THE NCAI ICWA AMENDMENTS ARE A POSITIVE AND EFFECTIVE ALTERNATIVE TO TITLE III OF H.R. 3286

The following alternative amendments were adopted by member tribes at the National Congress of American Indian's Mid-Year Conference in Tulsa, Oklahoma. They were carefully developed by tribal leaders and experts in the field of adoption and foster care of Indian children with input from representatives of the American Academy of Adoption Attorneys.

This effort by the tribes signifies their willingness to address the specific concerns of those who feel that ICWA has flaws in some areas. But just as important, the amendments meaningfully address the concerns raised about ICWA in a way that can provide more security for potential adoptive parents and still allow for meaningful participation of extended family members and tribes when appropriate.

1. Notice to Indian Tribes of Voluntary Proceedings

Provides for notice to tribes in voluntary adoptions, termination of parental rights, and foster care proceedings. Also clarifies what should be included in notices to tribes of these proceedings. Providing timely and adequate notice to tribes will serve to ensure a more appropriate and permanent placement decision for the Indian child. When tribes and extended family members are allowed to be part of a placement decision the risk for disruption is significantly decreased. With proper notice, tribes can make informed decisions on whether the child is a member and whether or not they have an interest to participate in the placement decision. Notice also helps to expand the pool of potential adoptive parents because frequently the tribe knows of extended family members and other quality adoptive homes that are unknown to the individual or agency facilitating the adoption.

2. Timeline for Intervention in Voluntary Cases

Provides for a window of 90 days for tribes to intervene after notice of a voluntary adoptive placement or 30 days after notice of a voluntary adoption proceeding whichever is later. If a tribe does not intervene within these timelines after proper notice, they can not come back and later intervene.

Timely placements of children, whether they be Indian or non-Indian, are a concern of everyone. It is in no one's interest to let children languish in foster care or institutions when there is an appropriate adoptive placement available. Understanding this, tribes at NCAI came together to adopt language that will place an appropriate timeline on their ability to intervene in voluntary adoptive proceedings involving their children.

Historically, tribes and extended family members interests were almost never given any consideration in these sensitive proceedings. They often only found out about adoptions of their children months and sometimes years after deals had been cut. With proper notice, tribes can make informed decisions regarding their interests in a child and help facilitate a timely and successful adoptive placement.

3. Criminal Sanctions to Discourage Fraudulent Practices

Provides criminal sanctions for individuals or agencies which knowingly misrepresent whether a child is Indian to avoid application of the Indian Child Welfare Act. The vast majority of disrupted adoptions involving Indian children happen as a result of unethical and illegal behavior on the part of the individual or agency facilitating the adoption. In the now infamous "Rost" adoption case, the natural father was counseled to avoid disclosing he was Indian in order to avoid application of the ICWA, after which the adoption attorney falsified adoption papers that asked for the natural father's ethnicity. This is just one example amongst many where a number of innocent people, as well as the adoption itself, were exposed to unnecessary risks for the purposes of making life a little easier for the person facilitating the adoption. This kind of disregard for the lives of children, their natural families and potential adoptive families cannot be tolerated and should be punishable by law.

4. Limits for Withdrawal of Consent to Adopt

Limits the length of time within which birth parents can withdraw their consent to adoption to six months after notice to the tribe. Provides more certainty that adoptions involving Indian children will not be disrupted by placing time limits on the natural parents ability to revoke their consent to adopt. Furthermore, it brings federal law pertaining to the adoption of Indian children more in line with applicable state laws by avoiding unlimited timelines on when consent to adoption can be revoked.

5. Clarification of Application of ICWA in Alaska

Clarifies that, for the purposes of the Indian Child Welfare Act, Alaskan Native Villages have a land base over which they can exercise child welfare jurisdiction. The Alaskan tribes and the Alaskan delegation are working on a modification to this provision and the National Indian Child Welfare Association supports whatever modifications are developed by these parties.

6. State Court Option to Allow Open Adoptions

Allows state courts to provide open adoptions of Indian children where state law prohibits them. Some state courts prohibit biological family members from maintaining contact with the child, even when the adoptive parents agree. This provision provides another tool in a state court adoption proceeding to avoid protracted litigation and ensure children with access to their natural family and culture when deemed appropriate. However, state courts will still have full discretion as to whether this option is utilized.

7. Clarifying Ward of Tribal Court

Clarifies tribal court's authority to declare children wards of the tribal court, much like state courts do. Clarifies that once a tribal court takes control of an on-reservation child or a child transferred to them by a state court that the tribal court retains control. Ensures that tribal courts will not unilaterally reach out and take control over a child whose permanent home is off-reservation.

8. Informing Indian Parents of Their Rights

Provides that attorneys and public and private agencies must inform Indian parents of their rights and their children's rights under the ICWA. This provision will ensure that Indian parents are informed up front and able to make balanced decisions on the adoption or foster care placement

of their children. This will help avoid unnecessary litigation due to natural parents making uninformed decisions that they may wish to change later.

9. Tribal Membership Certification

Any motion to intervene in an adoption proceeding by a tribe shall be accompanied by certification of the child's membership or eligibility for membership according to tribal law or custom. This provision will help ensure that there is no question as to whether a child is Indian under the ICWA and that tribal membership determinations are not arbitrarily made.

THE SUCCESS OF ICWA IN HUMAN TERMS

I want to tell you in human terms what the Indian Child Welfare Act means to Indian families. Recently a 32 year-old Indian mother in Oakland, California, Prisella Packineau, rediscovered her Indian heritage. She was the child of a Navajo mother and a Mandan-Hidatsa father. When Prisella was only eighteen months old, her mother became mentally ill while living in the Phoenix area. Because her mother was unable to care for her Prisella was placed with a non-Indian foster family and never returned to her mother or extended family. She never even knew she had an Indian family or relatives. Her non-Indian family forbid her to speak of her Indian heritage and passed it off as something that was not important.

Years later, while battling depression and anxiety about her lost identity Prisella developed a substance abuse problem and her own children were placed in substitute care. But this time there was an Indian Child Welfare Act and a social worker who knew how to implement it. Even though Prisella had been enrolled in the Navajo Nation at birth, because of her placement in a non-Indian family at such a young age, no one had bothered to inform or help her enroll her own children. Fortunately, the social worker notified the Navajo tribe who moved to enroll Prisella's children and help find a placement with her extended family.

Upon visiting the home of one of Prisella's aunts, the social worker found pictures of the Prisella at eighteen months of age still on the wall. The aunt told of the families grief and the frustration at not being able to find this child whom they had helped raise as an infant. They told of not being able to find information to know where Prisella might be or if she was even alive. The years of not knowing where their loved one had disappeared to had left a definite mark on this family.

The tribe working with the mother's maternal aunt asked that the children be placed with her while the mother sought treatment for her substance abuse problem. As a result of the Indian Child Welfare Act and the good work of the tribe and Prisella's social worker, the children were placed with Prisella's aunt and are doing beautifully there on the Navajo reservation.

Today, Prisella has been reunited with her Navajo family and will very soon be celebrating three years of sobriety. She also knows she has a biological father, whom she was told by her earlier caseworker was dead, and hopes someday to meet him as well. She is a much happier, self-

confident person today, while her children have found a loving home with their extended family. As Prisella puts it, "I am able to give my children today what I did not get - a strong sense of who they are as Indian people. I am still trying to find what was lost to me long ago and it is very, very hard. I am trying to fill the hole in my heart."

If the proposed amendments in Title III of H.R. 3286 had been in enacted into law this success story would not be possible. The state court would likely have found that ICWA does not apply because Prisella would have been judged to not have significant cultural, social, or political affiliation with her tribe. In addition, it is likely that she would have failed the test that she and her children had to be enrolled prior to a child custody proceeding commencing. In both cases, Prisella would have been denied the opportunity to discover her extended family and her children would likely be living in a home where they had no contact with their mother or culture. This story is not an uncommon one in Indian Country and tells the most important reasons why the Indian Child Welfare Act does work and why it would be a grave mistake to weaken it in any way. The mother in this story has agreed to send the Committee her story.

CONCLUSION

The Indian Child Welfare Act has provided much needed protection and hope to thousands of Indian children since its enactment. What many people do not know is that this law has also given Indian communities hope for a better future. It is not uncommon to find Indian people in communities all across the country that have either found their own identity because of the ICWA or have a family member that was reunited because of the ICWA. These collective experiences which are shared every day provide the healing that is needed for Indian communities ravaged by federal policies that were designed to isolate and assimilate Indian people. In many of these cases, the discovery of their lost identity has enabled them to fill an emptiness inside themselves and find the kind of support and understanding they never had. This is the ICWA that we know, and when allowed to work properly, provides security and certainty in Indian children's lives.

We ask you to support the NCAI draft amendments to the ICWA. We believe they will continue the positive contributions to the health and safety of Indian children, while also providing the certainty prospective adoptive parents need. This balanced approach is the kind that makes everyone a winner and achieves what everyone says they want, which is the best interests of the child. Thank you for serious consideration of this testimony and request.

I24102-3

Federal Bar Association

STATEMENT OF THE FEDERAL BAR ASSOCIATION, INDIAN LAW SECTION
BY DONNA J. GOLDSMITH

PREPARED FOR SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON PROPOSED AMENDMENTS TO
THE INDIAN CHILD WELFARE ACT OF 1978

My name is Donna J. Goldsmith. I am an attorney, a former adjunct professor of Federal Indian Law, and current Deputy Chairperson of the Indian Law Section of the Federal Bar Association. During the last ten years, I have represented Indian children, parents, extended family members, foster parents, and Indian tribes from both the United States and Canada in Indian Child Welfare Act[1] proceedings in state courts throughout the country. From January of 1993 through October of 1995 I represented Indian children and parents in hundreds of ICWA proceedings involving members of numerous Indian families. The views that I express to this Committee in this statement are professional conclusions derived from my litigation experience in the field of child welfare, and have been adopted by the Indian Law Section of the Federal Bar Association. The views expressed herein are those of the Indian Law Section of the Federal Bar Association, and do not necessarily represent the views of the Federal Bar Association itself.

It is axiomatic, given the nature of the current debate in Congress, that there is an ongoing necessity for federal legislation to prevent the continuing separation of Indian

[1] Indian Child Welfare Act of 1978, 25 U.S.C. 1901 *et seq.* (hereafter "the ICWA" or "the Act").

children from their cultural heritage. As this Committee is aware, last month Congresswoman Pryce introduced, and the House of Representatives passed, amendments to the Indian Child Welfare Act which threaten the futures of Indian children, and of their future generations. Congress was asked to fatally weaken the ICWA at the behest of those who continuously and consistently violate the Act -- state agencies, attorneys, state judges, and the adoption industry. The Indian Law Section believes that this is bad policymaking.

Because the Indian Law Section of the Federal Bar Association registered its objections to the procedural defects which led to passage of those amendments, I will not repeat those comments today. Rather, these comments will focus on the patterns and practices that I have encountered nationwide during the last ten years, and which I believe have created the perceived problems that this Committee seeks to remedy today. First, I will address the factual misconceptions that appear to be controlling this debate, and whether there is a need for amended legislation. I will not comment upon the sovereignty issues that the proposed legislation would affect -- those are issues that are more appropriately addressed by tribal leaders. I will also make suggestions that I believe might remedy some of the current problems.

It has been my experience that there is *no* support for the broad-brushed comments made by supporters of the House amendments. While I have litigated and consulted on ICWA cases throughout the country, I have litigated a substantial number of cases in three states where there are large Indian populations -- Alaska, California,

and Oregon -- and have found that as far as those three states are concerned, the information presented in the House debate was purely of an emotional nature. Although the adoption industry -- and I refer to it as an industry because it is precisely that -- and general opponents of the ICWA would have us all believe that thousands of Indian children continue to suffer great anguish as they languish in foster care, unable to be placed in permanent homes, reality presents a very different picture. During the last three years the Juvenile Court in Portland, Oregon appointed me and attorneys from the Native American Program, Oregon Legal Services to represent almost all of the Indian children and parents in Portland, Oregon in child abuse and neglect proceedings. *If* there were *any* Indian children languishing in foster care, much less great numbers of them, I would have been aware of them. By the same token, I have been training judges, attorneys, and state and tribal personnel on Indian Child Welfare Act issues nationwide, and have heard no data to support the emotional pleas made by supporters of the House amendments.

Another factual misconception that appears to be playing on peoples' fears is the argument that there are numerous cases in which Indian tribes are removing children from their adoptive homes after substantial bonding has occurred. In more than ten years of law practice in the area of Indian child welfare, I have represented parties in only two cases in which the child's tribe even attempted to challenged the adoptive placement -- and only one case in which the tribe was successful in doing so. In the latter case, the adoption agency placed the child with her adoptive parents with full

knowledge that the child was a full-blooded Indian child who had substantial numbers of family members who might wish to adopt her. The agency chose to place the child with a non-Indian couple who lived out of state -- presumably a couple who could afford to pay the substantial fees that adoption agencies collect for each adoption -- and never bothered to contact the child's tribe or family members regarding adoption. The child's grandmother learned of the placement and pending adoption, notified the tribe, and the tribe intervened immediately to assert its exclusive jurisdiction. Two different California state courts recognized the tribe's exclusive jurisdiction in the case, and dismissed the petitions pending before the state courts. Subsequently, the attorney for the adoptive parents ignored tribal court orders -- and the tribe was forced to seek the help of state authorities to return the child to her family.

This was not an isolated incident. I have received many calls from frantic grandparents, some of whom are spiritual elders and leaders in their communities, who have learned of a pending adoptive placement at the last minute, only to find that the adoption agency has shipped the child out of state to a new home -- without even calling a member of the child's family. There is something inherently wrong about permitting economics to drive adoption decisions that will affect children for their entire lives. In fact, this Congress would be shocked to learn of another society that tolerated and even encouraged the wholesale removal of indigenous children from their communities and families, and whose government moved to weaken the only law that gave those communities a small degree of power to protect their children from such removal.

Anyone who thinks that all that an Indian child needs is a loving home in *any* family demonstrates no sensitivity to the special needs of Indian children. Indian children need their families, their spiritual connections, and their culture. As this Congress is well aware, psychological studies demonstrated historically that Indian children raised in non-Indian homes were at greater risk. Testimony from psychologists who had worked with numerous Indian children who had been raised outside of their families and cultures formed the basis of Congress' decision to enact the ICWA in the first place. Thus, if Congress weakens the ICWA, we will have come full circle.

Contrary to popular opinion, adoptions by seemingly loving parents do not always last -- with devastating consequences for the children. I represented one Indian child whose "loving and devoted" non-Indian adoptive parents *gave her back* after five years -- because they decided that she was too emotionally troubled. A diligent state caseworker discovered the child's Indian community, and was able to place the child with her grandmother. Imagine how that child felt when her adoptive parents gave her back -- as if she were a doll that no longer pleased them. She is now a gifted young artist and a talented dancer who is totally immersed in her family's traditional ways -- and who loves every minute of it.

There appear to be different variations of the same theme continuing to play. Proponents of H.R. 3286 continue to plead that we must act to remove tribal interference with adoption decisions that are being made by private adoption agencies, and that to do otherwise is not in the "best interests" of the Indian child. They argue

that Indian children need to be placed in permanent homes, and that many Indian children are languishing, without adoption prospects, because prospective adoptive parents are afraid to adopt Indian children for fear that tribes will interfere with the placement. These same individuals, who know nothing about the individual cultures from which they continue to remove Indian children, presumptuously propose that it is in the best interests of Indian children to find placement in loving homes regardless of whether or not those homes are able to infuse the child with substantial knowledge of his/her culture. Such attitudes are ethnocentric, at best -- and terribly patronizing. When I read the floor debate in favor of the House amendments, I wondered how many Indian children the proponents of that remedial legislation have personally known, or to how many Indian children they have even spoken. My personal experience with the numerous Indian children I have represented has been that Indian children suffer immeasurably when they are removed from their cultures and their extended families. I have witnessed, firsthand, the tragedy that so often occurs when young Indian adults who have been placed with loving non-Indian families come home to their tribal communities looking for connections -- looking for themselves, as they have told me -- only to find that they cannot become a part of those communities because they do not understand the intricacies and nuances of the tribal cultural and social fabric. My tribal clients have shared stories with me year after year concerning the many young adults who come home to them, adults who were placed out of culture without the tribes' knowledge -- adults who are angry that no one fought to bring them home, who are angry that they do

not fit in. And, perhaps most frightening of all, these same young, displaced adults often have children who ultimately become numbers in the child welfare statistics because the loss of culture and identity has such a devastating impact upon both the individual and subsequent generations.

In fact, contrary to the assertion that Indian tribes are routinely intervening at late stages and disrupting placements that are, it is argued, in the best interest of Indian children, it has been my routine experience that Indian tribes are quite sensitive to their children's needs, and carefully consider their placement decisions with *only* the children's needs in mind. I am, quite honestly, baffled by the adoption industry's characterization of tribal decisions regarding adoption of their children. Many of the tribes that I have represented have had the ability, pursuant to the ICWA, to disrupt adoptive placements that did not comply with even the minimum requirements of the Act. In all but one instance the tribes chose, after independently assessing the children's needs, *not* to disrupt the placements.

I have represented little children who have articulated to me, unsolicited, how painful it is for them to be disconnected from their families. It strikes me that it is terribly presumptuous for members of Congress to amend the ICWA in response to a few cases that have gained national notoriety. The "best interests" of Indian children is to ensure for them immersion in -- not mere awareness of -- their cultural heritage. Thus, while they, along with all children, want to know where and with whom they will live, more often than not they do not appreciate the significance of the legal nuances

between adoption, guardianship, and permanent foster care.

While I would not dispute that there might be a need for some amendments to the ICWA, the House amendments do not address the failures that should be at the heart of this debate. There are several causes why a few adoptions, such as those brought to the attention of the media in recent years, have gained national attention -- and while the House amendments appear to address the concerns raised by the adoption industry, it is my belief that the House amendments will exacerbate, rather than remedy, any existing problems regarding implementation of the Act.

There appear to be four consistent failures within the adoption, dependency and neglect systems that thrust some adoptions of Indian children into the public arena. First, and most important, state court personnel, caseworkers, private agencies, and attorneys are failing, on a regular basis, to attempt to properly *identify* who is and who is not an "Indian child" for purposes of the Act -- often because the mere thought of following the ICWA intimidates them. *If* the state court is even cognizant that the ICWA exists, and that its application is not discretionary, it is not uncommon for a state agency or court to look at a child, conclude that the child does not "look Indian", and dismiss any potential ICWA concerns. In several memorable cases, I personally asked a family member whether or not there was Indian heritage, and discovered that although the caseworker had advised the court that there was none, in fact the children were either enrolled or eligible for membership in a federally-recognized tribe. In those instances, had adoption been the immediate goal, the child's tribe would not have had an

opportunity to request placement of the child with extended family or other members of the tribe.

Second, in the event that *someone* raises the question of whether or not the ICWA applies in a child custody proceeding, it is equally common for a judicial officer to conclude after an inquiry to the child's family member regarding blood quantum that the child is "not Indian enough" to qualify as an Indian child under the Act. This is different from the judicially-created "existing Indian family" exception. If an attorney who understands federal Indian law happens to be sitting in court on that particular day, and can advise the court that membership decisions must be made by the child's tribe -- and only the child's tribe -- there is a chance that the child's tribe will receive notice of those proceedings. However, it is more common that no one challenges these judicial determinations, because no one who cares about ICWA concerns happens to be in court on that particular day. The result is that a child's Indian heritage (and, perhaps, membership in a tribe) is not discovered for many months -- or, worse yet, at the termination of parental rights stage -- and the court must reevaluate more than a year's worth of placement decisions. My recommendation would be that Congress contemplate an amendment that specifically requires all judicial officers to inquire at the beginning of each child custody proceeding whether or not a child has Indian heritage, and which further orders the *court* to send notice to the child's tribe if the answer to the Indian heritage question is in the affirmative. Oregon has enacted such a statute[2] -- and while

[2] *See* ORS 419B.310(2).

not all judicial officers always remember to follow that law, it has proven to be helpful in identifying ICWA cases. If federal law were to impose a similar requirement, it is my belief that many of the problems that state courts currently face regarding challenged ICWA adoptions would disappear.

A third leading cause for litigation surrounding adoptions, particularly regarding why children's tribes are not able to respond and intervene at an early stage on their children's behalf, is that it is not uncommon for a child's tribe to receive **no** notice of a proceeding -- voluntary or involuntary -- because none of the parties to the case believe that it is their duty to notify the child's tribe. Because the state courts do not believe that it is a duty of the court to send notice to a tribe, and the attorneys will not necessarily take on the responsibility, there is often a large gap in time before a child's tribe may receive notice. While the current language of the Act regarding notice is explicit, failure to follow its directives continues to be a problem today. Although I recognize that this Committee might be primarily interested in voluntary adoptions, it is not uncommon for a proceeding that begins as an involuntary proceeding to result in a voluntary relinquishment before the case runs through the normal sequence of events. Thus, it would behoove this Committee to consider all factors that might alleviate current concerns.

A fourth leading cause of litigated ICWA adoptions is the refusal of state and private agency personnel and attorneys to follow the mandates and policies of the ICWA. For example, even in those instances where the agency involved in removing the child

attempts to comply with the notice provisions of the Act, there is often a failure to comply with the explicit requirements set forth in the ICWA. Tribal personnel from numerous Indian nations have advised me that tribal enrollment clerks often receive inquiries from state agencies regarding a child's enrollment status -- commonly, no information about any child custody proceeding is included in that inquiry. If the enrollment clerk does not realize the purpose of the inquiry, and does not advise the person who is responsible for tribal child welfare decisions about the inquiry, and if the state or private agency subsequently advises the court that a notice to the child's tribe has been sent and the court notes that the tribe has not intervened, it is obvious what will likely ensue. I have personally reviewed the notices that state caseworkers have sent to tribes on many of my cases -- and found almost all of them to be wholly inadequate and in violation of the direct mandates of the ICWA.

In some cases, the only notice that tribes receive is a telephone inquiry from a state caseworker -- and nothing more, in spite of the fact that the Act requires written notice. In addition, I have been in *numerous* cases where I heard a caseworker advise the court that he/she had called the child's tribe and determined that there was no Indian heritage -- yet, when I contacted tribal personnel, I discovered that the child was actually an enrolled member.

Failure to properly advise the court that a case is covered by the ICWA is a common problem that often results in precluding Indian nations from participating in their children's custody cases. In one Oregon case, the fourteen-year-old mother's

attorney advised her client not to let anyone know that she was Native American, as it would cause problems for the adoption. My understanding is that this happened in the Rost case, too. I recently received a call about another case where an Indian grandmother's court-appointed attorney refused to notify the court that an Indian child was involved in the dependency and neglect proceeding, because she feared that doing so would anger the court and result in the loss of future court appointments in that court. We advised this attorney that she was committing malpractice by refusing to raise this issue, and she subsequently notified the court that the Act applied. That child is now with her grandmother, instead of in foster care on her way toward an adoption. These are only three out of numerous cases nationwide. I understand that in some states, state and private agency personnel indirectly encourage young Indian mothers not to reveal their Indian heritage or tribal affiliation, advising the mothers that if the agency becomes aware that the mother is Indian the agency is required to follow laws that would make it difficult for the agency to place the child.

There are additional, equally compelling reasons why the Indian Law Section urges this Committee to refrain from entertaining any other amendments at this time, as to do so would put the cart before the proverbial horse. At least sixteen states are in the process of completing voluntary internal assessments of the efficacy of their courts' compliance with the ICWA, pursuant to Congressional allocation of funds to the Administration for Children and Families, Department of Health and Human Services,

State Court Improvement Program, fiscal year 1995.[3] In addition, *all* fifty states are conducting mandatory evaluations of their own ICWA compliance pursuant to Title IV-B of P.L. 103-432, beginning in fiscal year 1996. Each state must draft a report on the specific remedial measures that the state intends to take to bring itself into full compliance with the ICWA. It seems inappropriate, then, for Congress to enact remedial ICWA legislation at this time, when Congress has allocated substantial amounts of money to ascertain how states can better comply with the ICWA -- and the surveys and proposals are not yet in.

Perhaps the greatest irony of all is that the proposed amendments would punish those members of tribes who are forced to leave their reservation for economic reasons -- and who find themselves before a judge who has concluded that because they have left their communities and become "urban" Indians, they do not maintain significant enough ties to their community to warrant application of the ICWA. The amendments place in the hands of the very systems that caused Congress to enact the ICWA the power to determine that the ICWA does not apply to Indian children. This creates a fundamental conflict of interest.

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[3] According to the various regional and state offices of the Administration for Children and Families, Department of Health and Human Services, those states are Alaska, Arizona, California, Colorado, Iowa, Kansas, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. This list is not necessarily complete. In addition, while South Dakota is not conducting a full evaluation of state court ICWA compliance, the state is evaluating its need for additional Indian foster homes near the reservations within the state. The state of Oregon, alone, received eighty-eight thousand dollars ($88,000) to conduct a survey of the entire judicial and child welfare system.

It has been said before, but is worth repeating, that the problems that have led to this debate are not problems with the Act, or with tribal responses to adoptions of Indian children. Rather, the problem lies with those individuals (judges, attorneys, state or private agency personnel) who consistently refuse to comply with the terms of the Act. In states such as Nevada and New Mexico, where state and tribal judges and government leaders are working hard at developing and maintaining good lines of communication, few problems arise regarding out of home placements of Indian children.

Finally, I understand that the Committee is entertaining an amendment that would require state and private agencies to notify a child's tribe of any voluntary placement of an Indian child. This is a critical amendment, as notice in voluntary cases would alleviate the need for much of the litigation that occurs now. It is most important, however, that tribes receive notice within a very short time after a placement of *any* kind -- both voluntary and involuntary. Once a child has been placed in either foster care or a pre-adoptive placement, it becomes increasingly difficult to challenge that placement. In fact, it is quite common for state agencies to place Indian children in non-Indian foster placements with the idea that the foster care will be for only a short time -- only to find that the foster placement becomes the pre-adoptive placement and, ultimately, adoptive placement. The states continue to argue that the shortage of Indian foster homes justifies these placements -- the reality is that many states do not make any efforts -- significant or otherwise -- to solicit help from the Indian community to expand the numbers of Indian foster homes. It is easy to see that if the state fails to notify the

child's tribe in the initial stages of any proceeding, the child's bonding with the foster/adoptive family is likely to interfere with the ability to move the child at a later date to his/her family.

One last comment: It is my belief that the House amendments, and any other amendments that are similar in nature, will impose a tremendous burden on state courts, and that they guarantee that there will be a dramatic and substantial increase in litigation. Thus, in addition to the fact that the House amendments infringe upon an area of tribal sovereignty that is fundamental and inimical to the very concept of sovereignty, enactment of these amendments will exacerbate, rather than diminish, any timeliness issues that affect adoption of Indian children.

The Indian Law Section of the Federal Bar Association thanks the Committee for the opportunity to offer these comments on proposed amendments to the Indian Child Welfare Act.

OFFICE OF THE GOVERNOR
STATE CAPITOL
SANTA FE, NEW MEXICO 87503

GARY E. JOHNSON
GOVERNOR

June 25, 1996

(505) 827-3000

The Honorable John McCain
United States Senator
Chair, Committee on Indian Affairs
838 Hart Senate Office building
Washington, D.C. 20510

Re: Statement Prepared for Senate Committee on Indian Affairs, Hearing on Proposed Amendments to the Indian Child Welfare Act of 1978.

Mr. Chairman, Members of the Committee:

I believe it important to inform the Committee of my position on the proposed amendments to the Indian Child Welfare Act (ICWA).

As Governor of the State of New Mexico, I believe that the Act should not be amended with respect to defining who qualifies as an Indian child, and who is entitled to notice of state court hearings involving Indian children.

I understand that the proposed amendments would substitute a subjective definition of "Indian child" in place of the current objective definition. Currently, ICWA defines an Indian child as one who is enrolled as a member of a tribe, or eligible for tribal membership. This is an objective standard which does not invite costly litigation over the question of who is an Indian child.

The proposed amendments would allow state courts to decide the question of who is an Indian child based on a finding that one of the parents is "of Indian descent". Two problems are immediately apparent: 1) the qualifier ("Indian descent") is a standard so broad that, should it become law, almost anyone in America today might qualify, and 2) the issue of who is or isn't "of Indian descent" is a question of fact that can be decided only after hard-fought, costly, and time consuming litigation.

The proposed amendments would also allow the state to determine whether a child's parent has sufficient " ... social, cultural, or political affiliation with the Indian tribe" to warrant application of ICWA. This particular amendment would create yet another subjective standard whereby a tribal community would be denied the right to receive notice of a state court proceeding involving an Indian child. If a tribe is denied such notice, then the tribal community is denied the opportunity to have any say on behalf of an Indian child with blood and cultural ties to the tribe.

Senator McCain
June 25, 1996
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The proposed standards for defining an Indian child and for determining whether there is a nexus between the child and a tribe are, at best, subjective and therefore susceptible to differing interpretations. Replacing the traditional objective definition of Indian child with the kinds of subjective definitions or standards described above will result in unnecessary and emotionally wrenching litigation which, ultimately, will hurt children.

We must not lose sight of the historical and legal facts underlying ICWA. ICWA is not an Act designed to protect special interests or privileges. The Indian Child Welfare Act is a law that acknowledges the historical fact that Native American people occupied the Americas as self-governing sovereign nations long before Europeans, African Americans, and others immigrated to this land. ICWA -- in its current form -- is the instrument essential to protecting the cultural integrity and survival of Native Americans. It also acknowledges the historical fact that, before its enactment, large numbers of Indian children were taken from their families under false pretenses.

I understand that the proposed amendments have been prompted by some emotionally charged cases as well as an intense debate about the rights of individual parents who have loose or severed connections with a tribe which can claim rights over that parent's children. These are not easy issues. But I do believe that the proposed amendments to ICWA would make the process more difficult, more litigious and, ultimately, more harmful to children and their families.

Sincerely,

Gary E. Johnson
Governor

GEJ/HAW:tgc

CC:
Pete V. Domenici
United States Senator
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Statement
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Chairman, Three Affiliated Tribes
Before the United States Senate
Indian Affairs Committee
Hon. John McCain, Chairman
Hearing on Indian Child Welfare Act
June 26, 1996

Mr. Chairman, members of the Committee. Thank you for the opportunity to present written testimony before your committee.

First, we want to thank the many members of the Committee and especially the Chairman and Vice-Chairman who have shown their continued commitment to the Indigenous Peoples of these United States in this 104th Congress. We are especially grateful for the recent action this Committee has taken to remove Title III of H.R. 3286, the Adoption Promotion and Stability Act of 1996, which contained amendments to the Indian Child Welfare Act (ICWA).

It is my understanding that having removed the provisions to which Indian Tribes and Nations across the country, including ours, have actively opposed, your committee now wishes to examine various amendments to ICWA that Indian Tribes and Nations could support, especially including the draft amendment language developed, with our active participation, at the recent mid-year conference of the National Congress of American Indians (NCAI) in Tulsa, Oklahoma. As you may know, I am a First Vice-President of NCAI representing the Aberdeen Area tribes. First, however, I want to give a brief background about the Three Affiliated Tribes, and why the Indian Child Welfare Act is important to us. Then, I will describe why we believe that Title III is a misguided effort to amend ICWA and, in contrast, suggest how the draft NCAI Tulsa language addresses some of the fundamental concerns raised by the proponents of Title III.

The Three Affiliated Tribes are the Arikara, Mandan and Hidatsa Nations located on the Fort Berthold Indian Reservation in northwest North Dakota. Like most other Indian tribes and Nations within the United States, the Nations that make up our affiliated Tribes were vastly reduced in population for many reasons by the turn of the 20th century. As our population began to stabilize by the middle of this century, new threats to our population, culture and way of life appeared, including the construction of the Garrison Dam along the Missouri River, which split our traditional homeland along the Missouri River into five distinct communities all divided by a large body of water. This great "flood", as we call it, turned our largely self-sufficient society upside down, causing massive relocation, and assisted in creating great poverty and other social problems on our reservation.

This, in turn, meant that more of our population was inclined to leave the reservation, which dramatically increased the possibility that our members would be adopted into non-Indian families. As a result, these

tribal members have lost their Native culture and traditions. The psychological effect of the loss of one's Indian culture and traditions has been, for far too many Tribal members, an empty feeling of not knowing who they are and being unable to recover their "lost identity". The loss to the Tribe as a whole when its members are taken away is incalculable.

The traumas created for families by both voluntary and involuntary placement of their children outside of our communities remain very real, especially because of a common feature of most Indian tribes, the "extended family". Aunts, uncles, grandfathers and grandmothers all often share in the responsibilities of raising their nieces, nephews and grandchildren. Cousins become like brothers and sisters, and are often referred to that way.

The extended family relationships that develop are very strong. Recently, as we were preparing a letter to send to this Committee while it considered whether to remove Title III of H.R. 3286, within a few minutes in our Tribal building, nearly every Tribal member employee over the age of 35 could recall different incidents of family traumas caused by adoptions and placements of family members into non-Indian families, because there were generally available perfectly capable extended family tribal members who could have raised and cared for the children being taken away. Often, the children placed or adopted were never heard from again The following is one of those stories.

> An Indian women had four (4) children and also had a drinking problem. However, the Indian grandmother cared for the children in her home. The Indian grandmother was an excellent caretaker and loved her grandchildren very much. One day, non-Indian social workers arrived in a station wagon to take the Indian children "away." The children began running but, eventually, the children were loaded into their station wagon. The grandmother never gave away or disposed of the children's clothing, hoping that someday they would return. The grandmother cried every day and mourned for her lost grandchildren until the day she died in 1974. The grandchildren would have been in their teens when their grandmother passed away. To this day, the mother's sisters, the children's aunts, vividly remember the children crying as the station wagon drove away, and stated they will never forget that day. It was one of the aunts who told this story and as she did she wept for the children, including remembering how her mother suffered the rest of her life grieving and mourning for the children. In 1978, several years after this incident, the mother had another baby, which was just prior to when the Indian Child Welfare Act took effect. Again, the non-Indian social workers took her newborn son right from the hospital. The social workers told the mother that her son was being taken somewhere on the east coast. To this day, the Indian relatives have never seen or heard from the children taken away.

The passage of the Indian Child Welfare Act (ICWA) in 1978 was a modest step forward to prevent our existence as the Three Affiliated Tribes from being further eroded. Our Three Affiliated Tribes, as a sovereign, Federally recognized Tribe, whose member Tribes existed long before the United States was a nation, was assured by ICWA that if we wished, we had the right to be notified and to intervene in state sanctioned actions in which the fate of our children was being decided, assist in influencing the outcome and to potentially obtain a transfer of the case to Tribal court where the best interests of our children would be finally determined.

Our state courts in North Dakota, like other State courts, initially resisted the application of ICWA to its court proceedings, but now, nearly 20 years after ICWA's passage, our state courts generally comply with the law and understand it. Along with that understanding has come a new recognition that the tribal courts of the tribes in North Dakota are as capable as state courts in reaching wise decisions about the custody and welfare of children.

Now, however, because of a few celebrated and largely misunderstood cases in which some people have reached the erroneous conclusion that the welfare of children is secondary to tribal political goals, we face a new and grave threat to our very existence as sovereign peoples. We simply cannot even think about going back to the days when State courts could decide our children's fates without tribal involvement, and where necessary, intervention and assertion of tribal jurisdiction.

The proposed Title III of the Adoption Promotion and Stability Act of 1996, H.R. 3286, in our opinion, was and remains dangerous in several ways, and would lead, if adopted, to further costly and time consuming litigation over a number of issues. If amendments to ICWA are necessary, we believe the have NCAI Tulsa meeting language provides a basis for meeting most of the objectives of those who are concerned about the misapplication of ICWA in state court proceedings.

First, Title III would set a new standard for who is an Indian child for the purpose of allowing the tribe the right to intervene in a child custody proceeding. It states that a tribe may not intervene unless: 1) one of the child s biological parents is "of Indian descent," and 2) at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member. The determination of parental affiliation is to be based on the parent s affiliation at the time of the custody proceeding. Finally, a determination by the state court that ICWA does not apply is final.

Under Title III, this determination of "affiliation" with the child's member tribe is one left to a state judge, without tribal input, and thus makes a tribal determination of eligibility for membership or actual membership in the tribe irrelevant. This is exactly the kind of situation ICWA was enacted to prevent. It represents a very drastic invasion of tribal sovereignty by replacing the tribe's determination of eligibility for membership with a vague and virtually impossible to define state determined standard of tribal association sure to cause protracted and costly litigation. Tribes are political entities, not racial classifications, recognized by the Federal government as capable of self-governance, and ICWA is legislation specifically based on that recognition.

Therefore, we can only support legislation which preserves the fundamental right of tribes to determine their own membership and apply that determination in tribal and state child custody proceedings. We believe that the NCAI Tulsa meeting language concerning "certification" of membership by a tribe at the time it seeks to intervene in a child custody proceeding goes a long way to meet the objective of certainty in the state court setting and, although we feel that no changes to ICWA are necessary at this time, we support the proposed language.

Second, Title III is concerned about retroactive enrollment of Indian children affecting ongoing adoption proceedings or affecting adoptions that have already occurred. These provisions of Title III do not take into account the fact that many tribes update membership rolls sporadically; that a child is not

necessary enrolled at birth; that in some cases where the child's parents are members of different tribes, the parents will let the child make the tribal enrollment decision; that many people are fully recognized as being part of a tribal community even though they are not formally enrolled; and that many Indian people do not enroll until there is specific need for it (e.g., voting privileges, scholarship applications). It also does not take into account what Congress recognized when it enacted ICWA, that there are abuses inflicted on young Indian parents who are counselled to give their children away shortly after birth, before the enrollment decision is even made.

We believe that a major part of the perceived problems with ICWA are procedural. Thus, the NCAI Tulsa meeting language helps to resolve the procedural problems of delayed intervention by a tribe in a child custody proceeding by setting strict timelines in voluntary cases for providing notice to tribes of the possibility of a child being a tribal member and timelines for tribal intervention in the custody proceeding. Along with these timelines, the contents of the notice given to the tribe is specified, to allow the tribe a better opportunity to determine if it wants to intervene at all. At present, the practice is often that the intervention decision is made simply to preserve the tribe's rights in the case.

Third, and finally, Title III would provide that the amendments to ICWA made by the Title would apply to current ICWA proceedings. While this provision might be well meant to benefit parties in certain cases, such an application would only serve to delay and increase the complexity of existing litigation, rather than simplify it. Further, application of the present Title III language to ongoing proceedings would only highlight the tribal objections to the first two portions of the Title which enormously undermine tribal sovereignty.

Again, we believe the modest provisions of the NCAI Tulsa meeting language should be sufficient to provide clarity and certainty to the legal proceedings in future child custody proceedings without requiring new interpretations of vague standards.

Other portions of the NCAI Tulsa meeting language address additional problems raised in the discussion of the Title III amendments to ICWA. Among those are: 1) Criminal sanctions against those who would prevent the proper application of ICWA, for example, attorneys who counsel a party to deny his or her Indian heritage would be subject to subject to criminal charges; 2) specific language that applies the act to Alaskan tribes and native villages; 3) clarification of a tribal court's power to declare children wards of the tribal court; and 4) the allowance in state court, regardless of the State's laws, of "open adoptions", wherein the parent whose child is being adopted can still have some contact with the child.

While we support the NCAI Tulsa meeting language amending ICWA, we again want to emphasize that we are not prepared to compromise further regarding the right of each tribe to determine its membership free of state or federal interference or review. After all, the United States Supreme Court has long recognized the right of Indian tribes to determine their own membership. If ICWA is to be changed, let it be changed to create as much procedural certainty as possible without compromising the ability of all tribes to intervene in State court proceedings and protect those who are most important to us but least able to defend themselves, our children.

Thank you, Mr. Chairman, and members of the Committee for your time and consideration of this issue.

Testimony before the Senate Select Subcommittee on Indian Affairs in support

of:

H.R. 3286, the Indian Child Welfare Act of 1978

delivered on June 21, 1996

by John W. Steele

Introduction

I am grateful for the opportunity to testify in support of H.R. 3286, the Indian Child Welfare Act. In 1978 Congress passed ICWA to address the concerns surrounding the high incidence of removal of Indian children from their Indian families and tribes and the placement of Indian Children in adoptive or foster homes out side the extended families, tribes and cultures. ICWA recognizes that cultural biases in child custody proceedings contribute to this problem. To promote the stability of Indian tribes and to counter cultural biases, Congress enacted ICWA to provide minimum procedural and substantive requirements which state courts must apply to child custody proceedings. The Oglala Sioux Tribe feels that ICWA should be strengthened and amended to address concerns raises by the Tribes across the nation.

The Oglala Sioux Tribe is in support of the Resolution TLS -96-007A passed by the National Congress of American Indians Mid Year Conference and recommend the following amendments.

1. Notice to Indian Tribes of Voluntary Proceedings

Provides for notice to tribes in voluntary adoptions, terminations of parental rights, and foster care proceedings. Also clarifies what should be included in notices to tribes of these proceedings.
Providing timely and adequate notice to tribes will serve to ensure a more appropriate and permanent placement decision for the Indian child. When tribes and extended family members are allowed to be a part of a placement decision the risk for disruption is significantly decreased. With proper notice tribes can make informed decisions on whether the child is a member and whether or not they have an interest to participate in the placement decision. Notice also helps to expand the pool of potential adoptive parents because frequently the tribe knows of extended family members and other quality adoptive homes that are unknown to the individual or agency facilitating the adoption.

2. Timeline for Intervention in Voluntary Cases

Provides for a window of 90 days for tribes to intervene after notice of a voluntary adoptive placement or 30 days after notice of a voluntary adoption proceeding whichever is later. If a tribe does not intervene within these timelines after proper notice, they can not come back and later intervene.

Timely placements of children, whether they be Indian or non-Indian , are a concern of everyone. It is in no one's interest to let children languish in foster care or institutions when there is an appropriate adoptive placement available. Understanding this, tribes at NCAI came together to adopt language that will place an appropriate timeline on their ability to intervene in voluntary adoptive proceedings involving their children.

Historically, tribes and extended family members interests were almost never given any consideration in these sensitive proceedings. They often only found out about adoptions of their children months and sometimes years after deals had been cut. With proper notice tribes can make informed decisions regarding their interests in a child and help facilitate a timely and successful adoptive placement.

3. Criminal Sanctions to Discourage Fraudulent Practices

Provides criminal sanctions for individuals or agencies which knowingly misrepresent whether a child is Indian to avoid application of the Indian Child Welfare Act. The vast majority of disrupted adoptions involving Indian children happen as a result of unethical and illegal behavior on the part of the individual or agency facilitating the adoption. In the now infamous "Ross" adoption case the natural father was counseled to avoid disclosing he was Indian in order to avoid application of the ICWA, after which the adoption attorney falsified adoption papers that asked for the natural father's ethnicity. This is just one example amongst many where a number of innocent people, as well as the adoption itself, were exposed to unnecessary risks for the purpose of making life a little easier for the person facilitating the adoption. This kind of disregard for the lives of children, their natural families and potential adoptive families cannot be tolerated and should be punishable by law.

4. Limits for Withdrawal of Consent to Adopt

Limits the length of time within which birth parents can withdraw their consent to adoption to six months after notice to the tribe. Provides more certainty that adoptions involving Indian children will not be disrupted by placing time limits on the natural parents ability to revoke their consent to adopt. Furthermore, it brings federal law pertaining to the adoption of Indian children more in line with applicable state laws by avoiding unlimited timelines on when consent to adopt can be revoked.

5. Clarification of ICWA in Alaska

Clarifies that, for the purposes of the Indian Child Welfare Act, Alaskan Native Villages have a land base over which they can exercise child welfare jurisdiction.

6. State Court Option to Allow Open Adoptions

Allows state courts to provide open adoptions of Indian children where state law prohibits them. Some state courts prohibit biological family members from maintaining contact with the child, even when the adoptive parents agree. This provision provides another tool in a state court adoption proceeding to avoid protracted litigation and ensure children with access to their natural family and culture when deemed appropriate. However, state courts will still have full desecration as to whether this option is utilized.

7. Clarifying Ward of Tribal Court

Clarifies tribal court's authority to declare children wards of the tribal court, much like state courts. Clarifies that once a tribal court takes control of an on-reservation child or a child transferred to them by a state court that the tribal court retains control. Ensures that tribal courts will not unilaterally reach out and take control over a child whose permanent home is off-reservation.

8. Informing Indian Parents of Their Rights

Provides that attorneys and public and private agencies must inform Indian parents of their rights and their children rights under the ICWA. This provision will ensure that Indian parents are informed up front and able to make balanced decisions on the adoption or foster care placements of their children. This will help avoid unnecessary litigations due to natural parents making uniformed decisions that them may wish to change later.

9. Tribal Membership Certification

Any motion to intervene in an adoption proceeding by a tribe shall be accompanied by certification of the child's membership or eligibility for membership according to tribal law or custom. This provision will help ensure that there is no question as to whether a child is Indian under the ICWA and that tribal membership determination are not arbitrarily made.

Reasons to oppose the ICWA Amendments in Title III of H.R. 3286

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

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

Sponsors of this legislation have greatly misrepresented the amount of control that tribes have over placements of Indian children under the ICWA. If the jurisdictional and intervention provisions and procedures for consent to adoption in the ICWA are followed no adoption may be disturbed once it finalized unless there is fraud or duress in the initial consent. Even when there is fraud or duress, challenge can be brought only two years after an adoption decree is final. Furthermore, a state court has the discretion to place an Indian child outside the placement preferences in the ICWA if it finds good cause to the contrary. While an Indian tribe may seek transfer of jurisdiction of an off reservation case, either parent may object to the transfer which generally has the effect of preventing such a transfer. Moreover, even where a parent does not object, a state court may deny transfer of jurisdiction. Finally, tribal courts who have jurisdiction routinely order placements for Indian children with non-Indian families. The ICWA only sets out references, not mandates, for the placements of Indian children with the primary emphasis being on the family of the child, regardless of whether it is Indian or non-Indian. Thus, where the ICWA is complied with initially, there is no threat that an adoption will be overturned.

The sponsors want to make significant changes to the ICWA without holding any substantive hearings or allowing time for Indian tribes to provide their input. The Senate should not allow these proposed ICWA amendments to proceed with H.R. 3286 and allow the Senate Indian Affairs Committee to more carefully examine these amendments and issues involved as they are proposing to do during a hearing scheduled for June 26.

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

position to determine what the best interest of Indian children are and consistently produce better out comes for Indian children when compared to state courts and placing agencies.

Non-Indian adoptive homes are not the only loving homes available for (Indian children. While the sponsors of this legislation state that they are just trying to provide loving homes for Indian children, they have completely ignored the fact that many wonderful, qualified Indian families, many who are relatives of these children, are being overlooked as placements.

The sponsors claim that there are "hundreds" of cases where Indian children are "snatched" from their non-Indian adoptive homes, yet experts in the field of Indian adoption and foster care find that less than one-tenth of one percent or 40 cases ICWA adoption cases since the passage of the Act in 1978 have ended up in state supreme courts. State courts deal with much larger numbers of disrupted adoption cases of non-Indian children, yet they are not being singled out for this kind of drastic change. in fact, how many other state or federal child welfare policies can claim this kind of success in placing children in foster care of adoptive homes.?

The involvement of tribes in voluntary adoption proceedings ensures that young vulnerable Indian parents have balanced information available to them to help them make an informed decision regarding the potential adoption of their children. When Indian parents only receive information from adoption attorneys or agencies opportunities for placing the children with their extended family are rarely discussed or encouraged. Adoption brokers have a direct financial incentive to not encourage the involvement of extended family members or tribes decisions affecting their children.

The sponsors have falsely stated that the Indian Child Welfare Act was never intended to provide protections to off reservation Indian children or families, when in fact this was the primary group that Congress identified as most needing protections.

While the Congress of 1978 recognized the strengths of Indian families and the important connections between a tribe and its' children, the sponsors of this legislation only seem to be able to say negative things about tribes and Indian families. At a time when Congress has been so involved in ending discrimination in placement decisions of children and promoting the values of family and community control can the promotion of legislation that is so anti-Indian , anti-family, and anti-local control be justified.

Concerns with Section One - Requirement of parent - tribal affiliation

The bill has many serious flaws that will cause an explosion of new litigation on virtually every section of the bill. This will only result in delaying efforts to find good homes for Indian children awaiting adoption or foster care - the very problem that Congresswomen Pryce says she is trying to resolve. What is social, cultural, or

political affiliation? What evidence proves or disapproves such affiliation? What does it mean to be affiliated as of the time of the proceeding? Does the court consider the affiliation over the last 10 years or just within the last month? What if a child maintains such relationship through a grandparent or other relative, but the parent does not? What if the child's parent(s) are deceased? What does it mean that a determination of non-affiliation is final? Does it mean that a 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 lack of affiliation, the judge accepts this representation and two weeks later an Indian tribe presents overwhelming evidence that he parent has substantial contacts with th tribe? Every one of these questions and many more will be litigated repeatedly.

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

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

Concurs with Section Two - Tribal Membership

This section does not reflect the realities of how tribal membership mechanisms work and would likely exclude coverage of vast numbers of bona fide Indian children from coverage by the Indian Child Welfare Act. Many Indian children are not formally enrolled but are clearly members of a tribe and could be enrolled. In addition, assertions by the sponsors that tribes are trying to make members of everyone, "even with as little as 1/256th Indian blood" are simply absurd. First of all tribes reserve the right to determine their own memberships as sovereign governments. State agencies and courts are not equipped to make these kind of membership determinations and could easily make mistakes that would deny bona fide Indian children and their families from being covered by the ICWA in both foster care and adoption proceedings. Secondly, tribes have every incentive to not be enrolling children who are not legitimately connected with the tribe since ultimately these children will be eligible for benefits that the tribe provides to its members benefits which are generally limited in nature.

Section 2 would also impact Indian children and families resident or domiciled on the reservation. Typically, child custody proceedings involving these families would be under the exclusive jurisdiction of the tribal court. However, in those circumstances where a state court misinterprets the parents or child's membership status or where the parent or child have not been formally enrolled, but are clearly eligible to be enrolled, there is nothing to stop states from coming on the reservation and unnecessarily removing Indian children from their homes based on state, not tribal standards. There would be no requirement that an extended family or tribal placement for the child be sought. Tribal court authority over the voluntary and involuntary placement of such children would be lost, essentially taking us back th the types of rampant abuse which gave rise th the Indian Child Welfare Act.

Menominee Indian Tribe of Wisconsin

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STATEMENT OF THE MENOMINEE INDIAN TRIBE OF WISCONSIN

FOR THE HEARING OF THE SENATE COMMITTEE ON INDIAN AFFAIRS

REGARDING

THE INDIAN CHILD WELFARE ACT

JUNE 26, 1996

The Menominee Indian Tribe of Wisconsin is pleased to submit this statement to the Senate Committee on Indian Affairs concerning the Indian Child Welfare Act (ICWA). We appreciate the responsible manner in which this Committee and the House Resources Committee have approached the past year's legislative attack on tribal efforts to keep Indian families together through our rights under the Indian Child Welfare Act.

The Indian Child Welfare Act amendments introduced thus far in the 104th Congress are certainly illustrative of why we should resist legislating based on anecdote. The ICWA discussion in the House by the proponents of the pending ICWA bills -- both in the House Resources Committee hearing in May of 1995 and on the House floor last month -- reveal a lack of regard for accuracy and/or a lack of understanding of how the Indian Child Welfare Act works and the ramifications of those amendments.

Perhaps we should not be too surprised by the lack of understanding generally of the Indian Child Welfare Act. It is a procedural law geared to state court proceedings. But it is also an Act which governs proceedings involving individuals from different cultures and two distinct and separate governments - tribal and state. The Act functions well when all parties involved are knowledgeable regarding their rights and responsibilities under the Act and when all parties respect each others rights and responsibilities.

We applaud the work by tribes and Indian organizations undertaken over the past year and at the June, 1996 National

Congress of American Indians (NCAI) convention in Tulsa in developing proposed amendments to the Indian Child Welfare Act. We are supportive of the resolution and the draft amendments approved at the NCAI convention, but realize that the ICWA bills expected to be introduced by Senators McCain and Inouye and Representatives Young and Miller will not be identical to the NCAI amendments. The Menominee Tribe would certainly want to review these bills and offer comment prior to their Committee markups.

The draft amendments approved at the NCAI convention in Tulsa propose practical steps to improve the implementation of the Indian Child Welfare Act. Most problems attributed to the Indian Child Welfare Act derive from cases where tribes have not been fully informed about a case -- either because of lack of notification concerning voluntary cases or by attempted avoidance of ICWA compliance.

Draft Amendments from NCAI Conference. The draft NCAI amendments would, by providing notice to tribes for voluntary proceedings combined with time frames for intervention, address the criticism that tribes sometimes intervene in cases in an untimely manner. Under current law, a tribe can intervene in a voluntary ICWA proceeding at any time during the case. The problem is that the law requires notification to tribes only for involuntary cases, so tribes may not find out in a timely manner about voluntary proceedings. Indian parental and Indian children's rights would be protected by a requirement that attorneys and public and private agencies inform Indian parents of their rights under ICWA -- responsible attorneys and agencies already do this, but there is a need for it to be a statutory requirement. Additional certainty would be provided through time lines for tribal intervention and for withdrawal of parental consent for termination of parental rights. The amendments would also impose sanctions against those who willfully circumvent the Act.

We are concerned that the combination of the amendments which would place strict time frames on tribal intervention in voluntary cases[1] and the proposed requirement that a motion for intervention be accompanied by a certification documenting the child's membership or eligibility for membership might in some cases be unworkable. For instance, if there is question of paternity which would affect the child's membership or eligibility for membership, the process of making that determination may take longer than 30-90 days -- the Menominee Tribe has been a party to cases like this. There may be other circumstances in which the tribal membership determination may not be able to be made in such a short time frame.

[1] 30 days from receipt of termination of parental rights proceedings, 90 days from receipt of notice of an adoptive placement or 30 days from receipt of notice of a voluntary adoption proceeding, whichever is later.

Request. We ask the Committee to consider a modification which would allow some flexibility in provision of the certification of membership. We also ask that the Committee Report accompanying any ICWA legislation discuss the difference between enrollment in a tribe versus membership or membership eligibility.

Menominee/Wisconsin ICWA Agreement. The Menominee Tribe and the State of Wisconsin have had a cooperative agreement on implementation of adoptive services under the Indian Child Welfare Act since the early 1980's, an agreement which has had to be modified only twice. While tribal-state negotiations on such an agreement began prior to enactment of ICWA, it was enactment of ICWA that provided the impetus for finalization of the agreement. The agreement involves coordination and sharing of resources, including co-studying (tribal/state) of prospective adoptive families and tribal identification of available adoptive Menominee families.

This agreement works well, especially with regard to state agencies. Most of our problems with child custody proceedings arise from actions of private attorneys or state court personnel who are not fully informed about the Indian Child Welfare Act.

The ICWA amendments approved at NCAI -- in particular, the requirement to notify tribes regarding voluntary proceedings -- would improve the implementation of the Act. Under our agreement with the State, the Menominee Tribe identifies families on the Menominee reservation and throughout the State who are available as adoptive families. We are also knowledgeable about whether the child may have extended family. These are functions which the Tribe is able to undertake much more effectively than private or state agencies. The result is permanent placement of Menominee children -- often with Menominee families -- faster than could be undertaken by state or private agencies. For those children and families which meet the eligibility criteria, adoption subsidies and medical care are available. This could not happen absent a cooperative agreement as the federal Title IV-E Foster Care and Adoption Assistance Act does not provide funding to tribes.

Inter-Related Issues.

• H.R. 3286. While this hearing is focused on development of new amendments to the Indian Child Welfare Act, we still have at least one major hurdle during this Congress. That hurdle is for the conferees on H.R. 3286, the Adoption Promotion and Stability Act, to approve a final bill which does not contain the House-passed ICWA amendments -- the House needs to recede to the Senate on this matter. We know that the Senate Committee on Indian Affairs and the House Resources Committee will work for a final version of H.R. 3286 free of the Pryce-authored ICWA language -- it would be a disaster should it be adopted. In our

case, our cooperative agreement on ICWA with the State would be in shambles.

• Funding under Federal Child Protection Statutes Discriminate Against Tribes. Federal social service statutes which provide assistance to state governments for child protection and for foster care and adoption are not available to tribal governments. Not only would fair treatment of tribes with regard to funding under these acts enable tribes to more fully implement the Indian Child Welfare Act, it would assist tribes' in all their child protection efforts.

Members of this Committee are aware of the HHS Office of Inspector General's report which documents the discrimination against the tribes in receipt of federal social services funding (e.g., Title IV-E Foster Care/Adoption Assistance and Title XX Social Services Block Grant programs). Tribes do not receive money directly, and states pass through only a miniscule amount of federal social services-related funding to tribes. In fact, many, many tribes receive no funding whatsoever from the above-mentioned federal programs. (August, 1994 HHS Office of Inspector General, OPPORTUNITIES FOR ACF TO IMPROVE CHILD WELFARE SERVICES AND PROTECTIONS FOR NATIVE AMERICAN CHILDREN)

-- Title IV-E Foster Care/Adoption Assistance. The Title IV-E Foster Care and Adoption Assistance Program is an open-ended federal entitlement program which provides funding to states for foster care and adoption services. It requires that efforts be made to keep families together. It is a terribly flawed law in that it does not provide funding directly to tribes -- providing eligibility only to those children placed by state (not tribal) courts. The pending welfare reform bills would keep this program an opened-ended federal entitlement program.

We are aware that Members from both parties of the Senate Committee on Indian Affairs and the House Resources Committee have urged the Ways and Means Committee to adopt an amendment to welfare reform legislation to provide direct Title IV-E funding to tribes, and thank you for that.

Request. It appears that a welfare reform bill may be enacted this year, and we ask you to redouble your efforts on getting a Tribal Title IV-E amendment.

-- Title IV-B Child Welfare Services. The Title IV-B program provides a small amount of funding to tribes -- about $4 million annually. This is derived from a 1% statutory tribal allocation under the IV-B, Subpart 2 (Family Preservation and Support Services) and a discretionary allocation of less than 1/2 of 1% for tribes under the Subpart 1 (child welfare services) program. The welfare reform bills of the 104th Congress would have taken this funding from tribes and given it to states as part of the state block grant. We understand that the Ways and Means

Committee, in it recent markup of welfare reform legislation (H.R. 3507), reinstated tribal IV-B funding. We are pleased for that action, but ask that the Child Protection Block Grant in welfare reform provide a more reasonable level of funding for tribes. Current funding does not allow participation for all tribes, and only a very small amount of funding for the tribes that are able to participate.

Request. Welfare reform legislation should provide 2% of funding to tribes from the Title IV-B Child Welfare Services Block Grant or a Child Protection Block Grant.

• ICWA Compliance Report. The Title IV-B statute was amended in 1994 to require that states, as part of their required annual child welfare report to HHS, consult with tribes and explain the specific steps they are taking to comply with the Indian Child Welfare Act. This past year was the first year for implementation of this requirement. Because the pending welfare reform bills would repeal the IV-B program and roll it into a state block grant, this ICWA compliance reporting requirement would also be repealed.

We have seen the value of a signed ICWA agreement with the State of Wisconsin, and believe that a requirement for states to meet with tribes and report on ICWA compliance could go a long way toward heading off misunderstandings between state and tribal governments, and in fostering better working relationships. We understand that the testimony of the Intertribal Council of Arizona discusses the valuable experience of the tribes and urban Indian organizations in Arizona and the state government in working together on their ICWA compliance report.

Request. We ask that the ICWA compliance report contained in Title IV-B of the Social Security Act be retained, and not be repealed as part of welfare reform legislation.

• Indian Child Welfare Act Funding. Funding through the BIA for the Indian Child Welfare Act is now at about $13 million for reservation-based programs. The Menominee Tribe is aggressive in protecting our children under the Indian Child Welfare Act. We intervened under ICWA authority in 100 cases in FY1994 and 99 cases in FY1995. Additionally, the tribal court handles child custody cases arising on the reservation -- cases which are not covered by the Indian Child Welfare Act.

The small amount of ICWA funding for tribes is clearly inadequate, especially when you consider that states receive federal child welfare and foster care/adoption assistance funds which are denied to tribes.

Request. Congress should increase BIA funding for Indian Child Welfare Act programs.

Termination Era. While the Indian Child Welfare Act -- whose goal is to provide a legal framework for working with states in keeping Indian children within an Indian community when appropriate -- is of great importance to all tribes, it has an added dimension for the Menominee Tribe.

The "termination" by Congress of the Menominee Tribe in 1954 had disastrous consequences for our people. Among the consequences was the harm it brought to Menominee families and thus to the tribe. As a result of the termination legislation there was a 19-year period prior to "restoration" in 1973 where there was no longer any enrollment in the Menominee Tribe. Persons born before 1954 were considered Menominee tribal members, while their brothers and sisters born after that date were not, creating confusion and conflict. Termination brought an increased movement away from Menominee lands and into cities, and sale of some Menominee lands. Use of and passing on of the Menominee language suffered greatly. We are still trying to recover from that "lost generation" of the termination period. An integral part of this effort is to maintain strong family networks. The Indian Child Welfare Act and the agreement we have with the State of Wisconsin for implementation of this Act is important to the integrity of our families and the Menominee Tribe, and we ask that you work with us to see that this Act is not compromised.

Thank you.

MENOMINEE INDIAN TRIBE OF WISCONSIN
P.O. Box 910
Keshena, WI 54135-0910

MENOMINEE NATION
MENOMINEE TRIBAL LEGISLATURE
RESOLUTION 96-33

WHEREAS, the Menominee Indian Tribe of Wisconsin is a federally-recognized Indian Tribe with all rights, and powers thereto pertaining which acts through its duly constituted governing body the Tribal Legislature; and

WHEREAS, the effective implementation of the Indian Child Welfare Act is important to the Menominee Tribe's efforts to maintain the Menominee culture and to maintaining strong tribal families; and

WHEREAS, the Indian Child Welfare Act (ICWA) amendments contained in Title III of H.R. 3286, the Adoption Promotion and Stability Act of 1996, which was approved by the House of Representatives on May 10, 1996, would violate tribal sovereignty, would result in many Menominee, and other Indian and Native Alaskan, children losing the protection of the ICWA, and would cause lengthened child custody proceedings in state courts; and

WHEREAS, the Menominee Tribe applauds the work of the National Congress of American Indians and the National Child Welfare Association and others on alternative Indian Child Welfare Act amendments which would serve the purpose of all parties by providing clearer procedures for child custody cases;

NOW, THEREFORE, BE IT RESOLVED that the Menominee Tribal Legislature:

1) Opposes Title III of H.R. 3286;

2) Supports the intention of Senators McCain and Inouye to strike Title III from H.R. 3286 in the June 19, 1996, markup by the Senate Committee on Indian Affairs of that bill;

3) Supports Resolution TLS-96-007A concerning Indian Child Welfare Act Amendments which was approved by the National Congress of American Indians conference held in Tulsa, OK, on June 3-5, 1996;

4) Requests favorable consideration by the U.S. Senate and House of Representatives of the Indian Child Welfare Act proposals approved by the June, 1996, National Congress of American Indians conference in Tulsa, OK, and recognizes that Tribes may propose constructive changes to the NCAI proposals which should be given careful consideration;

5) Expresses its appreciation to the House and Senate Committees of jurisdiction on the Indian Child Welfare Act - the House Resources Committee and the Senate Committee on Indian Affairs - and especially to Representatives Don Young and George Miller and to Senators John McCain and Daniel Inouye for their opposition to the H.R. 3286 Indian Child Welfare Act amendments and for their work with Indian and Alaska Native tribes on Indian Child Welfare Act issues.

CERTIFICATION

The Undersigned Officers of the Menominee Tribal Legislature hereby certify that the above resolution was duly adopted at a meeting held on June 20, 1996, by a vote of 7 for, 0 opposed, 0 abstentions and 2 absent. The Undersigned also certify that the above has not been rescinded or amended in any way.

John H. Peller, Chairman
MENOMINEE INDIAN TRIBE OF WISCONSIN

DATE: June 20, 1996

Leslie Penass, Secretary
MENOMINEE INDIAN TRIBE OF WISCONSIN

TESTIMONY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
SENATOR JOHN GLENN
JUNE 26, 1996

Mr. Chairman, I appreciate the opportunity to testify before the Indian Affairs Committee regarding revisions to the Indian Child Welfare Act (ICWA). As you and the members of the Committee know, I have introduced S. 764, the Indian Child Welfare Improvement Act. This bill addresses a very narrow change in the existing application of ICWA during adoption proceedings.

Since my bill was introduced in May 1995, the Indian Affairs Committee has recieved a series of amendments to ICWA developed by a number of tribal groups and others. These amendments, known as the "Tulsa agreement" deal with several issues critical to the application of ICWA to child custody proceedings including notice to Indian tribes for voluntary adoptions, time lines for tribal intervention in voluntary cases, criminal sanctions to discourage fraudulent practices in Indian adoptions and a mandate that attorneys and adoption agencies must inform Indian parents of their rights under ICWA. I commend the development of this document which addresses existing flaws in the application of ICWA. I believe that this alternative approach to refining ICWA preserves the participation of tribal interests while offering greater certainty for potential adoptive families.

Mr. Chairman, the legislation that I introduced last year was a direct response to a situation involving a family in Columbus, Ohio. The Rost family received custody of twin baby girls in the State of California in November, 1993, following the voluntary relinquishment of parental rights by both birth parents. The biological father did not disclose his Native American heritage in response to a specific question on the relinquishment document. In February, 1994, the birth father informed his mother of the pending adoption of the twins. Two months later, in April 1994, the birth father's mother enrolled herself, the birth father and the twins with the Pomo Indian Tribe in California. The adoption agency was then notified that the adoption could not be finalized without a determination of the applicability of ICWA.

My interest in reforming ICWA is to ensure that the law could not be applied retroactively in child custody proceedings. I have no intention to weaken ICWA protections, to narrow the designation of individuals as members of an Indian tribe, or to change any tribes ability to determine its membership or what constitutes that membership. My sole intention is to require that ICWA cannot be retroactively applied. To this end, my office has met with the National Congress of American Indians, the National

Indian Child Welfare Association and other tribal representatives to resolve this issue.

Mr. Chairman, all I am saying is that once a voluntary legal agreement has been entered into, I do not believe that it is in the best interest of the child for this proceeding to be disrupted because of the retoractive application of ICWA. To allow this retroactive application could have a harmful impact on the child. I know that the Chairman and other members of the Committee share my overriding concern in asssuring the best interest of children awaiting placement.

As I stated earlier, I believe that the "Tulsa agreement" is a very significant step in resolving certain issues pertaining to application of ICWA in child custody proceedings. I look forward to working to incorporate language addressing the problems of retroactive application with those involved in the Tulsa agreement. I appreciate the Committee's work in this matter and this opportunity to testify on my views.

Mr. Chairman, the scope of my legislation is deliberately narrow to maintain ICWA' s purpose while preventing disruption in the placement and adoption of children in cases where ICWA is retroactively applied. To do otherwise, Mr. Chairman, is not acting in the best interest of the children, and that is my principal concern–the interests of the children.

STATEMENT OF CONGRESSMAN PETE GEREN

June 26, 1996

Mr. Chairman and Members of the Committee, thank you for giving me the opportunity to appear and speak on a subject that is close to my heart. I know that the Members of this committee have heard from various Native American tribal members regarding reform of the Indian Child Welfare Act and I recognize their legitimate concerns.

The Indian Child Welfare Act was enacted to address a very real and serious problem affecting the families and culture of Native Americans. Unfortunately, the remedy created by the Indian Child Welfare Act has led to its own abuses and injustices. This Act, as currently enforced, has created uncertainty and, in many cases, heartbreak in the adoption process.

It is unreasonable for the adoption of a child, a child with no cultural ties and with remote Indian ancestry, an adoption consented to by the birth parents, approved by lawful state authorities chosen by the birth parents, to be interrupted by any third party, even a sovereign nation such as a Native American tribe or a European nation.

The Pryce language that is included in the Adoption Promotion and Stability Act passed by the House of Representatives, preserves the goals of the Indian Child Welfare Act but eliminates the potential for injustice and abuse. Under

Pryce, jurisdiction and intervention rights of Indian tribes are based not just on the blood ancestry of the child as under the Indian Child Welfare Act, but also on the involvement of a biological parent in the cultural life of the Indian tribe. Pryce recognizes the legitimate role of Native American tribes in child custody proceedings involving children where at least one of the child's biological parents is of Indian descent and maintains significant social, cultural or political affiliation with the Indian tribe, but it allows birth parents with no ties to a tribe to make the decision they believe is in the best interest of the child. This change makes the Indian Child Welfare Act more reflective of the original intent of the framers of the act: to protect the cultural life of Native Americans.

The second significant change included in the Pryce language is the requirement that individuals over the age of 18 consent to tribal membership in writing in order to be considered a member of a tribe.

Lastly, the Pryce language prohibits a birth parent from asserting tribal membership after an adoption is complete and further would require a determination of membership in an Indian tribe as of the date of child placement. This change provides certainty for adoptive parents and prevents distant relatives or tribes from asserting custody over children, sometimes years after an adoption has been completed.

I have had an opportunity to examine the preliminary language proposed by the National Congress of American Indians. While this language may be a step in the right direction, it

falls short of the reform needed for the Indian Child Welfare Act. This proposal would require that an Indian tribe be given notice of the placement of a child with Indian heritage and that the tribe assert its right of intervention within 30 to 90 days of receipt of notice or its rights would be waived. The proposed legislation would make written waivers by Indian tribes enforceable and would allow adoptive parents and Indian relatives to enter into enforceable visitation agreements.

This language does not address the underlying problem with the Indian Child Welfare Act. First it does not give birth parents the freedom to make the decision they believe to be in the best interest of their child. The tribe still has standing in consensual adoption cases to dictate how these children will be placed.

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

Second, the language does not address the issue of retroactivity. In order for any reform of the Indian Child Welfare Act to be meaningful, it must place prohibitions on the assertion of tribal membership after an adoption has been completed under applicable state and United States law. The Rost

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

We must respect and honor the laws and rights of Native American tribes, but, we also must honor the God-given human rights of every person who is a citizen of the United States. Our country, the land of the free, is built on the principle that our citizens are free of the shackles of ancestry they have chosen to forsake. Neither the hand out of the grave nor of a great grandparent who is a citizen of another sovereign nation has a claim on the present and future of those who hold the privilege of American citizenship. It should not matter if that ancestor is German, Navajo, British or South African.

United States Senate
COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC 20510-6450

August 2, 1996

The Honorable Pete Geren
2448 Rayburn Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Geren:

I just today saw a copy of your letter to the editor on the Indian Child Welfare Act (ICWA) that appeared in the July 26, 1996 edition of the *New York Times*.

Your letter was premised on several serious mis-statements of the law. First, you said ICWA gives an Indian tribe "veto power" over the adoption placement decision of a birth parent. No provisions of ICWA do this. In actual fact, Title 25, Section 1911 allows that birth mother to stop the transfer of a case from State court to tribal court if the child is not domiciled on an Indian reservation, domicile being a matter under her exclusive control.

Second, you say "the tribe can require that her baby be adopted by a tribal member and removed to the reservation" many miles away. That simply is not the law. While ICWA provides what it calls a "preference" for adoptive placements of Indian children with Indian families, Section 1915 authorizes a State court to make a different placement if a judge finds good cause. ICWA also reiterates that the overriding principle is the best interests of the Indian child.

Third, you say ICWA favors abortion over adoption because, while a tribe has "no say" over a decision to abort, a birth mother "cannot place her child with a loving family without the approval of an Indian nation" under ICWA. This too is not the law. Tribes do not have "approval" rights over adoptions of Indian children in State courts. The law simply allows them to become involved in a court case as "intervenors" with the court. Their role is limited to one of providing advice to the State court judge on what is in the best interests of the Indian child. An intervenor's advice is a far cry from what you call "veto power."

Finally, you estimate that "15 million American citizens have sufficient Indian heritage to trigger" the application of ICWA. I know of no basis in fact or law for this estimate. In truth, ICWA applies to the approximately one million American Indians and Alaska Native who are, by statute, members of, or eligible to be members of, the 557 Federally-recognized tribal governments.

As I said in our discussion when you testified before this Committee's hearing on June 26, 1996, I respect your right to disagree but I know you would want to know what is the law on these issues. In view of this, I would encourage you to reconsider your views in light of American history and of the fundamental principles of Federal-Indian law that have been crafted over the years.

The parties to these Indian child welfare disputes, not politicians like you and me, have come up with a compromise that furthers the best interests of Indian children. It deserves your support.

Sincerely,

John McCain
Chairman

THE NEW YORK TIMES **EDITORIALS/LETTERS** FRIDAY, JULY 26, 1996

Indian Heritage Law Saps Adoption System

To the Editor:

Unfortunately, tragically, there is much more to the Indian Child Welfare Act than presented by "Blood Ties" (Op-Ed, July 19). This law is more than a protector of Indian children. As currently applied, it denies a fundamental right to millions of American women and undermines the adoption system in our country.

Say a 14-year-old girl in Texas, the state I represent in Congress, becomes pregnant by a fellow eighth-grader. They, their parents and grandparents were born and reared in Texas. None have had any contact with any Indian tribe. They prepare to deal with this family crisis consistently with the laws of their state and nation. The laws of the Indian nations scattered around our country never cross their minds.

They make the heart-breaking decision that it is in the best interest of the baby to place her for adoption. They work through their church and identify a local family to adopt her.

The adoption moves ahead until their attorney discovers that a deceased great-great-grandfather of the birth father was a member of the Oglala Sioux Indian tribe in South Dakota, making the baby 1/32d Sioux. The lawyer tells the mother that her baby is an Indian child and that the tribe has veto power over her adoption. If she chooses adoption, the tribe can require that her baby be adopted by a tribal member and removed to the reservation 900 miles away. Suddenly, the option of adoption is not very appealing to the girl, her family or the adopting couple.

Under this law, the girl can choose abortion or keep the baby and the tribe has no say. But she cannot place her child with a loving family without the approval of an Indian nation that once claimed an ancestor of the father of her baby.

This mother is an American, with no suffix or prefix, yet this law imposes the law of the Sioux nation between her and her baby.

Recent Senate testimony estimates that 15 million American citizens have sufficient Indian heritage to trigger the statute. This is un-American.

(Rep.) PETE GEREN
Washington, July 25, 1996

SENT BY:CONGRESSMAN GEREN ; 9-18-96 ; 2:15PM ; → CCITT ECM:# 2

COMMITTEES
NATIONAL SECURITY
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Congress of the United States
House of Representatives
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September 18, 1996

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

Dear Senator:

Thank you for your letter dated August 2, 1996 in response to my letter to the editor to the New York Times. I regret that we disagree on this issue.

You dispute my contention that the ICWA gives Indian tribes veto power over the adoption decisions of many American citizens. I believe a review of the case law supports my point. One needs to go no further than the Rost case for an example of the use of the ICWA and a distant tribal affiliation to disrupt a legal and otherwise enforceable adoption. Tragically, the case law is replete with examples.

Furthermore, you and other defenders of the ICWA avoid a discussion of the thorniest aspect of the ICWA with the mere assertion that its application is limited to the "Indian child," when hidden in the legal definition of that term is the heart of the injustice of the ICWA.

In your New York Times piece you glibly dismiss the Rost case with the explanation that the lawyers "failed to disclose that the children were Indians." I think most Americans would be surprised and feel misled after having read your op-ed if they knew that the children you refer to were 3/32 Indian, 29/32 something else, and neither they nor their birth parents had had any previous affiliation with the Pomo Tribe, the tribe that has come between the adopting parents and their adopted children.

Most Americans would support the application of the ICWA if it applied only to Indian children, as that term commonly is understood (and which the Pryce language attempts to codify). It is the interpretation of the ICWA that allows tribes, based on a mere trace of Indian blood, to reach well beyond their borders, across generations, and disrupt the adoption decisions of U.S. citizens that shocks the conscience of me and many others.

The basic principles of the application of the ICWA are set out in Mississippi Choctaw Indian Band v. Holyfield et al, 490 U.S. 30, 109 S.Ct. 1597 (1989) [hereinafter Holyfield]. The U.S. Supreme Court held that the Indian tribe had absolute jurisdiction over the placement of a child born to a woman who was domiciled on a reservation, but gave birth 200 miles from the reservation.