. In such situations some tribes may wish to appoint members who live in those cities as tribal judges.

The timeliness of the petition for transfer, discussed at length in the commentary to section C.1, is listed as a factor to be considered. Inclusion of this criterion is designed to encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays. Long periods of uncertainty concerning the future are

generally regarded as harmful to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings.

Almost all commenters favored retention of the paragraph stating that reservation socio-economic conditions and the perceived adequacy of tribal institutions are not to be taken into account in making good cause determinations. Some commenters did suggest, however, that a case not be transferred if it is clear that a particular disposition of the case that could only be made by the state court held especially great promise of benefiting the child.

Such considerations are important but they have not been listed because the Department believes such judgments are best made by tribal courts. Parties who believe that state court adjudication would be better for such reasons can present their reasons to the tribal court and urge it to decline jurisdiction. The Department is aware of one case under the Act where this approach is being used and believes it is more in keeping with the confidence Congress has expressed in tribal courts.

Since Congress has established a policy of preferring tribal control over custody decisions affecting tribal members, the burden of proving that an exception to that policy ought to be made in a particular case rests on the party urging that an exception be made. This rule is reflected in subsection (d).

C.4. Tribal Court Declination of Transfer

(a) A tribal court to which transfer is requested may decline to accept such transfer.

(b) Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.

(c) Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties.

(d) If the case is transferred the state court shall provide the tribal court with all available information on the case.

C.4. Commentary

The previous version of this section provided that the state court should presume the tribal court has declined to accept jurisdiction unless it hears otherwise. The comments on this issue were divided. This section has been revised to require the tribal court to decline the transfer affirmatively if it does not wish to take the case. This approach is in keeping with the apparent intent of Congress. The language in the Act providing that transfers are "subject to declination by the tribal court" indicates that affirmative action by the tribal court is required to decline a transfer.

The recommended time limit for a decision has been extended from ten to twenty days. The additional time is needed for the court to become apprised of factors it may want to consider in determining whether or not to decline the transfer.

A new paragraph has been added recommending that the parties assist the tribal court in making its decision on declination by giving the tribal court their views on the matter.

Transfers ought to be arranged as simply as possible consistent with due process. Transfer procedures are a good subject for tribal-state agreements under 25 U.S.C. § 1919.

D. Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Rights

D.1. Access to Reports

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. No decision of the court shall be based on any report or other document not filed with the court.

D.1. Commentary

The first sentence merely restates the statutory language verbatim. The second sentence makes explicit the implicit assumption of Congress—that the court will limit its considerations to those documents and reports that have been filed with the court.

D.2. Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from h or her parents or Indian custodians. These efforts shall take into account th prevailing social and cultural conditio and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extende family, the tribe, Indian social service agencies and individual Indian care givers.

D.2. Commentary

This section elaborates on the meaning of "breakup of the Indian family" as used in the Act. "Family breakup" is sometimes used as a synonym for divorce. In the context of this statute, however, it is clear that Congress meant a situation in which th family is unable or unwilling to raise th child in a manner that is not likely to endanger the child's emotional or physical health.

This section also recommends that th petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home for the child. The term "individual Indian care givers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed.

One commenter recommended that detailed procedures and criteria be established in order to determine whether family support efforts had been adequate. Establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not comtemplate such a role for the courts and they generally lack the expertise to make such judgments.

D.3. Standards of Evidence

(a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one of more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents of Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.

D.3. Commentary

The first two paragraphs are essentially restatement of the statutory language. By imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be shown that it is shown that it is dangerous for the child to remain with his or her present custodians. Evidence of that must be "clear and convincing" for placements and "beyond a reasonable doubt" for terminations.

The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be—without any testing of the implicit assumption that only a family that conformed to that stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress. The focus must be on whether the particular conditions are likely to cause serious damage.

D.4. Qualified Expert Witnesses

(a) Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.

(b) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty.

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

D.4 Commentary

The first subsection is intended to point out that the issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically two questions are involved. First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?

The party presenting an expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by nonexperts.

The second subsection makes clear that knowledge of tribal culture and childrearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior—which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.

Indian tribes and Bureau of Indian Affairs personnel frequently know persons who are knowledgeable concerning the customs and cultures of the tribes they serve. Their assistance is available in helping to locate such witnesses.

E. Voluntary Proceedings

E.1. Execution of Consent

To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

E.1. Commentary

This section provides that consent may be executed before either a judge or magistrate. The addition of magistrates was made in response to a suggestion from Alaska where magistrates are found in most small communities but "judges" are more widely scattered. The term "judge" as used in the statute is not a term of art and can certainly be construed to include judicial officers who are called magistrates in some states. The statement that consent need not be in open court where confidentiality is desired or indicated was taken directly from the House Report on the Act. A recommendation that the guideline list the consequences of consent that must be described to the parent or custodian has not been adopted because the consequences can vary widely depending on the nature of the proceeding, state law and the particular facts of individual cases.

E.2. Content of Consent Document

(a) The consent document shall contain the name and birthdate of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.

(b) A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

(c) A consent to termination of parental rights or adoption shall contain,

in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

E.2. Commentary

This section specifies the basic information about the placement or termination to which the parent or Indian custodian is consenting to assure that consent is knowing and also to document what took place.

E.3. Withdrawal of Consent to Placement

Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing, in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.

E.3. Commentary

This section specifies that withdrawal of consent shall be filed in the same court where the consent document itself was executed.

E.4. Withdrawal of Consent to Adoption

A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a *final decree of voluntary termination or adoption* by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.

E.4. Commentary

This provision recommends that the clerk of the court be responsible for notifying the family with whom the child has been placed that consent has been withdrawn. The court's involvement frequently may be necessary since the biological parents are often not told who the adoptive parents are.

F. Dispositions

F.1. Adoptive Placements

(a) In any adoptive placement of an Indian child under state law preference must be given (in the order listed below) absent good cause to the contrary, to placement of the child with:

(i) A member of the child's extended family;

(ii) Other members of the Indian child's tribe; or

(iii) Other Indian families, including families of single parents.

(b) The Indian child's tribe may establish a different order of preference by resolution. The order of preference must be followed so long as placement is the least restrictive setting appropriate to the child's needs.

(c) Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

F.1. Commentary

This section makes clear that preference shall be given in the order listed in the Act. The Act clearly recognizes the role of the child's extended family in helping to raise children. The extended family should be looked to first when it becomes necessary to remove the child from the custody of his or her parents. Because of differences in cultures among tribes, placement within the same tribe is preferable.

This section also provides that single parent families shall be considered for placements. The legislative history of the Act makes it clear that Congress intended custody decisions to be made based on a consideration of the present or potential custodian's ability to provide the necessary care, supervision and support for the child rather than on preconceived notions of proper family composition.

The third subsection recommends that the court or agent make an active effort to find out if there are families entitled to preference who would be willing to adopt the child. This provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities.

F.2. Foster Care or Preadoptive Placements

In any foster care or preadoptive placement of an Indian child:

(a) The child must be placed in the least restrictive setting which

(i) most approximates a family;

(ii) in which his or her special needs may be met; and

(iii) which is in reasonable proximity to his or her home.

(b) Preference must be given in the following order, absent good cause to the contrary, to placement with:

(i) A member of the Indian child's extended family;

(ii) A foster home, licensed, approved or specified by the Indian child's tribe whether on or off the reservation;

(iii) An Indian foster home licensed approved by an authorized non-Indian licensing authority; or

(iv) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed so long as the criteria enumerated in subsection (b) are met.

F.2. Commentary

This guideline simply restates the provisions of the Act.

F.3. Good Cause To Modify Preference

(a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:

(i) The request of the biological parents or the child when the child is of sufficient age.

(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

(b) The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.

F.3. Commentary

The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph (i) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons. The wishes of an older child are important in making an effective placement.

In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Paragraph (ii) recommends that such considerations be considered as good cause to the contrary.

Paragraph (iii) recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

Since Congress has established a clear preference for placements within the tribal culture, it is recommended in subsection (b) that the party urging an exception be made be required to bear the burden of proving and exception is necessary.

G. Post-Trial Rights

G.1. Petition To Vacate Adoption

(a) Within two years after a final decree of adoption of any Indian child by a state court, or within any longer period of time permitted by the law of the state, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such consent was obtained by fraud or duress.

(b) Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

G.1. Commentary

This section recommends that the petition to vacate an adoption be brought in the same court in which the decree was entered, since that court clearly has jurisdiction, and witnesses on the issue of fraud or duress are most likely to be within its jurisdiction.

G.2. Adult Adoptee Rights

(a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

(b) The section applies regardless of whether or not the original adoption was subject to the provisions of the Act.

(c) Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

G.2. Commentary

Subsection (b) makes clear that adoptions completed prior to May 7, 1979, are covered by this provision. The Act states that most portions of Title I do not "affect a proceeding under State law" initiated or completed prior to May 7, 1979. Providing information to an adult adoptee, however, cannot be said to affect the proceeding by which the adoption was ordered.

The legislative history of the Act makes it clear that this Act was not intended to supersede the decision of state legislatures on whether adult adoptees may be told the names of their biological parents. The intent is simply to assure the protection of rights deriving from tribal membership. Where a state law prohibits disclosure of the identity of the biological parents, tribal rights can be protected by asking the BIA to check confidentially whether the adult adoptee meets the requirements for membership in an Indian tribe. If the adoptee does meet those requirements, the BIA can certify that fact to the appropriate tribe.

G.3. Notice of Change in Child's Status

(a) Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.

(b) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.

G.3. Commentary

This section provides guidelines to aid courts in applying the provisions of Section 106 of the Act. Section 106 gives legal standing to a biological parent or prior Indian custodian to petition for return of a child in cases of failed adoptions or changes in placement in situations where there has been a termination of parental rights. Section 106(b) provides the whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, such placement is to be in accordance with the provisions of the Act—which requires notice to the biological parents.

The Act is silent on the question of whether a parent or Indian custodian can waive the right to further notice. Obviously, there will be cases in which the biological parents will prefer not to receive notice once their parental rights have been relinquished or terminated. This section provides for such waivers but, because the Act establishes an absolute right to participate in any future proceedings and to petition the court for return of the child, the waiver is revocable.

G.4. Maintenance of Records

The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

G.4. Commentary

This section of the guidelines provides a procedure for implementing the provisions of 25 U.S.C. § 1915(e). This section has been modified from the previous version which required that all records be maintained in a single location within the state. As revised this section provides only that the records be retrievable by a single office that would make them available to the requester within seven days of a request. For some states (especially Alaska) centralization of the records themselves would create major administrative burdens. So long as the records can be promptly made available at a single location, the intent of this section that the records be readily available will be satisfied.

Forrest J. Gerard,

Assistant Secretary, Indian Affairs.

November 16, 1979.

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TESTIMONY OF
THE NATIONAL INDIAN CHILD WELFARE ASSOCIATION

Mr. Chairman and members of the Committee, thank you for the opportunity to present this testimony on behalf of the National Indian Child Welfare Association which is based in Portland, Oregon. Our comments will focus on our view that the Indian Child Welfare Act (ICWA) has worked successfully for the vast majority of Indian children, families, and tribes. Where there is a need for improvements the appropriate solutions should reflect a measured, reasonable approach that considers the original purpose of the ICWA, and the needs of Indian children, families, tribes, and prospective adoptive parents. We believe that the amendments developed by the tribes and the National Congress of American Indians, with input from the American Academy of Adoption Attorneys, represents such an approach. However, we also believe that the ICWA amendments in Title III of H.R. 3286, "The Adoption Promotion and Stability Act", do not represent an effective solution to concerns that some have regarding the implementation of the ICWA in voluntary adoption proceedings. Our testimony will provide background on the Indian Child Welfare Act and identify the reasons we believe Congress should support the tribal/NCAI draft ICWA amendments and oppose the House passed ICWA amendments contained in Title III of H.R. 3286.

National Indian Child Welfare Association (NICWA). The National Indian Child Welfare Association provides a broad range of services to tribes, Indian organizations, states and federal agencies, and private social service agencies throughout the United States. These services are not direct client services such as counseling or case management, but instead help strengthen the programs that directly serve Indian children and families. NICWA services include: 1) professional training for tribal and urban Indian social service professionals; 2) consultation on social service program development; 3) facilitating child abuse prevention efforts in tribal communities; 4) analysis and dissemination of public policy information that impacts Indian children and families; and 5) helping state, federal and private agencies improve the effectiveness of their services to Indian people. Our organization maintains a strong network in Indian country by working closely with the National Congress of American Indians and tribal governments from across the United States.

INDIAN CHILDREN AND FEDERAL POLICY

In 1819, the United States Government established the Civilization Fund, the first federal policy to directly affect Indian children. It provided grants to private agencies, primarily churches, to establish programs to "civilize the Indian." In a report to Congress in 1867, the commissioner of Indian services declared that the only successful way to deal with the "Indian problem" was to separate the Indian children completely from their tribes. In support of this policy, both the government and private institutions developed large mission boarding schools for Indian children that were characterized by military type discipline. Many of these institutions housed more than a thousand students ranging in age from three to thirteen. Throughout the remainder of the nineteenth century, boarding schools became more oppressive. In 1880, for instance, a written policy made it illegal to use any native language in a federal boarding school. In 1910, bonuses were used to encourage boarding school workers to take leaves of absence and secure as many students as possible from surrounding reservations. These "kid snatchers" received no guidelines regarding the means they could use. Congress addressed this issue by declaring: "And it shall be unlawful for any Indian agent or other employee to induce, by withholding rations or by other

improper means, the parents or next of kin of any Indian child to consent to the removal of any Indian child beyond the limits of any reservation." In addition to boarding schools, other federal practices encouraged moving Indian children away from their families and communities. In 1884, the "placing out" system placed numerous Indian children on farms in the East and Midwest in order to learn the "values of work and the benefits of civilization."

Federal policy continued throughout the twentieth century with assimilation being the key focus in the Boarding Schools up until the 1950's. The passage of Public Law 280 in 1953 represented the culmination of almost a century old federal policy of assimilation. It's ultimate goal was to terminate the very existence of all Indian tribes. This ultimate assimilation policy was reflected in the child welfare policies of this period.

Throughout the 1950 and 60s, the adoption of Indian children into non-Indian homes, primarily within the private sector, was widespread. In 1959, the Child Welfare League of America, the standard-setting body for child welfare agencies, in cooperation with the Bureau of Indian Affairs, initiated the Indian Adoption Project. In the first year of this project, 395 Indian children were placed for adoption with non-Indian families in eastern metropolitan areas.

Little attention was paid, either by the Bureau of Indian Affairs or the states, to providing services on reservations that would strengthen and maintain Indian families. As late as 1972, David Fanshel wrote in *Far From the Reservation* that the practice of removing Indian children from their homes and placing them in non-Indian homes for adoption was a desirable option. Fanshel points out in the same book, however, that the removal of Indian children from their families and communities may well be seen as the "ultimate indignity to endure."

Fanshel's speculation bore out the truth of the matter. A 1976 study by the Association on American Indian Affairs found that 25 to 35 percent of all Indian Children were being placed in out-of-home care. Eighty-five percent of those children were being placed in non-Indian homes or institutions. In a response to the overwhelming evidence from Indian communities that the loss of their children meant the destruction of Indian culture, Congress passed the Indian Child Welfare Act of 1978.

THE INDIAN CHILD WELFARE ACT

The unique legal relationship that exists between the United States government and Indian people made it possible for Congress to adopt this national policy. Because of their sovereign nation status, Indian tribes are nations within a nation. The Constitution of the United States provides that "Congress shall have power to regulate commerce with Indian tribes." Through this and other constitutional authority, Congress has plenary power over Indian affairs, including the protection and preservation of tribes and their resources. Finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," Congress passed the Indian Child Welfare Act.

The Act, designed to protect Indian families, and thus the integrity of Indian culture, has two primary provisions. First, it sets up requirements and standards for child-placing agencies to follow in the placement of Indian children. It requires, among other things, providing remedial, culturally appropriate services for Indian families before a placement occurs; notifying tribes regarding the placement of Indian children and, when placement must occur, it sets out preferences for the placement of these children. The placement preferences start with members of the child's family, Indian or non-Indian, then other members of the child's tribe and lastly other Indian families. Both tribes and state courts have the ability to place Indian children with non-Indian families and often do when appropriate.

The Act also provides tribes with the ability to intervene in child custody proceedings, which results in greater participation from extended family members in many cases. Additionally, the Act recognized existing Indian tribal authority on the reservation and extended that authority to non-reservation Indian children when state courts transfer jurisdiction to tribal courts. A result of the Act has been the development and implementation of tribal juvenile codes, juvenile courts tribal standards, and child welfare services. Today, almost every Indian tribe provides a range of child welfare services to their member children.

INDIAN FAMILIES ARE THE LIFEBLOOD OF INDIAN COMMUNITIES

The importance of Indian families and their extended family networks in tribal culture has been well documented, especially during hearings for the Indian Child Welfare Act:

> [T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family...The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing.
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> [House Report 95-1386, 95th Congress, 2nd Session (July 24, 1978) at 10, 20.]

The strength of tribal culture comes from the agreement by members of who they are as a tribe and the value system that supports their tribal culture. This membership views family in a very broad sense, understanding the importance of all members in helping raise children and promote the well-being of the tribe. When an Indian child is born, it is a time of celebration, not just for the immediate family, but the for the extended family and other tribal members as well. Tribal members, whether they live on the reservation or a thousand miles away, are aware of this time for celebration and feel the common connection of this event. Family and culture are synonymous for Indian people and any changes in tribal membership or family will mean changes in culture and the viability of that culture for all members.

Acknowledging these family and community values leads to an appreciation of what it means to a tribe to lose even one child. Today, with a number of small tribes facing what can only be described as an precarious future and possibly even extinction, it becomes even more important to nurture the connections between Indian children and their tribal community.

TRIBAL MEMBERSHIP

Formal tribal membership determinations often do not happen prior to or at birth. Most tribes require a variety of information to be collected after the birth of the child before the membership process can even be initiated. The process itself can take anywhere from one month to several months depending on the accuracy of information provided, the number of tribal membership requests needing review, and the timing of the next tribal council or membership committee meeting.

The determination of tribal membership does not happen overnight and for good reasons. With the romanticism of Indian culture that began in the 1960's many non-Indian people have made claims to Indian heritage and the services or benefits that come with membership. By necessity, tribes have had to become careful in screening membership so that limited tribal services, such as health care, are available for those tribal members who qualify for them. This means that membership determinations can take time and because of limited resources to support this process, many tribes have times when enrollment applications are not accepted. The closing of the enrollment process is not of great concern to many tribes, because membership is still extended to tribal members, even if they have not completed a formal enrollment process. In addition, some tribes view enrollment lists as secondary to determinations of membership based on their intimate knowledge of what families and individuals are members of the tribe.

For those Indian families that are experiencing difficulties in trying to meet their basic needs, formal membership procedures may be a low priority. Because membership is assumed by many tribal members and the tribe under tribal traditions and customs, focusing on formalizing membership status during these stressful times would not seem necessary to many Indian people. Unlike other governments that use paper documents such as birth certificates as the primary means of establishing membership, tribes have long used and will continue to use their customary and traditional practices.

Enrollment does not equal membership in many situations. Many tribes, especially small tribes, do not have updated enrollment lists for a variety of reasons. One reason is the forced dispersion of the Indian population as a result of failed federal policies, such as the Boarding School, Termination and Relocation eras. During these periods Indian communities were broken apart by the forced removal of large numbers of children, while large numbers of adult Indian people were separated from their families involuntarily. The legacies of these policies are still visible in Indian Country today, as adult Indian people live in isolation from their families and communities, many not knowing their families or heritage. Tribes struggle to regain these lost connections, but are many times not successful until years and sometimes decades have passed in these Indian peoples lives. Stories abound in Indian Country of adult Indian people finding their families or connections to tribes that they never knew existed and the pain and grieving that they have lived with for many years because of their lost identity. In some cases, these people will never be given the opportunity to regain that sense of heritage and know their family.

COMMONLY ASKED QUESTION REGARDING THE ICWA

1) Was the ICWA intended to provide protections to Indian children and families living off the reservation?

Most definitely. When Congress began hearings on the ICWA prior to 1978, it was found that the children most vulnerable to unnecessary removals and institutionalization were those Indian children that lived off the reservation. At the time of passage of the ICWA, 25% - 35% of all Indian children were being unnecessarily removed from their homes and isolated from their natural families and communities. Those living off-reservation were particularly vulnerable to unnecessary removal because of their distance from tribal agencies and courts which had critical knowledge and experience to provide in a child custody proceeding. The legislative history of the ICWA and current body of federal case law makes clear that Congress intended to make ICWA protections available to all Indian children who are members of a federally-recognized tribes regardless of their place of residency.

2) Does the ICWA mandate that Indian children only be placed with Indian families?

No. The ICWA only provides preferences in the placement of Indian children with the first preference being family members - Indian or non-Indian. Furthermore, the ICWA provides state courts with the ability to alter the placement preferences upon a finding of good cause and have often done this. Furthermore, a large number of tribal child welfare programs in the United States have placed and will continue to place Indian children with non-Indian foster care or adoptive families when appropriate. It is important to understand that the process used in making placement decisions regarding any child will ultimately determine how well a child's needs are met. If the process is exclusionary and does not include all of the important parties, the placement becomes at risk of being disrupted or harmful to the child. Inclusion of all parties - extended family members, natural parents, tribe, and prospective foster or adoptive parents - is the most successful strategy and should be a part of every placement decision. This is the standard of practice that the ICWA establishes and when used properly almost never results in a disrupted placement.

3) Why should a tribe be allowed to intervene in a voluntary adoption proceeding between a consenting natural parent and a prospective adoptive couple?

As many states and tribes have found in their child welfare practice, many times natural parent(s) who are thinking about giving their children up for adoption have not clearly thought this decision through and may not be aware of opportunities to place the child with other family members. These parents are often very young and not yet mature in their thinking, but are nonetheless trying to deal with the tremendous stress of an unexpected pregnancy or other crisis in their immediate family. This was the case in a number of adoptions that Representative Pryce identified in the Congressional Record where young Indian parents, some that were not even 18 years of age, were being counseled by adoption attorneys to avoid involving their extended families in decisions to adopt out their children. Regrettably, these parents were then faced with a very tough

decision, one that has lifelong consequences, with little, if any, balanced information on alternatives to placing the child outside the natural family.

Situations like these where young Indian parents are only provided one way out of their dilemma do not meet the best interests of anyone, particularly the child. Allowing tribes to be a part of the adoption process enables extended family members in the community to be notified of a potential adoption of their grandchild, niece or nephew and be afforded the chance to discuss a possible placement in their family before it is too late.

In addition, tribes can provide assistance in locating appropriate homes for Indian children needing out of home placements. Many states and private adoption agencies find themselves with a shortage of qualified Indian adoptive homes and can benefit from the pool of homes that tribes may have available. As an example, in the state of Washington, the Yakama tribe has a pool of Indian foster care and adoptive homes which they have allowed the state Division of Social and Health Services to have access to. This agreement enables the agency facilitating the adoption to find the very best home for that child without unnecessary delays.

4) Is the ICWA a barrier to the timely placement of Indian children in foster care or adoptive homes?

No. In fact, since the passage of the ICWA, hundreds of thousands of Indian children have been successfully placed in both loving foster care and adoptive homes; both Indian and non-Indian. The ICWA has been a bright ray of hope for the vast majority of Indian children by helping them be reunified with their families and finding new homes when there are no natural family placements available. Tribal child welfare programs, which play a pivotal role in this accomplishment, have been increasingly successful in recruiting and maintaining foster care and adoptive homes within and outside of their reservation boundaries, making it possible for tribes to place Indian children even more quickly than states and private agencies in many cases. In many cases, state and private child placing agencies look to tribal child welfare programs to assist them in developing quality foster care and adoptive homes for Indian children.

A 1988 study on the status of the Indian Child Welfare Act revealed that tribal involvement in the placement of Indian children has resulted in, 1) Indian children being reunified more often with their natural families than with state or Bureau of Indian Affairs programs, and 2) shorter stays for Indian children in substitute care (i.e. foster care) than with state or Bureau of Indian Affairs programs. These successes are not surprising given the continued growth and sophistication of tribal child welfare programs in the United States. Many of these programs are now offering a full range of child welfare services independently or in collaboration with private and state child welfare agencies.

5) Are the protections available to Indian children in the ICWA still necessary today?

Yes. While the ICWA has certainly helped to reduce the chances that Indian children will not be unnecessarily removed from their homes, families and communities, there are still too many individuals and agencies involved in the unlawful placement of children; especially Indian children.

It is not an exaggeration to say that every year over a thousand Indian children who are eligible for and need the protections of the ICWA are being denied these fundamental rights to have access to their family and culture. This means that one or more of the following violations of the ICWA is usually occurring:

- Tribes and extended family members are not being notified when a member child is being considered for an out of home placement.
- Qualified Indian families, often times relatives of the Indian child, are not being given consideration as a placement resource for the child.
- Child welfare agencies working with Indian families who are experiencing difficulties are not making active and reasonable efforts to provide rehabilitative services to the family, thereby precluding any chance of the child being able to return home.
- State courts, without good cause, are refusing to transfer jurisdiction of child custody proceedings to tribal courts of which Indian children are members.
- Individuals or agencies are choosing to thwart the law by counseling young Indian families to not disclose their native heritage as a way to avoid the application of the ICWA or simply are refusing to take the necessary steps to confirm or deny whether the ICWA applies in a case.

6) Does the ICWA provide any flexibility for state courts to make individualized decisions in adoption cases?

Yes. A state court has the discretion to place an Indian child outside the placement preferences in the ICWA if it finds good cause to the contrary. While an Indian tribe may seek transfer of jurisdiction to tribal court of an off-reservation case, either birth parent may object to the transfer which has the effect of preventing such a transfer. Moreover, even where a parent does not object, a state court may deny transfer of jurisdiction to a tribal court.

7) Can the ICWA be used to disrupt an adoption proceeding at almost anytime?

No. If the jurisdictional and intervention provisions, and the procedures for consent to adoption in the ICWA are followed, no adoption may be disturbed once it is finalized unless there is fraud or duress in the initial consent. Even when there is fraud or duress, a challenge can be brought only two years after an adoption decree is final. A search of reported court decisions involving Indian adoptions where the ICWA was involved found only 30 cases since 1978 where adoptions were disrupted because of court disputes. Thus, where the ICWA is complied with initially, there is little threat that an adoption will be overturned.

WHY THE ICWA AMENDMENTS IN TITLE III OF H.R. 3286 WILL NOT WORK

- **Contrary to the sponsor's claims, this legislation will extend well beyond just voluntary adoption proceedings**. The legislative language will also deny Indian children the important protections they need in involuntary proceedings, both foster care and adoptions.

- **The amendments do much more than just "clarify" or "make minor changes" in the Indian Child Welfare Act as the sponsors have claimed**. Many full-blooded Indian children could end up in homes with strangers while their own extended family members who are qualified to care for them are ignored as potential placements.

- **The amendments address none of the real problems that give rise to lengthy adoption disputes**. Removing tribal government and tribal court jurisdiction over child custody proceedings will not improve placement outcomes for Indian children, and in fact will likely produce worse outcomes. The blaming of tribal governments and tribal courts ignores efforts by individuals who circumvent the ICWA law in state courts and cause most of the pain and suffering that both adoptive and natural families experience. In addition, tribal governments and courts have shown time and time again that they are in the best position to determine what the best interests of Indian children are and consistently produce better outcomes for Indian children when compared to state courts and placing agencies.

- **Indian families are being overlooked as viable placements for Indian children.**. While the sponsors of this legislation state that they are just trying to provide loving homes for Indian children, they have completely ignored the fact that many wonderful, qualified Indian families, many who are relatives of these children, are being overlooked as placements.

- **The bill has many serious flaws that will cause an explosion of new litigation on virtually every section of the bill. This will only result in <u>delaying</u> efforts to find good homes for Indian children awaiting adoption or foster care - the very problem that supporters of Title III say they are trying to resolve**. What is social, cultural, or political affiliation? What evidence proves or disapproves such affiliation? What does it mean to be affiliated as of the time of the proceeding? Does the court consider the affiliation over the last 10 years or just within the last month? What if a child maintains such relationship through a grandparent or other relative, but the parent does not? What if the child's parent(s) are deceased? What does it mean that a determination of non-affiliation is final? Does it mean that a judges determination cannot be appealed to a state appellate court or that a state appellate court decision which violates the ICWA cannot be reviewed in a federal court? Interestingly, determinations that uphold the application of the ICWA will be eligible to be appealed or reversed. What if a natural parent claims a lack of affiliation, the judge accepts this representation and two weeks later an Indian tribe presents overwhelming evidence that the parent has substantial contacts with the tribe? Every one of these questions and many more will be litigated repeatedly.

- **The bill replaces a bright line political test - membership in an Indian tribe as the trigger for the coverage of the ICWA - with a multi-faceted test that transforms the classification into more of a racial identification test**. This provision is likely unconstitutional since the legitimacy of Indian-specific legislation rests upon the fact that such legislation is based upon a political classification, and not a racial classification.

- **The arbitrary nature of Section One could result in Indian grandparents, uncles, aunts, nieces, nephews, and siblings being considered irrelevant in the lives of Indian children**. In the case of an Indian child who had very meaningful, significant relationships with their tribe and extended Indian family over a period of years, but maybe not within the last 3-6 months, the court could determine that this was sufficient evidence to exclude the child's tribe and extended family from being any part of that placement decision.

- **This section does not reflect the realities of how tribal membership mechanisms work and would likely exclude coverage of vast numbers of <u>bona fide</u> Indian children from coverage by the Indian Child Welfare Act**. Many Indian children are not formally enrolled, but are clearly members of a tribe and could be enrolled. In addition, assertions by the sponsors that tribes are trying to make members of everyone are false. First of all, tribes reserve the right to determine their own memberships as sovereign governments. State agencies and courts are not equipped to make these kind of membership determinations and could easily make mistakes that would deny bona fide Indian children and their families from being covered by the ICWA in both foster care and adoption proceedings. Secondly, tribes have every incentive to not be enrolling children who are not legitimately connected with the tribe since ultimately these children will be eligible for benefits that the tribe provides to its members - benefits which are generally limited in nature.

- **Title III would also impact Indian children and families resident or domiciled <u>on</u> the reservation**. Typically, child custody proceedings involving these families would be under the exclusive jurisdiction of the tribal court. However, in those circumstances where a state court misinterprets the parent or child's membership status or where the parent or child have not been formally enrolled, but are clearly eligible to be enrolled, there is nothing to stop states from coming on to the reservation and unnecessarily removing Indian children from their homes based on state, not tribal standards. There would be no requirement that an extended family or tribal placement for the child be sought. Tribal court authority over the voluntary and involuntary placement of such children would be lost, essentially taking us back to the types of rampant abuse which gave rise to the Indian Child Welfare Act.

- **Title III will interfere with positive efforts between tribes and states to protect Indian children and provide quality foster care and adoptive services**. A number of states and tribes have developed inter-governmental agreements to assist compliance efforts with the ICWA and create the best possible services for Indian children and families. Many of these agreements have put into place model services, court procedures, and training projects which will become almost totally irrelevant if Title III is enacted. Evidence of this assertion comes from states like Washington and Nevada which have gone on record to oppose the Title III ICWA amendments for these same reasons.