provisions without adjustments. Before introducing our proposed text, some background on aboriginal Canadians will be useful.

6. Under section 35 of the Constitution Act, 1982 there are three "aboriginal peoples of Canada": Indians, Inuit, and Metis. Most aboriginal groups refer to themselves as "First Nations."

7. The Indian Act provides for the registration of Indians, and registered ("status") Indians may or may not also be listed as members of particular "bands." Bands exercise various degrees of internal self-government under the Indian Act and agreements with the Minister. In northern Quebec, an alternative form of Indian regional government has been established since 1975 as part of a comprehensive land-claims agreement. Except as provided by a treaty or agreement, provincial child-welfare laws apply on reserves.

8. Inuit are not organised into Indian Act bands, and there are no reserves. The Inuit of northern Quebec have established a regional administration as part of their land-claims agreement with Ottawa, but Inuit self-government elsewhere is conducted by village mayors and councils under both federal and territorial supervision. Inuit legal status is in a dynamic state pending the settlement of land claims to two-thirds of the Arctic, and one proposal under serious consideration is the organisation of a new, predominantly-Inuit province.

9. Metis, properly speaking, are Prairie groups, ~~whose treaty status was terminated by Parliament following Riel's rebellion a century ago~~. Many still live in distinct rural communities, particularly in Manitoba. In addition, there are thousands of "non-status Indians" throughout Canada whose ancestors were "enfranchised" involuntarily because of marriage to non-Indians men, or under a programme which resembled the United States' "forced fee" policy of the 1910s. Canada recognises national-level Metis and non-status political organisations only.

10. While "bands" are the basic unit of Indian Act administration they are an artificial construct based on residence on a reserve, rather than cultural unity. Some bands are multitribal, but in a majority of cases the ethnohistorical tribe or nation is divided into several bands. Although bands have called themselves "First Nations," they are not "nations" in the same sense as the ~~Blackfeet~~ or Haida. In many instances, including Mikmaq and Blackfeet, the traditional national political organization persists, but is not recognised by Canada.

11. The situation is further complicated by "Provincial/~~Territorial~~ Organisations" (PTOs). Originally authorised in 1972 to pursue land claims, PTOs also receive federal funding for a variety of human-services programmes. Other regional aboriginal human-services organisations have also emerged recently, outside the band or PTO structure.

12. The superimposition of bands, PTOs, other government-funded aboriginal organisations, and traditional national councils makes the jurisdictional situation somewhat more complex and uncertain in Canada than in the United States, where authority is more or less clearly lodged in tribal councils recognised and listed by the Secretary of the Interior. Indeed, the Canadian situation is somewhat comparable to Alaska, where there is an unresolved distribution of responsibilities among municipal, tribal, regional aboriginal, state and federal agencies.

13. In Atlantic Canada, for instance, Mikmaq people are found in five provinces. In Nova Scotia alone there are more than thirty Mikmaq reserves, some presently uninhabited. All Nova Scotia Mi'kmaq originally were registered as a single band, but in 1960 the Minister divided them into twelve bands, and apportioned the reserves among them. A PTO for Nova Scotia Mi'kmaq was formed in 1972, but Mi'kmaq in New Brunswick and Quebec fall within other PTOs, and a second Nova Scotia PTO was formed in 1987. There is a Native Council of Nova Scotia for non-status Mi'kmaq, as well as several wholly independent regional Mi'kmaq service agencies such as the Mikmaq Arts and Cultural Society. The traditional national government, the Grand Council, continues to function, especially in relation to treaties and claims, and maintains a consular office in Boston.

14. The point of all this is to emphasize the necessity of taking Canadian organisational differences into account, insofar as they affect the locus of responsibility for child welfare. American caseworkers and judges need more precise guidance. Who should be notified, for example, when a Mikmaq child is taken into custody in Boston? The child's band--if it has one? A PTO? The Native Council? The Grand Council? Most have federally-recognised and funded responsibilities for community services; only the Grand Council has an office in the United States. A provision allowing aboriginal groups to designate agents for notice and intervention would be the most practical way to solve this problem.

15. The importance of a designated-agent provision is especially clear in trying to apply the placement-priority rules in section 105 of ICWA. A ~~Mikmaq~~ child may belong to a band, and may also be connected with one or more PTOs and other recognised regional ~~Blackfeet~~ organisations. Which one is the child's "tribe"? If the court cannot identify a suitable foster home within the child's own band (or reserve), can it place the child in any "Indian" home, rather than a ~~Mikmaq~~ home? That would be the result of treating "tribe" and "band" as equivalent.

16. Notwithstanding the relative complexity of the organisational system in Canada, we see no reason why the transfer provisions of section 101(a) should not apply, as long as there is a provision for designating agents as well. In a case where the child is not only Indian, but from another country, repatriation is especially desirable since the child's potential loss of status and identity is even greater. Although few aboriginal Canadian communities

have formal court systems, transfers should be encouraged wherever a suitable aboriginal agency or tribunal exists, or else to the appropriate Canadian forum.

17. Since aboriginal Canadians generally lack financial resources on the level enjoyed by U.S. tribal councils, provision also must be made for intervention by the Government of Canada, which has both an interest in, and legal responsibility for its aboriginal citizens. The Minister responsible for section 91(24) ("Indians, and lands reserved for Indians") of the British North America Act handles Indian, Inuit and Metis matters generally. At present, this is the Minister of Indian and Northern Affairs, but this of course may change as a result of future reorganisations of the Cabinet.

18. Our proposal for a new section of ICWA follows:

NEW SECTION

Sec. 125. Aboriginal peoples of Canada.

(a) Except as provided by this section, the provisions of sections 101(c), 102, 103, 104, 105, 106, 107, 110, 111 and 112 of this Act shall also apply to the aboriginal peoples of Canada and their children.

(b) The "Indian child's tribe," in the case of aboriginal peoples of Canada, shall be the child's Indian Act band or, if neither the child nor its parents are members of any band, the aboriginal government or most appropriate regional aboriginal organization with which the child's parents are connected by their origins or residence.

(c) Indian Act bands, other aboriginal governments, and regional aboriginal organizations may by resolution designate aboriginal organizations in Canada, or Indian tribes or Indian organizations in the United States, as agents for the purposes of this Act. Resolutions to this effect shall be delivered to, and promptly acknowledged by the Secretary, who shall publish a list of such designations annually in the Federal Register.

(d) For the purposes of section 102(a) of this Act, notice shall also be given to the Minister of the Government of Canada who is responsible for Indians and lands reserved for Indians.

(e) In any State court child custody proceeding involving an aboriginal Canadian child, the court shall permit the removal of such case to the aboriginal, provincial, or territorial court in Canada which exercises primary jurisdiction over the territory of the child's tribe, upon a petition, and absent unrevoked parental objections, as is provided for in other cases by section 101(b) of this Act.

TESTIMONY BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS ON OVERSIGHT OF THE INDIAN CHILD WELFARE ACT OF 1978

THE ALEUTIAN/PRIBILOF ISLANDS ASSOCIATION
THE COPPER RIVER NATIVE ASSOCIATION
THE KODIAK AREA NATIVE ASSOCIATION
THE NATIVE VILLAGE OF TANANA
AND
THE COOK INLET TRIBAL COUNCIL

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November 10, 1987

TESTIMONY BEFORE THE SENATE SELECT COMMITTEE

ON INDIAN AFFAIRS

This testimony is presented on behalf of the Aleutian/Pribilof Islands Association, the Copper River Native Association, the Kodiak Area Native Association, the Native Village of Tanana and the Cook Inlet Tribal Council. Collectively these organizations represent the interests of some 25 village tribal governments stretching from the Aleutian Chain to Interior Alaska to the Copper River valley. Cook Inlet Tribal Council also represents the interests of the Alaska Native population of Anchorage, comprising some ten thousand Native people. The villages represented by APIA, CRNA, KANA and CITC include both tribes organized under the Indian Reorganization Act and tribes organized outside that Act. Each administers a wide range of social service programs benefiting the Native people within their respective regions, including programs operated by contract with the Bureau of Indian Affairs under the authority of the 1975 Indian Self-Determination Act. In addition, each either is presently or has in the past carried out programs administered under the Indian Child Welfare Act. The Native Village of Tanana is in the forefront of a new trend in Alaska whereby larger villages are beginning to administer their 638 and Indian Child Welfare Act programs on their own after years of being served through the tribal confederations represented by the larger

regional associations.

Villages in Alaska -- we customarily use the term "village" rather than tribe -- are deeply concerned as are tribes elsewhere by the uneven successes made to keep the Native family together since passage of the Indian Child Welfare Act. This Committee will recall that at the time of the Act's passage it was reported by a Task Force of the American Indian Policy Review Committee that the rate of removal of Native children from their homes and placement in foster care was 300 percent as high as the rate for non-Native foster placement. The adoption rate for Native children was 460 percent higher than non-Native children, and 93 percent of those adoptive homes were non-Native. Record-keeping by state agencies in Alaska over the years has been so poor that it is extremely difficult to determine the true rate at which Native children today are being removed from their families, placed in foster or adoptive care, and placed with non-Native families. The unreliability of the data is compounded by the virtual lack of any centralized records over the fate of Native children caught up in the so-called "voluntary" adoptive placement system that operates outside state agencies. But we do know this: Native children continue to be removed from their families at disproportionately high rates, and they continue to be placed with non-Native families in substantial numbers. While practices across Alaska are uneven, generally speaking state agencies and state courts continue to lack sensitivity to the

traditional ways of Native upbringing and to life in remote rural Alaska. And private placement agencies continue to take advantage of young Native women in crisis as a ready source of children for childless white couples. We hope and trust that through these hearings Congress will carry forward the commitment made in 1978 to end these abuses by strengthening the Act.

Successful implementation of the Act in Alaska has also been thwarted by a prevailing attitude of hostility within state government to village tribal governments. As villages over the years have rekindled their tribal governments and have become increasingly active in matters affecting village children, the State has mounted a campaign in the courts to block Alaska's tribes. Taking refuge in usually sympathetic state courts, the Alaska Attorney General's office has vigorously pressed arguments that tribes somehow do not exist in Alaska, that Public Law 280-- of all statutes -- or the 1971 Alaska Native Claims Settlement Act abolished tribes in Alaska, that the Act's distinction between reservation and non-reservation children has no application in Alaska, and that villages in Alaska simply have no jurisdiction at all over the affairs of their own tribal children.

This campaign has been so successful that only last Friday the Alaska Supreme Court summarily reaffirmed its unique view that in enacting Public Law 280 and extending its provisions to

Alaska in 1959 Congress actually extinguished tribal governmental authorities over child welfare proceedings. In its new decision (a case known as In re K.E.) the Alaska Supreme Court did not even provide a legal analysis for its decision. It utterly ignored the United States Supreme Court's decision only a few short months ago in the California v. Cabazon Band case which had reaffirmed once again that Public Law 280 had no such effect. And it ignored the United States Supreme Court's decision in Iowa Mutual v. La Plante reaffirming the critical role of tribal courts in internal tribal affairs. As a result, although it is well-equipped with a tribal court, the Native Village of Tanana has been deprived the right to exercise its jurisdiction over one of its village children. The Alaska Supreme Court is now in the unique and unenviable position of being the only court in the Nation presently of the view that Public Law 280 extinguished tribal powers.

The Alaska Supreme Court is clearly wrong. But so long as its decisions remain in effect the promises of the Indian Child Welfare Act can never be fully realized for village Alaska. Perhaps the United States Supreme Court will see fit to correct these problems. If not, we can look forward to years more of litigation in the federal courts. And while we spend thousands of dollars and wait years and years for the uncertain results of such litigation, Native children in Alaska will continue to be deprived of the protections of their tribal governments which

Congress in 1978 expected and promised they would enjoy. Congress can put an end to all of this by making appropriate amendments to the Indian Child Welfare Act.

With these thoughts in mind we next discuss some of the specific areas where we believe clarifying amendatory legislation will substantially further the original purposes of the Indian Child Welfare Act.

1. Tribal Court Jurisdiction in Alaska.

According to the Act's legislative history it seems clear that Congress intended tribes such as Alaska Native villages in Public Law 280 states to exercise some measure of concurrent jurisdiction with state courts over childrens proceedings. This view was clearly expressed by the Department of Justice during this Committee's hearings on the Act. Except in Alaska, this is the prevailing view of Section 101(a) of the Act. This view is also consistent with the U.S. Supreme Court's interpretations over the years of Public Law 280 as preserving tribal powers and immunities. The Alaska Supreme Court stands alone in believing otherwise.

The Alaska Supreme Court has even suggested that Section 101 of the Act itself operated to extinguish any tribal powers in this area in Public Law 280 states. Such an interpretation of

the Act is plainly absurd and completely at odds with Congress' intent in the Act to foster and protect tribal interests, not cut them back.

Tribal governments in Alaska should not be discriminated against relative to tribes in other Public Law 280 states simply by virtue of a hostile state court. The Act must be amended to make it 100 percent clear that although state courts in Public Law 280 states may enjoy some measure of greater authority over certain matters than non-Public Law 280 states, tribal court jurisdiction in such states is not in any way impaired and remains fully operational.

It is likely that in a few Public Law 280 states, and certainly in Alaska, some tribal institutions have not yet fully developed to the point where they are able or would wish to exercise complete and exclusive jurisdiction over all proceedings involving village children. In such instances, such tribes should have the option of consenting to concurrent state jurisdiction. Although this is provided for in the Association on American Indian Affairs draft proposed bill, we do not believe this option should be a matter of negotiation with the state. Requiring that tribal consent to concurrent jurisdiction be by negotiated agreement leaves open the possibility that children in need would be the innocent victims of a failure of agreement to agree between an unwilling state and a tribe lacking the

resources to provide a full array of services to all its needy children.

2. Reassumption Petitions (Section 108).

Under current Section 108 a tribe in a Public Law 280 state may petition the Secretary of the Interior to reassume exclusive jurisdiction over some or all cases to the same extent as exercised by tribes in non-Public Law 280 states. We believe it is possible to amend Section 101 of the Act in such a way that Section 108 would become unnecessary. The requirement of Secretarial review and approval represents an unwarranted continuation of patronizing oversight of tribal matters by the Bureau of Indian Affairs. Each tribal government, not the Secretary, is in the best position to determine whether or not its exercise of exclusive jurisdiction in a particular area is feasible and in the best interest of its children. Moreover, the reassumption petitioning procedures are complex, burdensome, expensive and time-consuming, especially for small tribal governments like Alaska villages.

If some version of the petitioning procedures are to remain in the Act, we ask that the criteria be minimized and that the burden clearly be placed on the Secretary in the event he fails to approve a petition or fails to act within a reasonable time. Consideration should also be given to granting tribes procedural

and substantive protections similar to those currently being considered by this Committee in connection with amendments to the Indian Self-Determination Act.

3. Transfer of cases from state courts to tribal courts.

The current statute only explicitly addresses transfers of cases from state courts to tribal courts where the case involves a tribal child not domiciled or resident in Indian country. This makes sense in non-Public Law 280 states because that is the one situation where a state and a tribe arguably have concurrent jurisdiction. But in Public Law 280 states a tribe and the state may have concurrent jurisdiction over some proceedings involving children domiciled or residing within Indian country. Although the Act and its legislative history acknowledge this fact, the statute does not address transferring cases from state court to tribal court in such circumstances. This inadvertent omission can easily be corrected. In doing so, the standard favoring transfer of jurisdiction of such cases to tribal court should be considerably higher than non-Indian country cases since tribes clearly have a much stronger, powerful and compelling interest in children domiciled with the tribes. In our view transfer of such cases should be mandatory and with no exceptions.

4. Voluntary proceedings.

So-called voluntary proceedings represent one of our areas of very greatest concern. Voluntary placements are typically arranged either by a private attorney or through a private adoption agency. Typical of such agencies in Alaska is Catholic Social Services. Private agencies are under enormous pressure to locate adoptive children for childless families. Income and other criteria used by such agencies in screening adoptive families almost universally operate to exclude Native American families. The stage is therefore set for adoption of Native children into non-Native families.

These agencies consistently show an utter disregard for the Indian Child Welfare Act and the values it embodies. They make no active effort to find extended family members or other Native families willing to take an unwanted Native child. They routinely have parents sign confidentiality statements, and then use those statements as a basis for not providing any tribal notice. They make no effort to provide culturally appropriate remedial or rehabilitative services to keep the parent and child together, for they do not believe they have such an obligation. Indeed, by all appearances 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.

Catholic Social Services of Anchorage provides an excellent example. That agency has handled the adoption of dozens of Native children over the past nine years since the Act's passage. In no instance have they ever provided notice of such proceedings to the child's tribe. Virtually all of these children--possibly all -- have been adopted into non-Native families. These are shocking statistics.

The Indian Child Welfare Act clearly provides for a tribal right of intervention in voluntary proceedings. The right to intervene is empty without the right to receive notice of such proceedings. The State of Alaska takes the position that the Act and fundamental due process require that such notice be given. On this issue the Alaska Supreme court agrees. Thus in cases requiring confidentiality tribes are routinely notified of the voluntary proceeding and of the tribal right to intervene, but the identity of the parties is not revealed to the tribe unless the tribe actually intervenes. But private agencies apparently believe they are above the law and refuse to provide such notices. We agree with the Association of American Indian Affairs that the notice provisions of the Act must be strengthened to make it absolutely clear that private and public agencies alike must provide tribal notices regardless of whether the proceeding is voluntary or involuntary.

Another scheme often used by private agencies to abridge parental rights is the use of relinquishment proceedings to terminate parental rights prior to the initiation of adoption proceedings. In Alaska a parent's relinquishment of parental rights can be followed by a final decree terminating those rights in as little as ten days after the relinquishment is made. Under Section 103 of the Act as presently written there is an argument (endorsed by the Alaska Supreme Court) that a parent cannot revoke his or her consent to relinquishment after the final termination decree is entered. This results in substantial loss of parental rights.

Let us explain. Private adoption agencies in Alaska are in the adoption business. Their typical pattern is to determine before the initiation of any court proceeding who the adoptive parent will be. Typically the relinquishing Native parents participate in the process of selecting the adoptive family. The agency works with the mother so that she becomes comfortable with the placement. Everyone involved knows that an adoption is underway. When the time comes to go to court the first thing the private agency does is secure and file a voluntary relinquishment of parental rights. The agencies do this rather than secure a "consent to adoption" because the relinquishment of parental rights becomes final and irrevocable after ten days; a consent to adoption only becomes final and irrevocable after the final decree of adoption. By manipulating court procedures in this

manner the agencies effectively deprive parents involved in an adoption of the right to revoke their consent to the adoption up until the adoption decree is finalized. This is the prevailing practice of private agencies in Alaska, and we suspect the same is true in other states.

Where all parties to the voluntary proceedings contemplate an adoption, the Act should prohibit the use of the relinquishment process. Alternatively (and as proposed by the Association for American Indian Affairs) the law should be amended so that a relinquishment of parental rights may be revoked at any time prior to the final adoption decree, just like a consent to adoption.

Voluntary proceedings are not always as "voluntary" as they may appear. Such proceedings often involve an unwed young and troubled mother. She often feels confused, abandoned and all alone. Often as a result of the crisis surrounding her pregnancy she is unemployed. She may be drinking heavily or abusing drugs. In many cases characterizing such a mother's act of giving up her child as informed and voluntary act is to raise from over substance and to simply disregard the circumstances leading up to her situation. Yet the circumstances contributing to the lack of true voluntariness may not meet the high standard required to later void their consent. Under the combined stress of many factors such mothers are easy targets for public and private

social workers either anxious to place the child with an adoptive family or searching for an easy way to protect the child from neglect and simplify the mother's life without regard to the higher value placed on preserving the family.

We believe that in most cases there is very little difference between voluntary and involuntary termination proceedings. For this reason, we believe the Act should be made abundantly clear that a parent in a voluntary proceeding has most of the same rights as a parent in involuntary proceedings, including the right to appointment of counsel, and that the public or private agency seeking the relinquishment show by clear and convincing evidence that culturally appropriate remedial and rehabilitative services have been provided to prevent the break-up of the Native family.

Loss of children through the voluntary adoption process represents a major loophole in the Act which we strongly urge the Committee to address in its deliberations.

5. Tribal notice.

Quite understandably the notice provisions of the Act were drafted with the typical reservation in mind. But as this Committee well knows Alaska is anything but typical. It often takes two weeks for notices to arrive in a village. Depending on

the time of year Councilmembers may be deeply involved in subsistence hunting and fishing activities. For these and other reasons, the ten-day period is unrealistic for remote tribes and is certainly unrealistic in village Alaska. For this reason the period should be enlarged to be more realistic, and we suggest a twenty-day period.

Enlarging the notice time-frame is not a complete answer, however. Most villages throughout Alaska have social service programs benefiting tribal members administered through a regional confederation of tribes typically known as a regional association. APIA, KANA, CRNA and CITC are typical of such entities. These regional associations operate under authority of broad tribal resolutions adopted in accordance with the Indian Self-Determination Act and fall within that Act's definition of a "tribal organization". When Indian Child Welfare Act programs are administered through a grant, those programs are likewise almost universally administered by the regional "tribal" organization (as that term is defined in the Self-Determination Act). These associations have full-time staffs and considerable expertise in childrens matters. They typically work as the advocate on behalf of a village when intervening in state childrens proceedings. Given the unique situation in Alaska, we believe that implementation of the Act would be substantially enhanced if the Act required that two tribal notices be sent rather than one. That is, in addition to the notice sent to the

Village, the State should be required to sent a notice to the tribal organization administering social service or Indian Child Welfare Act programs for that village.

The State of Alaska has repeatedly stated that it is unwilling to send two notices, arguing that to do so is too expensive and burdensome. It is willing to send notices to regional associations but only if the Village specifically passes a resolution authorizing such notice and only if it can do so by dispensing with notice directly to the Village.

We do not believe that villages should be forced to give up their right to notice in order to benefit from the added security of having notices sent to the full-time staff of the regional association providing that village with children and family social services through 638 contracted programs and ICWA grants. Given the reluctance of state and private agencies to comply with anything other than the literal, bare minimum requirements of the Act (if that), we ask that the statute be explicitly amended to require that regional associations and villages receive dual notices. This could easily be done by adding the words "and tribal organization" immediately after the word "tribe" where appropriate in the Act, and defining tribal organization as that term is defined in the Indian Self-Determination Act but narrowly to cover only tribal organizations administering social service or ICWA programs on behalf of a tribe.

6. <u>ICWA funding issues</u>.

One of the single greatest impediments to successful implementation of the Indian Child Welfare Act in Alaska has been the inadequate and inconsistent funding of ICWA programs. Some of the other witnesses today will go into detail about these problems and we therefore only touch on some of the broader issues.

First, the Indian Child Welfare Act grant program should not be a competitive program. Competition among grantees itself can be and has been very destructive to cooperation. In Alaska over the years the Alaska Native Childrens Advisory Board collapsed in major part due to competition among tribes and tribal organizations around the State. Two or three years ago a disappointed grantee actually filed suit against other successful grant recipients because of dissatisfaction over the BIA's grant selection process. And as the Committee is aware, the BIA grant review process itself has come under substantial fire across the Nation in recent years.

Children are removed from their families year after year. Children and families have crises year after year. The need does not stop when the tribe's program is no longer funded. The Copper River Native Association's experience is typical. The

Bureau funded ICWA programs for the villages in CRNA's region in 1981 and 1982, and again in 1985 and 1986. In other years, the program simply has not existed. Although CRNA has tried to do what it can out of its 638 contract, today its ICWA program is essentially dead.

The competitive grant funding program eliminates any ability for a tribe or tribal organization to engage in long-range planning. It eliminates any continuity from year to year. It eliminates stability. And it makes it impossible for a program to evolve from year to year to gain experience. When funding fails to come because the competitive grant application was denied, positions are eliminated. Experienced people move on. A developing program is substantially diminished, or dismantled altogether. When the tribe or tribal organization has its program funded once again one or two or three years later the tribe must essentially begin from scratch.

If the Indian Child Welfare Act is to work as Congress contemplated it must have a sound funding program. And if the funding program is to work it must provide stability and predictability for tribes and tribal organization from year to year. For this reason we urge that the Committee consider eliminating the competitive aspect of these grants. Sufficient funding should be provided so that each tribe or tribal organization operating a program in Alaska can maintain a core

program of services. The Committee might also consider changes so that the ICWA funding could be included in the Indian Priority System so that tribes would have the ability to prioritize a relatively greater share of their funds toward ICWA programs.

Our second concern is with the restrictions imposed unilaterally by the Bureau of Indian Affairs on how ICWA grant funds may be used. This issue has been addressed by the Association for American Indian Affairs in its testimony and we agree that the BIA's restrictions should be eliminated. ICWA funds must be available for training, technical assistance and, where necessary, legal representation for tribes to intervene, to secure transfer of cases and to generally enforce the Act's mandates. While tribes elsewhere may have other sources of revenue for such purposes, villages in Alaska have no source of independent funds.

We appreciate that even if these changes are made, funding is unlikely to be sufficient for tribes to employ legal counsel in every child custody proceeding. Tribes unable to afford counsel, however, should not be denied the right to participate at all. We believe the Committee should look carefully at the problem of lack of legal representation for tribes. One partial solution might be to expressly authorize tribal representatives to appear in state court proceedings on behalf of the tribe without counsel. Although many state courts allow tribes to

participate in this way, often objections are raised by state attorneys that the tribal representative is engaged in the unauthorized practice of law. Where accepted, this effectively denies the tribe any participation whatsoever.

Lastly, the Act should be amended to make clear that the Section 201 program is to be administered in Alaska. For virtually all other purposes the Indian Health Service and the Bureau of Indian Affairs have historically treated Alaska as a reservation. Indeed, the "reservation" provisions of the Indian Child Welfare Act apply to Alaska by virtue of the inclusion in the "Indian country" definition of "dependent Indian communities" which covers Alaska villages. And yet, when it comes to funding the Department of the Interior has consistently denied Section 201 funds in Alaska. The failure to properly administer the Section 201 grant program compounds the consequences of lack of adequate funding and unpredictable grant award decisions under Section 202. Tribes and tribal organizations in Alaska should be eligible for funding under Section 201 to the same extent as reservation-based tribes and tribal organizations elsewhere in the Country.

7. Alaska-specific provisions.

The current law contains provisions unique to Alaska in the definitional section for "Indian" and "Indian tribe". We believe

that these sections could possibly be improved. For instance, the current definition of "Indian" is ambiguous in its application to Alaska Natives who were born after December 17, 1971 (termed "new-born Natives") and were therefore not enrolled as shareholders to a regional corporation under the Alaska Native Claims Settlement Act. Although they are included to the extent they are members of a tribal village, Congress in 1978 intended the Act to provide even wider protections for Alaska Natives. Consideration should be given to reworking the definition to include new-born Natives. Also, there appears to be some potential inconsistency between the shareholder provision in the definition of "Indian", and the "Native village" provision in the definition of "Indian tribe". We would be pleased to work with the Committee in reexamining these definitions to be sure that they accomplish Congress' intended purpose of extending the Act's protections to all Alaska Natives.

The Indian Child Welfare Act was intended to curb the flight of Indian children from their families and their tribal heritage. Certainly it cannot be denied that some progress has been made since 1978, and that the placement preference provisions have had a positive impact. But this has not been easy, and considerable litigation has multiplied in Alaska and elsewhere as state and private agencies continue to resist complying fully with the letter and spirit of the Act. Disturbingly, in Alaska Native children are now removed from their families in far greater

numbers than was the case in 1978. In short, while some progress has been made much more remains to be made before we can be satisfied that we have accomplished the lofty but clearly achievable goals set forth in the Act. We look forward to working closely with the Committee to develop amendments which will strengthen the Act, reduce the level of litigation, and ultimately improve the stability of Native families and the future of Native American tribes through their children. We thank the Committee for the opportunity to present this testimony.

Select Committee of Indian Affairs

on the Implementation of P.L. 95-608

The Indian Child Welfare Act

The State of Arizona supports the intent of the Act to prevent unwarranted breakup of Indian families and to give tribal governments authority in determining child custody matters.

The Act more clearly delineates and defines the respective roles of tribal governments, states, and federal agencies. The act also provides for the cooperative effort of all parties involved.

This legislation has significantly improved the governmental capacity of tribal governments and has created productive working relationships between the State of Arizona and tribal governments by promoting intergovernmental agreements.

The Arizona Department of Economic Security (DES) facilitated and participated in the initial intergovernmental relationship and continues to be very supportive of such endeavors. Through a joint effort of DES, tribal governments, and the Inter-Tribal Council of Arizona (ITCA), the following was accomplished:

- o DES has employed an Indian Child Welfare Specialist to mediate services for Indian children. The Indian Child Welfare Specialist works with each tribe in Arizona to coordinate and promote social services to Indian children who reside both on and off Indian reservations.

- The Arizona State Legislature has appropriated funds for the past three years to develop on-reservation child abuse/neglect prevention and treatment programs for 13 tribes through intergovernmental agreements. As a result, very innovative community based programs have developed on reservations which otherwise would not exist.
- Arizona has actively supported the development of a Tribal Child Protective Services Academy which has recently graduated 35 tribal workers. The training is modeled after the state child protective services academy curriculum and the professional trainers are the same utilized by the state. The ITCA, the Salt River Pima-Maricopa Indian Community, the Gila River Indian Community, and the Phoenix area BIA Social Services co-sponsor this activity.
- DES has participated in sponsoring an annual Indian child and family conference for the last four years. These conferences have been co-sponsored by ITCA, the Arizona State University (ASU) School of Social Work, and the Phoenix area BIA. The purpose of these conferences are to define tribal, state and federal roles in Indian child and family services and to promote an exchange of knowledge of social services focused on Indian children and families.
- DES, ITCA, and two tribal governments are currently involved with the ASU School of Social Work in developing a model curriculum for child welfare workers serving Indian communities which brings together the public child welfare providers in Arizona and the 20 Indian tribes.

Areas of concern regarding the Indian Child Welfare Act are as follows:

- The Indian Child Welfare Act addresses prevention of placement and stresses the importance of providing family support services prior to removing and placing a child in out-of-home care. The Act requires that active efforts be made to prevent placements and reunify families. Under the Act, the court must be satisfied that active efforts have been made to provide remedial services and rehabilitative programs. These have proven unsuccessful. Without justification that these efforts have been made, the child may not be removed.

  A major distinction between the Indian Child Welfare Act and the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272) relates to enforcement and federal monitoring. No penalties exist for failure to comply with the active efforts provision of the Indian Child Welfare Act, other than the stipulation that the child may not be removed. There is federal monitoring of agency compliance with the reasonable efforts provision under the Adoption Assistance and Child Welfare Act (P.L. 96-272), and there are financial penalties for failure to comply.
- The Act requires strengthening in the area of voluntary placements (Section 103.a). Arizona has experienced the relinquishment of many Indian infants to private adopting agencies and to non-Indian individuals. This has created a concern as to whether Indian Health personnel inform the parents of the Indian Child Welfare Act and the long term

impact of the relinquished child with respect to the tribal concepts of assuring Indian children their full rights of cultural heritage and membership in the tribe.

Tribes do not require notice when a consent has been executed under Section 103 nor are placement preferences provided to promote the best interests of Indian children by maintaining Indian children intact with Indian families.

o The notification provisions require further coordination between tribes and states. Tribal response to notification of hearings needs to be strengthened and coordinated to ensure tribal intervention and participation. Some tribes have developed a separate office or designated specific staff to assume the responsibility of reviewing cases where the state has given notification. For tribes which have structured their responsibilities to respond to notifications, cases flow through the process much easier than those cases where the tribe does not have a formal mechanism to review and respond.

It is the belief that many tribes would more readily request transfers of jurisdiction to tribal courts if resources were available on or near the reservation for children with special needs. Tribes must be encouraged and given the support to develop resources for special-needs children who are otherwise deferred to the states simply because of the lack of resources on or near reservations.

o Active efforts to recruit Indian foster and adoptive families, must be supported by tribes and states in order to strengthen the placement preferences outlined by the Act.

TOHONO O'ODHAM NATION

WRITTEN TESTIMONY

INDIAN CHILD WELFARE ACT OVERSIGHT HEARINGS

In 1978 the Indian Child Welfare Act was passed in an effort to protect the best interest of Indian children and to maintain the stability of Indian families. Inherent in the act are problems of implementation and accountability.

The Tohono O'odham Nation has actively utilized the Indian Child Welfare Act to regain custody of its children. Implementation, many times has been difficult due to different interpretations of the act. The law appears to allow too much leeway for state courts to interpret the law as they see fit without regard to the Indian child or Indian tribes. This has contributed to the continued practice of placing Indian children with non Indian families. It has also been our experience that non Indian courts and agencies are ignorant of the Act. Too much time and money has been and is being spent on educating these individuals. The context of the law along with its historical ramifications should be a part of every law school and social work education. The objectives of the law cannot be accomplished if state courts and agencies are not willing to recognize the law.

The following amendments to the Indian Child Welfare Act will assist the Tohono O'odham Nation as well as other Indian nations to accomplish the intent of the Act which is to protect Indian children and maintain Indian families.

Section 4 - 1 Child Custody Proceeding shall mean and include:

I. "Foster Care Placement"

"Which shall mean any action removing an Indian Child from its parents or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parents or Indian custodian cannot have the child returned upon demand but where parental rights have not been terminated."

Amended to include any voluntary action or proceedings initiated by parent or custodian.

IV. "Adoptive placement" which shall mean the permanent placement of an Indian child for adoption including any action resulting in a final decree of adoption."

Amended to include any voluntary proceeding initiated by parent or custodian whether it be through a state agency or a private agency for adoption.

Section 101 - 5 Indian Child's Tribe means:

A. "The Indian tribe in which the Indian child is a member or eligible for membership or

B. In the case of a Indian child who is a member of or eligible for membership in more than one tribe the Indian tribe with which the Indian child has the more significant contacts."

Amended to state that the tribe determined to have the more significant contact with the child may designate as the Indian child's tribe, any other tribe in which the child is a member of or eligible for membership.

Title I - CHILD CUSTODY PROCEEDING

Section 101 B

"In any state court proceedings for the foster care placement of or termination of parental rights to an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe absent objection by either parent upon the petition of either parent or the Indian custodian or the Indian child's tribe, provided that such transfer shall be subject to the declination by the tribal court of such tribe."

Amended to state that the petition may be presented to the court orally or in written form by either parent, the Indian custodian or the Indian child's tribe. Also to strike the "good cause" clause and "enter agreement entered into under Section 109 of this act."

Section 102 A

"In any involuntary proceeding in a state court where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe by registered mail, with return receipt requested of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined such notice shall be given to the Secretary in like matter who shall have fifteen days after receipt to provide the requested notice to the parent or Indian custodian and the tribe. No

foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodial and the tribe or the secretary, provided that the parent or Indian custodian of the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceedings."

Amended to state that any child custody proceeding involving an Indian child in state court is subject to notification by the party initiating the child custody proceeding to the parent, the Indian custodian and the Indian child's tribe. Also to include that the party initiating the proceedings must make reasonable efforts to identify the tribal affiliation of the child before sending notice to the Secretary. If notice is sent to the Secretary then no proceedings shall be held until at least thirty days after receipt of notice by the Secretary.

Section 102 C

"Each party to a foster care placement or termination of parental rights proceeding under state law involving an Indian child shall have the right to examine all reports or documents filed with the court upon which any decision with respect to such action may be based."

Amended to state that any party in any child custody proceeding under state law involving an Indian child shall have the right to examine and copy all reports or other documents upon which any decision with respect to such action may be based which includes the case record and any other documents that were reviewed in preparation for giving oral testimony in a hearing.

Section 103 A

"Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or the Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation, in English, or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to or within ten days after birth of the Indian child shall not be valid."

Amended to include that any Indian parent or custodian may not waive any of the provisions of this act and the

inclusion of a waiver provision in any consent executed by an Indian parent or custodian shall render that consent invalid. Also to include that the Indian child's tribe shall be notified of any pending voluntary consent proceedings pursuant to this section.

Section 105 A

"In any adoptive placement of an Indian child under state law a preference shall be given in the absence of good cause to the contrary to a placement with:

1. A member of the child's extended family.

2. Other members of the Indian child's tribe.

3. Other Indian families."

Amended to state that in any adoptive placement of an Indian child under state law placement preference shall be made in accordance with the following order of placement:

1) A member of the child's extended family.

2) Other members of the Indian child's tribe.

3) Other Indian families.

Section 106 A

"Notwithstanding state law to the contrary whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing in a proceeding subject to the provision of Section 102 of this act that such return of custody is not in the best interest of the child."

Amended to state that the public or private agency or individual seeking to place the child for adoption in accordance with the provisions of Section 102a shall notify the biological parent, prior Indian custodian, and the Indian child's tribe of the pending placement proceeding and their right of intervention, their right to petition for transfer of jurisdiction to the tribal court and the parents or Indian custodian's right to petition for return of custody.

Section 106 B

"Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive or adoptive placement such placement shall be in accordance with the provisions of this act, except in the case where the Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed."

Amended to state that whenever an Indian child is removed from a foster care placement or institution for the purpose of further foster care preadoptive, or adoptive placement, or when a review of any such placement is scheduled, such placement shall be in accordance with the provisions of this act, including notice to the child's biological parents and prior Indian custodian, provided that the parental rights have not been terminated and the Indian child's tribe.

Title III - Record Keeping, Information, Availability, and Timetables

Section 301 A

"Any state court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this act shall provide the secretary with a copy of such decree or order together with such other information as may be necessary to show:

1. The name and tribal affiliation of the child.

2. The names and addresses of the biological parents.

3. The names and address of the adoptive parents.

4. The identity of any agency having filed such information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parents or parent that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained as such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552) as amended.

Amended to state that any state court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this act shall provide the secretary and the Indian child's tribe with a copy of such decree or order together with such other information as may be necessary to show ...

Section 301 B

"Upon request of the adopted Indian child over the age of 18 the adoptive or foster parents of an Indian child, or an Indian child, the secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting enmity the secretary shall certify to the Indian child's tribe where the information warrants that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe."

Amended to state that the Secretary shall disclose the names and tribal affiliation if any of the child's biological parents and any other information that may be necessary for the Indian child to secure membership in the tribe in which the child may be eligible for membership. Also to state that where the documents relating to such child contain an affidavit from the biological parent or parents requesting that their identity remain confidential, and the biological parent is still alive at the time of the request and the affidavit has not been revoked the secretary shall provide to the Indian child's tribe such information about the child's parentage and other circumstances of birth as required by such tribe to determine the child's eligibility for membership under the criteria established by the tribe, provided that an affidavit of one parent requesting such confidentiality shall not affect the right of the Indian tribe, the adoptive or foster parents, or an Indian tribe to identify information with respect to the other parent, provided further that nothing in this section shall be deemed to affect any rights of an adoptive Indian child under Section 107 of this act.

HOU HAWAIIANS

A TRIBAL OHANA DEDICATED TO THE SURVIVAL OF THE HAWAIIAN PEOPLE
P.O.BOX 721 HALEIWA, HAWAII 96712

HOU PARA LEGAL SERVICE

October 30, 1987

Honorable Senator Daniel K. Inouye
Chairman, Select Committee on Indian Affairs
722 Hart, Senate Office Building
Washington, D.C. 20510-1102

Aloha Senator Inouye,

The HOU Para Legal Service is most pleased to hear you will be chairing the Senate Select Committee on Indian Affairs hearings on the Indian Child Welfare Act (ICWA).

The family court experience of the HOU Para Legal Service over the last four years definitely indicates the socio-economic problems facing the Native Hawaiian families of 50% aboriginal blood or more as defined in the Hawaiian Homestead and 5F provisions of the Statehood Admissions Act strongly parallels those suffered by their American Indian and Alaskan Native counterparts. In over half of the family court cases foster or adoptive Native Hawaiian children are being placed in non-Native Hawaiian homes, often resulting in the permanent breakup of the family and the child's alienation from his rightful cultural identity.

We recognize there has been other legislation concerning those of any amount of Hawaiian blood. In this instance, however, we believe the recommendations in the attached Exhibit A would satisfy Congress' concerns and be the most practical and beneficial way to write this particular legislation.

Please include letter with exhibit in the IWCA hearing record. Mahalo Nui Loa for your consideration in this matter.

Respectfully,

Kamuela Price
Executive Director
HOU Para Legal Service

KP:cb
Encl.
bcc: Bert Hirsch

EXHIBIT A

SUPPLEMENT TO INDIAN CHILD WELFARE ACT

RATIONALE FOR INCLUSION OF NATIVE HAWAIIANS IN INDIAN CHILD WELFARE ACT

The problem facing the indigenous Hawaiian parent and child is similar to that suffered by American Indian and Alaskan Native people. Mainly it is a critical need for the United States to excercise a trust responsibility in protecting her aboriginal people's entitlements under U.S. laws and policies. In over half the family court cases in Hawaii, foster or adoptive Native Hawaiian children are being placed in non-Native Hawaiian homes, often resulting in the permanent breakup of the family and the child's alienation from his rightful cultural identity.

CONGRESSIONAL FINDINGS RELATIVE TO NATIVE HAWAIIANS

(1) that section 5F of the Hawaii Admissions Act of 1959 in sub sections (B) and (C) is a condition of Statehood whereby the the United States Congress mandates the state of Hawaii to carry out the trust responsibilities defined therein;

(2) that Congress through statute, the above-mentioned Statehood compact and the general course of dealing with Native Hawaiians has assumed the responsibility for the protection and preservation of Native Hawaiians and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of the Hawaiian "OHANA" tribal

family than their children and that the United States has a direct interest as a co-trustee in the Hawaii Admission Act in protecting Native Hawaiian children's relationship to the "OHANA" tribal family;

(4) that an alarmingly high percentage of Hawaiian families are broken up by the removal, often unwarranted, of their children from them by non-Native Hawaiian public and private agencies and that an alarmingly high percentage of such children are placed in non-Native Hawaiian foster and adoptive homes and institutions; and

(5) that the state, exercising its recognized jurisdiction over Native Hawaiian child custody proceedings through administrative and judicial bodies, has often failed to recognize the essential "OHANA" tribal family relations of Hawaiian people and the cultural and social standards prevailing in Native Hawaiian communities and families.

DEFINITIONS

(1) Native Hawaiian means any person who is 50% aboriginal blood or more or whose parent or legal custodian is a Native Hawaiian as defined in the Hawaiian Homestead and 5F provisions of the Statehood Admission Act.

(2) Native Hawaiian child is any unmarried person who is under the age of 18 and is either A) a Native Hawaiian of 50% aboriginal blood or more or B) under the custody or guardianship of a Native Hawaiian of 50% aboriginal blood or more.

(3) Native Hawaiian means any person as defined in the Hawaii Admissions Act in essence those of 50% aboriginal blood or more.

(4) Native Hawaiian child means any unmarried person who is

under 18 years of age and of 50% aboriginal blood or more or whose parent or custodian is of 50% aboriginal blood or more.

(5) Native Hawaiian child's "OHANA" means the family or extended family of the child who live together or are recognized by one another as immediate family.

(6) Native Hawaiian custodian means any Native Hawaiian person who has legal custody of a Hawaiian child under OHANA custom or State Law or to whom temporary physical care, custody and control has been transferred by the parent of such child.

(7) Native Hawaiian "organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Native Hawaiians, or a majority of whose members are native Hawaiians.

(8) Native Hawaiian OHANA tribal group means any Native Hawaiian family, extended family OHANA, or other organized group or community of Native Hawaiians recognized as eligible for the services provided to Native Hawaiians by ANA or any other Federally-authorized agency.

(9) Parent means any biological parent or parents of a Native Hawaiian child or any Native Hawaiian person who has lawfully adopted a Hawaiian child including (hanai) adoption under "OHANA" tribal law or custom. It does not include the unwed father where paternity has not been acknowledged.

(10) Hawaiian Homestead and 5F lands means those lands covered under the Hawaii Admission Act and any public lands not covered under such sections, title to which is either held by the United States in trust for benefit of any Native Hawaiian organization or individual or held by a Native Hawaiian organization or individual subject to a restriction by the United States against

alienation.

(11) Secretary means the Secretary of the Interior and

(12) The State of Hawaii Courts will have exclusive jurisdiction of a Native Hawaiian child who resides in any of the Hawaiian islands.

Pending Court Proceedings

(a) Notice time for commencement of proceeding and additional time for preparations. In any involuntary proceeding in a state court where the court knows or has reason to know that a Native Hawaiian child is involved, the party seeking the foster care placement or termination of parental rights for a Hawaiian child shall notify a biological parent or prior Native Hawaiian custodian by registered mail with return receipt requested of the pending proceedings and of their rights to legal representation. If the identity or the location of the parent or prior Native Hawaiian custodian cannot be determined such notice shall then be given to the Secretary in same manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or prior Native Hawaiian custodian. No foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or prior Native Hawaiian custodian or the Secretary provided, that the parent or prior Native Hawaiian custodian shall upon request, be granted up to twenty additional days to prepare for such proceedings.

(b) Appointment of Counsel In any case in which the court determines indigency, the parent or Native Hawaiian custodian shall have the right to court-appointed counsel for the child upon a finding that such appointment is in the best interest of

the child.

(c) Priority in Appointing Counsel will be given only to recognized Native Hawaiian non-profit advocacy agencies, such as the Native Hawaiian Legal Corporation or the Hou Para Legal Service.

- Where State law makes no provision for funding such Native Hawaiian legal advocacy agencies, the Court shall promptly notify the Secretary upon appointment of counsel to the Native Hawaiian advocacy agency, and upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921.

(d) Examination of reports or other documents Each party to a foster care placement or termination of parental rights proceeding under State law involving a Native Hawaiian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(e) Remedial services and rehabilitative programs; preventive measures Any party seeking to effect a foster care placement of, or termination of parental rights to, a Native Hawaiian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Native Hawaiian family and that these efforts have proven unsuccessful.

(f) Foster care placement orders; evidence; determination of damage to child No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent

or Native Hawaiian custodian is likely to result in serious emotional or physical damage to the child.

(g) Parental rights termination orders; evidence; determination of damage to child No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Native Hawaiian custodian is likely to result in serious emotional or physical damage to the child.

CROSS REFERENCES

Interpretive Notes And Decisions

If party wishes to defeat biological parent's petition for return of custody, he or she must prove that such return is not in child's best interest by showing (1) that remedial and rehabilitative programs designed to prevent breakup of Native Hawaiian family had been implemented without success and (2) that such return of custody is likely to result in serious harm to child: serious harm element must be established by testimony of qualified expert witnesses.

Parental rights to Native Hawaiian child pursuant to Native Hawaiian Child Welfare Act may not be terminated on basis of finding that evidence was clear and convincing that continued custody would likely result in severe emotional and physical damage to child: the Act requires proof beyond reasonable doubt.

Under Indian Child Welfare Act dependency and neglect must be proved by clear and convincing evidence. People In Interest of S.R.

Expert witness requirement was fulfilled by testimony of social worker with 4 years experience who has BA degree in social work and has had contact with Native Hawaiians on regular basis, and testimony of director of children's shelter and resource center who has BS degree in social work and one year towards her master's degree since approximately 30 percent of children utilizing shelter will be Native Hawaiians.

1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents. Where any parent or Native Hawaiian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Native Hawaiian custodian. The court shall also certify that either the parent or Native Hawaiian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Native Hawaiian custodian understood. Any consent given prior to, or within ten days after, birth of the Native Hawaiian child shall not be valid.

(b) Foster care placement; withdrawal of consent. Any parent or Native Hawaiian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Native Hawaiian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody. In any voluntary proceeding for termination of parental rights to, or adoptive placement of, a Native Hawaiian child, 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.

(d) Collateral attack; vacation of decree and return of custody; limitations. After the entry of a final decree of adoption of a Native Hawaiian child in the State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress, and the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

CROSS REFERENCES

1914. PETITION TO COURT OF COMPETENT JURISDICTION TO INVALIDATE ACTION UPON SHOWING OF CERTAIN VIOLATIONS

Any Native Hawaiian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Native Hawaiian custodian from whose custody such child was removed, and the Native Hawaiian child's OHANA may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102 and 103 of this Act.

1915. PLACEMENT OF INDIAN CHILDREN

(a) Adoptive placements; preferences. In any adoptive placement of a Native Hawaiian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

(1) a member of the child's extended family;

(2) other members of the Native Hawaiian child's OHANA; or Native Hawaiian OHANA extended family; or

(3) other Native Hawaiian families.

(b) Foster care or preadoptive placements; criteria; preferences. Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with

(i) a member of the Native Hawaiian child's OHANA extended family;

(ii) a foster home licensed, approved, or specified by the Native Hawaiian child's OHANA;

(iii) a Native Hawaiian foster home licensed or approved by an authorized non-Native licensing authority, or

(iv) an institution for children approved by a Native Hawaiian OHANA or operated by an Native Hawaian organization which has a program suitable to meet the Native Hawaiian child's needs.

(c) Tribal resolution for different order of preference; personal

preference considered; anonymity in application of preferences. In the case of a placement under subsection (a) or (b) of this section, if the Native Hawaiian child's parent custodian or OHANA shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Native Hawaiian child or parent shall be considered; Provided, that where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable to Parent, Custodian or OHANA. The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Native Hawaiian community in which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability. A record of each such placement, under State law, of a Native Hawaiian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary of the Native Hawaiian OHANA, parent or custodian.

1916. RETURN OF CUSTODY

(a) Petition; best interest of child. Notwithstanding State law to the contrary, whenever a final decree of adoption of a Native

Hawaiian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Native Hawaiian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of the Act.

(b) Removal from foster care home; placement procedure. Whenever a Native Hawaiian child is removed from a foster care home or institution for purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where a Native Hawaiian child is being returned to the parent or Native Hawaiian custodian from whose custody the child was originally removed.

1917. OHANA AFFILIATION INFORMATION AND OTHER INFORMATION FOR PROTECTION OF RIGHTS FROM OHANA RELATIONSHIP; APPLICATION OF SUBJECT OF ADOPTIVE PLACEMENT; DISCLOSURE BY COURT

Upon application by a Native Hawaiian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the OHANA affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's OHANA relationship.

1918. Not Applicable

1919. Not Applicable

1920. IMPROPER REMOVAL OF CHILD FROM CUSTODY; DECLINATION OF JURISDICTION; FORTHWITH RETURN OF CHILD: DANGER EXCEPTION

Where any petitioner in a Native Hawaiian child custody proceeding before a State court has improperly removed the child from custody of the parent or Native Hawaiian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Native Hawaiian custodian unless returning the child to his parent or Native Hawaiian custodian would subject the child to a substantial and immediate danger or threat of such danger.

1921. HIGHER STATE OR FEDERAL STANDARD APPLICABLE TO PROTECT RIGHTS OF PARENT OR NATIVE HAWAIIAN CUSTODIAN OF NATIVE HAWAIIAN CHILD

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Native Hawaiian custodian of a Native Hawaiian child than the rights provided under this title ( ), the State or Federal court shall apply the State or Federal standard.

1922. EMERGENCY REMOVAL OR PLACEMENT OF CHILD; TERMINATION; APPROPRIATE ACTION

Nothing in this title ( ) shall be construed to prevent the emergency removal of a Native Hawaiian child from his parent or Native Hawaiian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates

immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the jurisdiction of the appropriate Native Hawaiian OHANA, or restore the child to the parent or Native Hawaiian custodian, as may be appropriate.

1923. EFFECTIVE DATE ??

None of the provisions of this title ( ), except sections ( ), shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after the enactment of this Act, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

Interpretive Notes and Decisions

NATIVE HAWAIIAN CHILD AND FAMILY PROGRAMS

1931. GRANTS FOR ON OR NEAR NATIVE HAWAIIAN DOMICILES

(a) Statement of purpose; scope of programs. The Secretary is authorized to make grants to Native Hawaiian OHANAs and organizations in the establishment and operation of Native Hawaiian child and family service programs on or near Hawaiian Homestead or other domicile lands and in the preparation and implementation of child welfare codes. The objective of every Native Hawaiian child and family service program shall be to

prevent the breakup of Native Hawaiian families and, in particular, to insure that the permanent removal of a Native Hawaiian child from the custody of his parent or Native Hawaiian custodian shall be a last resort. Such child and family service programs may include, but are not limited to

(1) a system for licensing or otherwise regulating Native Hawaiian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Native Hawaiian families and for the temporary custody of Native Hawaiian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the OHANA family in the disposition of domestic relations and child welfare matters;

(6) education of State judges and staff in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Native Hawaiian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Native Hawaiian families involved in OHANA, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such

programs unaffected; State licensing or approval for qualification for assistance under federally assisted program. Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act ( ) or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for us under this Act ( ). The provision or possiblity of assistance under this Act ( ) shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act ( ) or any other federally-assisted program. For purposes of qualifying for assistance under a federally-assisted program, licensing or approval of foster or adoptive homes or insitutions by a Native Hawaiian OHANA shall be deemed equivalent to licensing or approval by a State.

Interpretive Notes and Decisions

1932. GRANTS FOR OFF-RESERVATION PROGRAMS FOR ADDITION SERVICES

The Secretary is also authorized to make grants to Native Hawaiian organizations to establish and operate off-reservation Native Hawaiian child and family service programs which may include, but are not limited to

(1) a system for regulating, maintaining, and supporting Native Hawaiian foster and adoptive homes, including a subsidy program under which Native Hawaiian adoptive children may be provided support comparable to that for which they would be eligible as

Native Hawaiian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Native Hawaiian families and Native Hawaiian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Native Hawaiian families involved in child custody proceedings.

1933. FUNDS FOR ON AND OFF HAWAIIAN HOMESTEAD LANDS

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments. In the establishment, operation, and funding of Native Hawaiian child and family service programs, both on and off Hawaiian Homestead lands the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under (?)

History; Ancillary Laws and Directives

1934.