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 birthmother, 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.

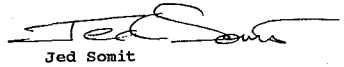
The law of almost all states requires that in custody matters, the legal parents are given a preference for custody, and that the crucial criterion is the "best interests of the child". There is great uniformity in approach among the various states, as well as a uniform law on custody jurisdiction, the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

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)

REMARKS OF DAVID KEENE LEAVITT BEFORE THE UNITED STATES SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

WASHINGTON, D.C., MAY 11, 1988

My name is David Keene Leavitt. I am an attorney in California, specializing for the past 28 years in the adoption of children, often involving the Indian Child Welfare Act. I am here today on behalf of the Academy of California Adoption Lawyers, and as liaison of the Family Law Section, American Bar Association, for the Model Adoption Act.

Ten years of experience under the Indian Child Welfare Act has revealed harmful unintended consequences, particularly regarding children of mixed Indian and non-Indian ancestry. These problems are particularly acute in California, where over one third of all adoptions in the United States occur and almost everyone has come from somewhere else. When part-Indian ancestry is claimed, compliance with the Act almost never involves tribes within California. About 90% of the inquiries to the Bureau of Indian Affairs concerning California children of mixed Indian and non-Indian ancestry, fail to establish the suspected tribal connection. Nevertheless, they often delay adoption and sometimes frustrate the process entirely.

We support the purposes of the Indian Child Welfare Act. We understand the legitimate need of Indian tribes to maintain their populations, their integrity and their cultural values. Since overhaul is now before you, however, we must point out

and ask the Committee to deal with the unexpected problems that the Act imposes upon the general population into which many Indians have assimilated during the past 100 years.

We urge this Committee to better define the scope of the act and more carefully delineate those children it seeks to protect from those youngsters outside its scope. We believe the act should exempt children who are without ethnic tribal connections or of only minor Indian ancestry.

The original Indian Child Welfare Act was obviously predicated upon certain unspoken assumptions: (1) That children within its scope were clearly identifiable as members of a tribe or a peripheral community; (2) That a protected child or its immediate family maintained at least some ethnic connections to tribal organizations, cultures or customs; (3) That Indian ancestry and ethnicity were so predominant and non-Indian characteristics so minor, that preservation of the Indian portion of the child's heritage warranted tribal supremacy over state law and Indian ancestors over non-Indian ancestors; and (4) That tribes, tribal offices and tribal resources were likely to be nearby, available to help and interested in retaining or absorbing the child. The assumptions are often invalid as to children of mixed ancestry whose Indian connections are minor or remote.

At the root of the problem is the question of assimilation. Assimilation is a major concern in many communities: Catholics and Jews, for example, complain that about half their offspring marry persons of other faiths. At a certain point many shed

the identity of their ancestral group and create a blended new identity of their own. There is a point where assimilation into the general community eclipses special ancestral ties and they no longer warrant special treatment. In a program designed to preserve and perpetuate a single ancestral group, Congress has an important obligation to define the parameters of that group. Congress must set forth with particularity when persons have so merged into the general population that tribal law no longer supplants state law.

In my practice I interview more than two hundred expectant mothers annually. About one-third mention "Indian" as being part of their or the natural father's ancestry. For millions of Americans, who do not particularly consider themselves Indian, even a little "Indian blood" is seen as a badge of honor. Often, however, they are not quite sure to which tribe the ancestor belonged. I cannot recall even one person claiming ancestry in a California tribe!

The failure of precise definition has been harmful to Indian and non-Indian children alike.

Tribal intervention is not the problem. Tribes display no interest in the custody of children whose Indian ancestry is slight or remote, and ethnic relationship non-existent. They have neither the desire nor the resources to incorporate and provide for the long term care, special needs, or adoptive placement of such children.

The problem arises when persons who live entirely outside the Indian world, who may

never have considered themselves "Indian", or participated directly or indirectly in tribal affairs, but are of partial Indian ancestry, attempt to frustrate and delay legitimate state court proceedings for adoption. For example, Sec. 105 of the Act sets forth rigid placement preferences for "Indian children", under which it appears virtually impossible for such a child to remain with a non-Indian family. This may well be appropriate for a child predominantly of Indian ancestry and ethnicity, but unreasonable in the case of a child almost entirely non-Indian but brought under the act by remote ancestral connections only.

The practical result is that parents of part Indian children who successfully invoke protection of the Act cause abandonment of adoption plans, seldom achieve custody of the child, and virtually never cause the entry of the child into an Indian environment. They do not enhance the population or ethnic wealth of the tribes. They are mere "spoilers". They use the act as a legal bludgeon for their own personal benefit, contrary to established principles of child welfare and adoption.

In some cases, the delay, red tape and expense of termination proceedings which might involve the Indian Child Welfare Act cause state authorities to avoid adoption service altogether to partially Indian children. Only this week the attorney for one of the largest public adoption agencies in the country told me that his agency routinely avoids adoption planning or termination of parental rights the moment a possibility of Indian ancestry arises. The agency has only so many workers, so much staff, so much time, and more children without Indian ancestry who need service than they can successfully handle. Rather than become embroiled in

the Indian Child Welfare Act, they simply postpone and defer and delay and forget and ignore the part Indian child. Let me emphasize that this problem does not exist with the child whose Indian ancestry, heritage and tribal identification is known. Tribes are easily, promptly and often contacted. Children are protected as contemplated in the Act. It is only the part-Indian or the suspected - but - non-Indian child who suffers.

In several hundred of 2,000 adoptions I have handled since 1978, Indian ancestry has been claimed and inquiry made through the Bureau of Indian Affairs in an attempt to establish the tribal connection and comply with the Act, usually with negative results. According to the Director of the Adoptions Branch of the California State Department of Social Services, over 90% of the inquiries to the Bureau of Indian Affairs fail to establish the tribal link or identity. In each case, adoption is delayed. Consent to adoption cannot even be executed until it is determined whether federal, tribal or state formalities are to be observed. The problem is far more acute with abandoned or abused children who must remain in temporary care until parental rights are terminated. Often the delay is so great that no one will adopt the child at all!

Our most serious concern today is Section 4(4) and Section 4(5)(C) which defines 'Indian' and 'Indian child' as "any unmarried person who is under age 18 and is ... of Indian descent and is considered by an Indian tribe to be a member of its community".

The clear meaning of this language to most lawyers is that an Indian tribe could define anyone it pleases, who has even a drop of that tribe's ancestry, as a member of its community. Under such a definition, most Americans could well be considered an 'Indian' or an 'Indian child'!

I have been advised by Peter Taylor, of the Committee staff, that the language which so alarms us is based on a 1938 federal court decision involving persons partially of Indian descent, not enrolled in the tribe, but nevertheless living in proximity to and interacting with the tribal population. The term 'Indian community' was used by the court to describe these persons who were ancestrally and ethnically connected to the tribe, but not legally within it. The proposed amendment to the Act obviously intends to include persons on the periphery.

There is a point, however, at which persons leave the periphery of the tribe and enter the the mainstream of the general population. Once in the mainstream, they and their offspring look to the laws of the states in which they reside to govern their family relationships, and the adoption and placement of their children. We feel that these people are entitled to know with reasonable certainty when "Indian-ness" becomes subordinate and the general laws prevail.

Congress has a duty to more precisely define the scope of the Act with its impact on non-Indian or part-Indian people in mind. We have no specific proposal to make at this time, but tests might include a specific percentage of Indian ancestry. The phrase "substantial ethnic ties" comes to mind which might consist of factors such

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as tribal enrollment; receipt of tribal benefits; submission to tribal courts; tribal marriages, divorces or filiation proceedings; receipt of tribal communications; etc. Good lawyers familiar with Indian issues could forge a workable definition.

Unwed fathers are my second area of concern today. They constitute a major problem in the world of adoption today, with or without the Indian Child Welfare Act. The Act presently applies only to unwed fathers whose paternity has been acknowledged or adjudicated. It is a simple thing to acknowledge paternity, but a difficult thing to prove it. It is harder when the alleged father is absent, and dreadful where paternity is in doubt, an alleged father denies paternity, or is in flight to avoid the possibility of 18 years of child support.

Under the proposed amendments, the mere suspicion of "Indian-ness", in an absent, possibly questionable, birth father may engender seriously harmful consequences: voidable adoptions, insecure placements, reluctance of state courts to act if it is suspected that a tribal court might be the proper forum. Tribal identity may never be established, yet the adoption system is paralyzed until it is. Children remain interminably in foster care as a result. Under the proposed amendment, nearly any man a mother names as a possible father who might be of Indian ancestry, would stymie adoption indefinitely -- even if he ultimately turns out to be the wrong man or not an Indian after all!

California adoption law requires that the state locate and terminate the rights of alleged fathers whenever possible -- whether or not Indians are involved. State

adoption workers report that almost half their time is consumed tracking down missing alleged fathers, most of whom they never find, and hardly any of whom admit paternity or exhibit interest in the child.

The threat of a missing unacknowledged, unadjudicated, unwed father who could blow the adoption away if he turns out to be a tribal member, curtails the liklihood of early, safe adoption. Families will be frightened away if a child might, months or years down the line, be claimed by a tribe. The heartbreaking impact of the recent Navajo litigation in San Jose created nationwide concern, even though those adopting parents knew at the outset that the Navajo tribe would be involved. Agonies and resentments would be exacerbated manyfold were litigation to occur years down the line when a missing or marginally indentified unwed father appears to assert Indian rights.

We urge retention of the present standard for unwed fathers: the Act should apply only where paternity is acknowledged or adjudicated.

Amendments to this legislation should honor the words of its title: "The Indian Child Welfare Act". It is not an Indian Welfare Act at the expense of children, nor should it subject Indian children to foreign values alien to their ancestral and ethnic heritage. It is contrary to the interests of all children, everywhere, to be denied love and security, to remain indefinitely in foster care or to become embroiled in protracted custody proceedings. Indian children are no different from the others. In that regard, I must call upon members of this Committee to re-

examine and reject Section 102(g) which appears to say that drunkenness, crowded or inadequate housing, or "non-conforming" social behavior (whatever that may mean, i.e. homosexuality, sado-masochism, drug addiction?) cannot be considered likely to harm the Indian child. I cannot imagine a tribal court that would fail to consider such things or knowingly consign its children to such homes. Such language has no place in an Act to protect children.

The Academy of California Adoption Lawyers and I would welcome the opportunity to work with your staff and other interested persons to come up with workable solutions to the problems I have addressed. We hope that this ten year revision of the Indian Child Welfare Act will truly bring it up to date and make it better.

Because I had only three days to prepare these remarks, I would request leave of the Chair to furnish additional written material within two weeks for inclusion in the record.

NATIONAL INDIAN SOCIAL WORKERS ASSOCIATION, INC.

Testimony presented

by

National indian Social Workers Association

on

Senate Bill 1976

May 11, 1988

My name is Evelyn Lance Blanchard, Vice-president of the National Indian Social Workers Association. My association with the Indian Child Welfare Act is long, having participated in early efforts to bring about its enactment. The law has focused my career and I have become a student of it.

The Association strongly supports S.B. 1976. The proposed amendments are needed and they reflect what has been learned from law and social work primarily. There has been considerable progress over many issues in the ten years since the law was passed. The state of Washington Children's Division has on-going consultation with tribes and Indian organizations and Oregon enacted a law which provides foster care to Indian families from state public funds. Tribal and department workers are investigating abuse and neglect complaints together and supporting each others' efforts to assist families. The needed clarity that has stimulated these amendments comes from both difficulty and success.

Our comments will highlight issues in three areas: (1) developments in the field and practice; (2) best interest and least restrictive issues; and (3) the adoption of Canadian Native children by U.S. citizens.

1. Developments in the field and practice of Indian family and children's services.

It is not difficult to understand the developments that have taken place in light of a report by the Children's Bureau that the out-of-home placement rates of Indian children have returned to or have increased slightly above those reported in 1976. The Committee's attention has been called to the complications provided by the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272). The primary and major training opportunities for tribal and Indian organization workers have been provided through P.L. 97-276 rather than the ICWA. The ICWA seeks to prevent break up of the family as its clear first intent. The P.L. 96-276 is concerned with permanency planning which regulates the time and process by which a family can expect to receive help to maintain stability or reunite the family unit. The Adoption Assistance Act responds to a problem of foster care drift while the ICWA prevents the breakup of the Indian family. The 1976 study made clear the skills needed by Indian program workers. The work would involve developmental analysis and knowledge or attachment theory necessary to the many repatriation's that would take place. Preciseness of training was needed as workers, administrators and officials worked through conceptual translations of values and social control mechanisms. The tragedy of the enactment of the law was brought about by long-standing governmental action and in-action which had contributed to the destruction of Indian family life; there was much to learn and correct.

The expansions of the notice requirements, the definitions of child, family and tribe and curbs on voluntary placements, all reflect an increased knowledge of Indian family life and a need for strengthened requirements. Greater discipline is needed to implement the law fully. We are encouraged that the field recognizes open-adoptions more consistently but are concerned that the arrangements in these adoptions be very clear, and enforced by the Courts. Problems regarding "future opportunity to learn about their tribal identity" are highly debatable issues in my experience. For example, in the recent Carter/Halloway case, the natural mother asked that her sone have Navajo language lessons while he lives with his permanent guardians 50 weeks of the year. This request was opposed and notmade a part of the Court's order. The level of sophistication and respect necessary to permit open adoptions to work is high and complex, and must go beyond anon-Indian view of what it means to be an Indian.

Through the years, the Association has called the Committee's attention to the need for a reliable data base to monitor implementation of the Act. Years ago, Congress directed the BIA and the Children's Bureau to develop adequate reporting procedures regarding the law. As yet, these

procedures are not in place. Considerations regarding what data are collected and need to be collected are developed without adequate consultation with tribes and states. A low cost effort proposed by tribes, Indian organizations and the states of Oregon and Washington was rejected by the BIA in spite of statements of interest and support by twenty-two other states. There does not yet exist a simple instrument that can guide workers to implement the law fully. Part of the difficulty experienced with implementation is that good instructional guidance has not been established which results in procedural errors by workers. The desires to change attitudes and behaviors are thwarted by confusion. The Bureau will soon report on a study developed to provide guidance needed. That study contained 11 different questionnaires with many open-ended questions. Compilations of the data into truly useable form will be difficult. The BIA is joined in the effort by the Children's Bureau. No real efforts have been made by the BIA to examine developing theory and practice in the field. Monies for study or development mainly come from the Children's Bureau with emphasis on technology transfer. Often the results of these efforts are primarily descriptive and do not deal sufficiently with the nuts and bolts of method and technique. The fact that Indian country is faced correcting and building contemporary social services systems is not sufficiently understood in these developments. Indian tribes are raising precise questions about the fit of activities such as parenting classes in the rehabilitation of these people and the extent to which these efforts incorporate customary lifeways and practices.

The attention to the extended family in the Act goes much beyond the issue of placement and is directly involved in a family's effort to stabilize itself.

2. The best interest of the child, the least restrictive setting and reasonable efforts.

These issues have surfaced as among the most difficult in the implementation of the law. Indian children have been fed into the adoption market for a long time. During the 50s, the BIA entered into an arrangement with Child Welfare League of America to place Indian children in non-Indian homes. Family and children's services in Indian communities are a recent phenomena. Up until the passage of the ICWA, child welfare matters were routinely turned over to state departments for services and placement of children even in non-280 states. The BIA reimbursed the states for costs incurred for the child. The authority and jurisdiction over the children was removed from the tribal setting and handed to the outside. This historical behavior has impeded tribes' ability to become knowledgeable about resources needed to assist many of their children and families and has preconditioned many courts' view regarding Indian peoples' ability to help themselves. These

circumstances are complicated by a general lack of training for Indian and non-Indian workers alike. The vast majority of training available to Indians is through large conferences and sessions that are funded to support specific agendas of federal agencies, such as termination of parental rights and child protection teams.

The attitude that Indian children are better off if they are not raised on reservations or in Indian communities is yet widespread and strong. The continuing presence of this attitude prompts the worker to look outside the child's community rather than inside it. The heavy workload of many workers never allows them time to assist in the development of resources within the Indian community that will meet the child's needs. The shameful rates at which the ICWA is funded have never permitted the resources needed to study developmental efforts. Lack of commitment to these developmental efforts leads a high-ranking BIA official to proclaim in a recent issue of Linkages that poverty is not an important factor in abuse and neglect of Indian children. Indian people have always been poor! The fact that we are operating without clearly described characteristics of child abuse and neglectin Indian country ten years after the law was enacted presents a difficult situation for all involved. Lip service has been given to intergenerational characteristics of abuse and neglect and, more recently, faddish responses which came out of work with children of alcoholics have become the popular intervention, in spite of the fact that the law has always called for careful study of the problem where alcohol abuse is a factor.

Unfortunately, in too many places the needs of substitute caretakers are given greater weight than are the needs of the child to grow up within his/her own family. The best interest of the child too often has concentrated on the relationship the child has developed with foster parents rather than the natural parents with whom the initial and strong relationship was formed. The fact that workers and courts continue to concentrate on a brief period of the child's life and do not see the trauma and tragedy experienced by these children in adolecence and adulthood is an impedement to implementation and destructive to resource development. The prevailing attitudes and behaviors make it very difficult for workers to adhere to requirements of least restrictive setting and reasonable efforts. These problems are yhet so pervasive that a project specifically funded to look at "reasonable efforts" for Indian families was obscured in the description of the effort to a group of consultants called in for the work. Clarification of the effort was demended and a letter from the funding agency affirmed the Indian focus intent. While it would seem important to capture the philosophy of Indian thought to guide these developments, the majority of consultants were not Indians and an examination of these efforts in situ was not

made. Another formula was advanced that addresses the complex issues in a simplistic manner. The amendments require greater attention and substantiation of the bases for removal of Indian children and their placement in foster care. The more precise information required and elimination of the escape clause, "good cause to the contrary," may provide the stimulation necessary to address the complex problems of Indian families who need support.

3. The adoption of Canadian Native children by U.S. citizens

The needs of the adoption marketin the U.S. maintain a high demand for children. When the U.S. tightened up adoption practices, many agencies turned their faces to Canada where Native children have fewer protections and the provincial governments control services to children in most areas. Because the jurisdiction of bands and reserves in Canada is not well recognized and respected, their children are in special danger of being removed from their homelands. The provinces contract with private agencies to provide services to these children. Unfortunately, the history of cooperative efforts between these agencies and the bands is poorer than what exists in the U.S. Native children are brought to the U.S. with no arrangements for them to meet their families and maintain any relationship with their communities. Too often these adoptions are disrupted and the children enter our juvenilejustice system from which some never escape. The experiences of physical, sexual and emotional abuse experienced by many of these while in adoptive placement are severe. Young people who are now being referred to me by Native agencies in Canada present a picture of serious damage. In addition to the trauma that they have experienced in their placements, these children often do not know whether they are U.S. or Canadian citizens. This may not seem like a tremendously serious problem to some of us and should be easily clarified. In addition to the severe identity confusion these children experience as a consequence of their placements, they see themselves as being without a country. Recent efforts to assist these children with these problems reveals the confusion and lack of information by the agencies that arranged these adoptions. One agency in York, Pennsylvania complained that the laws had changed so many times that it did not know what to tell its clients. There apparently is no oversight of these international placements which means these children are completely undefended. The damage and trauma that these children have undergone is great and one has to raise a question of liability. The same agency cited above denied that any of the adoptions disrupted but rather that the children ran away. That same agency, exasperated with the burden of a very disturbed, deazf 15-year old Native child, threatened to take the child to the Canadian border and dump her if the Native agency did not come up with immediate plans for her care. Aside from the horrible treatment many of these children receive they eventually gecome

burdens in our country with funds expended for their imprisonment and financial support. Extending the protections of the ICWA to Native peoples in Canada should correct some of the maltreatment of these children. However, it is recommended that a closer look at these problems be taken and an examination of liability for the damage inflicted on these children be made. After many of these children have been abused in their adoptive homes they are simply thrown away and disowned. These practices by agencies licensed in our country must stop.

The Association accepts that social change takes time and it also recognizes that laws are passed to discipline and regulate. The amendments being proposed are necessary steps to greater clarification of the law and we hope this will continue to stimulate the kinds of practices that will ensure Indian families will no longer be destroyed.

Evelyn L. Blanchard
Vice-President

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Indian Child and Family Services

The Indian Child Welfare Consortium

April 27, 1988

Senator Daniel J. Evans
Vice Chairman
U.S. Senate Select Committee on Indian Affairs
Washington, D.C., 20510-6450

RE: Indian Child Welfare Act Amendments

Dear Senator Evans,

Two recent Indian Child Welfare cases, the Jeremiah Halloway case in Utah and the Baby K case in San Jose, California, have made spectacular national headlines because of the controversy involved in allowing tribal courts to decide the fate of their children. Both happen to be Navajo cases, but the situation could occur in any tribe.

Tribal assertion of rights over Indian Child Welfare cases have finally brought the Indian Child Welfare Act to the attention of the public, but it is attention that has been misconstrued and is damaging to Indian people and tribes. Both cases involved non-Indian families in custody disputes over their adoptive Indian children. Unfortunately, no one, including the media, has pointed out that the Indian tribe involved in both cases, the Navajo, did what it believed best for the children. In both cases, the Tribe recognized the damage that could be done to the child by removing it from the only parents it had known and chose to allow guardianship with the non-Indian family with liberal visitation with the child's extended biological family and continued contact with the Tribe. These actions are all in keeping with the spirit and the letter of the law--the Indian Child Welfare Act.

More importantly, people must not forget what those familiar with the Indian Child Welfare Act know: that wholesale removal of Indian children from their families and heritage (25-35% of all Indian children prior to the passage of the ICWA) and their subsequent placement in non-Indian homes was highly destructive to the children's emotional health and was decimating Indian families and tribes.

Besides the anguish caused to the non-Indian families involved in the cases mentioned above, a sense of hopelessness is developing among those of us who work for Indian social service programs. We think the Indian Child Welfare Act will never work to the advantage of Indian people as long as there is no system to enforce this law.

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Congress enacted the Indian Child Welfare Act in good faith. Unfortunately, the Act lacks the teeth necessary to ensure it will be followed. Currently, enforcement of the law is predicated on choice rather than penalty, causing many social workers to choose not to bother with the cumbersome rules of the law.

Government leaders, social workers, public and private adoption agencies, juvenile court judges and attorneys--all who are required to follow the law--must realize that they can face criminal penalties for not following the law, for not actively seeking and identifying children as Indians when they are up for adoption or are being removed from the custody of their parents or caretakers, for not notifying the respective Indian tribes, and for not placing Indian children with members of their extended family, with a tribal member or in an Indian home approved by the tribe.

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), runaways, substance abuse, and violent deaths. This is not a good legacy for any government to leave for any of its people.

Today, those of us trying to carry out the Act find ourselves frustrated by workers at all levels in most states and counties in these United States, workers who have no cultural sensitivity and who in this pluralistic society of ours continue to operate as if we are indeed some homogenous pot of interchangeable peoples. Our strength as a nation is our difference.

We urge your support of the ICWA amendments which are currently before the Senate Select Committee on Indian Affairs. The amendments will strengthen adherance to the Act by invalidating negative court decisions concerning the Act, addressing new issues that have emerged in the last ten years, and clarifying language in the original law.

We also strongly urge the inclusion of criminal penalties to the Act. The pain suffered by the non-Indian adoptive parents and the portrayals of Indian tribes as callous and uncaring occur only because an existing federal law is violated repeatedly across this country every day and no penalties are exacted. If states and counties are not penalized in some significant way for failing to carry out the Indian Child Welfare Act, there will continue to be Jeremiah Halloway's and Baby K's. There is absolutely no reason for this to be.

Thank you for your continuing interest in the rights of Indian people and for your concern about the welfare of their children, an important element in the future of these United States.

Sincerely,

Rose-Margaret Orrantia
Executive Director

RMO:kd

SENATOR DENNIS DeCONCINI

STATEMENT

ON

S. 1976, INDIAN CHILD WELFARE AMENDMENTS

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

MAY 11, 1988

MR. CHAIRMAN, AMONG THE WITNESSES WE ARE HEARING FROM TODAY ARE TWO INDIVIDUALS WHO REPRESENT THE STATE OF ARIZONA AND THE NAVAJO NATION. I WANT TO WELCOME THEM AND EXPRESS MY APPRECIATION FOR THEIR INPUT ON S. 1976. BECAUSE WE HAVE 20 DIFFERENT TRIBES IN MY STATE THE INDIAN CHILD WELFARE ACT IS VERY IMPORTANT. THE ARIZONA TRIBES HAVE VERY YOUNG POPULATIONS. THEY PLACE A HIGH PRIORITY ON THE SOCIAL WELFARE OF THEIR CHILDREN.

UNFORTUNATELY THE FEDERAL GOVERNMENT HAS NOT PROVIDED THE NECESSARY SUPPORT THE TRIBES NEED TO RESPOND TO THEIR CHILDREN'S NEEDS. YET A RECENT REPORT ON THE INDIAN CHILD WELFARE ACT'S IMPLEMENTATION FOUND THAT INSPITE OF THE LIMITED RESOURCES AND SUPPORT FROM THE FEDERAL GOVERNMENT, THE TRIBES ARE DOING A NOTABLE JOB OF PROTECTING INDIAN CHILDREN AGAINST UNNECESSARY DISPLACEMENT FROM THEIR FAMILIES AND HOMES. THE TRIBES ARE FOLLOWING STANDARDS OF GOOD CASEWORK PRACTICE.

I WANT TO EMPHASIZE THAT THE INDIAN CHILD WELFARE ACT PROVIDES A FUNDAMENTAL BASIS FOR THE CONSIDERATION OF CHILD WELFARE CASES WHERE THE INDIAN CHILD AND NATURAL PARENT IS DOMICILED ON A RESERVATION. IT ENABLED THE TRIBES TO SET UP WITHIN ITS SOCIAL WELFARE AND JUDICIAL SYSTEMS A PROCESS FOR REVIEWING AND DECIDING THESE CASES. THIS BROUGHT INTO THE TRIBAL GOVERNMENTS A SYSTEMATIC WAY OF DEALING WITH INDIAN CHILD WELFARE CASES. IT MAKES SURE THAT STATES WORK IN CONCERT WITH THE INDIAN TRIBES ON THOSE CASES.

THE LAW DOES NOT PLACE ANY MORE BURDENS ON THE INDIVIDUALS WHO WANT TO PUT UP CHILDREN FOR ADOPTION THAN THE STATE LAW PLACES ON OTHER CITIZENS. I WANT TO EMPHASIZE THIS BECAUSE I BELIEVE THAT MANY OF THE HIGHLY PUBLICIZED CASES INVOLVING INDIAN CHILDREN MISREPRESENT THE TRIBAL GOVERNMENT'S ROLE AND THE FEDERAL LAW. WE ARE LED TO BELIEVE THAT THE TRIBE IS INTERVENING IN STATE PROCEEDINGS FOR THE SOLE PURPOSE OF TAKING THE CHILDREN AWAY FROM THE FOSTER OR ADOPTIVE HOMES OR FOR THE PURPOSE OF DENYING THE WISHES OF A NATURAL INDIAN PARENT TO PLACE A CHILD IN A NON-INDIAN HOME. THE LAW DOES NOT GRANT TRIBES THIS RIGHT. THE LAW DOES GIVE THE TRIBE THE RIGHT TO REQUEST THAT ITS COURTS BE GRANTED JURISDICTION SO THAT THE MERITS OF THE PROPOSED PLACEMENT CAN BE HEARD IN TRIBAL COURTS.

I WANT TO SUBMIT FOR THE COMMITTEE HEARING RECORD A LETTER FROM THE CHAIRMAN OF THE NAVAJO NATION, PETER MACDONALD, WHICH EXPLAINS HOW THE BABY KEETSO CASE WAS RESOLVED. HE STATES ELOQUENTLY THE REASONS WHY THE TRIBE AND NAVAJO PEOPLE BELIEVE IN THE IMPORTANCE OF CONSIDERING SUCH MATTERS WITHIN A TRIBAL CONTEXT. I BELIEVE THAT IT IS IMPORTANT FOR THIS COMMITTEE AND CONGRESS TO LISTEN TO THE TRIBE. WE MUST NOT BE SWEPT AWAY BY MISUNDERSTANDINGS.

I LOOK FORWARD TO THE TESTIMONY OF ALL THE WITNESSES HERE TODAY. I EXPECT THAT WE CAN ALL AGREE ON THE BEST WAY TO PROTECT THE BEST INTEREST OF ALL INDIAN CHILDREN.

Testimony of the National Committee For Adoption
William L. Pierce, Ph.D.
Senate Select Committee on Indian Affairs
May 11, 1988

On behalf of the Board and membership of the National Committee For Adoption (NCFA), I wish to thank you for the invitation to testify here today. NCFA is the headquarters organization of a non-profit, voluntary movement to strengthen adoption and related services.. NCFA was founded in 1980. It has 140 local adoption or maternity services agencies throughout the United States in its membership. This statement does not necessarily reflect the views of all our board, member agencies or individual members. NCFA's members are all non-profit, voluntary organizations guided by volunteer board members and staffed predominantly by professional social workers.

In addition to providing technical assistance to its member agencies, NCFA works for the development of adoption-friendly policies and practices by public and private institutions. It also speaks and publishes for adoption and maternity services agencies as well as those families and individuals touched by adoption.

NCFA is supported by member agency dues, grants from foundations, corporations or philanthropists, individual member dues, contributions, and the sale of materials. NCFA currently receives no direct government funds.

Generally member agencies receive the majority of their support from

fees for services. They also are supported by purchase of service contracts as well as support from private contributions and foundations.

Back when the Indian Child Welfare Act (ICWA) was being developed I was the Assistant Executive Director of the Child Welfare League of America. In that role I took part in the negotiations that brought about passage of the ICWA and, with others, sought its enactment. In 1980 I left that organization to join the newly-founded National Committee For Adoption (NCFA), where I serve as President and chief executive officer. In that role, I have had the opportunity to examine adoption in America in detail since it is adoption that our organization mainly focuses on. From this perspective I have been able to study the impact of the ICWA on adoption as it relates to the birthparents and children that are covered by the Act. Our comments are directed toward only one issue that is covered by the ICWA -- adoption. We are speaking only with respect to those aspects of foster care that specifically relate to adoption. As our organization is made up of private, non-profit agencies, we will not deal directly with the provision of foster care nor with involuntary termination of parental rights. And we freely admit that we are not experts in the complex field of Indian affairs. But we are experts in adoption -- and would like to comment on this specific aspect of the ICWA.

The Indian Child Welfare Act of 1978 should be seen as a major attempt to address a unique situation. Despite the fact that the

United States government recognizes the sovereignty of Native American tribes, at the time of enactment of the ICWA many Indian children were apparently being placed without recognition of this sovereign relationship. There is no question that some baby brokers -- either unethical private placement intermediaries or agency workers -- were taking advantage of the impoverished situation of some women on some reservations to literally purchase babies from Indian women. And there is no question that some few agencies, both public and private, and some social workers, both those working for agencies or in private practice, were largely insensitive to the needs of Indian women and children. NCFA supports the concept that the sovereign governments of Indian tribes should have a role in child welfare proceedings concerning tribal members. We disagree with some witnesses that have come before us today and at the hearings in November regarding the scope of this role and how this role should be limited. But we do believe that the sovereignty of Indian governments and the trust relationship between the U.S. and Indian governments makes the existence of a working ICWA a necessity. In fact, we would wholly disagree with some people who believe that child welfare proceedings involving some racial or ethnic groups, such as black or biracial children, should be treated in the manner similar to that in the ICWA. Such a proposal completely ignores the unique sovereign status of Indian tribal governments.

Ten years after the enactment of the ICWA, it is appropriate that these hearings take place. Our experience is that the ICWA has had

some unintended consequences and that some improvements in the Act need to be made. However, we believe the direction taken in S. 1976 neither addresses those unintended consequences nor improves the act.

The Indian Child Welfare Act is inadvertently driving Indian women or women carrying babies of Indian descent into the clutches of unethical, sometimes downright criminal, private intermediaries. Frankly, this is an effect of the Act that I did not foresee ten years ago, though I honestly believe I should have. Before I elaborate, I feel, based on testimony presented to this Committee in November, that a brief discussion of the voluntary adoption process is necessary. One witness at the November hearings testified that "Private agencies are under enormous pressure to locate adoptive children for childless families...These agencies consistently show an utter disregard for the Indian Child Welfare Act...it seems the principal objective of such agencies is to get Native families out of the way so that they can meet the demand for adoptive children." The reality is different. Good, ethical adoption agencies see the pregnant young woman and the father to be, when he is still involved, as the primary client. Serving young, single or troubled would-be parents is why these agencies exist. The notion that adoption agencies such as those that are members of NCFA somehow profit from the crises facing young pregnant women is ludicrous. Today, it regularly costs an adoption agency up to $14,000 to provide a full range of services to a pregnant client. Such services include private prenatal care, accredited high school

education, and maternity home care. The average fee collected from adoptive parents by our agencies in 1987 was less than $7,000. If adoption agencies were in the business of treating babies as chattel and birthparents as some sort of factories then these agencies would no longer exist. The public outcry following the inevitable media investigations and revelations would close the agencies down. But further testimony that adoption agencies exist to help women in need is found in this telling fact: at a time when even public, tax supported social service agencies are turning away pregnant minority women seeking adoption services, NCFA agencies are serving these women and placing their babies, even though doing so is creating a deficit for some agencies of up to $300,000 per year.

Our greatest concern about the Indian Child Welfare Act is that it is depriving biological parents, Indian or otherwise, of free choice. The result is devastating for Indian parents and their children. Most disturbing is that the ICWA is driving many Indian women away from the charitable services provided by good and ethical non-profit adoption agencies and into situations that are not nearly as ethical or safe. Agencies report that it is common for a Native American woman to approach an agency about adoption services but, upon hearing of the requirements of the ICWA, she disappears, never to be heard from again. One agency reports that this occurs in at least 90% of cases, and this is an agency that has approximately 50 pregnant Indian women come into its offices every year. Based on the agency's estimate of 90%, this means that at this one agency alone 45 Indian women are being forced to pass up ethical charitable

services because of the ICWA.

It is the Indian Child Welfare Act that is forcing Indian women to make this decision. These Indian parents do not wish to have the tribe notified, do not wish to have their relatives notified of their pregnancy and their adoption plan. For most women this results from a desire for confidentiality. Agencies report that these women are incredulous when told that the tribe must be told about their pregnancy, and their extended family too. They do not understand why they can't make a confidential decision on their own, why they can't do so even if they are 18 or older. These women often never return to the agency. Other women "disappear" because they fear that their child could be transferred to the tribe against their wishes. While the current law does specifically say that the birthparent can object to the transfer of a child custody proceeding to the jurisdiction of a tribal court, interpretations vary on this point. The recent case that has been covered prominently in the media about the Navajo birthmother, Patricia Keetso, who had placed her child with a non-Navajo couple that she had chosen and then saw her child taken to the reservation by the tribe against her wishes, is a case in point. As this Committee is well aware, the situation on many of the reservations is such that their populations are too frequently marked by poverty, unemployment, alcoholism, and other social ills. When told of the requirements of the ICWA, and when told that other people must be told of her pregnancy, many young women express the same sentiments that Ms. Keetso did when she reportedly said "There's nothing for [my baby] there" (USA Today,

4/22/88).

When Indian women, in some cases 90%, are forced to run away from ethical social services agencies because of the requirements of the Indian Child Welfare Act, then something is amiss. We do not have to wonder what happens to these women. We know one of three things happens -- none of which tribes or backers of Indian interests support. Some end up at abortion clinics, even though this was obviously not their first choice. NCFA has no position on abortion, but we do believe that it is wrong when any woman feels compelled to have an abortion because she lacks any other confidential alternative. The result in those instances is obvious: less Indian children on this Earth.

Other women are deciding to parent their children, even though they neither wish to parent nor are they prepared to do so. The results are well documented: more poverty, more welfare, less schooling, more child abuse -- in all, a terrible prognosis for child and mother.

And other women are running right to attorneys or agencies with a reputation for being able to "finesse" the ICWA. And some of the lawyers who specialize in private adoption -- not all, but some -- are little more than baby brokers. Women run to these private attorneys because the word is out, the word on the street is clear: many attorneys are willing to ignore the Indian Child Welfare Act. So are some unethical agencies. And some of those who are helping

women avoid the ICWA are well-meaning individuals or groups with a strong "pro-life" orientation who know confidentiality is a requirement if the woman is to be able to carry to term.

One of the concerns when the ICWA was enacted was that Indian women were being coerced or misled into placing their children for adoption. We believe it is accurate to say that dubious practices in adoption are more prevalent today than ten years ago and they occur commonly but not exclusively in the private adoption market. It is becoming common place for a pregnant woman dealing with a private adoption attorney to be asked to sign a "pre-adoption agreement" before she ever gives birth. These official looking agreements state that the woman agrees to place her yet unborn child with the clients of the attorney in exchange for various benefits, usually medical expenses or living expenses. While these "pre-adoption agreements" are not legally binding, to a 17 or 18-year-old young woman with no legal expertise they can be quite imposing and can be -- and are -- used to pressure young women to relinquish their children. Today, we are urging the Select Committee to amend the ICWA so it does not have the effect of driving Indian women into such situations.

We believe that there is a basic principle that ought to function in respect to all adoptions. This includes those involving members of Indian tribes, members of other racial or ethnic groups, citizens of other nations, and persons holding various religious beliefs or who are members of various religious faiths. That principle,

irrespective of these and other factors (including the fact that biological parents may be adolescents), is that a biological mother (and if he is known and involved, the biological father) has the right to determine the sort of adoptive home she wants for her child. This does not mean, as in the case of either "surrogacy" or "baby-selling" schemes, that the biological parent or parents can accept money or other things of value in return for the transfer of parental rights. Nor does it mean that we approve of other inappropriate or illegal actions that some few biological parents may involve themselves in, or be led to by unscrupulous individuals. In other words, while we accept the premise that a biological parent or parents have the right to make an informed, voluntary choice of the sort of adoptive home they wish for their child, they do not have the right to accept inappropriate payments, services or benefits in return for that transfer. Children are "resources" but they are not the "property" of their parents or anyone else.

Children may not be considered "property" because they, too, have rights, and the best interests of children must be considered when there is a determination regarding where a child will live permanently (or, for purposes of foster care, reside temporarily). We recognize both the rights of biological parents to make informed, voluntary choices for their children and for those choices to be made in the context of what is in the best interests of the child.

It seems logical to us therefore, following this principle, to recognize that a biological mother and father may make a voluntary

informed choice to place a child for adoption with any fit family they choose. If, for instance, an Indian couple decides to place their child for adoption with their relatives and the home is fit (and I wish to emphasize here that we recognize that "fitness" must be sensitive to cultural, racial and other differences), that decision should be honored. If they wish to bypass their relatives and place with some other fit couple within their tribe, that decision should be honored. If they wish to place with some other fit couple who are members of some other tribe, that should be honored. And if they wish to place their child with some fit couple who are not members of any tribe or who have no Indian heritage, that should be honored.

By the same token, if an Anglo (or other non-Indian) biological mother and Indian biological father determine to place their child with some fit Indian family, that should be their choice. Or that same couple may determine to place their child with a fit Anglo (or other non-Indian) family. Or an Indian biological mother and Anglo (or other non-Indian) biological father may similarly choose either an Indian or non-Indian family.

We believe the same principle should be applied to all races, ethnic groups, national groups, and religious groups. While we recognize that these racial, ethnic, national and religious groups are concerned about "losing" their children, and while we recognize the need in any transracial, transethnic, transnational, or transreligious placement to inform and teach children about their

background, when it comes to a conflict between the right of biological parents to make voluntary, informed decisions about the home they wish for a child and the right of some other entity, including their own parents' interests in raising their grandchild, the laws and the courts should defer to the biological parents' wishes.

We recognize, as most members of the general public do, as most professionals involved in adoption do, that there is a subsidiary principle that also needs to be kept in mind when placing children for adoption. That subsidiary principle is that when possible, so long as the biological parents agree, the child should be placed with an adoptive family that most closely matches the family of biological origin. I can tell you that our agencies follow this principle, as do most good, ethical agencies. This principle is also tempered by the belief that a child should not wait an undue period of time for a permanent adoptive home because of these "matching" requirements, so long as diligent efforts have been made to recruit a pool of adoptive couples and other steps have been taken to find a similar home.

These principles are what guides most good, ethical adoption practice today. These principles are what makes possible the timely movement of tens of thousands of children in this country into loving, permanent homes. Most of those children, especially children born in North America, end up in "matching" homes. Many other children born in other countries, including Korea, India, and

Colombia, are adopted by non-matching families. Children in all these adoptive families are doing well. Research has shown that children adopted by racially and ethnically matching families have done well. And research has shown that children adopted by families that do not match the child racially and ethnically have done quite well, also. In fact, research into adoption disruption rates (about 15% for special needs placements nationally) has found that racial or ethnic difference between child and parents has no effect on the likelihood that a placement will disrupt. So who can argue with transracial adoptions, if the children are doing so well?

We have already addressed, albeit briefly, the issue of whether a child can be considered property, whether a child can be "owned" by a group or entity. This is an appropriate place to stop and expand upon this issue. There are some who argue that a child does indeed "belong" to, is indeed "owned" by, a racial, ethnic, or national group. Some argue that Black children "belong" to the black community, Jewish children "belong" to the Jewish community, Native American children "belong" to the Native American community/governments, Arab-American children "belong" to the Arab-American community, Puerto Rican children "belong" to the Puerto Rican community and so on ad infinitum. It is appropriate for the Black community or Jewish community or Native American community/governments or any other community to develop social services designed to serve members of that community. But we run into great difficulty when we try to determine what community "owns" a child. We run into great difficulty if we try to attach a title of ownership to every child who comes into contact with the child welfare

systems. For example, who "owns" a child that is part Native American, part Black, and part Hispanic? Or part Jewish and part Native American? Or any other combination you would like to choose? We can very quickly become more concerned about what label to apply to a child than about what is in the best interests of that child. We have seen children literally grow old and "age out" of foster care because someone determined that that child "belongs" to a certain group and therefore must be placed within that group.

Bear with me while I take this argument just one step further. We must recognize the semantic difficulties around discussions of racial classification, even in the dispassionate world of statistics. Here is what Monthly Vital Statistics Report, the report of the National Center for Health Statistics says:

> "The child's race is determined from the race or national origin of the parents. When only one parent is white, the child is assigned the other parent's race or national origin. When neither parent is white, the child is assigned the father's race or national origin, with one exception; if the mother is Hawaiian or part-Hawaiian, the child is considered Hawaiian. If information on race is missing for one of the parents, the child is assigned the known race of the other parent."

In other words, the racial classification system we use to identify children is rather arbitrary, and, one could argue, biased. It is one thing when this classification system is applied to statistics and exaggerates one population over another. It is quite another when this classification system could be applied to deny, through labeling, a biological parent or parents the right to determine what sort of fit family the child should be adopted into.

We could have the situation of a child whose mother is part-Hawaiian and part-Asian and a father who is part-Indian and part-Black. That child would be called Hawaiian for statistical purposes. But the child could also be Indian for purposes of the ICWA. And the child may be considered socially Black for adoption purposes. Yet the biological parents may wish the child placed with an Asian couple, or an Anglo couple.

The Indian Child Welfare Act must clearly and sensibly determine what constitutes an Indian child, for if this is not decided then more time will be spent trying to label these children than finding homes for them.

The Select Committee must realize that there are almost daily battles going on between parents, whether they be Indian themselves or carrying a child of Indian descent, and tribes over what happens to these parents' children. For the relative few biological mothers, and sometimes fathers, who are willing to suffer the pain, the complete loss of confidentiality, to fight the tribe, these battles create months and years of impermanency for the children and heartache for the biological parents. Just because these cases do not end up in the media, the Select Committee should not mistakenly believe that they are rare. They are not. And those Indian biological parents who decide not to fight do end up aborting, or becoming young single parents, or ending up in the private adoption market on an almost daily basis.

If S. 1976 is enacted into law as it is currently written, more

battles between biological parents and the tribes will break out, and more Indian women will feel forced to abort, to become single parents, or to find an unscrupulous individual or agency who will circumvent the Indian Child Welfare Act. S. 1976 would not only require that tribal governments be notified when an Indian parent wishes to place a child for adoption, but would also require that the adoption agency and the court go to extreme measures to prevent this Indian parent from placing her child. Section 102(d) of S. 1976 reads that "Any party seeking to effect a foster care, preadoptive or adoptive placement of...an Indian child under State law shall satisfy the court that active, culturally appropriate efforts, including efforts to involve the Indian child's tribe, extended family and off-reservation Indian organizations, where applicable, have been made to provide remedial services and rehabilitative programs designed to prevent such placement...and that these efforts have proved unsuccessful" (emphasis added). Not only must the agency try to actively stop an Indian parent from choosing to place her or his child for adoption but S. 1976 would require that if the agency somehow failed to stop the parent from doing so, then the tribe could take custody of the case even if the Indian parent objects. Section 101(b) states that "In any State court child custody proceeding involving an Indian child...the court shall transfer such proceeding to the jurisdiction of the Indian child's tribe...Provided further, That a parent whose rights have been terminated or who has consented to an adoption may not object to transfer" (emphasis added).

S. 1976 would remove all possibility for confidentiality for biological parents placing a child for adoption. Section 107 states that "An adopted Indian individual who has reached the age of eighteen, the Indian child's tribe or the Indian child's adoptive parents may apply to the court...[and] the court shall inform the individual of the names and tribal affiliation of his or her biological parents" (emphasis added). We strongly oppose this provision. The U.S. Supreme Court has agreed with many appellate courts that the privacy rights of biological parents must be protected. We also know from experience that given the choice between a confidential abortion and a non-confidential adoption, most women will choose abortion. Again, the result will be fewer Indian children on this Earth. We support a confidential mechanism whereby adopted persons of Indian descent can determine their tribal affiliations, as is called for in the current ICWA. We even support mechanisms like state voluntary adoption registries where biological parents and adult adoptees can meet when they both make their consent known. We do not support situations where one party can unilaterally intrude upon the life of another party, situations that would be created by S. 1976.

We believe that the ICWA needs amendments but that S. 1976 goes in the wrong direction. The ICWA should be amended so as to specifically state that a biological parent may make a request, in writing, to an authorized employee of a licensed adoption agency that neither the tribe nor anyone else be notified of her pregnancy and her adoption plan and that that request shall be honored. The

ICWA should also be amended to state that if a biological parent objects to the transfer of custody of a voluntary adoption or voluntary parental rights termination proceeding from a state court to a tribal court then such objection should automatically be honored. And we also urge the Select Committee to amend the ICWA to make it a federal crime, at a felony level, to engage in any baby selling or baby brokering activities involving Indian children and to prohibit the use of "pre-adoption agreements." Obviously, we oppose the provision in S. 1976 that specifically provides that a birthparent who has consented to an adoption plan may not object to the transfer of custody to a tribal court in voluntary adoption proceedings. Such a provision would only go further in forcing women -- Native American and others carrying babies of Native American heritage -- into choices they do not wish to make.

The current Indian Child Welfare Act has also inadvertently created situations that fail to protect the best interests of Indian children.

The current definition of Indian child for purposes of the ICWA states that an Indian child is one who is a member of an Indian tribe or who is eligible for membership and has at least one biological parent who is a tribal member. This definition has created confusion and delays that work against the best interests of children. Agencies, judges, child welfare workers, attorneys, guardians ad litem, etc. are not clear as to who is an Indian child for purposes of the ICWA. This can create delays when a judge

orders further investigation to determine if a child comes under the jurisdiction of the ICWA. And, while the current law does state that the definition of parent "does not include the unwed father where paternity has not been acknowledged or established," the role of the biological father's possible Indian descent in adoption proceedings has not been clarified, again causing delay and confusion, especially when the biological mother is non-Indian.

An example of a case currently unsettled can illuminate our concern about the definition of "Indian child." (We have been asked to delete all identifying information, even the State.) The agency had worked closely with a pregnant non-Indian teenager in foster care concerning plans for her then unborn child. The young woman chose adoption. The agency attempted to work with the young woman to find the biological father. The young woman claimed to be unaware of the whereabouts of the father. The agency asked if the biological father was Indian. The young woman said that no, he was not Indian. The agency worker offered to drive the young woman from bar to bar looking for him in order to ask for his consent to the adoption. She refused, so the agency published a notice in a local newspaper hoping to locate the biological father. This was not successful and the parental rights of both biological parents were terminated under state law. Later, after the child was born, the mother of the biological father showed up and claimed that the biological father indeed was Indian and that she wanted custody of the child. Now it is eight months later. The child has spent his first eight months of life in foster care. The biological father has never been heard

from. And there is no end in sight at this point, without possible, indeed probable, lengthy judicial proceedings.

S. 1976 would create even greater confusion. Section 4(5) would provide that an Indian child for purposes of the ICWA would include "any unmarried person who is under age eighteen and...is of Indian descent and is considered by an Indian tribe to be part of its community...[and] if a child is an infant he or she is considered to be part of a tribal community if either parent is so considered" (emphasis added). This will broaden the scope of the ICWA to such an extent as to create greater confusion and even more delays. The ones that will be hurt will be the children in question. Is it realistic to require that a court determine if any tribe would consider a child as "part of its community"? We think not.

For the sake of clarity, for the sake of predictability, and in order to end confusion and delays that now occur, we believe that the ICWA should be amended to state that "Indian child" be defined as a child who has two biological parents that are members of a tribe. They need not be members of the same tribe, nor need they be residents of any reservation, but they need both be members of a tribe. And in situations where paternity has neither been established nor acknowledged, then the tribal membership or non-membership of the biological mother would be the determining factor.

The current Indian Child Welfare Act provides that a biological

parent may revoke the consent to adoption at any time up until the final adoption decree is entered. The specific wording is that "the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent." This means that, on the average, a consent can be revoked and the child be "returned" up to six months after placement. In some states this can mean up to a year. And given the difficulty that can occur in getting on a court docket, it can sometimes mean even longer. This provision is having a negative, inadvertent affect on Indian children who are eligible for adoption. Agencies report that many would-be adoptive parents, including Indian would-be adoptive parents, are unwilling to adopt an Indian child because of the possibility that the child could be removed at any time up to six months after placement, or even up to a year after placement. A recently completed study by CSR Incorporated for HHS' Administration for Children, Youth, and Families concluded that even where efforts to recruit Indian families for Indian children are intensive, results are "discouraging" (April 16, 1988 CSR/ACYF briefing). Given the difficulty in recruiting Indian adoptive families, it seems very unwise to maintain a provision of the current ICWA that actually works to discourage those Indian families who do want to adopt from adopting.

State laws, in an attempt to balance the need of children for permanency and the need of biological parents to make an informed decision, provide that no consent to adoption signed prior to the

birth of the child is valid and that the biological parents have a limited time to revoke consent. This limited time often ranges from three days to ten days. In some states it is longer. And some state laws provide that no properly effected consent to adoption may be revoked.

We have always maintained that when a biological parent has had the benefit of professional counseling provided by an employee of a licensed adoption agency prior to signing a consent to adoption, then the ability to revoke that consent should be limited. To do otherwise creates situations where children are left in impermanence and prospective families are unwilling to adopt, much like what is happening to some Indian children and some Indian prospective adoptive families. We urge the Select Committee to examine the effect of this provision of the ICWA and to consider bringing the ICWA in line with current state laws.

There are other children being hurt, though not directly because of the Indian Child Welfare Act itself. Rather these children are being hurt because of the practices of some less than ethical individuals or agencies. Increasingly, we are getting panicky calls from adoptive parents or birth parents who have fears for the well-being of the children with Native American heritage that have been adopted -- often years ago. Just this week, I received a call from a mother of a child adopted several years ago. This family had wanted to adopt a child in need of a home, regardless of race or ethnicity, just a child needing a home. They had wanted to adopt a

specific Black child waiting for a home. They were told they could not adopt the child because they were White and the child had to be placed into a Black home. But this family did adopt, though not that Black child. That child stayed in foster care for another three years. The child they adopted had an Anglo birthmother. The birthmother did a "direct placement" -- sometimes called an "open adoption" -- with them. The birthmother confided that the birthfather was Native American and lived as an enrolled member of a tribe on a reservation. On advice provided by the private adoption lawyer they went to, they never attempted to terminate the parental rights of the biological father, even though his identity and location were known. The adoption went through, but today they live in constant fear that the kinds of nightmares they read about in the national press or see on television could happen to their family. They now feel their lawyer and their "open adoption" were both examples of bad judgment on their part, but it is too late for them. It need not be too late for others, if people will heed the warning of NCFA and this Select Committee: deal only with ethical lawyers or agencies. And be wary of "open adoption" arrangments, direct placements done without the assistance of ethical and knowledgeable professionals and be wary of other negotiated conditions of adoptive placements. "Open adoptions" can easily lead to later conflict, perhaps even lawsuits filed, justly or unjustly, under the Indian Child Welfare Act, with the result being some sort of negotiated solution far short of the permanency children and families need, as increasingly seems to be the situation today. (This case was given to me on condition that I share none of the details as to location,

ages, sex of child, or tribe. Given that condition, I accepted the information to share with this Committee.)

With all due respect to other witnesses who are testifying today, it is not only families like the one that I have just described who become victimized. Many Indian young women and their children become victimized by the private adoption market. It is routine practice among some attorneys to go along with or suggest a plan whereby one says that a child born to an Indian woman, or to a non-Indian woman impregnated by an Indian man, is a Mexican child, a Puerto Rican child, or a Filipino child in order to completely avoid the requirements of the Indian Child Welfare Act.

It is also routine among some lawyers to routinely ignore or finesse the rights of biological fathers, especially if the biological father might be Indian. An example, of course, is the case from Kentucky, involving a baby being taken to the Cayman Islands by the birthmother. That adoption is controversial and has drawn criticism from Kentucky and Indian child welfare groups. The attorney who arranged that adoption, David Keane Leavitt of Beverly Hills, CA, reportedly did 13 adoptions in the Grand Caymans last year. Leavitt also was quoted in The (British Columbia, Canada) Province last year about his placements to that country. Leavitt said he's placed "between 10 and 15" California babies in British Columbia in the past couple of years. The paper said, "Under California law, the father has to give permission for an adoption within the state if he's known by the mother. But if the baby is adopted by B.C.

[British Columbia] parents only the unwed mother's permission is required. In two or three cases, Leavitt, said, the natural mother travelled to B.C. to give birth just to avoid legal battles in California."

The article stated, "B.C. is a safe place for them (the birthmothers) to have their children adopted," said Mr. Leavitt.

There is even one fellow, Richard Gitelman, a man who is currently facing trial on a Pennsylvania arrest warrant, who is at this moment trying to set up an operation in the West Indies Island of Monserrat. His reported plan is to fly pregnant women into the island, have them give birth there, then fly them off without their babies and place their babies with couples willing to pay the price.

Beginning in 1972, in Stanley v. State of Illinois (405 U.S. 645), the U.S. Supreme Court recognized that unwed fathers have certain rights. Most agencies press birthmothers to name the fathers for many reasons, including their wish to see that the adoption itself will not be jeopardized later on by the birthfather challenging the adoption because his rights were not properly terminated. But lawyers such as Mr. Leavitt read the law quite differently. Here is what Mr. Leavitt said in Congressional Quarterly's Dec. 11, 1987, Editorial Research Reports, "Independent Adoptions": "Adoption agencies, according to Leavitt, misunderstood the Stanley ruling and don't realize it has been 'almost totally reversed' by the Lehr decision. The agencies, he says, 'almost invariably insist on dragging the guy in...and start trying to

talk him into hanging around and paying child support and, in effect, discouraging [the mother] from doing what she wants to do, which is...separate from her child so she can get a new life started and know her baby will be safe. These agencies blow their own adoptions out the window.'"

This testimony is already too long and this issue too complex for us to discuss in details some of our other concerns with S. 1976. We do wish to list these briefly here with the hope of providing greater detail to the Committee in the future. These concerns are:

-S. 1976 would exempt Indian tribal governments from some basic foster care requirements of Title IV-E of the Social Security Act while requiring that the tribes be eligible for Title IV-E money. (Section 201(b) and (c))

-S. 1976 would create an expensive, bureaucratic and paperwork nightmare for states and private adoption agencies by requiring that states ensure that private agencies be in compliance with the ICWA for state licensing and that private agencies be audited for ICWA compliance by the state on an annual basis. This would require that limited resources needed for child welfare activities be spent preparing, conducting, and responding to these yearly audits. (Section 115)

-S. 1976's requirements for compliance thoughout the bill ignore private, non-agency intermediaries.

-S. 1976 would require that all records, reports, or other documents be provided by an adoption agency to the tribe. This will include even confidential agency documents that are not filed as part of the court proceedings. (Section 102(c))

-S. 1976 expands the definition of "Indian tribe" to include Canadian Indians which may cause greater delay and bureaucratic obstacles to the placement of children of Native American descent. (Section 4(9))

-S. 1976 fails to specify the role of the Interstate Compact on the Placement of Children in relation to tribal governments.

-S. 1976 fails to allow for confidentiality of any party to an adoption, including birthparents and adoptive parents, even when these parties so desire. Section 301(a), for example, requires that all identifying information automatically be given to the tribe by the state court.

-S. 1976 nowhere addresses the child's right to permanency and to a family.

-S. 1976 all but requires that adoptions of children covered by the ICWA be "open adoptions," adoptions that are at best experimental and which many parties would not consider adoption at all but rather a form of extended foster care. (Section 102(h))

To conclude, we wish to thank the Select Committee for inviting

us here to share our views regarding the workings of the current Indian Child Welfare Act and the proposed amendments in S.-1976. When the ICWA was enacted in 1978 it represented a major attempt to recognize and involve the sovereign Indian governments in child welfare proceedings concerning Indian children. We do believe that the ICWA was a progressive development, one that was necessary due to the unique U.S. - Indian relationship. That we are here today highlighting some inadvertent effects of the ICWA and calling for some amendments to the ICWA should not be seen as a condemnation of the ICWA. After ten years of experience, it is to be expected that improvements in the Act would be necessary. As is clear from our comments we do not believe that the improvements are to be found in the direction taken by S. 1976. We do hope however that the Select Committee will examine the issues that we have raised and take action to address them in order to make the ICWA a law that indeed works for Indian children and their parents.

TESTIMONY ON S. 1976,

AMENDMENTS TO THE "INDIAN CHILD WELFARE ACT OF 1978"

MAY 11, 1988

BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

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