

a reputation for excellence, and with limited resources, we are able to ensure that in those counties where we are working, the act is implemented. It can happen if the resources are made available.

I do not have written testimony to submit, because I was using the time prior to coming here to submit an appeal to the Bureau of Indian Affairs. We were notified that we will be funded, but the level of funding is ludicrous. There is no way that the amount we were given will allow us to provide the services that are needed in this area.

For the gentleman from Beverly Hills in California that testified prior to us, I would like to say that the State of California very definitely does have an indigenous population of Indian peoples. They are not all from out of State. I think he needs to do a little homework.

Not only are there quite a number of indigenous peoples, part of the problem with the State of California is that because these indigenous peoples were small bands of Indians and because they did not have large land bases such as the Navajos have or other tribes, it is an area that is really beautifully set up to divide and conquer. And in the State of California, that is precisely what happens.

I would also like to say that the State of California, by its own survey which was conducted in 1983 and 1984, has found itself to be 85 to 95 percent out of compliance with the Indian Child Welfare Act. The suggestion that States be allowed to monitor their own compliance, to me, is like putting the wolf in as the shepherd of the flock. I sincerely doubt that you are going to have any kind of compliance.

In the counties that we serve, I have a current case load for April of 1988. In San Diego County, we have 51 children currently in placement. In Riverside County, we have 62 for a total of 113 children in those two counties. All but 8 of those children are in either a relative placement, in a tribal licensed home, or in a licensed Indian home.

We actively recruit Indian homes. We have enough Indian homes for the children that are referred to us. Any of those counties or any of those States where the comment is made that there are no homes available, I think that if a little research is done, you will find that there have been no active efforts made to recruit Indian homes.

Because of the difficulties that we were having with the State of California in their persistent and continuing lack of cooperation to place Indian children in Indian homes and saying that they couldn't be placed because there were no Indian homes and when those counties were doing the recruiting, there were no Indian homes, because they weren't recruiting them.

So, I can prove to you that those homes are there. They are not only Indian homes; they are good Indian homes. They are good Indian homes by anybody's standards.

I keep having this feeling that the majority population seems to feel that you have to lower standards somehow to have a good Indian home. That is not the case.

All of our homes are licensed. We use the State of California standards which we adapt, because we have that ability and that prerogative to do it because the act gives us that ability and pre-

rogative, and our homes are excellent homes. We are monitored on a yearly basis. They come out and evaluate our homes, our files, and they go visit our homes. There has never in the history of our being licensed been any gross deficiencies found in any of our homes.

Then, just to further provide services, we found it necessary to apply to become licensed as a State adoption agency, because for the children who were in the case load, once parental rights were terminated and it went to adoptions, there was no way for us to have access or to have input as to where these children were going to be placed.

We began to find that, in most cases, the children were being placed in non-Indian homes and, once again, the same excuse is used, that there are no adoptive Indian homes. Once again, I will give you the same reason: they don't recruit them.

So, it is essential that there be programs such as ours that are out there, that are actively recruiting, that are doing case management, that are ensuring that the children are being placed in Indian homes, and that the homes are being monitored, which is what we do.

Those are some general comments that I wanted to make in reference to why Indian children don't get placed in Indian homes.

I have some further comments that I wanted to make.

I also would like to state that this past year, our organization also did pick up the Los Angeles project which was defunded by the Bureau of Indian Affairs, and we picked it up on monies that were given to us by the State of California. It was a one-time only appropriation.

If you will look at that case load—and I will submit the case load profiles to you so that you can have them — we asked for a print-out of the case load for the county of Los Angeles, and they identified 200 Indian children in their case load. Yet, only 35 were referred to us.

Of the 35 that were referred to us, only 5 of those children are in Indian homes. All the rest are in non-Indian placements. Several of those cases are now at the point where there has been termination of parental rights. I believe the *Micmac* case is one of them.

Those children are in non-Indian homes, and in our experience, what happens is that the court will say that they find good cause to the contrary to place the children in Indian homes because they have already been in non-Indian homes for anywhere from months to years and that it would be detrimental to the children to be removed and placed in Indian homes.

Some of the other issues I wanted to address have been addressed in some part by some of the other people who have testified. The whole issue having to do with training— there is not adequate training. I guess I can only speak for California. There is not adequate training for the county social workers. Most of them are not familiar with the act. It has been in existence for ten years. Yet, to this day, they will say well, I didn't know there was such a thing as an Indian Child Welfare Act.

The system for notifying tribes that the State has put into effect is cumbersome. When a child is going to be adopted, county workers are instructed to fill out a very lengthy and complicated form

which they then send to the Bureau of Indian Affairs in Sacramento, and the Bureau of Indian Affairs has stated that they are something like three years behind in processing them which means that if a child comes into the case load today, it will be three years before there is any kind of permanency planning for that child.

That is the sort of situation that, as a person who administers a program in the State of California, those are the kinds of situations that we have to deal with.

The issue of notifying tribes and not getting a response—in our experience, we do notify tribes when children come into the case load that are identified as being from out of State. We personally notify the tribes. The response is timely, and I can't understand why people say that the tribes don't respond, because they do, and they respond in a timely fashion.

Once again, I think that the system that has been put into effect for doing the notifications is unclear, and it is cumbersome, and it is another layer of bureaucracy that the State has come up with not to help implement the act but, I believe, to put up another barrier for it to be implemented.

As far as the reunification—the services that we provide are directed towards reunifying families. In the State in which we work, there are no special funds, no special programs, which provide monies for programs such as ours to provide those services. So, we do it with the small and limited sums that we get through the Title II grants.

We are in a position to see successes, and we see successes. Families are reunified. We are convinced that when children are removed from their families, that perhaps for some of these families, it is the first time that inappropriate behaviors have had a direct consequence, that is, the child was actually removed.

We also experience that those families at that particular moment are vulnerable to change and that many of those families will avail themselves of any services that are provided in order for them to get their children back. They do, and children are reunified with their families, and children do stay with their families, and those families are intact.

Another barrier, of course, that I have alluded to is insufficient funding. Every year, I spend three months of the year writing the proposal, waiting to see if the proposal is going to be funded, and then appealing the proposal. So, that is three months that could be used to work with children that I spend making sure that the project is funded.

I believe that there has to be a better way, a different way to allocate those funds. I wish I had a magic wand and I could say what that way should be. I don't. I think that perhaps having more funds available would make the process more accessible to more projects.

Once again, I can only speak for the State of California which has, by the 1980 census, in excess of 250,000 American Indian peoples, and there are only three projects presently funded in the State of California to serve all those people. I think that you will see that is totally inadequate and that many people are going unserved.

The other issue has also been addressed, and that is the issue of how one reports whether States are in compliance. A recommendation I would make would be that those statistics be gathered locally, that they be maintained by the State, and that they go through a national clearinghouse, and that some standardization of how case loads are reported be instituted to be carried out—I guess I will say the Bureau right now, because that is who is doing it—and just ensure that there are statistics being gathered and there is a place where they all go and where the Congress can have access to them.

I believe that if the Congress had access to the number of children that are actually being served and to the successes that are happening that more funds would be made available for projects to continue.

The last area that I would like to address is the area of how the projects are funded. I believe that the people who are selected to do the reading—and I am not impugning their credentials. I am simply saying that, oftentimes, they are called in from areas to read proposals for an area with which they are not familiar.

Because they are not familiar with the area, they do not know the mechanics of trying to implement a project. In the State of California, although some people seem to think that there are no Indians, there definitely are, and they are in extremely rural areas. We frequently have to use four-wheel vehicles to get back there. All of southern California is not highways and not freeways, and it is not all urban.

I believe that many of the readers are not familiar, first of all, with the geographic areas that must be covered and, second of all, with the cost of living that is involved in trying to run a program in California.

Additionally, I would like to state that although there was never an open comment made that Indian people are not qualified and that Indian people cannot run projects, I can assure you that there are many qualified Indian people. All of our first line staff are qualified Indian people with appropriate degrees, and I know that they are out there, because I hire them.

I would also like to ask that I be allowed to submit written testimony.

Senator EVANS. We will certainly allow that. In fact, we will keep the record open for 10 days to allow any additional testimony from those who have appeared before us or others.

[The prepared statement of Ms. Orrantia appears in appendix.]

Senator EVANS. Thank you very much.

Let me turn first to Ms. Lui. One of the concerns expressed by some who testified this morning was on the additional identification of what constitutes an Indian. Do you think that is a definition that is difficult to identify or is beyond what is appropriate? The additional language is in 5(c) which says, in essence, "is of Indian descent and is considered by an Indian tribe to be part of its community."

There have been assertions by some, of course, that this means someone of some very small fraction blood could be asserted by a tribe to be part of its membership and that there are no standards on which to really determine Indian descent.

Ms. LUI. Senator, the language you refer to—I can see the basis for the concern, and it may well be that some fine tuning of the language would help. However, it is our view that it would be a workable—the basic approach is a workable approach.

Ms. Blanchard just commented to me that it is language straight out of the State of Washington's codes.

However, I can see the area of their concern, the concern for people who are just minimally and under no one's statutes or codes of any tribe would they qualify for membership or probably even be considered by the Indian tribe to be part of its community. So, it is my opinion that although some consideration should be given to the comment, that doesn't mean to throw away that provision.

Senator EVANS. Let me ask one further question. The current law, in essence, says that if you are a member of an Indian tribe or are eligible for membership in an Indian tribe. Is that sufficient, or are there cases where someone is of significant Indian descent but from whatever the requirements are may not be eligible for tribal membership?

Ms. LUI. There are cases that do arise. You would think that the first two, a and b, would cover, but there are situations that arise where there is a child.

For example, there was a child born in Gallup. For reasons beyond everyone else's control, no one could ever establish who gave birth to that child. The birth mother was simply not there when the child was discovered hours later. That is a child whom everyone knew was probably Navajo, but there was no way to establish that.

That child in the area would be a member of the Indian community in everything but the card.

Senator EVANS. In a fundamental sense—I will ask Ms. Blanchard this question—are we in a situation where we essentially have a buyer's market in adoptions? Are there a lot more parents who seek children than there are children available?

Ms. BLANCHARD. Yes; that is the case. It has been so. We have begun to feel the strain of the market since about the 1930's. It has been that long.

Of course, part of our difficulty, speaking from the standpoint of Indians and our role in the market, is that social services are a very recent phenomenon in Indian country, really, probably not even 20 years old. Before the passage of the Indian Child Welfare Act when we could hope to get some of these jurisdictional things straightened out, all across the country, 280 or not, the BIA would intervene in family life, arrange through the various States for the placement of those children, and the Bureau would support those placements.

In the 1950's, the Bureau of Indian Affairs entered into a direct agreement with Child Welfare League of America to supply babies for the adoption market.

So, I don't know how many more years it will take for us to bring some regularity to this situation, but it still is a very serious problem, and the fact that fewer and fewer mothers of any race or ethnic group are choosing to relinquish their children for adoption is a major factor in it.

Senator EVANS. Is there a concern that even with the current Indian Child Welfare Act, a concern by some that these additions which might require more notification and participation by Indian tribes and Indian tribal courts simply interfere with their business, the business being seeking out and getting paid, in essence, for ensuring that there are adoptions?

Ms. BLANCHARD. Yes; it does, it will. We see from our experience that many of these private independent arrangements are extremely poor and, in fact, dangerous for all the people involved. I mean, they become tragedies as the cases that Ms. Lui cited.

This act is only 10 years old. It came about as the result of Government action and inaction over an extensive period of time, and it is a very important piece of social legislation. I think it requires the refinements that have been proposed, and I think it requires our diligence and our patience and so forth to bring about these changes in the thinking of our society.

In my opinion, I think it is a tragedy that we even ever had to pass an Indian Child Welfare Act.

Senator EVANS. Ms. Orrantia, your record in southern California sounds like an exemplary one. If I wrote the figures down correctly, out of 152 adoptions, all but 8 were adopted into Indian families. Is that correct?

Ms. ORRANTIA. That was foster care placements.

Senator EVANS. Foster care placements?

Ms. ORRANTIA. Yes.

Senator EVANS. What about more permanent adoptions? Are you finding the same potential for Indian children to be adopted into Indian families?

Ms. ORRANTIA. We just became licensed in April, and we have potentially 8 children right now who will be adopted, and we do have Indian homes that they can go to.

Senator EVANS. So, you believe that both for foster care and for permanent adoptions there are Indian families available?

Ms. ORRANTIA. Indian families that are available, that are appropriate, and that are willing.

Senator EVANS. What about the assertion that most of those of Indian background in California come from somewhere else? Of course, I suppose that is true of everybody in California. They all come from somewhere else, but what about that as an assertion and what influence does that have on the adoptions and on how things might be operated under this proposed bill?

Ms. ORRANTIA. The comment that there are a large number of Indian people from out of State is an accurate statement. I think historically you need to look at the reason why they are there.

For many of them, it wasn't exactly their choice. The relocation program brought people to the Bay Area, to Los Angeles which is one of the large areas, and over a period of 20 or 30 years, some of those people have moved down into San Diego and that area. So, we also come into contact with people who are there as a result of the relocation.

Senator EVANS. So, you are saying that that was specific policies of the Federal Government at the time?

Ms. ORRANTIA. Exactly.

Senator EVANS. In relocation?

Ms. ORRANTIA. Exactly, and then to say that simply because an act of the government 30 years ago removed somebody from the reservation terminates their right to have their children protected is ridiculous.

Senator EVANS. I presume that there are also a number attracted to California just individually or for other reasons as well as the more governmental encouraged program of relocation.

Ms. ORRANTIA. People would come to California for the purpose of finding employment.

Senator EVANS. Sure.

Ms. ORRANTIA. Which everybody knows doesn't exist on a lot of reservations. There is no way to maintain your children in a fashion that is acceptable to the majority population. So, you go looking for it somewhere else.

In most cases, that requires that you leave the reservation. Also, in my experience with people who come to urban areas for expressly that purpose, they maintain their "homes" on the reservation with the intention that at the time they retire, they will return there.

Senator EVANS. You say when you begin the adoption procedures, there are Indian families available, willing, able, and qualified. To what degree can you match children with Indian parents of the same tribe or the same heritage? I presume there are some quite considerable differences between tribes and their own heritage, language, customs, traditions.

Ms. ORRANTIA. I believe we have to make a distinction of whether we are speaking of adoptions in terms of children who are adopted because parental rights have been terminated because of lack of reunification of the family. In those cases, we are in almost all cases dealing with children who are older. Usually, the youngest will be 18 months, but usually they are anywhere from 18 months to 5, 6, or 7 years. It depends on how long they have been in the system.

Now, for the majority of those children, if we are doing out job, they are in a relative placement. Then, of course, if the child is going to be adopted, then those relatives are the ones who adopt the child.

Senator EVANS. Sure.

Ms. ORRANTIA. There are some cases where, for whatever reason, there isn't an appropriate family member. Then, that child, once again if we are doing our job, is in either a tribal home or in a licensed Indian home. Once again, those foster parents have the first opportunity to adopt that child.

Now, if we are speaking of relinquishments, that is a whole different ball game.

Senator EVANS. You mentioned in the letter that you submitted to me which, if it has not been, ought to be made part of the record, an interesting statement on page 2 where you said:

The current literature in psychology shows that Indian children who are adopted by non-Indians suffer greater problems as they reach adolescence. They have higher rates of suicide, already four times higher in the Indian population than in the general population, runaway, substance abuse, and violent deaths. This is not a good legacy for any government to leave for any of its people.

Do you have more specific references to that literature and studies, and how extensive and how all-encompassing are those studies that provide that kind of result?

Ms. ORRANTIA. The information that I was referring to specifically deals with Dr. Samuel Roll who has, I believe, provided testimony in, I believe, the Holloway case, and I know that that testimony is available.

Senator EVANS. Is that from research that he had done or just from his testimony referring to other research? I want to get at the basic background of this information to determine how it was compiled and to what degree we can rely on its validity.

Ms. BLANCHARD. Senator, the basis for that information comes from studies done by Dr. Joseph Westermeyer in Minneapolis who continues to do some work, Dr. Irving Berlin of the Department of Child Psychiatry at the University of New Mexico, and also Dr. Martin Topper, a psychiatric anthropologist who was working on the Navajo and left recently. I think he is here in this area someplace working for one of the Federal agencies here in Capitol area.

Senator EVANS. OK. I do have copies of the report from Dr. Berlin and from Dr. Westermeyer which I will ask to have be made part of the record. If you could give us a more explicit reference to other studies along this same line, then we will make them part of the record as well.

Ms. BLANCHARD. All right.

[Materials referred to appear in appendix.]

Senator EVANS. Ms. Blanchard, you mention the project in Oregon and Washington which was rejected by the Bureau of Indian Affairs. Do you know why explicitly or what reason explicitly that was given for that rejection?

Ms. BLANCHARD. Well, yes. They didn't like it and were angry at us. That is essentially it, unfortunately.

Senator EVANS. I am sure they weren't blunt enough to say we are not going to approve this because we are angry at you.

Ms. BLANCHARD. No, they said they were not interested in it, and they were angry when they said it.

Senator EVANS. Okay.

Ms. BLANCHARD. So, I mean—

Senator EVANS. But did they say they were not interested in it because they didn't need the information or because it wasn't important or what?

Ms. BLANCHARD. They think they are going to get this information out of the study that they funded, but I just don't see how they are going to get it.

Then the State of Washington, Children's Services Division for a few minutes refused to provide the Bureau or the Children's Bureau with some figures that are, frankly, voluntary. There is no Federal requirement that the States provide this information, and I was told directly that the Bureau considered it an affront that I should appear with this proposal when the State of Washington had denied them the information they requested, and that was also part of what stimulated their anger and rejection.

Senator EVANS. We will look into that. I have a somewhat special interest in—

Ms. BLANCHARD. Yes, well, in fact, we are going forward with it in a very small way. The School of Social Work at the University of Washington has a doctoral student this summer, an Indian student who is going to be able to devote some time to this, and Maria Tenorio, the Indian Child Welfare Act liaison in Oregon, has available to her this summer a student who is subsidized.

So, we are going to push anyway. I think it is simple, it is clear, and it looks like it will work.

Senator EVANS. Well, we will certainly look into that and ask the Bureau of Indian Affairs if they can explicitly show us where they have, through this study which is now in draft report form, accomplished the same purpose and gotten the same information. If they have not, then the next question will be why reject a relatively inexpensive opportunity to get that kind of information.

Ms. BLANCHARD. We will be glad to send a copy of the proposal to your office.

Senator EVANS. Thank you very much.

We thank all of you for your testimony and all those who have patiently sat through this morning's hearing. We are dealing with a very important, very difficult act. Any time any of us attempt to deal with the future of children, we are dealing with our own destinies in many respects, and the challenge is the trusteeship we have in this generation to try to give better opportunity and better support to the next generation.

I am sure that everyone who has testified and everyone who is involved has that in mind. That there are differences in approach and differences in how we feel we might achieve that goal is understandable.

I thank all of you for testifying. It has been very helpful. I am sure that the committee will now proceed with its markup of this legislation, keeping in mind the very important testimony which has been given to us.

Thank you very much.

The hearing is adjourned.

[Prepared statement of Senator DeConcini and materials submitted by the National Committee for Adoption appear in appendix.]

[Whereupon, at 1:57 p.m., the committee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY-INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, ON S. 1976, A BILL "TO AMEND THE INDIAN CHILD WELFARE ACT AND FOR OTHER PURPOSES."

May 11, 1988

Mr. Chairman and members of the Committee, I am pleased to be here today to discuss S. 1976, a bill to amend the Indian Child Welfare Act (ICWA).

We are strongly opposed to S. 1976 and will submit a substitute bill in the near future that will address our concerns discussed here today.

The ICWA is fraught with complicated issues. We must struggle with the rights of the child, who must be placed in a foster or adoptive home, to have a secure home as quickly as possible, the rights of parents to choose to place a child for adoption and to have some say in that placement, and the rights of a tribal court to exert jurisdiction over tribal members. We believe that the the best interest of the child and the appropriateness of ICWA applying to a child should be continually kept in mind.

We do not believe that S. 1976 adequately addresses the consideration of the best interest of Indian children. Only once in the amendments is "the best interest of the child" specifically addressed. The premise of the Act is considered to be "The best interest of the Child". However, it does not acknowledge the child's right to a family or permanency.

S. 1976 loses sight of our goal of protecting the best interest of Indian children. Without going into a section-by-section

discussion of the bill I would like to mention those areas we believe should be closely considered by the Committee and where we disagree with the intent of S. 1976.

1. Should Congress remove the right of Indian parents to voluntarily place a child with a non-Indian family?

In a voluntary placement the "best interest of the child" may very well be with the family chosen by the Indian parents. The individual rights of the parents must be considered and carefully weighed against the rights of the tribe to exert jurisdiction and consider a different placement.

2. Should Congress give a tribal court jurisdiction over an Indian person who has never lived within the jurisdiction of that court?

We do not believe that Indian parents and their children should have to return to the reservation of their tribe which is often in another state for a court proceeding concerning the child. Non-Indians are not required to do anything comparable. Again, the best interest of the child and the rights of the parents must be weighed against the rights of the tribe to exert jurisdiction.

3. Does Congress want to require "open adoptions" to the extent that the biological parents and their family would be allowed to visit the child even if the adoptive parents would not agree to such terms?

Such an arrangement may not always be in the best interest of the child and should be left to agreement between the biological parents and the adoptive parents. ICWA should not impose so many restrictions on non-Indian families that such families would no longer be available as possible resources.

4. Does Congress want to extend ICWA to Canadian Indians?

We do not believe this is appropriate and have consistently excluded Canadian Indians from policies affecting Indians of the United States.

5. Does Congress want to expand the definition of "Indian child" and "Indian tribe" far beyond the current definitions which center around membership and federal recognition?

The issue of tribal membership and cultural identity is a sensitive one. The courts have been clear about the rights of tribes to determine their membership. However, we must understand the complexity of the membership issue as it relates to ICWA. Out of some 500 tribes and Alaska Native villages there are approximately 300 that have some sort of membership or census roll.

S. 1976 expands the definition of Indian child far beyond the current definition which applies the Act to a child that is a tribal member or is eligible for membership and has a biological parent who is a member of the tribe. If a parent is not a member of a tribe, then would the child be raised with a tribal cultural identity? Should the tribe have exclusive jurisdiction over this child? Would it be in the best interest of this child to limit placement into an Indian home? We believe that the answer to these questions is probably no and ICWA should not apply to this child.

If, on the other hand, a child is to be placed for adoption and one or both parents is a member of a tribe and relates to the tribe in some way, then chances are that that child would be raised with some tribal identity and indeed the placement of this

child by a tribal or state court in an Indian family (where one is available) may be in the best interest of the child.

We strongly oppose the expansion of the definition of Indian child and recommend that the definition should not only contain a membership requirement but also that the domicile of the birthparent or parents is in Indian country. If the family is not domiciled in Indian country we believe that the appropriate state court should have jurisdiction over the proceeding but that the priority list currently under ICWA for foster care and adoption placements should be followed unless the best interest of the child requires a different placement.

We estimate that implementation of S. 1976 would cost the BIA approximately \$7 million. The cost to the states and individuals involved would certainly raise this figure substantially.

Mr. Chairman, we have serious concerns about these issues. As I stated earlier, we will be sending a draft bill to meet our concerns in the near future and ask that the Committee not act on S. 1976 until you can review our draft. I am certain that by working together we can agree on a bill that will address the most important issue - the "best interest of the Indian child."

This concludes my prepared statement, I will be happy to answer any questions you may have.



THE SECRETARY OF THE INTERIOR
WASHINGTON

May 11, 1988

Honorable Daniel K. Inouye
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am extremely alarmed over the provisions of S. 1976, a bill to amend the Indian Child Welfare Act. My concerns are such that I have asked Assistant Secretary Swimmer to request permission of the Chairman to incorporate this letter in the record when he testifies on the bill.

The three branches of the Government of the United States frequently are called upon to deal with the complex issues which arise when Indian tribes, states and the federal government each seek to exercise sovereignty over matters or persons of interest to them. The reasonable balancing of interests between such entities, always bearing in mind what is in the best interests of Indians as individual human beings, is not always easy.

I believe strongly that it is clear that this bill fails the test of reasonable balance. It would skew the balance in a manner which is wholly unacceptable to the Department of the Interior and should be unacceptable to any persons who are concerned about human rights issues, especially including the human rights of children.

Although there are multiple flaws in the bill, we call your attention to three, fundamental objections:

First. The bill is anathema to the salutary constitutional principle that legislation cannot stand if it makes classifications and distinctions based on race. If enacted, this bill would subject certain Indian children to the claim of jurisdiction of an Indian tribe solely by reason of the children's race. For example, under Section 101(b) of the bill, if a tribe seeks transfer of a child custody or adoption case from state court to the tribe, the parents' objection to such transfer will be unavailing unless the objection is "determined to be consistent with the best interests of the child as an Indian" (emphasis added). The provision ignores all other aspects of the child's status as a human being. That, in my view, is pure racism.

Honorable Daniel Inouye - 2 -

May 11, 1988

The Fourteenth Amendment to the Constitution was adopted to protect the rights of the individual against classifications based on the individual's race. This bill cannot be reconciled with that guiding principle. It is not enough to say "but, this is 'Indian legislation.'" Indians are, and certainly should be, entitled to the basic protections of the Constitution even when those protections would be denied by "Indian legislation." See *Hodel v. Irving*, 107 S.Ct. 2076 (1987)(Just Compensation Clause of Fifth Amendment).

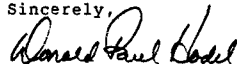
Second. The bill is contrary to what I believe is sound, prevailing public policy in this country -- in adoption and child custody cases, it is the interests of the child which are of paramount importance. This bill subordinates the best interests of the child to that of the tribe. While we all can agree that a child's knowledge of and exposure to his or her cultural heritage can be a vital and valuable aspect of the child's personality and value system, it is wrong to elevate that concept to a point where it overrides virtually every other concern bearing on the fundamental well-being of the child.

Third. At least the current Act limits the jurisdictional claim of the tribe to children of tribal members. Such membership typically is obtained by voluntary enrollment or at least can be terminated by the Indian's voluntary act, thereby creating a situation where the tribal member arguably may be said to have consented to application of tribal law. This bill, however, extends the jurisdictional reach of the tribe to children whose parents need not be tribal members. Indeed, the parents and other ancestors of the child may have had no connection with the tribe, perhaps for years or even generations.

In such circumstances, it seems to me that the state in which the parents and child are domiciled does have a proper and overriding interest to see to it that its processes, not those of the tribe, are invoked to assure that the child custody or adoption proceeding will result in protecting the best interests of the child.

The bill does substantial violence to important constitutional principles and to sound public policy. Mr. Chairman, you may wish to inquire of Assistant Secretary Swimmer about the accusations frequently leveled against the United States for its treatment of Indians when the issue of human rights within the Soviet Union arises. Enactment of this bill in the name of "Indian legislation" simply will provide significant fuel to that fire. The bill should not be enacted.

Sincerely,



DONALD PAUL HODEL

cc: Hon. Daniel J. Evans,
Ranking Minority Member

STATEMENT BY EDDIE F. BROWN
DIRECTOR

ARIZONA DEPARTMENT OF ECONOMIC SECURITY

BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

May 11, 1988

I appreciate the opportunity to address you today regarding the Indian Child Welfare Act (ICWA). My name is Eddie Brown. I am the Director of the Department of Economic Security (DES) and an enrolled member of the Pascua Yaqui Tribe. The ICWA provides for the establishment of relationships between the states and tribal governments in order to protect and preserve Indian families and communities. The state of Arizona fully supports the rights of tribal governments to intervene in child custody matters regarding children members of tribes.

The Arizona Department of Economic Security administers state and federal human service programs in Arizona and is responsible for child welfare programs including child protective services, foster care and adoptions. The department also licenses and monitors child placing group care and adoption agencies. In Arizona, there are 20 federally recognized tribal governments which have jurisdiction over tribal lands. Reservations account for 26.6% of the total land base and are located throughout the state. The total Indian population residing on Arizona Indian reservations is approximately 200,000. This represents the largest reservation Indian population in the United States and accounts for approximately 20% of the reservation Indian population nationwide. Forty-six percent (46%) of the reservation population is under 18 years of age.

Many accomplishments have resulted from implementation of the ICWA. The number of Indian children in state licensed foster care homes has been reduced from 220 in 1980 to 84 in 1988. This number reflects 3.3% of our state agency's foster care population. Through joint efforts of the department, tribal governments and the Inter-Tribal Council of Arizona, further accomplishments include:

- o A permanent Indian Child Welfare Specialist position to coordinate services for Indian Children funded through state appropriations.
- o Thirteen (13) on-reservation Child Abuse/Neglect Prevention and Treatment programs funded through state appropriations.
- o A Tribal Child Protective Service Academy Training Program which trained 35 tribal workers during the past year.
- o An annual Indian child and family service conference, now in its fourth year, to train state and tribal staff and define tribal, state and federal roles in the provision of services to Indian families.
- o A project with the Arizona State University School of Social Work and ITCA to develop a model curriculum for child welfare workers serving Indian communities.
- o The use of formal intergovernmental agreements to pass through Title IV-E foster care funding to tribes. The agreement recognizes the sovereign status of tribal governments.

We are proud of these accomplishments in Arizona and continue to work towards increased coordination of services and resources with tribal governments. The ICWA mandates have given our state the impetus for these activities.

This committee is to be commended for the complex task it has assumed in clarifying and strengthening the Indian Child Welfare Act. The Arizona Department of Economic Security has reviewed the proposed amendments dated December 16, 1987. These amendments provide new standards and procedures to protect the rights of Indian children and their relationships to their tribes. Tribal court jurisdiction is expanded. The amendments strengthen the role of the Indian family and the tribe in child custody proceedings through notification requirements and placement procedures.

In the best of all worlds, the amendment provisions would mean that the tribes would take cases involving Indian child custody proceedings into their courts relieving the state system of this responsibility. In reality, that does not happen. It is the experience of the Arizona Department of Economic Security that the tribes are rarely able to assume jurisdiction early in state proceedings because of their lack of social service and judicial resources. Tribal response to notification of hearings needs to be strengthened and coordinated to ensure early tribal intervention and participation.

The proposed requirements for state agencies and courts solidify what has been the practice of Arizona DES and its courts. The DES works closely with the tribes in providing services for their members. The department has supported the tribes' roles in state court proceedings and has encouraged tribes to assume jurisdiction. Procedures in the amendment eliminate subjectivity in applying the Act.

These provisions mandate additional efforts and recordkeeping that will require increased resources to be dedicated by our agency. It will be necessary to provide more detailed training of case managers in ICWA requirements and in the area of available resources. State attorneys prosecuting the dependency and termination proceedings will have additional trial responsibilities in order to protect the well-being of Indian children.

There are three specific areas that cause our agency concern. These are:

1. Separate state licensing standards for Indian foster homes.
2. Annual audits of private child placement agencies.
3. Funding guidelines and fiscal resources.

The following addresses these concerns in more detail.

1. Separate State Licensing Standards For Indian Foster Homes:

The Arizona Department of Economic Security recognizes the interests of the Indian community to place children in foster homes that maintain social and cultural ties. Our department seeks to place all minority children, whether black, Hispanic or Indian, in appropriate homes which meet health, social and cultural standards to ensure a child's growth and stability.

The proposed amendment to Title I, Section 105 (f) states "If necessary to comply with this section, a State shall promulgate in consultation with the affected tribes, separate state licensing standards for foster homes servicing Indian children and shall place Indian children in homes licensed or approved by the Indian child's tribe or an Indian organization." The "if necessary" provision is unclear. Our department recognizes the licensing authority of tribal social services on reservations. Arizona would strongly object, however, to having separate state promulgated standards for off-reservation foster families of Indian descent. Our current rules allow flexibility and consideration of cultural and environmental differences as long as the health, welfare and safety of the child is not jeopardized. Separate regulations would be impractical and unnecessary. Arizona's rule promulgation procedures allow considerable public comment. State law, procedures, and the additional costs for such enactment make this section of great concern.

2. Annual Audits of Private Child Placement Agencies:

Title I, Section 115 requires states to include compliance with the Act by the private child placement agencies "as a condition of continued licensure" and further mandates state agencies to "annually audit such agencies to ensure that they are in compliance." Throughout the country, it is recognized that there may be continued abuses of ICWA procedures. To require state agencies to monitor compliance of child placing agencies creates several difficulties:

- o Licensing staff rarely review more than 5 to 10 case files of a child placing agency. The extent of the audit is not clear and probably could not be met with existing resources.
- o State resources of time and staff are not sufficient to expand current monitoring functions.
- o Licensing staff are knowledgeable regulators, however, such audit requirements would demand legal expertise not currently required of social services licensing staff.

We would recommend that states be mandated to include, as a contract item, compliance with ICWA in licensing standards, not only for child placing agencies, but also for group care and adoption agencies.

3. Funding Guidelines and Fiscal Resources:

Title II, Section 203, addresses federal funding guidelines to carry out the provisions of the Act. These guidelines restrict grant awards to tribes or Indian organizations. Since the Act mandates state agencies to expand staff training, resource development, notification, legal requirements, and licensing functions, Congress must recognize that states will also need financial assistance.

Neither the tribes nor the states can adequately comply with the Act without sufficient funds. Indian tribes have received insufficient funds to meet the Act's mandates since its inception. As the ICWA caseload increased, funding at the national level decreased. Congress must consider entitlement funds to tribes and to states where federally recognized Indian tribes are located. Federal ICWA funding needs to be greatly expanded.

I am aware that additional funds are available through Title IV-B and Title IV-E of the Social Security Act. Of Arizona's 20 tribes, only 5 tribes (Navajo, Hopi, Gila River, San Carlos Apache, Tohono O'odham) receive Title IV-B funds and only one tribe (Gila River) receives Title IV-E funds. The federal administrative requirements to receive these funds are complex and cumbersome. Tribes find it difficult to achieve the administrative sophistication needed for fiscal and programmatic compliance, particularly for Title IV-E. Tribes should be able to access Title IV-E funds directly from the federal government and simplification of administrative requirements should be considered.

The proposed amendment, Title II, Section 201 (c) requires further clarification regarding the responsibility and liability of the states with respect to tribal compliance or non-compliance with provisions under the Adoption Assistance and Child Welfare Act (P.L. 96-272). States must not be held responsible for funds provided under Title IV-B and Title IV-E of the Social Security Act when such funds are no longer under the jurisdiction of the states.

Thank you for allowing me to present these issues to you today. The rights of the Indian children and their relationships to their tribes are extremely important. The realities of fiscal and programmatic resources which are available to the tribes and state child welfare agencies need to be considered prior to increased federal mandates.

Remarks of Eugene Ligtenberg before the
United States Senate Select Committee on
Indian Affairs

Washington, D.C. May 11, 1988

My name is Eugene Ligtenberg. I am the Director of the South Dakota Division of The Casey Family Program. With me, in the room, are Elizabeth Garriott, a social worker from our office in Martin, South Dakota, serving the Pine Ridge and Rosebud reservations; and Darice Clark, a social worker from our office on the Fort Berthold Reservation in North Dakota. The Casey Family Program provides long-term foster care to children who cannot return to their biological parents and who are not likely to be adopted as determined at the time of intake. At the current time the program serves 97 Native Americans plus approximately 600 other children in Western United States. Two-thirds of the Native American children served are in North and South Dakota.

We would like to give our support to the Indian Child Welfare Act of 1978 and to S. 1976, which we believe would significantly improve the existing act.

The Native American culture is unique in this country and cannot be compared to other cultures and ethnicities.

Most Native American cultures have a natural "foster care" system that has been in existence for hundreds of years before contact with the majority culture. The process of acculturation and assimilation has drastically altered this system. Many native cultures view children as a responsibility of the group or tribe rather than a possession of a set of parents. Individual rights were subservient to the group or tribe, because native people viewed life as a whole entity made up of everyone and everything in the universe. Native people need to have the opportunity of this responsibility being returned to them.

For many years it was the policy of the United States government to assimilate native people into the dominant culture. This assimilation was not by choice of native people, but was forced upon them. Efforts to take away their unique tribal, kinship and religious values have been devastating. Now that tribes are again strengthening themselves, we must provide laws and the means for native people to re-establish themselves, their values and their customs. The Indian Child Welfare Act of 1978 has done much to reverse the movement of Indian children to non-Indian families, who, for the most part, have not been helpful in establishing the unique identity of Native American children.

S. 1976 will protect children who are not currently protected by existing law. It is not the responsibility of

Native American people to meet the demand of non-Indian families to have children through the adoption process.

The United States government established reservations for Indian tribes to have their own tribal government and to interact with the United States government as separate entities. Hence, other ethnic groups do not need to have Acts of Congress protect and preserve their heritage and culture in this way.

We support the priority setting for placement. In our experience, when we have committed ourselves to the preservation of a child's culture, we have been able to locate homes for Indian children as provided in the Act. We do not believe lack of Native American families is an adequate excuse for not complying with the priority established in the Act.

Many of the children with whom we work have previously been in non-Indian foster homes. Many of them have low self-esteem and lack identification with their culture. Many times they have a negative perception about Native Americans.

In policy and practice, we are committed to providing Native American children positive role models within Indian families. In addition we provide experiences designed to enhance their identity as Indian persons.

We support the amendments which require private agencies to comply with the Act as part of their licensing requirements and which require states to make active efforts to recruit and license Indian foster homes.

We support the establishment of Indian Child Welfare Committees in each area to monitor compliance with this Act on an on-going basis.

In my opinion, an Indian child who is helped to have a positive identity as an Indian person, has his or her chances of a happy, well-adjusted productive life significantly increased. I believe S. 1976 will increase the likelihood of that happening.

I urge your support and thank you for your consideration.

PREPARED STATEMENT OF DANIEL J. EVANS, U.S. SENATOR FROM WASHINGTON, VICE
CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

THANK YOU, MR. CHAIRMAN. WE ARE HERE TODAY TO DISCUSS A
VERY IMPORTANT BILL WHICH SERVES TO AMEND, THE INDIAN CHILD
WELFARE ACT. THIS LAW WAS ENACTED IN 1978 AND SERVES TO PROTECT
ONE OF THE MOST VITAL RESOURCES IN INDIAN COUNTRY: THE CHILDREN.

CONGRESS PASSED THIS LAW IN RESPONSE TO THE ALARMINGLY HIGH
PERCENTAGE OF INDIAN CHILDREN WHO WERE SEPARATED FROM THEIR
FAMILIES AND TRIBAL HERITAGE BY THE INTERFERENCE, OFTEN
UNWARRANTED, OF NON-TRIBAL PUBLIC AND PRIVATE AGENCIES. WITH
REGULARITY THESE CHILDREN WERE PLACED IN NON-INDIAN FOSTER AND
ADOPTIVE HOMES AND INSTITUTIONS. THE WHOLESALERE MOVAL OF NEARLY
25 TO 35 PERCENT OF ALL INDIAN CHILDREN FROM THEIR FAMILIES AND
HERITAGE OCCURRED PRIOR TO ENACTMENT OF THE INDIAN CHILD WELFARE
ACT.

TODAY THAT DRAMATIC RATE HAS DECLINED, HOWEVER, A RECENTLY
RELEASED STUDY COMMISSIONED BY THE ADMINISTRATION ON CHILDREN,
YOUTH AND FAMILIES AND THE BUREAU OF INDIAN AFFAIRS REVEALS THAT
INDIAN CHILDREN MAKE UP 0.9 PERCENT OF THE TOTAL CHILD POPULATION
BUT REPRESENT 3.1 PERCENT OF THE TOTAL SUBSTITUTE CARE
POPULATION. INDIAN CHILDREN ARE PLACED IN SUBSTITUTE CARE AT A
RATE THAT IS 3.6 TIMES GREATER THAN THE RATE FOR NON-INDIAN
CHILDREN. (THERE WERE 18 STATES WHO REPORTED EVEN A HIGHER RATE
EXCEEDING THIS RATIO, INCLUDING: ALASKA (5.1:1); ARIZONA
(3.9:1); MONTANA (8.6:1); NORTH DAKOTA (21.7:1); SOUTH DAKOTA

(25.2:1); AND WASHINGTON (4.0:1).)

THE NUMBER OF INDIAN CHILDREN IN SOME TYPE OF SUBSTITUTE
CARE HAS INCREASED FROM 7,200 IN THE EARLY 1980'S TO 9,005 IN
1986. THE FINDINGS OF THIS NATIONAL STUDY INDICATE THAT MANY
MORE INDIAN CHILDREN ENTERED RATHER THAN LEFT CARE IN 1986, WITH
PROJECTIONS THAT THIS NUMBER WILL RISE EVEN FURTHER.

MR. CHAIRMAN AND DISTINGUISHED GUESTS, IT IS THE POLICY OF
THIS NATION TO PROTECT THE BEST INTERESTS OF INDIAN CHILDREN AND
TO PROMOTE THE STABILITY AND SECURITY OF INDIAN TRIBES AND
FAMILIES. THE INDIAN CHILD WELFARE ACT HAS ATTEMPTED TO ADVANCE
THIS POLICY THROUGH THE ESTABLISHMENT OF MINIMUM FEDERAL
STANDARDS FOR THE REMOVAL OF INDIAN CHILDREN FROM THEIR FAMILIES
AND BY REQUIRING THE PLACEMENT OF SUCH CHILDREN IN FOSTER OR
ADOPTIVE HOMES WHICH ARE REFLECTIVE OF THE UNIQUE VALUES OF
INDIAN CULTURE. THE NATIONAL STUDY, WHICH I HAVE HIGHLIGHTED,
REVEALS THAT PREVENTIVE EFFORTS TO AVOID THE REMOVAL OF THE CHILD
HAS OCCURRED IN ONLY 43 PERCENT OF THE CASES REVIEWED. MANY
OTHER SHORTCOMINGS, AS WELL AS EXCELLENT RECOMMENDATIONS, RELATED
TO PROPER IMPLEMENTATION OF THE INDIAN CHILD WELFARE ACT WERE
IDENTIFIED IN THIS REPORT AND HAVE BEEN EXPANDED UPON IN PREVIOUS
OVERSIGHT HEARINGS.

S. 1976, IS A SYNTHESIS OF THOSE RECOMMENDATIONS AND IS
DESIGNED TO RESPOND TO THE CONCERNS EXPRESSED BY INDIAN TRIBES,
CHILD WELFARE PROGRAMS AND COURT SYSTEMS. THESE AMENDMENTS,

HOWEVER, ARE ONLY A FIRST STEP TOWARDS RECTIFYING THE PROBLEMS EXPERIENCED BY THE LIMITATIONS OF THE CURRENT ACT. AS WE APPROACH SOLUTIONS TO THESE PROBLEMS WE RECOGNIZE THAT THE TRIBES, THE STATES AND THE FEDERAL GOVERNMENT MUST WORK TOGETHER TO INCREASE SUCCESS IN ACHIEVING THE LANDMARK GOALS OF THE INDIAN CHILD WELFARE ACT.

OUR PURPOSE HERE TODAY IS TO EXPLORE WAYS TO IMPROVE THE TRUE INTENT OF THIS ACT: THAT OF PROTECTING THE BEST INTEREST OF THE INDIAN CHILD. I LOOK FORWARD TO YOUR COMMENTS AND RECOMMENDATIONS.

PREPARED STATEMENT OF ROBERT B. FLINT, BOARD MEMBER, CATHOLIC SOCIAL SERVICES, INC., ANCHORAGE, AK

Mr. Chairman and members of the Select Committee on Indian Affairs, I am Robert B. Flint, board member and counsel of Catholic Social Services, a private, nonprofit agency serving South Central Alaska. Accompanying me is Sister Mary Clare who founded the agency in 1966 and was its Executive Director for nearly 20 years.

Catholic Social Services, since its inception, has provided counseling services to birth parents and adoption placement where such a parent has decided to relinquish a child. Many of our clients are Alaska Natives. As a result, we are very interested in the Indian Child Welfare Act and S. 1976 which proposes to enact substantial changes in the statute.

We are well aware of the importance of Indian and Native culture and are sensitive to the concerns which led to the enactment of ICWA in 1978. We strongly support efforts to keep families intact and to preserve cultural heritage and rights including those of children. Ten years ago Sister Clare testified on the Indian Child Welfare Act before the House Subcommittee. Our concerns with S. 1976 are the same she expressed then - confidentially and parental choice. In 1978 Congress enacted ICWA with language designed to preserve

the individual rights of Native parents in these two very sensitive and personal areas.

The 1978 Act provided for notice to Indian tribes in the case of involuntary adoption proceedings, but not in that of voluntary proceedings. An order of placement preference was established, but this order could be varied or dispensed with for good cause. The statute specifically provided that the preference of the birth parent must be considered. Confidentiality was preserved in record keeping by allowing the birth parent to file a confidentiality affidavit which acted to bar release of his or her name and address. We have operated under this statute with Native birth parents for ten years. In our opinion, the 1978 Act strikes a proper balance between individual rights and group rights.

We start from the premise that Indian citizens should have the same rights as any other individual American. Additionally, because of the special relationship, Indians may gain additional rights or privileges, and steps may be legitimately taken to preserve cultural heritage. We believe it to be wrong, however, constitutionally, and as a matter of public policy, to make Indians second class citizens by denying to Indian birth parents the same confidentiality and decision-making rights others have. S. 1976 would result in discrimination in the following ways:

1. Section 101(b) deprives the consenting birth parent of the right to object to transfer to a tribal court.

2. Section 101(d) requires notice to the tribe in any adoptive placement.

3. Section 103(a)(2) requires notice to the tribe for a consent proceeding even over the objection of the parent.

4. Section 105(d) and (e) virtually prohibit placement of a child with a non-native family even if the birth parent has chosen such a family.

5. Section 107 discloses the birth parent's name even if there is an objection by that parent.

We do not believe that the problem with the preservation of Indian culture lies in the voluntary adoption area. Even if it did, the coercive power contained in S. 1976 is a poor way to preserve culture. Indians, as well as any other persons with an ethnic background, can choose to remain in a culture or not. Where some choose not to remain, coercion is an unworthy and ineffective means to a good end.

On behalf of the Native birth parents we serve, Catholic Social Services requests that any bill passed incorporate provisions allowing birth parents to object to: (1) court transfer, (2) notice to the tribe and, (3) release of identifying information, and to express a placement preference that will be honored.

Additionally, we are concerned with the following sections:

- a) Section 4(2). A person should be allowed to choose his or her own domicile.

- b) Section 4(4). A person "considered to be a part of a community" is too vague.
- c) Section 4(15). A tribal court should be a court, not an administrative body.
- D) Section 103(c). This section should retain a cut off for a decree of termination. The adoption decree, because of the home study, is often much later and results in too long a period to withdraw a consent.

Thank you for your consideration.

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May 9, 1988

Senate Select Committee
on Indian Affairs
U.S. Senate
Senate Hart Building, Room 838
2nd and Constitution Streets, N.E.
Washington, D.C. 20510
Attn: Pete Taylor

Honorable Senators:

I am shocked to find myself opposing a bill which is apparently intended to protect and expand the welfare of Indian children. I am very much in favor of that worthy goal. However, the old saying, "the road to hell is paved with good intentions," could not have a more appropriate example than S. 1976.

Twenty years ago, I spent the summer in Pine Ridge, South Dakota. As a law student, I was there to help the people on that reservation with their legal problems. My two colleagues and I were sent there as volunteers by the Law Students' Civil Rights Research Council, under the sponsorship of the Association on American Indian Affairs.

I learned a lot that summer. The Indians I encountered were proud people. Proud of their heritage; proud of themselves. The elderly full-blooded Sioux woman who asked me to "liberate" her car comes to mind. A Nebraska auto dealer had illegally repossessed it, and the threat of legal action was enough for us to persuade him to give her the keys. We drove back to her small, dirt-floored, wood house victoriously. As I was about to leave, she pressed a 75 year old silver dollar into my hand and insisted, over my protestations, that I take it. She could not accept my help without "paying" for it.

I got a taste - albeit a small one - of the racism that persists against our Indian brothers and sisters three years later. I was in Santa Fe, New Mexico, as a driver/chaperone of a group of students from Boulder High School, on a weekend visit to the Institute of American Indian Art. I was having a late night sandwich at a restaurant in the company of several (Indian) teachers there. I was also wearing the beaded headband I had been given by a young friend as a going-away present at Pine Ridge.

A man on his way out of the restaurant tousled my hair as he walked by and said loudly, "You Indians should all go back to

the reservations where you belong." My companions' body language told me to "cool it," and after he left, they said that it was not worth fighting over - things like that happen all the time. Indeed.

Non-Indian Americans have reaped the benefits of the mass-murder and theft perpetrated against the Indians. We should all encourage and support legislation to remedy the dreadful poverty, inadequate health service, lack of economic opportunity and depression that pervade many reservations. Likewise, we should do everything possible to protect Indian culture and respect for it.

Forced assimilation of Indians into non-Indian society would be nothing less than genocide. The Indian Child Welfare Act of 1978 (hereafter "ICWA"), was intended to prevent just that:

"The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." 25 U.S.C. 1902.

It creates a class of "Indian children," who are clearly defined as: tribal members or children of tribal members who are, themselves, eligible for membership. 25 U.S.C. 1903 (4). It clearly gives tribal courts jurisdiction over child custody proceedings within the usual jurisdiction of tribal courts - that is, involving children on the tribe's reservation. 25 U.S.C. 1911(a).

It further gives those courts jurisdiction over Indian child custody proceedings which would otherwise be subject to state court jurisdiction, unless: (1) there is good cause to the contrary, (2) a parent objects, or (3) the tribal court objects. 25 U.S.C. 1911(b).

The ICWA enables parents of Indian children to be well protected in state court proceedings from having their children taken from them against their wishes. Their tribe can intervene, they can have court-appointed counsel, expert witnesses are required, and high standards of proof must be met.

25 U.S.C. 1911(c), 1912. If parental rights are, nevertheless, severed involuntarily, then the child's Indian heritage is given great weight in regard to his/her ultimate placement. 25 U.S.C. 1915.

Voluntary placements are allowed by the ICWA, but here, too, the parent is protected by having a judge certify that the parental consent was given knowingly, voluntarily and at least ten days after the child's birth. 25 U.S.C. 1913(a). A further safeguard is the right to withdraw consent until a final decree of termination or adoption is entered. 25 U.S.C. 1913(c).

It is difficult to imagine a more comprehensive way in which to guarantee that Indian children will not be:

- (1) involuntarily removed from their parents without justification, or
- (2) placed by public and private agencies in non-Indian environments, or
- (3) voluntarily placed by their parents without their informed consent.

The ICWA protects the rights of parents of Indian children. That, however, is not the goal of S.1976. The "new improved" ICWA, as amended, would subordinate parental rights to the superior wisdom of tribal courts. If enacted, S. 1976 would prevent a parent from choosing the adoptive home for the child. It would also expand the number of children within the ambit of the ICWA to the point of absurdity. It would lead to great uncertainty as to the validity of adoption decrees. It would lead to the abortion of more Indian children. For these reasons, I vehemently oppose this truly frightening bill.

My expertise is not in the area of Indian child welfare. As an attorney, I specialize in private adoption. Infertile couples seeking a child to adopt come to my office, and we help them to locate parents seeking to voluntarily place their child for adoption. The parties usually meet and get to know each other before the birth, and the child is usually placed directly into the adoptive home. The parties are the subject of a report by our State Department of Social Services, and ultimately a judge must decide that it is best for the child that the adoption be granted.

I believe that this process serves all concerned. The child gets a good home. The adoptive parents get the opportunity to raise and love a child. The biological parents get the satisfaction of choosing the home for the child they love, but cannot raise.

I have never been involved in a contested adoption with Indian parents or an Indian tribe. I have, however, handled numerous adoptions in which the child was of Indian descent. In less than five percent of those cases was it necessary to obtain the parent's consent in the presence of a judge, pursuant to the ICWA. This is because so many people are "part" Indian, but only a little bit. If they can identify the tribe, the tribe has usually never heard of them or their part-Indian ancestor. Therefore they are not, nor is their child, eligible for membership.

Under S. 1976, the definition of "Indian child" has been broadened to include a child who "is of Indian descent and considered by an Indian tribe, to be part of its community. . ." (Sec. 4(5) (c), p. 7, lines 20-21). This appears to potentially include any child with an Indian ancestor. There is no objective test; so if a tribe decided to consider a child that was one-millionth (or less) Indian to be a member of its community it would come within the ICWA. (Ironically, this child would not be eligible for the benefits of membership).

Under the present law that, alone, would not change things too drastically. The biological parent could still place the "Indian child" in the home of choice, but would have to sign consent in the presence of the court. And the consent would be absolutely subject to revocation until the adoption became final (contrary to the usual practice in virtually all states).

However, if S. 1976 is enacted, the signing of the consent would preclude the parent from objecting to having the case transferred to tribal court. (S.1976, Sec. 101 (b), p. 12, lines 3-19). Thus, the decision to place the child in the adoptive home would be at the mercy of the particular tribal court.

The parent's wish to keep the adoption from the tribe's awareness would be thwarted, because under S. 1976 her right to privacy is non-existent. (S. 1976, Sec. 103(a) (2), p. 19, lines 4-19).

In practice, the parent who voluntarily seeks an adoptive placement outside the tribal court would have three unhappy choices: (1) "forget" about the Indian ancestor; or
(2) have an abortion; or
(3) raise the child.

It is difficult to believe that our legislators, upon reflection, would want to enact such a counterproductive law. Furthermore, although I have addressed only voluntary placements, the overbroad new "definition" of "Indian child,"

and the incredible expansion of tribal court jurisdiction could lead to equally ludicrous results in involuntary termination cases. (For example: A ten year old child is the subject of a termination action on the grounds of abandonment or abuse. The state juvenile court terminates parental rights. The child has been living for 2 years in a foster home which wishes to adopt the child. The child is one-millionth Indian. Tribal court takes jurisdiction and places the child on an out-of-state reservation with complete strangers).

If the ICWA is to be amended at all, I have three suggestions:

- (1) Clearly limit the right of intervention to involuntary proceedings only. 25 U.S.C. 1911(c).
- (2) Clearly apply the two year limit on collateral attack to the entire ICWA. 25 U.S.C. 1913(d).
- (3) Clearly give a parent placing a child voluntarily for adoption an inviolable right to privacy. (California law requires that the tribe be contacted. This can cause the parent to become an object of social scorn.)

Finally, I want to thank the Committee for giving me this opportunity to offer my views. Although I believe that S. 1976, if enacted, would ultimately be declared unconstitutional, it would cause a great deal of harm until then.

Respectfully submitted,

MARC GRADSTEIN
Attorney at Law

MG/kh

P.S. Attached as exhibits are letters from:

Benjamin C. Faulkner
Attorney at Law

Rita L. Bender
Attorney at Law

Catherine M. Dexter
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Philip Adams
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May 4, 1988

Mark Gradstein, Esq.
1109 Vicente Street, Suite 101
San Francisco, California 94116

Re: Federal Indian Child Welfare Act.

Dear Mr. Gradstein:

I understand that you will be testifying before the Senate Select Committee on Indian Affairs on May 11, 1988, regarding an amendment to the Federal Indian Child Welfare Act ("ICWA"), sponsored by Senator Daniel Evans, R-Wash.

If given the opportunity, please read this letter into the record, reflecting a case history in Oklahoma which would have a different result if the amendment were to pass. However, if possible, protect our anonymity by keeping our names confidential.

We are strongly opposed to the amendment which would dictate solely on the basis of a trace of Indian heritage, that a child eligible for adoption must be placed upon purely racial grounds, ignoring all other factors that should be considered in the best interest of the child.

My wife and I are Oklahomans. She is 1/32 Cherokee and I have no documented Indian blood. I grew up, in part, in Latin-American countries, because my Okie father traveled in the oil business. I speak Spanish and love the Latin-American cultures.

We encountered a pregnant girl who wanted to place her unborn child for adoption. She had three other small children and simply could not provide for a fourth. The mother is 1/4 Creek and the baby's father is 4/4 Hispanic. Thus, the baby would be 1/8 Creek and 1/2 Mexican-American.

The mother does not live on a reservation, in an Indian community, nor in an Indian lifestyle.

ENGLISH, JONES & FAULKNER

Mark Gradstein, Esq.
May 4, 1988
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When she learned the basics of our multi-ethnic/cultural background she was delighted at the prospect of our adoption of her baby. She and my wife talked frequently by telephone about "things" before the baby was born. The baby was born and we commenced the adoption process with the hearty approval of the mother, and the tacit consent of the natural father. We complied with all the laws, including ICWA. To our chagrin, and to the outrage of the natural mother, the Creek Nation intervened and declared all-out war on us. After five months of trauma, a complete trial was held in District Court, replete with testimony of a psychologist, an anthropologist and a thorough evaluation by the Welfare Department.

The Tribe's position was that adoptive parents who did not speak Creek were per se ineligible to adopt a child with any scintilla of Creek Blood. This was interesting in light of the fact that by these Creek standards, the natural mother herself would have been ineligible to adopt her own child. The Tribe had no particular adoptive couple in mind, but would "warehouse" the child in a foster home until a suitable couple could be found.

The Judge found it to be in the best interest of this child that we adopt him; in part because of the mother's wishes, in part because my wife is Cherokee, and in part because I will protect his Latin-American heritage. He granted the final adoption. The case is now on appeal to the Oklahoma Supreme Court by the Tribe.

What will happen?

The amendment suggested by Senator Evans would institute a policy of racism that is abhorrent to our sensibilities.

Of course the child's Indian heritage is important and should be protected. But judges and parents -especially parents- deserve the flexibility and discretion to evaluate the overall needs and interests of each particular child. A law which forces an unnatural presumption of rectitude, based upon one racial facet of a multi-racial child, is a threat to the true spirit of civil liberties, and a millstone around the neck of every child it affects.

ENGLISH, JONES & FAULKNER

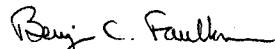
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In our case, it would deprive the child of the opportunity to have all his ethnic and cultural characteristics protected and developed in mainstream American society, as his natural parents desire, and as his adoptive mother, a 1/32 Cherokee, desires.

I hope this letter is of assistance in putting into focus the possible noxious effects of the proposed amendment.

I would like to add that as an attorney who handles private adoptions, I have, on more than one occasion, discovered adoptions that took place in which the parties apparently did not disclose the Indian blood of the infant, because of their fear that the natural parents' desires for the placement would not be followed. Obviously, in those instances ICWA worked to deprive the children totally of their heritage.

Sincerely,


 Benjamin C. Faulkner

BCF/le

Law Offices
 of
 RITA L. BENDER

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May 4, 1988

SENATE SELECT COMMITTEE
 ON INDIAN AFFAIRS
 United States Senate
 Washington, D.C.

Honorable Senators:

I write this letter as comment upon the pending amendment to the Indian Child Welfare Act, S.1976. I am in legal practice in Seattle, Washington. I engage in substantial representation of birth parents and prospective adoptive parents. I am the author of the chapter on Washington Adoption Law to be published in the new Washington Practice Series by West Publishing.

The Senate is presently addressing adoption law issues in its consideration of amendment to the Indian Child Welfare Act. I am of the opinion that the Indian Child Welfare Act of 1978 was an appropriate piece of legislation, which has gone a substantial distance towards ameliorating problems which previously existed of interference between Indian families, tribes and children. However, the pending amendments to the Act have certain flaws, which I urge you to consider and correct before final passage.

The definition section of the amendment provides that Indian child means

"any unmarried person who is under age eighteen and is a) a member of an Indian tribe, or b) is eligible for membership in an Indian tribe, or c) is of Indian descent and is considered by an Indian tribe to be a part of its community ... if a child is an infant he or she is considered to be part of a tribal community if either parent is so considered."

The problem with the expanded definition of "Indian child" is the lack of clarity. There is no definition of Indian descent. Since this may include a child who has some small portion of Indian heritage, and such ethnic background may be unknown to the placing agency or parent, the adoption could subsequently be called into question by a family member who later revealed the

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existence of such background. I can conceive of this problem arising in the context of unmarried fathers, whose family background may be little known to the mother.

Since the definition of Indian child includes a child "who is considered by an Indian tribe to be a part of its community," or an infant child whose "either parent is considered to be part of a tribal community," the information available at the time of placement may not be sufficient to know whether a tribe would consider this an Indian child.

My primary concern with the vague and overbroad definition of Indian child is that it may be very difficult to make a judgment at the time the placement is originally considered as to whether Indian Child Welfare Act applies. To fail to follow the Act where it is necessary will result in an adoption proceeding in which the child is vulnerable, as the Act provides for intervention by the child's family and for vacation or setting aside of final judgment. The new definition may create extreme uncertainty, which in many cases cannot be resolved. Adoption should be safe for all the parties involved, as the human stakes are far too high to place at risk by vague laws.

The draft of the Act further provides that in voluntary proceedings, no request for confidentiality will be honored; the tribe must be notified of the pending placement. The result is that a mother considering relinquishment of her child for adoption, should either she or the child's father be of native descent and considered by either an Indian or Alaska native tribe to be part of its community (facts which may or may not be known to the mother), must suffer the ensuing lack of privacy. That is, she may not make plans for the placement of her child in private, despite the fact that she does have the right to make plans to abort the child without notice to anyone. Thus, a mother who determines to give her child life, is then denied the right to make decisions for the child's placement without notice to and involvement by a tribe with whom she may have no affiliation. Such an outcome does not appear to me to be sound.

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I know that you will be receiving comments from many sources, and that the task of reconciling all of the competing interests is large.

Thank you for giving me the opportunity to express my concerns.

Respectfully,

Rita L. Bender
RITA L. BENDER

RLB:mln

RICHARD H. MULLER
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May 6, 1988

SUSAN C. MOFFET

Mr. Marc Gradstein
Attorney at Law
1109 Vicente Street
Suite 101
San Francisco, CA 94116

RE: Senate Bill 1976 Amending the Indian Child Welfare Act

Dear Mr. Gradstein:

It has come to our attention that you will be testifying at the Senate Select Committee on Indian Affairs in Washington D.C. next week. As you are aware, our office is located in Portland, Oregon and practices heavily in the area of independent adoption. Because of the impact we feel the proposed changes to the Indian Child Welfare Act (as set forth in Senate Bill 1976) will have on private adoption, we request that you present our letter to the Senate Committee along with documentation you will be submitting on your behalf.

Our concern with the proposed bill centers on the expansion of definitions for "Indian Child" and "Parent". We feel that the proposed definitions will undermine the security of private adoptions beyond the intent of the drafter of the new legislation.

Currently, a "Indian Child" is defined as an unmarried person under the age of eighteen (18) who is either an enrolled member of an Indian Tribe or eligible for membership in an Indian Tribe. Proposed Section 4(5)(c) extends the definition of parent to include a child who:

..."(c) is of Indian decent and is considered by the Indian tribe to be part of its community, or, for purposes of sections 107, any person who is seeking to determine eligibility for tribal membership; if a child is an infant he or she is considered to be part of a tribal community if either parent is so considered;

Expanding the Indian Child Welfare Act in this manner, will make it virtually impossible for attorneys and prospective adoptive parents to determine if a given child is or is not a

Mr. Marc Gradstein
Page Two

"Indian Child". Currently, one may call the BIA or the local tribe and find out if a young woman seeking to place her unborn child for adoption is enrolled as a member of an Indian tribe. From that, it is easy to determine whether or not the child is "enrollable". By expanding the definition to include any child that is considered by the Indian tribe to be a part of its community, it would be virtually impossible for prospective adoptive parents or their attorney to literally "read the mind" of the tribe in determining whether a particular infant is considered within its purview. This would theoretically make it possible for the tribe to come back years after the adoption has been finalized and argue that the child was within its "consideration" when there was no objective way for the adoptive parents or their attorney to determine that at the time of the placement and adoption.

Our second concern is the definition of a "parent" under Section 4(10) of the Act which expands the definition to include unwed fathers where paternity has been "recognized in accordance with tribal custom". This expansion of the previous definition of "parent" could mean that a father may have performed some act within the custom of his tribe regarding a child born to a caucasian woman who has no knowledge of what the tribe's customs are or its effect on the adoptability of her unborn child. Under the current requirements, the father would have to do an overt act under state law in order to acknowledge the child or establish paternity under a state sponsored paternity suit. Both of these means would be known and easily determined by the birth mother, prospective adoptive parents or their attorney. Because individualized tribal customs vary, it is virtually impossible to determine in advance whether some local "custom" of the tribe has been followed when the birth mother or prospective adoptive parents may have no access or right to access of information regarding that custom.

We request that you draw the Senate Committee's attention to these problems inherent in expanding the definitions of "Indian Child" and "parent" in regard to private adoption. We respectfully suggest that either these definitions remain as they currently are or that an exemption be written into the proposed bill as to their impact on private adoptions.

Thank you in advance for considering our views in this matter.

Sincerely,

Catherine M. Dexter
CATHERINE M. DEXTER

CMD:mmj

Philip Adams

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 San Francisco 94104
 (415) GARFIELD 1-1296
 May 4, 1988

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

In RE: S. 1976

Dear Sirs:

I wish to urge your Committee to vote against any favorable action on the proposed amendment to the Indian Child Welfare Act. I have been active in the field of adoptions in California since 1943 and have been an interested observer of the growth of legislation in this field for 40 years. I believe that the thrust of the original Indian Child Welfare Act was a dubious one as it tended to negate the individual rights of a woman over her child solely on the basis of alleged primacy of the social group to which she happened to be assigned.

It is my recollection that Indian's have been American citizens since the 1920's and I see a serious constitutional question in a law which purports to curtail the unquestionable rights of an American citizen to determine the future of his or her own child in legislation which purports to Indian Tribal Courts as having superior authority. On a practical basis if one defends this type of legislation on the basis that an individual Indian woman is not competent enough to decide where her child is to be raised, what reasonable basis is there to decide that the conglomeration of such incompetent people in a tribe is anything more than incompetence raised to the nth power.

However the existing Child Welfare Act is at least limited to the objective criteria. It must be demonstrated that the child is eligible for enrollment in an existing unit under established percentages of Indian blood. Vague traditions in a family "we have some Indian blood" without any specific tribe or individual involved is insufficient. Under the proposed legislation there would be substituted a totally vague standard of "Indian descent".

You have undoubtedly observed the horror story of

the 9 or 10 year old boy in Utah who is being torn out of the only home he has known, and most recently, the case involving the Navajo child in San Jose. One gets the feeling the tribal courts are motivated by a feeling of "we will teach these white folks".

Certainly I hope your Committee will come to a conclusion that whatever the merits of the existing statute are, that the proposed amendments would do more harm than good.

Respectfully yours,

PHILIP ADAMS

PA/jf

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May 6, 1988

TO WHOM IT MAY CONCERN:

Re: INDIAN CHILD WELFARE ACT

This is to advise that I do numerous adoptions in the State of Arizona and I have felt for some time that the Indian Child Welfare Act is one of the most cumbersome and unnecessary acts that I have ever had to work with. I probably do more private adoptions than anyone in the State of Arizona and in many other states, and I frankly do not see a reason for the Act in the first instance. It is on very rare occasions that we do adoptions of an Indian child and I would doubt the statistics, when I see your language, ". . . an alarmingly large percentage of Indian children are separated from their families. . .". In addition to this, it has always seemed unfair to me that the mother, and often the father as well, of a child desires to adopt out the child and just because they just happen to be of an Indian heritage, their own tribal law, or U.S. Indian law, either prevents them from doing it or makes it extremely difficult for them. To my knowledge, they are the only birth parents in the United States who have these burdensome restrictions upon them.

My first suggestion would be that the entire Act be scrapped, but if it is preserved then I think that the natural mother should have a much greater role in the placement of her child and the ability to give a final consent to an adoption.

Very truly yours,

MAC LEAN & JACQUES, LTD.

John H. MacLean
JOHN H. MAC LEAN

JHM:rmt

led Somit, Attorney At Law

1440 Broadway Suite 910
Oakland, California 94612

(415) 839-3215

May 6, 1988

To the Honorable United States Senators
Considering S. 196

re: S. 1976
Amendments to Indian Child Welfare Act

Dear Sirs:

I oppose the proposed amendments to the Indian Child Welfare Act.

I am a father of three children by adoption. My law practice includes independent (private) adoptions. I am very active in the State of California on adoption related issues and legislation.

The Indian Child Welfare Act, in its present language, well serves the important interests of the legislation to protect the various Indian Tribes from having children who would have been raised in the Tribe's culture from being adopted or placed outside the Tribe and the Tribe's heritage, culture and institutions. For children residing or domiciled on a reservation, the existing power of the Tribe to obtain jurisdiction is extensive, and when jurisdiction is exercised pursuant to the Act, such jurisdiction is exclusive of the civil courts of the States. This existing power is fully adequate to protect the interest of the Indian Tribes.

The proposed amendments present many problems and dangers, to the children who may become subject to the Act, and to both sets of parents involved in adoptions (the birthparents and the adopting parents). A member of an Indian Tribe who has left the reservation and decided to be domiciled and to reside off the reservation, should not be deemed to have surrendered all her rights to influence or determine her child's upbringing. If she, perhaps even years or decades after leaving the reservation, decides to place a child for adoption, she should be allowed, like every other citizen, to be able to select a home and the adoptive parents

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for her child. Yet, under the proposed amendments, even though she has not had any contact with her Tribe for years, the Tribe could assert exclusive jurisdiction, over her objections. The Tribe could then proceed to take the child from the adoptive home where it may have been for months and years, and place the child with another family, again over the objection and without the participation of the birth-mother, or of the prospective adopting parents, who may be the only parents the child has known.

A birthmother who has consented only to a specific adoption under State law, can be held under the Act to have surrendered all her rights to custody of the child, Act, and therefor lose the power she had under State law to regain custody if the adoption she contemplated, and the only one to which she consented, could not be completed.

The laudable goal of protecting the Indian heritage does not require this result when the child's connection with the Tribe and its culture is attenuated. Yet, the whole purpose of the proposed amendments is to extend the Indian Child Welfare Act to children who have no close connection with the reservation or Indian culture; the amendments would extend exclusive jurisdiction simply on the basis of any part of Indian blood (descent) in the child. This departs from the original goal of the Act in protecting the Indian Tribes, and substitutes a right of the Tribes to impress children for purposes of artificially maintaining the reservation.

Under the broad wording of the amendments, if the Tribe so chooses, any infant born to any person with any percentage of Indian blood could be subject to the Act, and to exclusive Tribal jurisdiction, even if the birthparents have never had any connection (other than by blood) with the Tribe. The nexus with the Tribe's interest in maintaining a tribal identity is completely absent.

The law of almost all states requires that in custody matters, the legal parents are given a preference for custody, and that the crucial criterion is the "best interests of the child". There is great uniformity in approach among the various states, as well as a uniform law on custody jurisdiction, the Uniform Child Custody Jurisdiction Act.

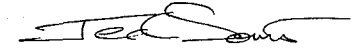
In contrast, the Indian Child Welfare Act does not follow the customary and accepted approaches of preferring the biological parents, and consideration of child's best interests is only a part of the consideration in custody matters under the Act; great attention is given to the interest of the Tribe and its heritage.

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While the Tribes' interests are substantial, the existing Act fully protects them. It is not necessary, and certainly not in the interest of the particular children involved, to extend the Act, and its anomalous approach to custody matters, beyond children actually raised within the Tribe's culture.

I respectfully request that the proposed amendments not be adopted.

Very truly yours,



Jed Somit

JS:cw

cc: Marc Gradstein, Esq. (to deliver to the Senate)
 David Leavitt, Esq. (to deliver to the Senate)