

Although the case involved a birth mother domiciled on a reservation, the court offered a thorough discussion of the broader application of the ICWA. The Court said that in cases involving the voluntary adoptive placement of a child born to a parent not domiciled on an Indian reservation, Indian tribes are allowed to intervene and assert the placement preference under the act. The Court stated that, "the most important substantive requirement imposed on state courts is that of Section 1915(a), which, absent 'good cause' to the contrary, mandates that adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families." Holyfield at 1602. The principles apply regardless of whether the action is in state or tribal court.

Referring to the purpose of maintaining Indian children with Indian tribes, the Supreme Court of Montana stated: "The principal statutory method by which these purposes are achieved is the order of preferences set forth in 25 USC S. 1915(a) and (b), and the Tribe's right to intervene." Matter of Baby Girl Doe, 865 P.2d 1090, 1095 (Montana 1993).

Absent good cause, the placement preference established in the act will be given effect and the child may be removed from the original adoptive parents and placed with the tribe or relatives, thus voiding the adoption choice of the birth mother. In Matter of Coconino Cty. Juv. No. J-10175, 736 P.2d 829 (Ariz.App. 1987), involving the foster placement of an Indian child, remoteness of placement and culture shock to the child were not "good cause" to avoid the placement provisions. The court stated, "If the trial judge finds that the father is not a fit parent he must, in the absence of good cause based on something more than has been presented in this case so far, follow the placement hierarchy dictated by 25 U.S.C.A. S.1915(b)." Matter of Coconino Cty. Juv. No. J-10175, 736 P.2d 829, 833 (Ariz.App. 1987).

Good cause is a matter of discretion of the courts and is not expressly defined in the act. Courts have varied in their determinations of what is good cause for the purpose of avoiding the placement preference guidelines. The Supreme Court of Minnesota stated, "We believe, however, that a finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child's best interests." Matter of Custody of S.E.G., 521 N.W.2d 357, 362 (Minn. 1994).

By using their substantive right to intervene and asserting the placement preference of the act, Indian tribes are able to disrupt an adoption placement and either assert the placement preference or force birth parents to reassert custody of their children. See Matter of Adoption of Baby Boy L, 643 P.2d 168 (Kan.1982). In either instance the end result is that tribes are able to effectively veto the voluntary adoption placement by a birth parent.

In your letter you state that the ICWA also reiterates that the overriding principle is the best interests of the Indian child. In fact, both the statute and the case law puts the interest of the tribe on the same level as the interest of the child. The Act's declared policy is, "to protect the best interests of Indian

Children and to promote the stability and security of Indian tribes and families..." 25 U.S.C. S. 1902 (Supp.1987). As interpreted by the courts, the ICWA does not make the best interests of the child paramount but recognizes it in conjunction with the interests of the tribe. "The stated purpose of the act is to protect the best interests of the Indian child through promoting the stability and security of Indian tribes and Indian families..." Matter of Guardianship of O.G.M., 808 P.2d 684, 687 (Okla. 1991) see also Matter of Adoption of Baby Boy D, 742 P.2d 1059, 1063 (Okla.1985). "The numerous prerogatives accorded the tribes through the ICWA's substantive provisions... must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." Holyfield at 1608.

I disagree with your characterization of the Indian tribes' right to intervene under the ICWA. Clearly this right does more than simply allow tribes to give advice to a judge. As stated in Matter of Baby Girl Doe and in Matter of Guardianship of O.G.M., the right to intervene is the means by which a tribe asserts its placement preference under the act. "Intervention by the tribe insures that the child will not be removed from the Indian community and consequently lose touch with Indian tradition and heritage." Matter of Guardianship of O.G.M., 808 P.2d 684, 688 (Okla. 1991)

In reference to the figure of "15 million" people subject to ICWA, it was Senator Ben Nighthorse Campbell who used that number at the Senate Indian Affairs Committee hearing on the ICWA.

As you well know, the ICWA applies to more than just enrolled members of Indian tribes, or to Indians, as that term commonly is understood. It applies to any American child with even a minute fraction of Indian blood. Examples in the case law show that the ICWA has been asserted to disrupt the adoption of children who are only 3/32nds, 1/16th, 5/16ths and 1/64th Indian. Because the tribes are allowed to determine what constitutes an "Indian child" for purposes of the act, any child with any fraction of Indian heritage may be considered an "Indian child". The number of children to whom the act applies may expand and contract at the caprice of Indian tribes.

It is impossible to gauge the impact of the chilling effect of the ICWA on adoption decisions. Adoption attorneys will attest to the chilling effect of the act on both adoptive parents and birth parents. When informed of the perils involved in the application of the ICWA, many planned adoptions are scuttled.

When faced with the injustice of applying the ICWA, many state court judges have created their own exception to the law. These judges have determined that they will not apply the act in cases where the "Indian child" has no connection to an Indian tribe - in effect judicially enacting the Pryce language. I believe this judicially created exception represents a reaction to the inherent wrong of the ICWA and not a lack of understanding by these judges. Judges, not politicians, sitting with all of the facts before them, have recognized the ICWA's potential for injustice and have taken appropriate action.

I have no disagreement with the intent of the drafters of this act. ICWA was intended as a shield to prevent the arbitrary removal of Indian children from the reservation. As applied, it is much more than a shield. It is an offensive weapon used by Indians and non-Indians alike to intervene and disrupt the placement of children in adoptive homes. This is a law, divisive in nature, that not only pits Indians against non-Indians and birth mothers against Indian tribes, but even pits tribes against tribes. It is both ironic and unfortunate that an act intended to protect Indian families is being used to interfere in the adoptive families of others.

As I am sure you are aware, the Indian birth family in the Rost case is appealing the decision of the California Court of Appeals to the U.S. Supreme Court. If the Supreme Court upholds the decision of the California Court of Appeals, much of ICWA would be declared unconstitutional and your legislation would be moot. I would hope that you would forebear from pressing for a vote on this issue until the Supreme Court has determined whether it will grant certiorari in that case.

Thank you for your consideration and your sincere efforts to address the problems in the ICWA. Again, I regret that we disagree on this issue.

Sincerely,


Pete Geren
Member of Congress

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Testimony of Hon. Gerald B.H. Solomon
Senate Committee on Indian Affairs
Hearing
Wednesday, June 26, 1996

Mr. Chairman:

Thank you for the opportunity to testify today on the reform of the Indian Child Welfare Act.

Mr. Chairman, as some of our sociologists and social workers negatively portray adoption and adoptive families, it is up to those of us with personal experience of adoption to relay its importance to the formation of our children and the strengthening of the family.

I am here today because I have always been a strong supporter of adoption, and the generosity of families who have sought to make homes for children who, for whatever reason, were not able to be raised by their biological parents.

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

I, myself, was blessed to be adopted by a generous stepfather and raised in a loving family. For these reasons, Mr. Chairman, I wholeheartedly supported recent adoption legislation in the House, H.R. 3286. This bill makes adoption an option for families of all income levels by offering a \$5,000 tax credit while also streamlining the process for interracial cases. This ground-breaking legislation will decrease the backlog of children in foster care and help find caring homes for all children. This legislation is extremely important in reforming adoption regulations. In the limited legislative schedule we have remaining, we must finish work and this bill to allow for the soonest relief for American families.

I am here today to also offer my full support for reform of the Indian Child Welfare Act to add to this adoption legislation. The Indian Child Welfare Act was passed in 1978 in response to a terrible problem within the Indian community: the high numbers of Indian children being placed in foster care and the breakup of many Indian families because of the unwarranted removal of their children by nontribal public and private agencies. This was clearly an unjust situation that needed to be corrected in order to protect the sanctity of the Native American family.

Though this Act was meant to remedy this situation, the reality is that the Act has been detrimental in some cases.

The problem that the Act was created to correct, namely, the inordinate number of Indian

children in foster care, has actually risen since its enactment because of the increased authority the Act can give an Indian tribe.

There have been cases of parents being blocked from adopting children because the Indian Child Welfare Act allows retroactive registration even after the biological parents have given up all legal rights to the child.

This committee is discussing compromise language to amend the Act to respond to many concerns. This compromise between the tribal governments and the adoptive community represents a step in the right direction in reforming the Act. I am encouraged at portions of this language that will limit the length of time for tribes to contest adoptions while also facilitate voluntary agreements between Indian families or tribes and non-Indian adoptive families.

However, I and many of my colleagues are concerned that this language, while commendable, will not address cases where the adoptive child is retroactively registered with an Indian tribe. With future negotiations on the adoption legislation (H.R. 3286) between the House and the Senate, these concerns can hopefully be rectified.

This legislation is extremely important to the families of this country, Indian and non-Indian. Adoption plays a vital role in strengthening the family unit and protecting the values of this great nation. We must remember that the best interests of the children must be paramount in all child custody proceedings. Congress must work diligently to remove barriers to adoption and provide a sense of security to adoptive parents and children that their adoptions will be permanent. For this reason, I hope the Chairman will continue to pursue and pass reform of the Act in this Congress. This window of opportunity can not be missed in the final weeks of this legislative session!

I urge support of full reform of the Indian Child Welfare Act and thank you for your consideration.

Thank you, Mr. Chairman.



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STATEMENT OF
THE NATIONAL INDIAN EDUCATION ASSOCIATION
ON
AMENDMENTS TO THE INDIAN CHILD WELFARE ACT OF 1978
SUBMITTED TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

June 26, 1996

The National Indian Education Association (NIEA) is a national, non-profit membership organization with over 3,000 members, which has traditionally represented national Indian education concerns and related issues. NIEA is pleased to submit this statement on amendments to the Indian Child Welfare Act (ICWA) Amendments of 1978.

It is NIEA's position, along with many other tribes and tribal organizations, that the ICWA provides adequate procedures in protecting Indian families and tribes from the unwarranted removal of Indian children and, does not believe that the ICWA should be amended. However, in order to address specific concerns of those who feel that ICWA does not work in some areas, NIEA supports the amendments which were formulated and adopted at the Mid-year meeting of the National Congress of American Indian (NCAI) in June 1996. It is our understanding that the NCAI amendments to ICWA were drafted by tribal leaders, practitioners and experts in the field of adoption and foster care of Indian children. Assistance was also provided by the American Academy of Adoption Attorneys. These amendments, which signify the willingness of Indian tribes to address the concerns raised about the ICWA, provide the appropriate changes to the existing law while preserving and protecting tribal sovereignty.

As outlined below and thoroughly discussed in statements of the National Indian Child Welfare Association (NICWA), the Association on American Indian Affairs (AAIA), and NCAI, the National Indian Education Association supports the amendments to the ICWA as provided in the following topic areas:

1. Notice to Indian Tribes of Voluntary Proceedings.
2. Timeline for Intervention in Voluntary Cases.
3. Criminal Sanctions to Discourage Fraudulent Practices.
4. Limits for Withdrawal of Consent to Adopt.
5. Clarification of Application of ICWA in Alaska.
6. State Court Option to Allow Open Adoptions.
7. Clarifying Ward of Tribal Courts.
8. Informing Indian Parents of Their Rights.
9. Tribal Membership Certification.

NIEA believes that these amendments will decrease the amount of disrupted adoptions and protect Indian children in custody proceedings while preserving tribal sovereignty.

In conclusion, NIEA supports the positions and recommendations made by witnesses - the Honorable Don Young, the Honorable Eni Faleomavaega, the Bureau of Indian Affairs, the Department of Justice, NCAI, Oneida Chairwoman Deborah Doxtator, Gila River Governor Mary Thomas, adoption attorneys, as well as statements from interested parties, including the AAIA, and the NICWA - regarding these amendments before this Committee on June 26, 1996, in efforts to protect Indian children, tribal culture, and most importantly, tribal sovereignty.

STATEMENT ON BEHALF OF THE
ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

SUBMITTED TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS

HEARING ON LEGISLATION
TO AMEND THE INDIAN CHILD WELFARE ACT

JUNE 26, 1996

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I. Introduction

Mr. Chairman and members of the Senate Committee on Indian Affairs. The Association on American Indian Affairs, Inc. (AAIA) is a national non-profit citizens' organization headquartered in South Dakota, with field offices in Washington, D.C. and California. Its mission is the preservation and enhancement of the rights and culture of American Indians and Alaska Natives. The policies of the Association are formulated by a Board of Directors, all of whom are Native Americans.

The Association began its active involvement in Indian child welfare issues in 1967 and for many years was the only national organization active in confronting the crisis in Indian Child Welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of the Indian Child Welfare Act (ICWA) and, at the request of Congress, AAIA was closely involved in the drafting of the Act in 1978. Since that time, the Association has continued to work with tribes in implementing the Act including the negotiation of tribal-state agreements and legal assistance in contested cases.

The ICWA was enacted in response to a tragedy that was taking place within the Indian community. Enormous numbers of Indian children had been removed from their families and tribal communities without just cause. The Indian Child Welfare Act was landmark bipartisan legislation which, although it has been imperfectly implemented in some places, has provided vital protection to Indian children, families and tribes. It has formalized the authority and role of tribes in the Indian child welfare process. It has forced greater efforts and more painstaking analysis by agencies and courts before removing Indian children from their homes. It has provided procedural protection to families and tribes to prevent arbitrary removals of children. It has required recognition by agencies and courts alike that an Indian child has a vital interest in retaining a connection with his or her Indian heritage. Each year thousands of child custody and adoption proceedings take place in which the Indian Child Welfare Act is applied. It is worth mentioning and emphasizing that the "high profile" cases which have given rise to Title III of H.R. 3286 are but a small fraction of the cases in which the Act has been applied. For all of these reasons, Congress should not lightly tinker with the Act.

The Association is greatly concerned about the impact of Title III of H.R. 3286 which was approved by the House of Representatives. As will be explained in more detail in the remainder of this testimony, AAIA believes that Title III would exclude children who need the protection provided by ICWA from coverage under the Act, cause an enormous amount of litigation, have a serious impact upon tribal sovereignty and may be unconstitutional. AAIA believes that the alternative approach to addressing the handful of problematic ICWA cases (the so-called NCAI amendments) is far preferable to the amendments proposed in

H.R. 3286 and supports Committee action on those amendments.

II. Background:

Why the Indian Child Welfare Act of 1978 became law.

A. The problem

As the United States Supreme Court explained in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (hereinafter Holyfield), the Indian Child Welfare Act "was the product of rising concern in the mid-1970s over the consequences to Indian children, Indian families and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." Id. at 32. The evidence presented before Congress revealed that "25-35% of Indian children had been separated from their families and placed in foster homes, adoptive homes or institutions." Id.

Studies by the Association on American Indian Affairs, commissioned by Congress, reported that Indian children were placed in foster care far more frequently than non-Indian children. This was true of all 19 states surveyed with Indian placement rates ranging from 2.4 times the non-Indian rate in New Mexico to 22.4 times rate in South Dakota. "The Indian Child Welfare Act of 1977", Hearings on S. 1214 before the Select Committee on Indian Affairs, United States Senate, 95th Cong., 1st Sess. (August 4, 1977), at 539 (hereinafter "Senate 1977 Hearing"). The percentage of Indian children placed in non-Indian foster homes in those states that reported this information ranged from 53% in Wyoming to 97% in New York.

Moreover, "[t]he adoption rate of Indian children was eight times that of non-Indian children [and] [a]pproximately 90% of the Indian placements were in non-Indian homes." Holyfield, supra, 490 U.S. at 33. All but one of the states surveyed also had a greater rate of Indian children placed for adoption than was the case for non-Indians. The Indian adoption rate in the most extreme case -- the State of Washington -- was 18.8 times the non-Indian rate. Senate 1977 Hearing, supra, at 539. The percentage of Indian children placed in non-Indian adoptive homes ranged from 69% in Washington to 97% in Minnesota. Id. at 537-603.

Congress found that this extraordinary and unwarranted rate of placement in out-of-home non-Indian households was not in the best interests of Indian tribes, families and children. See Holyfield, supra, 490 U.S. at 49-50 (The ICWA is concerned about both the "impact on the tribes themselves of the large numbers of children adopted by non-Indians ... [and] the detrimental impact on the children themselves of such placements outside their culture.") See also findings of Congress' American Indian Policy Review Commission reprinted in United States Senate Report 95-597, 95th

Cong., 1st Sess. (November 3, 1977) at 52 ("Removal of Indian children from their cultural setting seriously impacts on long-term tribal survival and has damaging social and psychological impact on many individual Indian children.")

In the case of Indian tribes, the Court specifically found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children..." 25 U.S.C. 1901(3). This concern was also expressly reflected in the floor statements of "the principal sponsor in the House, Rep. Morris Udall ('Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy'), and its minority sponsor, Rep. Robert Lagomarsino ('This bill is directed at conditions which...threaten...the future of American Indian tribes...')." Holyfield, *supra*, 490 U.S. at 34, n.3 (citations omitted). As the Montana Supreme Court stated in analyzing the congressional intent underlying the ICWA:

Preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture. Absent the next generation, any culture is lost and necessarily relegated, at best, to anthropological examination and categorization.

[Matter of M.E.M., 635 P.2d 1313, 1316 (Mont. 1981)]

As the Holyfield case likewise recognized, Congress was also very concerned about "the placement of Indian children in non-Indian homes...based in part on evidence of the detrimental impact on the children themselves of such placement outside their culture". 490 U.S. at 49-50. Testimony at Congressional hearings was replete with examples of Indian children placed in non-Indian homes and later suffering from debilitating identity crises when they reached adolescence. This phenomenon occurred even when the children had few memories of living as part of an Indian community. As the Senate Select Committee on Indian Affairs noted in its report on the ICWA, "Removal of Indians from Indian society has serious long-and short-term effects...for the individual child...who may suffer untold social and psychological consequences." Senate Report 95-597, *supra*, at 43. For example, in testimony submitted by the American Academy of Child Psychiatry, it was stated that:

There is much clinical evidence to suggest that these Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough they are cared for by devoted and well intentioned foster or adoptive parents. Nonetheless, particularly in adolescence, they are subject to ethnic confusion and a pervasive sense of

abandonment with its attendant multiple ramifications. Senate 1977 Hearing, *supra*, at 114.

See also the testimony of Dr. Joseph Westermeyer, a University of Minnesota social psychiatrist, concerning patients that he had treated, cited in Holyfield, *supra*, 490 U.S. at 33, n.1

[T]hey were raised with a white cultural and social identity. They are raised in a white home. They attended, predominantly white schools, and in almost all cases, attended a church that was predominantly white, and really came to understand very little about Indian culture, Indian behavior, and had virtually no viable Indian identity. They can recall such things as seeing cowboys and Indians on TV and feeling that Indians were a historical figure but were not a viable contemporary social group.

Then during adolescence, they found that society was not to grant them the white identity that they had. They began to find this out in a number of ways. For example, a universal experience was that when they began to date white children, the parents of the white youngsters were against this, and there were pressures among white children from the parents not to date these children...

The other experience was derogatory name calling in relation to their racial identity...

[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did.

AAIA has frequently received inquiries from troubled Indian adolescents and adults who were placed outside of their communities as children and are seeking to reconnect with their tribes. Excerpts from one letter, reprinted in AAIA's newsletter, Indian Affairs, No. 124 (Summer/Fall 1991) at 4-5, illustrate the experiences of these children:

Because of our youth it wasn't obvious to us that we were missing anything in our lives, but as time passed and we began school comments were made at us that aroused our suspicions of something not being right...Neighborhood children would ask "what are you?", "who are you?...[When I] was informed that...[my brother and I] were Indians... [a]bsolute shock and confusion dominated our every thought...Burdened with the ignorance of our culture and with the hopeless change of immediate enlightening we proceeded to identify ourselves to our observant neighbors who immediately showed their ignorance with abusive name calling, offensive gestures and demeaning remarks. We lived through these times but not without emotional trauma on our hearts and minds that we carry to this day...The emotional and psychological pain of my childhood experience cannot be imagined...

In addition, Congress heard considerable testimony on the importance of the extended family in Indian culture. As the House Interior and Insular Affairs Committee Report explained:

[T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family...The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childbearing.

[House Report 95-1386, 95th Cong., 2d. Sess. (July 24, 1978) at 10, 20.]

As an example, in the Choctaw language which is still widely spoken, the words for mother and father are extended to the father's sisters and mother's brothers respectively, as well as to sons of paternal great uncles, grandsons of paternal great-great uncles, uncles by marriage on the mother's side, daughters of maternal great aunts, granddaughters of maternal great-great aunts and other relatives as well. Swanton, John R., Source Material for the Social and Ceremonial Life of the Choctaw Indians, Smithsonian Bulletin No. 103 (1931) at 87. This is indicative of the fact that responsibility for raising a Choctaw child was shared by many of the child's relatives.

Thus, Congress had before it evidence that in most Indian cultures, a child is considered part of a larger extended family and that placement of a child outside that family is a loss felt by the entire family.

Congress determined that a large part of the cause for this Indian child welfare crisis which was devastating Indian tribes, children and families rested with State agencies and courts. Congress found that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5). The House Committee Report specifically recognized "...the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of the Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future." House Report 95-1386, supra, at 19, cited in Holyfield, supra, 490 U.S. at 45, n. 18. See also statements by Rep. Morris Udall, House sponsor of the ICWA, cited in Holyfield, supra, 490 U.S. at 45, n.18, to the effect that "'state courts and agencies and their procedures share

a large part of the responsibility' for crisis threatening 'the future and integrity of Indian tribes and Indian families.'" State systems operated in virtually an unfettered fashion. As Cong. Robert Lagomarsino, Republican co-sponsor of the ICWA stated in explaining his support for the ICWA, "[g]enerally there are no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agents." 124 Cong.Rec. H 12849 (Oct. 14, 1978). The result of this systemic failure was summarized in the House Report as follows:

(1)...many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.

(2) The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law...Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments.

(3)...agencies established to place children have an incentive to find children to place [most notably Indian children not protected by the system].

[House Report 95-1386, supra, at 10-12.]

2B. Congress' Conclusions and Solutions

As a result of the testimony that it heard and the findings that it made, Congress enacted the Indian Child Welfare Act, 25 U.S.C. 1901 et seq. As was stated in Holyfield, supra, 490 U.S. at 37, 50, n.24

'The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected'...[and] 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society'. (emphasis added, citations omitted)

See also 25 U.S.C. 1902 which states that the purposes of the Act are to "protect the best interests of Indian children and to promote the stability and security of Indian tribes..."

The primary mechanism utilized by Congress to ensure the

preservation of that child-tribal relationship was to "curtail state authority", Holyfield, *supra*, 490 U.S. at 45, n.17, and to strengthen tribal authority over child welfare matters. As the Holyfield court noted, "It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-a-vis state authorities..." *Id.* at 44-45. Accordingly, the ICWA includes a number of provisions recognizing and strengthening the tribal role in making decisions about Indian children. See e.g.

- 25 U.S.C. 1911(a) (exclusive tribal jurisdiction over Indian children resident or domiciled on the reservation);
- 25 U.S.C. 1911(b) (transfer of off-reservation state court proceedings to tribal court);
- 25 U.S.C. 1911(c) (recognizing the right of Indian tribes to intervene in all state court child custody proceedings involving children who are members or eligible for membership in the tribe);
- 25 U.S.C. 1911(d) (requiring state courts to accord tribal court judgments full faith and credit);
- 25 U.S.C. 1912(a) (requiring notice to Indian tribes by state courts in involuntary child custody proceedings);
- 25 U.S.C. 1914 (providing Indian tribes with the right to challenge state placements that do not conform with the Act's requirements in federal court);
- 25 U.S.C. 1915(c) (recognizing, as a matter of federal law, tribally-established placement preferences for state placements of off-reservation Indian children);
- 25 U.S.C. 1915(e) (recognizing right of Indian tribes to obtain state records pertaining to the placement of Indian children); and
- 25 U.S.C. 1919 (authorizing tribal-state Indian child welfare agreements).

Moreover, the ICWA includes a number of other provisions, in addition to the provisions described above, which are designed to keep Indian families intact and directly or indirectly to protect the relationship between the tribe and those individuals eligible for membership in the tribe. See, e.g.,

- 25 U.S.C. 1912(e) and (f) (establishing substantive standards for involuntary foster care placement of an Indian child or termination of an Indian parent's parental rights

which exceed those provided for non-Indian parents under state law);

- 25 U.S.C. 1915(a) (requiring that adoptive placements of Indian children under state law be made preferentially with the child's extended family, other members of the Indian child's tribe or other Indian families, in that order, absent good cause to the contrary);

- 25 U.S.C. 1915(b) (requiring that foster care placements of Indian children under state law be made preferentially with the child's extended family, a tribally-licensed foster home, an Indian foster home licensed by a non-Indian entity or a tribally-approved or Indian-operated facility, in that order, absent good cause to the contrary);

- 25 U.S.C. 1915(d) (requiring that the cultural and social standards of the Indian community must be applied by the state court when it applies the placement preferences); and

- 25 U.S.C. 1917 (providing adopted Indians who have reached the age of 18 with the right to access their adoption records for the purpose of establishing their Indian tribal membership).

Many of the sections of the ICWA and a major part of the problem which Congress sought to address involved involuntary removals of children from their families and tribal communities and placement of such children into both foster care and adoptive placements. See, e.g., 25 U.S.C. 1912. However, it is also clear that "voluntary" adoptions of Indian children were likewise of great concern to Congress based upon the evidence it had heard. As the United States Supreme Court specifically found, the tribe and child have an interest in maintaining ties independent of the natural parents' interests and, thus, "Congress determined to subject such [voluntary] placements to the ICWA's jurisdiction and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." *Id.* at 49-53. As explained in In re Adoption of Child of Indian Heritage, 543 A.2d. 925, 931-933 (N. J. 1988), a case cited approvingly by the Holyfield court at 490 U.S. at 51:

The effect on both the tribe and the Indian child of the placement of the child in a non-Indian setting is the same, whether or not the placement was voluntary. Furthermore, the economic factors that led Congress to provide safeguards against induced voluntary relinquishments to state agencies are equally implicated in private placement adoptions... Finally, while an unwed mother might have a legitimate and genuine interest in placing her child for adoption outside of an Indian environment, if she believes such a placement is in the child's best interests, consideration

must also be given to...Congress' belief that, whenever possible, it is in an Indian child's best interests to maintain a relationship with his or her tribe.

[543 A.2d at 932]

See also House Report No. 95-1386, supra, at 11 (recognizing that many "voluntary" consents are not truly voluntary.); In re Adoption of Holloway, 732 P.2d 962, 969-970 (Utah 1986); In re Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187, 189-192 (Ariz. 1981), cert. den. sub nom. Catholic Social Services of Tucson v. P.C., 455 U.S. 1007 (1982).

Thus, the ICWA specifically prohibits relinquishment of an Indian child for adoption for at least ten days after birth. 25 U.S.C. 1913(a). Moreover, such consents must be executed before a court of competent jurisdiction and a Court taking a voluntary consent to the termination of parental rights must determine that the consequences of the consent "were fully understood by the parent or Indian custodian", including, if necessary, the use of an interpreter to explain the consequences of the consent in the parent's native language. 25 U.S.C. 1913(a). This is to ensure that voluntary relinquishments are truly voluntary.

Moreover, the jurisdictional provisions in 25 U.S.C. 1911(a) and (b) are fully applicable to voluntary proceedings. Holyfield indicated that this means that only the tribal court, and not the State court, is a "court of competent jurisdiction" for the purposes of taking a consent to the termination of parental rights when the child is a reservation resident or domiciliary or a ward of the court. 490 U.S. at 52, n. 26. In addition, tribes are provided with the right to intervene in voluntary proceedings, 25 U.S.C. 1911(c), and the placement preferences in 25 U.S.C. 1915 apply to voluntary proceedings. The collective intent of these sections was to ensure "that Indian child welfare determinations [including adoptive placements] are not based on 'a white, middle-class standard, which, in many cases, forecloses placement with (an) Indian family.'" Holyfield, supra, 490 U.S. at (1602). 25 U.S.C. 1914.¹

¹ The description of the provisions of the ICWA included herein is based upon the most widely accepted interpretations of what these provisions mean both in practice and as applied by the courts. It is true that there may be individual cases that have interpreted a given section differently than may be described in this testimony. Because it would be far beyond the scope of this testimony to provide an exhaustive analysis of what the courts have done with every section of the ICWA, I have limited my analysis to the summary form in the text of my testimony. However, should any testimony be submitted which raises questions which the Committee would like to have answered, I would be happy to provide such

Thus, based upon the compelling testimony that it heard, Congress enacted the ICWA in order to (1) provide for procedural and substantive protection for Indian children and families and (2) recognize and formalize a substantial role for Indian tribes in cases involving involuntary and voluntary child custody proceedings, whether on or off reservation.

III. Impact of Title III of H.R. 3286 approved by the House

The purpose of Title III of H.R. 3286 is ostensibly to eliminate a narrow category of troublesome cases which have arisen under the Act, namely, adoptive placements with non-Indian families that are challenged some time after placement has occurred by Indian tribes or by natural parents who invoke the protection of the Act. These cases have sometimes resulted in extended court proceedings which cause great distress to all concerned -- the child, adoptive parents, natural nuclear and/or extended family and the Indian tribe. Even though AAIA would emphasize that these cases constitute a very small number of the overall cases decided under ICWA each year, AAIA agrees that it would be desirable to reduce the number of such cases even further if this is possible.

Having said that, it believes that the legislative approach chosen in Title III of H.R. 3286 is fundamentally incorrect, has great potential for harm to Indian children and principles of tribal sovereignty, would cause enormous litigation and disrupt state child welfare systems thereby delaying permanent placements, and is probably unconstitutional.

Currently, although a few courts have adopted the so-called "existing Indian family exception", see Matter of Adoption of Baby Boy L, 643 P.2d 168 (Kan. 1982) wherein the test was first recognized, most courts have held that the application of the Indian Child Welfare Act itself is dependent upon the presence of two elements: (1) a state court "child custody proceeding" as that term is defined in 25 U.S.C. 1903(1), and (2) an "Indian child" as that term is defined in 25 U.S.C. 1903(4), as the subject of the proceeding. See Holyfield, supra, 490 U.S. at 42; In re the Custody of S.B.R., 719 P.2d 154, 155-156 (Wash. Ct. App. 1986); Matter of Kreft, 384 N.W.2d 843, 845 (Mich. Ct. App. 1986); Matter of Appeal in Maricopa County, 667 P.2d 228, 231 (Ariz. Ct. App. 1982); A.B.M. v. M.H., 651 P.2d 1170 (Alaska Sup. Ct. 1982), cert. den., sub nom Hunter v. Maxie, 461 U.S. 914 (1983); In the Matter of the Adoption of a Child with Indian Heritage, supra, 543 A.2d at 933. "Indian child" is defined under the ICWA to mean "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. 1903(4).

additional legal analysis as would be desired.

Title III would narrow the coverage of the Act significantly by reclassifying many children currently considered to be Indian as non-Indian for the purposes of the Act. Title III would exclude from the Act children whose parents (1) have not formally applied for membership for themselves or their children in their tribe, although eligible, or (2) do not (in the opinion of a state court or agency) maintain a significant social, cultural or political affiliation with an Indian tribe notwithstanding that they are members. By excluding such children, Title III directly undercuts the underlying premises and principles of the ICWA in very substantial ways.

A. Title III is anti-family

The ICWA recognized the vital importance of the extended family in Indian society. Yet, the main impact of this title is to make a child's relationship with his or her extended family legally irrelevant and readily terminated. Under the arbitrary Title III test to determine which children are covered by ICWA -- whether a parent has a social, cultural or political affiliation with an Indian tribe at the time of the child custody proceeding -- it does not matter if all of the child's grandparents, aunts, uncles and cousins are actively involved with both the child and the tribe. If the child's parents are not involved at the time of the proceeding, ICWA does not apply to that child. If the ICWA is not applied, the main impact is to deprive the extended family of the right to be considered as preferred placements for the child. For a Congress that has actively sought to promote pro-family policies, it would be particularly tragic, indefensible and hypocritical to so discount the role of Indian grandparents and other extended family members, particularly in view of the fact that the role of the extended family in Indian society is so critical.

Indeed, the value of maintaining relationships between an Indian child and his or her grandparents or other relatives does not become unimportant by reason of a parent's alienation from his or her tribe. Indian parents who place their children for adoption or become involved with the child welfare system may very well be alienated from their culture. However, this does not mean that continued alienation is in the best interests of their children. The empirical evidence is that maintaining extended family and tribal relationships is in the child's best interests. It is for these reasons, among others, that organizations like the American Psychological Association and National Association of Social Workers have taken a position in opposition to Title III.

B. Title III violates basic principles of tribal sovereignty

Contrary to the approach of Title III, it is a well settled principle that Indian tribes have the authority to define their membership and that this authority is integral to the survival of tribes and the exercise of their sovereignty. Thus, in a case

where an Indian woman sought to challenge her denial of tribal membership in federal court based upon the equal protection provision in the Indian Civil Rights Act, the United States Supreme Court found that the appropriate forum for such a challenge was tribal court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). As the court explained:

A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters. (citations omitted)

[436 U.S. at 72, n. 32]

See also United States v. Wheeler, 435 U.S. 313, 322 n. 18 (1978); Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218 (1897); Baciarelli v. Morton, 481 F.2d 610, 612 (9th Cir. 1973).

C. Title III will not achieve its stated purposes

1. The adoption process will not be simplified

The standard for coverage of the ICWA in Title III -- maintenance of a "significant social, political or cultural affiliation" with the tribe -- is not defined. What is social, cultural or political affiliation? What evidence proves or disproves such affiliation? What level of affiliation is significant? It is likely that the meaning of every word in this test will be litigated repeatedly and that Title III will lead to an enormous increase in litigation and not a decrease.

2. State agencies and court will be overwhelmed by implementation of the new standard

Because Title III inexplicably covers involuntary foster care and termination of parental rights cases in addition to voluntary adoptions (which are the only "problem" cases cited by the supporters of Title III) and applies to all pending cases, Title III will require the reevaluation of thousands of child welfare cases across the country to determine whether a parent of the child maintained significant social, cultural or political ties with the tribe. This will place an enormous burden upon state social services agencies and courts, thereby delaying permanent placements. Indeed, the Attorney Generals of four Western states -- New Mexico, Oregon, Washington and Nevada -- have already taken a position in strong opposition to Title III.

3. Title III goes far beyond the off-reservation adoption cases involving children of "limited" Indian ancestry which gave rise to the legislation

a. It will exclude bona fide Indian children

The provisions in Title III which impose a "parental/tribal affiliation test" and prevent "retroactive" membership in an Indian tribe would exclude many bona fide Indian children and parents from the Act. The "affiliation" test would exclude even full-blooded Indians whose extended family is fully involved in tribal affairs and whose parents may have previously been closely connected with their tribe if, at the time of the proceeding, the child's parents happen to be alienated from their tribe(s) in the view of a state court judge.

The "retroactive" membership provision shows little understanding of how membership often works "in the real world". The failure of an Indian individual to formalize his or her tribal membership is not unusual. Often, because on an informal basis, they are clearly recognized as members of the community, individuals may see no reason to formalize membership unless necessary to exercise tribal "rights" such as voting or eligibility for per capita payments that need to be protected through registration. This failure to formalize membership is likely to be particularly prevalent in terms of children or those individuals who have personal problems that may result in involvement with a child custody proceeding; thus, the result of Title III would be that some of the neediest and most vulnerable Indian individuals would lose ICWA protection.² In short, the perception on the part of the sponsors -- which appears to be that recognition of membership after commencement of a child custody proceeding is evidence that a child is not a bona fide Indian child -- is simply not reality.³

² For example, due to the intermarriage of Indian people from different tribes today, there are many children who may be eligible for enrollment in more than one tribe. Parents of such children may decide to delay making a decision on tribal membership to allow the child to decide when he or she is older. If such a child were to become a mother or father as a teenager or young adult without taking whatever action is necessary to become a member of an Indian tribe, his or her bona fide Indian child would not be covered by the ICWA.

³ Another problem is that state courts can sometime confuse enrollment with membership. Formal enrollment does not equal membership in many situations. See, e.g., United States v. Antelope, 430 U.S. 641, 646 n.7 (1977); United States v. Broncheau, 597 F.2d 1260 (9th Cir., cert. denied, 444 U.S. 859 (1979)). For example, a number of small tribes do not have updated enrollment

b. It applies to involuntary dependency proceedings

Even though the only "problem" cases cited by proponents of Title III are adoption cases, Title III applies fully to involuntary dependency cases as well as adoption cases. Depriving troubled Indian families of the support and assistance of their tribes in the involuntary context will be particularly devastating. There are many examples where troubled alienated individuals have been "saved" when they reunited with their tribe and tribal community through the application of the ICWA. For no apparent reason, the sponsors of Title III would prevent the tribe from making these positive interventions in the future by depriving coverage of the Act in an involuntary proceeding where the parent lacks a significant affiliation with the tribe at the time of the proceeding. Moreover, as noted, applying this standard to involuntary proceedings is likely to overwhelm and disrupt existing state systems and State Attorney Generals are lining up to oppose Title III.

c. It will impact on-reservation children and families

Title III would also have an impact upon children and families resident or domiciled on the reservation. If an on-reservation child and parent have not taken action to formally become members of an Indian tribe, there is nothing to prevent state child welfare agencies from coming onto the reservation, removing such children from their families under state law standards and commencing a child custody proceeding not subject to the ICWA.

d. The proponents of Title III have misunderstood or misrepresented the ICWA and the status of Indian children

1. The ICWA was always targeted at off-reservation proceedings

The proponents of Title III have asserted that Title III is consistent with the original intent of ICWA which was primarily to protect tribal jurisdiction over on-reservation children. Yet, contrary to this assertion, a primary purpose of the Indian Child Welfare Act was to curtail state authority over off-reservation

lists. Enrollment lists may regularly be "closed" and "opened for updating" only on a very sporadic basis. This is not of great concern to these tribes generally because they know through custom, tradition and kinship ties who their members are. Yet, it does not take much imagination to contemplate a state court erroneously interpreting the presence of an enrollment list and the absence of an individual on that list as evidence that the individual is "not really a member" prior to the child custody proceeding.

Indian children in state proceedings because State insensitivity to Indian cultural values had led to massive numbers of these children being placed outside of their homes. In direct contravention of this intent, Title III would restore enormous power to state social workers and courts to once again make their own determinations about Indian culture which will be determinative in deciding whether ICWA applies. Even if affiliation were to be viewed as a valid test, there is no reason to believe that state agencies and judges generally will have the experience and sensitivity to evaluate tribal identity. See Santa Clara Pueblo v. Martinez, supra, 436 U.S. at 72 n.32 wherein the United States Supreme Court recognized the "vast gulf between tribal traditions and those with which...courts are more intimately familiar."

2. Tribes cannot dictate the result in proceedings involving off-reservation Indian children.

The proponents of Title III have the inaccurate perception that once an Indian tribe intervenes in a state court proceeding, it is entitled to dictate an end result precluding placement with a non-Indian family. This is not true. While it is true that the Act requires preferential placement with extended family and tribal members in state court adoption proceedings, a state court may nonetheless place a child outside the preferences if it finds good cause to the contrary. 25 U.S.C. 1915(a). Moreover, while an Indian tribe may seek transfer of jurisdiction of an off-reservation case, either birth parent may object to the transfer which has the effect of preventing such a transfer. 25 U.S.C. 1911(b). Indeed, even where a parent does not object, a state court may deny transfer to a tribal court if it finds good cause to the contrary. Id. Finally, even if the case is transferred to tribal court, tribal courts have the authority to place Indian children with non-Indian adoptive parents and have done so on a number of occasions in the past. Thus, intervention of the tribe does not automatically result in a particular outcome in any given case.

3. It is a fallacy that Title III will free up Indian children "languishing" in foster care for adoption

Proponents of Title III have asserted that it will free up 500,000 children for adoption. Given that the total Indian population is about 2 million, this is truly an astounding claim. Even aside from the clearly erroneous numbers used by the proponents of Title III, it should be emphasized that the basic situation in terms of Indian children is not similar to that of other minority children such as has given rise to the proposal in Title II of H.R. 3286 to prevent any delays in the placement of children on the basis of race. There are not large numbers of Indian children languishing in foster care because of inadequate numbers of Indian families available to adopt these children. In the "disputed" cases which have been cited by proponents of Title

III, there have (by definition) been family and tribal members eager to adopt these children. Moreover, tribes can normally find placements for their children when given the opportunity. This is what the ICWA is all about -- in essence, it prevents discrimination against Indian people in the placement of their own children.

E. Title III is probably unconstitutional

1. It ignores that the political relationship between Indian tribes and the federal government is the basis for Indian legislation

Title III would replace a bright line political test -- membership in an Indian tribe as the linchpin for the coverage of the Act -- with a multi-faceted test that transforms the classification into more of a racial identification test, than a political test! This not only intrudes upon tribal sovereignty, but may be unconstitutional since the legitimacy of Indian-specific legislation rests upon the fact that such legislation is based upon a political classification and not a racial classification. See, e.g., Morton v. Mancari, 417 U.S. 535 (1974).

2. It is violative of due process.

Title III provides that a state trial court determination of non-affiliation with a tribe is final, but a determination of affiliation is appealable. This fundamentally unfair provision is a violation of basic due process rights.

F. Title III is the flawed product of a flawed process.

Indian tribes were never consulted in the development of Title III and are uniformly opposed to it, as are many mainstream adoption and child welfare organizations and state governments. The House Resources Committee (the Committee of jurisdiction in the House) voted to strip Title III out of H.R. 3286 and was overruled by the House Rules Committee, which is virtually unprecedented. There is compelling reason for Senate Committee on Indian Affairs to strongly reaffirm its decision of last week to strip Title III from H.R. 3286 because Title III is a hastily conceived, poorly drafted piece of legislation which will do much harm to Indian children, families and tribes.

IV. The NCAI draft proposal:

A fair and reasonable approach to refining the ICWA

The NCAI proposal, developed by Indian tribes and organizations, addresses many of the concerns which were raised by the supporters of Title III. That alternative would

Require notice to Indian tribes in all voluntary

proceedings.

- Require that if a Tribe is to intervene in voluntary termination proceedings, it must do so within 30 days of receiving notice in the case of voluntary termination of parental rights and within 90 days of receiving notice in the case of a particular adoptive placement.
- Limit parents' rights to withdraw consent to an adoption to 6 months after relinquishment of the child or 30 days after the filing of an adoption petition, whichever is later; if an adoption is finalized before 6 months, that would also end the period during which consent can be revoked.
- Clarify that Alaska Native villages are reservations for the purposes of ICWA.
- Provide for criminal sanctions for anyone who assists a person to lie about their Indian ancestry for the purposes of applying the ICWA.
- Allow state courts to enter enforceable orders providing for visitation or continued contact between tribes, natural parents, extended family and an adopted child.
- Require attorneys, public and private agencies to inform Indian parents of their rights under ICWA.
- Require that tribes certify that a child is a member or eligible for membership in the tribe when the tribe intervenes in a child custody proceeding.
- Clarify tribal court authority to declare children wards of the tribal court.

This alternative not only takes into account tribal concerns in a manner which Title III does not, but also addresses the concerns raised about the ICWA by Title III's proponents far more effectively than Title III. The process proposed in the NCAI draft would bring consistency, certainty, fairness and timeliness to the process.

Currently, because the ICWA does not include a specific notice requirement to Indian tribes in the case of voluntary adoptions, Indian tribes frequently do not learn of such adoptions until some time after the initial placement has been made. Particularly in the case of an off-reservation birth to an unwed mother -- which makes up a substantial portion of these cases -- there may be a significant delay in such information becoming known within the tribal community. Thus, even where an Indian tribe acts promptly upon obtaining the information, a situation may have developed

where the child has already spent a significant amount of time in that placement before the tribe intervened.

Providing tribes with prompt notice in all cases will greatly enhance the possibility that a prospective adoptive parent will know before placement (or within a very short time thereafter) whether a member of the child's family or tribe has an interest in adopting the child. Notice will help to ensure that "unwanted" children are provided with good homes, but will also ensure that "wanted" children are not removed from their families and tribes in cases where homes are available within their families or tribal communities. AAIA would respectfully submit that those who would oppose such notice are not really concerned about ensuring good homes for Indian children. Rather they are simply seeking to find available adoptable children for non-Indian adoptive parents. Congress has an obligation to enhance the possibility that Indian children who need placement are placed in good homes; it does not have the obligation to ensure that all persons wanting to adopt "get a child" at the expense of that child's future connection with his or her heritage and natural family. At present, several states have explicitly recognized and successfully implemented a requirement that notice be provided in voluntary proceedings. See, e.g., Wash. Rev. Code Ann. 13.34.245(3), (5); 26.33.090(2); 26.33.110(2); 26.33.240(1) (West Supp. 1989); Minn. Stat. Ann. 257.352 (2), (3); 257.353(2), (3) (West Supp. 1989); Okla. 10 O.S. 1991, section 40.1 (as amended in 1994); Mich. Court Rules 5.980(A). Moreover, in other states, it appears to be standard practice to notify tribes of voluntary proceedings. See, e.g., B.R.T. v. Executive Director of the Social Services Board of North Dakota, 391 N.W.2d 594, 595 (N.D. 1986); In re Adoption of Halloway, 732 P.2d 962, 963 (Utah 1986). Thus, notice to Indian tribes in voluntary proceedings is entirely feasible and desirable.

Likewise, requiring that parents be informed of their rights under ICWA will increase the chances that a parent fully considers his or her placement options at the very beginning of the process. The combination of notice to the tribe and full information to natural parents will help to ensure that a young, vulnerable Indian parent has the balanced information available which that parent to make an informed decision. When only an adoption attorney or agency is involved with a young parent considering adoption, there is a substantial likelihood that extended family options will not be explored. Ensuring that parents have full information from the outset will help to lessen the number of later disputes which arise because the parent was confused and unclear of the possible options that are available to her when she placed the child for adoption.

The possibility of open adoption as an option in all proceedings, another part of the NCAI proposal, may also facilitate harmonious placements of children and avoid conflict in some situations. In a number of states, courts currently have no authority to recognize open adoptions even where the parties have

reached an agreement.

At the same time, under the NCAI amendments, if a tribe does not take action within a specified period of time, the tribe will be barred from intervention. Prospective adoptive parents will have assurance that they can go forward with the adoption without later action by the tribe which may disrupt the adoption. The time limits on parental withdrawal of consent serve the same purpose in terms of a parental challenge post-placement. Under the NCAI proposal, prospective adoptive parents will know the time frames that are applicable when they agree to accept a child into their home and the fear of disruption at some unknown point in the future which, it has been asserted, is having a chilling effect upon adoptions should be alleviated.

In addition, the amendments provide more assurance that all parties will "play by the rules". The criminal sanctions will discourage corrupt attorneys and others from subverting the ICWA. There is considerable anecdotal evidence that natural parents are often told by adoption attorneys and agencies that they should not reveal that the child is of Indian heritage in order to avoid the application of the Indian Child Welfare Act. We do not know how often this occurs because it is impossible to determine how often such deception goes undetected. However, almost all attorneys working on behalf of tribes and Indian families have experienced cases where a natural parent who has changed his or her mind about the adoption has revealed that he or she was told and encouraged not to reveal the child's Indian background.

Similarly, the provisions dealing with tribal certification of membership and tribal court wardships are a measured effort to provide assurances to other parties that tribes are following a specified set of rules as well. The certification requirement will have a chilling effect upon any tribal inclination to manipulate membership requirements to obtain ICWA coverage for a child (if in fact this is a problem). Moreover, the wardship section makes clear that tribes may not reach out and make non-reservation children wards of the tribal court unless this occurs through a valid state court transfer of jurisdiction.

Thus, AAIA is very supportive of Congressional action on the NCAI amendments. It believes that the amendments will advance the valid goal of decreasing the number of extended court disputes which will arise under the ICWA.⁴

⁴ I would note, however, that I have been involved in recent discussions with tribal and Indian organization representatives, as well the adoption attorneys who have been invited to testify at the hearing. Based upon those discussions, some largely technical amendments have been developed to the NCAI draft. They are included as Appendix A and have the support of AAIA.

V. Conclusion

The NCAI proposed amendments will lessen the number of disrupted adoptions and provide the best possible placements for Indian children without impacting upon tribal sovereignty. AAIA urges you to support the NCAI amendments to the ICWA and reject Title III of H.R. 3286.

Appendix A

[] - Deletion from NCAI draft

___ - Addition to NCAI draft

Amendment 1:

1913(c) would be amended to read as follows:

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

- (i) within one hundred days following any foster care placement,
- (ii) [within] no later than five days following a pre-adoptive or adoptive placement,
- (iii) within ten days of the commencement of a termination of parental rights proceeding, and
- (iv) within ten days of the commencement of an adoption proceeding.

Notice required under (ii) above may be provided prior to placement if a particular pre-adoptive or adoptive placement is contemplated.

EXPLANATION: This clarifies that it is permissible (and presumably desirable) that notice be provided to a tribe at the earliest possible point in time when a placement is contemplated, even before birth.

Amendment 2:

1913(e) would be amended as follows:

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

Remainder of section remains the same

EXPLANATION: Technical clarifying amendment only.

Amendment 3:

1924 would be amended as follows:

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

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

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

(b) [No] The parents of [an] the Indian child shall not be prosecuted under this section.

Explanation: Amendment 4 is a substantive amendment which closes another "loophole" which has been used to subvert the Act. The amendment to (b) is simply technical.

Amendment 4:

Section 1903(10) should be changed in accordance with whatever agreements are reached between the Alaska Natives and the Alaska Congressional delegation.

Amendment 5:

1913(b)(ii)(C) and (b)(iii) would be amended as follows:

(C) less than thirty days have passed since the parent received notice of the commencement of the adoption proceeding.

1913(b)(iii)

(iii) If a consent has not been revoked within the time frames provided in subsection (b)(ii), a parent may thereafter revoke consent only pursuant to [under] applicable State law and such relief as may be provided thereunder or, upon petition of a parent [or the Indian child's tribe] to a court of competent jurisdiction and a finding that consent to adoption or termination of parental rights was obtained through fraud or duress[, or that notice was not provided under this section]. [In such case] Upon a finding that such consent was obtained through fraud or duress, the child shall be immediately returned to the parent and a final decree of adoption, if any, shall be vacated. No adoption which has been in effect for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under

State law.

EXPLANATION: These changes clarify that failure to notify a tribe does not extend the parents' right to revoke consent to adoption for two years after an adoption is final. Such a result was unintended. The notice language belonged in subsection (b)(ii)(C) and has now been added there.

Amendment 6:

1913(d)(ii) would be amended as follows:

(ii) the names, maiden names, addresses and dates of birth of the Indian parents and grandparents of the child, if known after inquiry of the birth parent placing the child or relinquishing parental rights and the other birth parent, if available, or if otherwise ascertainable through any other reasonable inquiry.

EXPLANATION: This change is intended to recognize that in certain circumstances the information required by this subsection may not be ascertainable even through reasonable inquiry. The subsection continues to require that known and reasonably ascertainable information be provided.



Shakopee Mdewakanton Sioux Community

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SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Statement for the Record

Hearing Before
the
United States Senate Committee on Indian Affairs
on
Amendments to the Indian Child Welfare Act (ICWA)
Held On
June 26, 1996

Mr. Chairman and Members of the Committee:

The Shakopee Mdewakanton Sioux (Dakota) Community appreciates this opportunity to present its views concerning proposed amendments to the Indian Child Welfare Act (ICWA).

We commend you for holding the June 26, 1996 hearing on this important subject. The fulfillment of your responsibilities in this way is made even more significant because the issue was not fully considered in the House of Representatives prior to its passage of H.R. 3286 on May 10, 1996. We also commend you for striking Title III of H.R. 3286 when the House-passed bill came to the Senate and was referred to this committee.

The Shakopee Mdewakanton Sioux (Dakota) Community is located in Prior Lake, Minnesota. Our Community was formally organized under federal law on November 28, 1969. There are approximately 250 tribal members of the Community; approximately one-half of all tribal members are minors.

We are a small Tribe and our experience under ICWA is limited. However, we feel strongly that weakening ICWA will cause harm to children and will damage the ability of Tribes to function successfully.

Our Tribe recently adopted a Domestic Relations Code and established a tribal Children's Court. It has addressed only one ICWA case, where the father of the subject child is a tribal member and the mother is not Indian. The Tribe asserted legal custody of the child because of family problems and will retain custody until it is certain that the baby is in a safe and loving environment. The entire custody issue has been handled from the beginning by the tribal court and the mother and her family have not disputed tribal jurisdiction. Further, the Community received cooperation and support from the local county government, Scott County, during this particular proceeding. Clearly, the Community's child welfare system functions as intended.

There is no such thing as a "typical" Tribe and ours, like all others, is unique. We are a small community and we have the financial resources to take care of each other. We believe we are typical, however, in the sense that we and all other Tribes take seriously our responsibility to our children. The procedures established by Congress in the passage of ICWA in 1978 certainly have the effect of helping to ensure our survival and of providing to children their Indian heritage and culture. However, the most basic concern of all has to be the well-being of each individual child. The survival and strengthening of the tribal community and the communication of our culture to children serve to accomplish this ultimate goal. The well-being of the individual child is greatly enhanced by the presence of the supportive greater family that is the tribal community. Similarly, the child is strengthened by personal knowledge of and connection to his or her own ancient heritage and culture -- something which is sadly missing for so many children in the adoption system.

When Congress enacted ICWA in 1978, it followed certain fundamental principles. These principles should not be abandoned now because of a small number of very unfortunate cases.

One such principle is that the objective standard of eligibility for tribal membership is a reliable and fair way to determine which children come within the protections of ICWA. A subjective standard of cultural affinity or racial identity, to be applied by numerous and varied judges and other authorities as would happen under Title

III, cannot possibly lead to the kind of fairness or certainty that Congress seeks to ensure and is at the heart of due process.

Related to that is the principle that only Tribes can and should determine eligibility for tribal membership. This has been recognized by the federal government, including the Supreme Court, for many years.

A third principle is the long-standing belief that Tribes are sovereign entities with a political and legal status that defines their relationship with the U.S. government and the states. They are not race-based organizations as seems to be the assumption for the drafters of the provisions of Title III of the House bill.

All three of these principles would be violated by the approach taken in Title III of H.R. 3286.

While we do not advocate any change to ICWA as it stands today, certain modifications to the statute may address concerns about its operation while adhering to the principles set forth above. Such modifications should be along the lines of the amendments agreed to by the National Congress of American Indians (NCAI) at its Mid-Year Conference held in Tulsa on June 3-5 of this year. As the Committee knows, those amendments would provide the following:

1. Notice to Indian Tribes for voluntary adoptions, termination of parental rights, and foster care proceedings;
2. Time lines for tribal intervention in voluntary cases;
3. Criminal sanctions to discourage fraudulent practices in Indian adoptions;
4. Clarification of the limits on withdrawal of parental consent to adoptions;
5. Application of ICWA in Alaska;
6. Open adoptions in states where state law prohibits them;
7. Clarification of tribal courts' authority to declare children wards of tribal court;
8. A duty that attorneys and public and private agencies must inform Indian parents of their rights under ICWA; and
9. Full protection of tribal sovereignty in the determination of membership, a principle which is beyond compromise.

Since Tribes do intervene in voluntary adoption proceedings, changing ICWA to require that they receive timely notice will help prevent delay and disruption of voluntary proceedings that are already underway. With the requirements for such timely notice, Tribes can then reasonably be limited to a period of 90 days during which they must make a definite decision whether they will intervene. Along with these measures, a national standard for deadlines concerning parents' withdrawal of their consent to adoption will add predictability to the process. Requiring public and private agencies and attorneys to inform Indian parents of their rights and their children's rights prior to granting consent to adoption should provide both a more humane process and one which is less likely to be disrupted later. The addition of criminal sanctions is appropriate and, had they been in effect, might well have deterred some of the conduct in the negative anecdotes which fostered the overreaching House-passed legislation.

It is important for the entire Senate to know, as this Committee already knows, that the preservation of abstract political principles is not the objective here. Rather, it is by the preservation of these long-standing principles that our tribal communities survive and are strengthened. In turn, the survival and strengthening of the tribal community serves the best interests of the children, with the community providing the children with the nurturing and the cultural identity that enhances their lives.

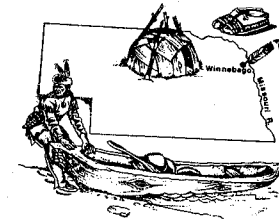
We believe ICWA works well today in the vast majority of cases. Some modifications to the law may be helpful in addressing concerns that have been raised from some quarters. We commend the Committee to opposing the approach taken in Title III of H.R. 3286. If the Senate determines that modifications to ICWA are appropriate, we urge an approach like that in the group of amendments presented by NCAI. Thank you for the opportunity to present our views.

Submitted July 9, 1996

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WINNEBAGO TRIBE of NEBRASKA

WINNEBAGO TRIBAL COUNCIL P.O. BOX 687 WINNEBAGO, NEBRASKA 68071



**Statement of the Winnebago Tribe of Nebraska
Submitted to the
Senate Indian Affairs Committee
Regarding
Amendments to the Indian Child Welfare Act**

July 10, 1996

This statement on amendments to the Indian Child Welfare Act (ICWA) is submitted on behalf of the Winnebago Tribe of Nebraska.

The Tribe wishes to advise the Committee that we are strongly opposed to the ICWA provisions authored by Congresswoman Pryce which were contained in Title III of H.R. 3286, the adoption tax credit bill, as passed by the House of Representatives. The Tribe strongly supports the Senate Indian Affairs Committee's recent recommendation that Title III be deleted from the bill before it is considered by the full Senate.

In addition, the Winnebago Tribe states our strong support for alternative amendments to ICWA as endorsed by tribal leadership at the National Congress of American Indians' mid-year conference in Tulsa, OK, in early June. The

Winnebago Tribe agrees with the provisions of this proposal and hopes the Senate Indian Affairs Committee will introduce legislation based upon this proposal.

Another concern that the Tribe wishes to call to the Committee's attention as it considers amendments to ICWA is the need to clarify the Act's definition of "domicile." In the Tribe's experience, state courts often interpret the term "domicile" differently from the way we do, and the way we believe Congress intended under ICWA. Our understanding is that where an Indian child or family is domiciled may be analogous to where persons in the military service are domiciled. Even though a serviceman may be moved from location to location in his tour of duty, his initial base is considered his domicile for the whole time of service. Similarly, we consider an Indian child's reservation as his or her domicile, even though the child may also live for periods of his or her life off the reservation.

The Winnebago Department of Human Services has on staff one Indian child welfare staff worker who handles ICWA cases both on- and off-reservation, and three child protection services staff who handle ICWA cases only on the reservation. These community members serve the Tribe not only as professionals, but they are also parents, aunts and uncles, and grandparents of the Indian children who are so important to the future of our tribe.

The Winnebago Tribe currently has some 50 active Indian Child Welfare Act cases in seven states: 19 in Iowa, nine in Minnesota, two in Montana, three in Nebraska, two in New Mexico, three in Washington, one in Wisconsin, and 11 which have been transferred to tribal court. Generally, in the Tribe's experience, the states, especially Minnesota, are working well with us in child custody and placement proceedings. The Winnebago Tribe's general experience is that state courts are willing to work with the Tribe. We have a good success rate in getting

cases transferred back to tribal court, particularly in instances where the case has not been going on for longer than one year.

Efforts at family reunification are particularly strong. We expect, for example, that two children now in New Mexico will be reunited with their Winnebago parents within the next 90 days. Also, in none of these 50 active cases are parental rights about to be terminated.

The Winnebago Tribe feels strongly that tribes should intervene in every ICWA case. This will not necessarily lead to a request to transfer to tribal court, however. We simply believe that each tribe should know when there is a placement involving a child who may be or is a tribal member; for that reason, we especially support the provisions regarding notification that are contained in the "Tulsa proposal."

In conclusion, the experience of the Winnebago Tribe has been that state courts have sometimes misunderstood or been ignorant about the provisions of the Indian Child Welfare Act. However, when state courts having jurisdiction over Winnebago children are willing to work with the Tribe in custody proceedings, we have found that to be in the best interests of the Indian child.

The Winnebago Tribe appreciates the leadership of the Senate Indian Affairs Committee in opposing ICWA amendments, such as Title III, that would be harmful to tribal communities. We applaud your willingness to consider and to support tribally-developed amendments to ICWA. Thank you.



Spokane Tribe of Indians

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CENTURY OF SURVIVAL
1881 - 1981

TESTIMONY OF BRUCE WYNNE, CHAIRMAN

SPOKANE TRIBE OF INDIANS

Presented to the

Senate Committee on Indian Affairs

For the Hearing on Amendments to the Indian Child Welfare Act

June 26, 1996

Mr. Chairman, recently members of the Congress have been treated to a series of horror stories about alleged abuses of the Indian Child Welfare Act. These stories have been gathered by the opponents of the Act and are designed to loudly demonstrate perceived weaknesses of the Act. While we in Indian country know there may be problems with ICWA, we also doubt the factual basis of many of the stories or the good intentions of those who have gathered and published them.

We invite members of Congress to visit our Reservation and other Indian Reservations where they would find a very different set of horror stories. These stories would come from people who were adopted into non-Indian families before there was an ICWA and who therefore did not have the Act's provisions to protect

TESTIMONY OF BRUCE WYNNE, CHAIRMAN
SPOKANE TRIBE OF INDIANS
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them. For many of these people, ICWA might have been saved them from years of grief and disorientation.

Attached to my testimony is the story of Georgia G. and her sister Geneva. Because of ICWA, stories like this need never be repeated but only if Congress can hold the line on attempts to undermine the integrity of the Act. The Act has worked well for 20 years; the so-called "abuses" of the Act are minimal compared to the abuses that preceded its enactment. We cannot turn back now and undo an Act that has worked to keep Indian children with their families, their extended families, or with other Indian foster-care families who can love and nurture them in ways that non-Indians, no matter how well-meaning, can duplicate.

That is what ICWA is about: preventing the wholesale adoption of Indian children to non-Indian families and preserving for children, while they are still children, the heritage to which they are entitled. Before enactment of ICWA, more than 25 percent of all children born to Indians were adopted by non-Indian families. This cultural removal, whether deliberate or not, followed the long line of other attempts by the United States government to terminate Indian people, either by killing them with guns, whiskey, or diseased blankets or, after attempts to kill them failed, by erasing their languages, cultures and religions.

TESTIMONY OF BRUCE WYNNE, CHAIRMAN
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We very much appreciate the Committee's interest in helping to preserve Indian culture by preserving ICWA. The retention of Indian children in Indian families over the past 20 years has made an enormous difference everywhere in Indian country. We have come from a time when people were ashamed to be Indian to now, when people are not only proud to be Indian but are working diligently to prevent the further loss of Indian language and culture and to preserve what still remains. All of the members of the Spokane Tribe are grateful that we, as a Tribe, are now able to determine the placement and care of our Indian children.

We thank the Committee for recommending deletion of the House-passed amendments that would have severely weakened ICWA and look forward to working with you on amendments to strengthen the Act's provision. In this regard, the Tribe generally supports the tribal amendments agreed to by delegates to the NCAI's convention in Tulsa in early June. We have the following concerns, however, that we would like to share with the Committee.

First, in section 1913(c)(i), we believe that 100-day period for notification of the Tribe in voluntary adoption cases should be shortened. Our concern is that a 3+ month wait could allow serious attachment and bonding to take place in the pre-

TESTIMONY OF BRUCE WYNNE, CHAIRMAN
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adoptive setting before the Tribe is even aware of the child's existence and could mean detrimental delays in identification of tribal relatives. If custody of the child is then changed, serious trauma could result. Whenever possible, the Tribe should be notified at the very earliest practicable date.

Section 1913(d) should be amended by adding an "s" to "affiliation" and to "tribe" to clarify that often there is more than one Tribe involved in a custody proceeding.

We recommend that the following language be added to Section 1913(g):
"Written verification that the Indian child's Tribe/s received notice must be provided prior to finalization of the voluntary termination of parental rights or the entry of an adoption decree."

At the end of section 1924(b), the following language should be added: "...in a proceeding involving their biological child." This would prevent possible interpretation of the amendment as not applying to adoptive parents of Indian children, to adoption attorneys, to agency employees, as well as to others to whom ICWA does in fact apply.

TESTIMONY OF BRUCE WYNNE, CHAIRMAN
SPOKANE TRIBE OF INDIANS
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As for amendments to section 1924 generally, we would comment that as an alternative to penalties that might interfere with attorney/client confidentiality, the Committee might consider sanctions against any agency, whether public or private, for violations of the section. The sanctions could include loss of federal funds, for example. Also, states might be required to suspend licenses for agencies that are found to violate the section or to require bonds for violators. States might also be required to include ICWA compliance procedures in examinations or licensing proceedings for employees of agencies who are going to work with foster care or adoption cases.

The Tribe is ready to work with the Committee in any way possible to insure the continuing viability and integrity of the Indian Child Welfare Act. Again, and very sincerely, we thank the Chairman, the Vice Chairman and the Committee members for their continuing commitment to this effort.



Spokane Tribe of Indians

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CENTURY OF SURVIVAL
1881 - 1981

THE STORY OF GEORGIA AND HER SISTER GENEVA

Daughters of the Spokane

Georgia is 37 years old. She and her sister Geneva were taken from their grandparents and placed in an orphanage when they were just 3 and 4 years old. The sisters are just two of the many thousands of Indian children who were taken from their families and placed in a system of non-Indian strangers. Georgia is enrolled now at the Spokane Tribal College and doesn't remember anything bad about living with either her grandparents or her mother when she was a small child.

After a year at the orphanage, Georgia went to live with a foster family where she was taught to eat properly, to behave, and to go to church. She didn't understand a lot of things and did not even realize that Geneva was her sister when they used to fight at the orphanage; Georgia thought Geneva was just another brown kid. She believes now that they fought with each other because each blamed the other for being taken from their home. She was once told that her mother was sick.

Georgia says that her sister and she get along but they never talk about all the things that happened to them as children. Geneva doesn't like being Indian. She has a daughter now and she doesn't like to be Indian either.

WRITTEN STATEMENT
OF THE
NAVAJO NATION
ON
PROPOSED AMENDMENTS TO THE INDIAN CHILD WELFARE ACT
SUBMITTED
TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS

JUNE 26, 1996

The Navajo Nation has already gone on record opposing the proposed amendments which were included in the H.R. 3275, a bill to amend the Indian Child Welfare Act ("ICWA"). Since it is the Navajo Nation's understanding that the Senate Committee on Indian Affairs has focused its attention on a set of alternative amendments which were developed by the National Congress of American Indians ("NCAI") on June 2, 1996, this written statement focuses on the NCAI alternative amendments. For the Navajo Nation's comments on the original proposed ICWA amendments, the Committee is referred to the Navajo Nation's Written Statement on H.R. 3275, attached.

The NCAI alternative amendments are a dramatic improvement over the original proposed language contained in H.R. 3275. However, the Navajo Nation still has several concerns about the application of the NCAI alternative. The majority of these concerns result from the Navajo Nation's unique position, being located in three states and having had active ICWA cases in every jurisdiction within the United States.

1. The NCAI proposal for a new Section 1913(b) would impose a rigid timeline of six months from receipt of notice by the tribe or 30 days from commencement of the adoption proceeding for withdrawal of consent for the adoption. The difficulty here occurs when the Indian heritage of the child is concealed or missed. It is important that the rights of the tribe and the right to withdraw consent in an adoption proceeding not be cut off until accurate information about the child has been received and the tribe has an opportunity to react. For example, a tribe should not be penalized if it first states that it will not intervene, based on information which indicates that the child is not a member, only to find out later that the tribe received erroneous information. In such a situation the tribe should have the opportunity to intervene, based on the corrected information.

2. NCAI proposed a new Section 1913(c) and(d) which require that in a voluntary placement or a voluntary termination, the Indian child's tribe must receive notice of the proceeding, and that the notice must contain information to allow the Indian child's tribe to verify application of the ICWA. While the proposal adds language in Section 1924 to make fraudulent misrepresentation in an ICWA

proceeding a crime, punishable by fine and imprisonment, there is no requirement that the information contained in the Section 1913(d) notice be compiled in good faith or after investigation. While criminal sanctions are important, there are many situations where erroneous information may be provided to a tribe, through oversight, error, or lack of a good faith investigation, which does not rise to fraud, and which would negatively affect both the tribe's ability to determine the child's enrollment and whether the tribe will intervene in the state court proceeding. It is of critical importance that a good faith investigation be made into the information required by the Section 1913(d) notice and forwarded to the tribe.

3. NCAI's proposed Section 1913(e) sets forth timelines within which a tribe may intervene in a state proceeding. While each of these timeframes refer to the tribe filing a notice of intent to intervene, it is not clear what this notice requires. Where local counsel is required for filing the notice of intent, these timelines present particular difficulties since simply finding local counsel may take longer than the 30 days allowed, let alone determination of ICWA applicability, case staffing, or contract approval with local counsel (which is subject to Bureau of Indian Affairs approval under 25 U.S.C. Section 81 and thus involves timeframes not within the tribe's control). Alternately, if this section merely requires a statement from the tribe's ICWA program that it intends to intervene, without further procedural requirement, it may be possible to meet the proposed statutory timelines. However, depending on the adequacy and accuracy of the information received by the tribe, the 30-day timeline may still present difficulties in determining enrollment eligibility of the Indian child. Clarifying language directing that the notice of intent to intervene only requires a simple statement which may be submitted by the tribe's ICWA program is needed to prevent ICWA from being deprived of any meaning.

4. The Navajo Nation is also concerned that the term "certification" as used in the addendum may be used to impose an artificial barrier in some jurisdictions. It is together possible that some states may act officiously by requiring that a particular state form be used to meet state evidentiary standards. While the proposed amendments can be read to mean that this certification is a tribal certification, language clarifying that it is a tribal certification which is required, without the need for further evidentiary authentication could greatly minimize the opportunity for later misunderstandings.

5. One issue completely unaddressed by the proposed alternative amendments is language which would deal with some odd state court decisions. This language would be in a proposed new section 1904, "This title shall apply whenever an Indian child is the subject of a child custody proceeding." This additional section would address the "existing Indian family" exceptions which were created by state cases in California and Oklahoma. What has occurred is that these state courts have, in effect, acknowledged the ICWA, yet determined that it

was not intended to apply to a specific case. Without a provision to address this situation, it is likely that confusion will continue.

Whatever changes may be proposed to the ICWA, it is important to recall that the effects of ICWA have not only been to preserve American Indian tribes' most precious resources -- it members, but also to prevent the type of alienation experienced by Indian children who were adopted by non-Indian families before ICWA was adopted. While during infancy and early childhood, an Indian child may adapt to and be accepted by a non-Indian family, many of these children later face difficulties in self-identification and adaptation. What may have started out as a "good" intention becomes detrimental to the child. While much has been said about children and parents, both natural and adoptive, it is critical to be mindful of the long-term effects of depriving Indian children of their heritage.

The Navajo Nation, subject to the above issues, believes that the proposed NCAI amendments will help clarify ICWA. Although some of the concerns of the Navajo Nation may require further statutory language, the majority of these issues may be addressable through report language. The Navajo Nation is prepared to assist the Committee in drafting legislative history to address these concerns.

ROLAND E. JOHNSON, GOVERNOR
LAGUNA, NEW MEXICO
POSITION OF THE PUEBLO OF LAGUNA
ON
THE PROPOSED AMENDMENTS TO THE INDIAN
CHILD WELFARE ACT
TO

MAY 2, 1996

I am Roland E. Johnson, Governor of the Pueblo of Laguna, located in the State of New Mexico. I am submitting this position paper concerning H.R. 1448, a bill to amend the Indian Child Welfare Act of 1978 (hereinafter referred to as the "ICWA"). It is my understanding that this proposed Bill would require that any determinations regarding the status of a child as a member or potential member of an Indian tribe not be given retroactive effect, but that for purposes of any child custody proceeding involving an Indian child, membership in an Indian tribe shall be effective only from the actual date of admission to membership in the Indian tribe. As the official spokesperson for the Pueblo of Laguna, I am submitting this statement to indicate the strong objection by the Pueblo to H.R. 1448.

It appears that certain members of Congress have again taken it upon themselves to impose their own wishes upon tribes by proposing certain amendments to the ICWA, without the benefit of any type of consultation with tribes, or even clearly thinking through what damaging effects that it would have not only upon the child, but upon that child's tribe. For over two hundred years the

children of Native Americans have been the innocent victims of a cultural war waged against them by the American society. The wishes and actions of the primary sponsor of H.R. 1448 can only be likened to the motives and actions that Christian missionaries, Indian agents, school teachers and politicians have all argued that Indian children must be taught to be something other than Indian, to be something they are not and can never be.

Even in more recent years, although some progress has been made in changing American society's narrow-minded view of Indian people in general, Indian children in particular have been systematically separated from their families and tribal communities. Through largely unwritten policies that have given automatic preference to middle class, non-Indian homes and institutions in adoption, foster care and child custody proceedings, state courts and state social services agencies have made the conscious decision to sever the ties of many Indian children from their families, clans and tribal communities.

I think that it would be appropriate here to pose the question of why did the 95th Congress of the United States pass the ICWA? From a reading of the legislative history of the Act, its passage and its signing into law by President Carter on November 8, 1978, was a major step in trying to stop the abusive practices in the removal of Indian children from their parents. The enactment of the ICWA, was a direct result of an outcry from Indian country that Indian children, including those that were and are potentially eligible for enrollment in a tribe, were being lost to non-Indian foster and adoptive homes at an alarmingly disproportionate rate. This outcry became evident to Congress as they heard