104TH CONGRESS
*2d Session*

SENATE

REPORT
104–335

# TO AMEND THE INDIAN CHILD WELFARE ACT OF 1978, AND FOR OTHER PURPOSES

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JULY 26, 1996.—Ordered to be printed

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Mr. MCCAIN, from the Committee on Indian Affairs, submitted the following

# REPORT

[To accompany S. 1962]

The Committee on Indian Affairs, to which was referred the bill (S. 1962) to amend the Indian Child Welfare Act of 1978, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

## REPORT

The text of the bill follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE; REFERENCES.**

(a) SHORT TITLE.—This Act may be cited as the "Indian Child Welfare Act Amendments of 1996".

(b) REFERENCES.—Whenever in this Act an amendment or repeal is expressed in terms of an amendment to or repeal of a section or other provision, the reference shall be considered to be made to a section or other provision of the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.).

**SEC. 2. EXCLUSIVE JURISDICTION.**

Section 101(a) (25 U.S.C. 1911(a)) is amended—

(1) by inserting "(1)" after "(a)"; and

(2) by striking the last sentence and inserting the following:

"(2) An Indian tribe shall retain exclusive jurisdiction over any child custody proceeding that involves an Indian child, notwithstanding any subsequent change in the residence or domicile of the Indian child, in any case in which the Indian child—

"(A) resides or is domiciled within the reservation of the Indian tribe and is made a ward of a tribal court of that Indian tribe; or

"(B) after a transfer of jurisdiction is carried out under subsection (b), becomes a ward of a tribal court of that Indian tribe.".

**SEC. 3. INTERVENTION IN STATE COURT PROCEEDINGS.**

Section 101(c) (25 U.S.C. 1911(c)) is amended by striking "In any State court proceeding" and inserting "Except as provided in section 103(e), in any State court proceeding".

**SEC. 4. VOLUNTARY TERMINATION OF PARENTAL RIGHTS.**

Section 103(a) (25 U.S.C. 1913(a)) is amended—

(1) by inserting "(1)" before "Where";

(2) by striking "foster care placement" and inserting "foster care or preadoptive or adoptive placement";

(3) by striking "judge's certificate that the terms" and inserting the following: "judge's certificate that—

"(A) the terms";

(4) by striking "or Indian custodian." and inserting "or Indian custodian; and";

(5) by inserting after subparagraph (A), as designated by paragraph (3) of this subsection, the following new subparagraph:

"(B) any attorney or public or private agency that facilitates the voluntary termination of parental rights or preadoptive or adoptive placement has informed the natural parents of the placement options with respect to the child involved, has informed those parents of the applicable provisions of this Act, and has certified that the natural parents will be notified within 10 days of any change in the adoptive placement.";

(6) by striking "The court shall also certify" and inserting the following:

"(2) The court shall also certify";

(7) by striking "Any consent given prior to," and inserting the following:

"(3) Any consent given prior to,"; and

(8) by adding at the end the following new paragraph:

"(4) An Indian custodian who has the legal authority to consent to an adoptive placement shall be treated as a parent for the purposes of the notice and consent to adoption provisions of this Act.".

**SEC. 5. WITHDRAWAL OF CONSENT.**

Section 103(b) (25 U.S.C. 1913(b)) is amended—

(1) by inserting "(1)" before "Any"; and

(2) by adding at the end the following new paragraphs:

"(2) Except as provided in paragraph (4), a consent to adoption of an Indian child or voluntary termination of parental rights to an Indian child may be revoked, only if—

"(A) no final decree of adoption has been entered; and

"(B)(i) the adoptive placement specified by the parent terminates; or

"(ii) the revocation occurs before the later of the end of—

"(I) the 180-day period beginning on the date on which the Indian child's tribe receives written notice of the adoptive placement provided in accordance with the requirements of subsections (c) and (d); or

"(II) the 30-day period beginning on the date on which the parent who revokes consent receives notice of the commencement of the adoption proceeding that includes an explanation of the revocation period specified in this subclause.

"(3) The Indian child with respect to whom a revocation under paragraph (2) is made shall be returned to the parent who revokes consent immediately upon an effective revocation under that paragraph.

"(4) Subject to paragraph (6), if, by the end of the applicable period determined under subclause (I) or (II) of paragraph (2)(B)(ii), a consent to adoption or voluntary termination of parental rights has not been revoked, beginning after that date, a parent may revoke such a consent only—

"(A) pursuant to applicable State law; or

"(B) if the parent of the Indian child involved petitions a court of competent jurisdiction, and the court finds that the consent to adoption or voluntary termination of parental rights was obtained through fraud or duress.

"(5) Subject to paragraph (6), if a consent to adoption or voluntary termination of parental rights is revoked under paragraph (4)(B), with respect to the Indian child involved—

"(A) in a manner consistent with paragraph (3), the child shall be returned immediately to the parent who revokes consent; and

"(B) if a final decree of adoption has been entered, that final decree shall be vacated.

"(6) Except as otherwise provided under applicable State law, no adoption that has been in effect for a period longer than or equal to 2 years may be invalidated under this subsection.".

**SEC. 6. NOTICE TO INDIAN TRIBES.**

Section 103(c) (25 U.S.C. 1913(c)) is amended to read as follows:

"(c)(1) A party that seeks the voluntary placement of an Indian child or the voluntary termination of the parental rights of a parent of an Indian child shall provide written notice of the placement or proceeding to the Indian child's tribe. A notice under this subsection shall be sent by registered mail (return receipt requested) to the Indian child's tribe, not later than the applicable date specified in paragraph (2) or (3).

"(2)(A) Except as provided in paragraph (3), notice shall be provided under paragraph (1) in each of the following cases:

"(i) Not later than 100 days after any foster care placement of an Indian child occurs.

"(ii) Not later than 5 days after any preadoptive or adoptive placement of an Indian child.

"(iii) Not later than 10 days after the commencement of any proceeding for a termination of parental rights to an Indian child.

"(iv) Not later than 10 days after the commencement of any adoption proceeding concerning an Indian child.

"(B) A notice described in subparagraph (A)(ii) may be provided before the birth of an Indian child if a party referred to in paragraph (1) contemplates a specific adoptive or preadoptive placement.

"(3) If, after the expiration of the applicable period specified in paragraph (2), a party referred to in paragraph (1) discovers that the child involved may be an Indian child—

"(A) the party shall provide notice under paragraph (1) not later than 10 days after the discovery; and

"(B) any applicable time limit specified in subsection (e) shall apply to the notice provided under subparagraph (A) only if the party referred to in paragraph (1) has, on or before commencement of the placement, made reasonable inquiry concerning whether the child involved may be an Indian child.".

**SEC. 7. CONTENT OF NOTICE.**

Section 103(d) (25 U.S.C. 1913(d)) is amended to read as follows:

"(d) Each written notice provided under subsection (c) shall contain the following:

"(1) The name of the Indian child involved, and the actual or anticipated date and place of birth of the Indian child.

"(2) A list containing the name, address, date of birth, and (if applicable) the maiden name of each Indian parent and grandparent of the Indian child, if—

"(A) known after inquiry of—

"(i) the birth parent placing the child or relinquishing parental rights; and

"(ii) the other birth parent (if available); or

"(B) otherwise ascertainable through other reasonable inquiry.

"(3) A list containing the name and address of each known extended family member (if any), that has priority in placement under section 105.

"(4) A statement of the reasons why the child involved may be an Indian child.

"(5) The names and addresses of the parties involved in any applicable proceeding in a State court.

"(6)(A) The name and address of the State court in which a proceeding referred to in paragraph (5) is pending, or will be filed; and

"(B) the date and time of any related court proceeding that is scheduled as of the date on which the notice is provided under this subsection.

"(7) If any, the tribal affiliation of the prospective adoptive parents.

"(8) The name and address of any public or private social service agency or adoption agency involved.

"(9) An identification of any Indian tribe with respect to which the Indian child or parent may be a member.

"(10) A statement that each Indian tribe identified under paragraph (9) may have the right to intervene in the proceeding referred to in paragraph (5).

"(11) An inquiry concerning whether the Indian tribe that receives notice under subsection (c) intends to intervene under subsection (e) or waive any such right to intervention.

"(12) A statement that, if the Indian tribe that receives notice under subsection (c) fails to respond in accordance with subsection (e) by the applicable date specified in that subsection, the right of that Indian tribe to intervene in the proceeding involved shall be considered to have been waived by that Indian tribe.".

**SEC. 8. INTERVENTION BY INDIAN TRIBE.**

Section 103 (25 U.S.C. 1913) is amended by adding at the end the following new subsections:

"(e)(1) The Indian child's tribe shall have the right to intervene at any time in a voluntary child custody proceeding in a State court only if—

"(A) in the case of a voluntary proceeding to terminate parental rights, the Indian tribe filed a notice of intent to intervene or a written objection to the termination, not later than 30 days after receiving notice that was provided in accordance with the requirements of subsections (c) and (d); or

"(B) in the case of a voluntary adoption proceeding, the Indian tribe filed a notice of intent to intervene or a written objection to the adoptive placement, not later than the later of—

"(i) 90 days after receiving notice of the adoptive placement that was provided in accordance with the requirements of subsections (c) and (d); or

"(ii) 30 days after receiving a notice of the voluntary adoption proceeding that was provided in accordance with the requirements of subsections (c) and (d).

"(2)(A) Except as provided in subparagraph (B), the Indian child's tribe shall have the right to intervene at any time in a voluntary child custody proceeding in a State court in any case in which the Indian tribe did not receive written notice provided in accordance with the requirements of subsections (c) and (d).

"(B) An Indian tribe may not intervene in any voluntary child custody proceeding in a State court if the Indian

tribe gives written notice to the State court or any party involved of—

"(i) the intent of the Indian tribe not to intervene in the proceeding; or

"(ii) the determination by the Indian tribe that—

"(I) the child involved is not a member of, or is not eligible for membership in, the Indian tribe; or

"(II) neither parent of the child is a member of the Indian tribe.

"(3) If an Indian tribe files a motion for intervention in a State court under this subsection, the Indian tribe shall submit to the court, at the same time as the Indian tribe files that motion, a certification that includes a statement that documents, with respect to the Indian child involved, the membership or eligibility for membership of that Indian child in the Indian tribe under applicable tribal law.

"(f) Any act or failure to act of an Indian tribe under subsection (e) shall not—

"(1) affect any placement preference or other right of any individual under this Act;

"(2) preclude the Indian tribe of the Indian child that is the subject of an action taken by the Indian tribe under subsection (e) from intervening in a proceeding concerning that Indian child if a proposed adoptive placement of that Indian child is changed after that action is taken; or

"(3) except as specifically provided in subsection (e), affect the applicability of this Act.

"(g) Notwithstanding any other provision of law, no proceeding for a voluntary termination of parental rights or adoption of an Indian child may be conducted under applicable State law before the date that is 30 days after the Indian child's tribe receives notice of that proceeding that was provided in accordance with the requirements of subsections (c) and (d).

"(h) Notwithstanding any other provision of law (including any State law)—

"(1) a court may approve, as part of an adoption decree of an Indian child, an agreement that states that a birth parent, an extended family member, or the Indian child's tribe shall have an enforceable right of visitation or continued contact with the Indian child after the entry of a final decree of adoption; and

"(2) the failure to comply with any provision of a court order concerning the continued visitation or contact referred to in paragraph (1) shall not be considered to be grounds for setting aside a final decree of adoption.".

**SEC. 9. FRAUDULENT REPRESENTATION.**

Title I of the Indian Child Welfare Act of 1978 is amended by adding at the end the following new section:

**"SEC. 114. FRAUDULENT REPRESENTATION.**

"(a) IN GENERAL.—With respect to any proceeding subject to this Act involving an Indian child or a child who may be considered to be an Indian child for purposes of this Act, a person, other than a birth parent of the child, shall, upon conviction, be subject to a criminal sanction under subsection (b) if that person—

"(1) knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device, a material fact concerning whether, for purposes of this Act—

"(A) a child is an Indian child; or

"(B) a parent is an Indian; or

"(2)(A) makes any false, fictitious, or fraudulent statement, omission, or representation; or

"(B) falsifies a written document knowing that the document contains a false, fictitious, or fraudulent statement or entry relating to a material fact described in paragraph (1).

"(b) CRIMINAL SANCTIONS.—The criminal sanctions for a violation referred to in subsection (a) are as follows:

"(1) For an initial violation, a person shall be fined in accordance with section 3571 of title 18, United States Code, or imprisoned not more than 1 year, or both.

"(2) For any subsequent violation, a person shall be fined in accordance with section 3571 of title 18, United States Code, or imprisoned not more than 5 years, or both.".

## PURPOSES

The purpose of S. 1962 is to amend the Indian Child Welfare Act to make the process that applies to voluntary Indian child custody and adoption proceedings more fair, consistent and certain, in order to further advance the best interests of Indian children without eroding tribal sovereignty and the fundamental principles of Federal-Indian law.

## BACKGROUND

### FEDERAL-INDIAN CHILD WELFARE POLICY

In 1978, the Congress enacted the Indian Child Welfare Act (ICWA) in response to growing concerns about the consequences of the decades-old practice of separating Indian children from their Indian families and tribes through adoption or foster care placement. The 95th Congress expressed concern over the inordinately high number of placements of Indian children into non-Indian homes and environments, concluding that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic aspect of American Indian life today."[1] The 1977 Final Report of the American Indian Policy Review Commission, established by the Congress to study and provide recommendations on Federal-In-

[1] H. Rept. 95–1386, 2d Session, 1978, at page 9.

dian policy, shared this concern.[2] Congressional oversight hearings in 1974, 1977 and 1978 documented many examples of wholesale removal of Indian children from their families and homes. Studies conducted by the Association of American Indian Affairs prior to enactment of the ICWA revealed that 25 to 35 percent of all Indian children had been separated from their families and placed into adoptive families, foster care, or other institutions.[3] In certain States, the problem of public and private agencies removing Indian children from homes was more widespread. For example, in Minnesota from 1971 through 1972 nearly one in every four Indian infants under the age of one year old was placed for adoption. Over this same period, the adoption rate of Indian children was five times that of non-Indian children and approximately 90% of the placements involving Indian children were with non-Indian families.[4]

Upon a review of the provisions of the ICWA and of its legislative history, it is clear to the Committee that the 95th Congress sought to address both the problems associated with the involuntary removals of Indian children from their families and tribal communities and placement of such children into both foster care and adoptive settings, as well as the voluntary adoptions of Indian children.[5] As the United States Supreme Court observed in *Mississippi Band of Choctaw Indians* v. *Holyfield,* an Indian tribe and an Indian child have an interest in maintaining ties independent of the interests of the birth parents and, thus, "Congress determined to subject such [voluntary] placements to the ICWA's jurisdiction and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents."[6]

The 95th Congress found that the extraordinarily high rate of involuntary and voluntary placements of Indian children with non-Indian families was not in the best interests of Indian tribes, Indian families and Indian children. As construed in the *Holyfield* case, the ICWA is concerned with both the "impact on the tribes themselves of the large numbers of children adopted by non-Indians * * * [and] the detrimental impact on the children themselves of such placements outside their culture."[7]

Several witnesses in hearings before the Senate and House Committees held prior to enactment of the ICWA testified about the serious adjustment problems encountered by many adopted Indian children as they reached adolescence in non-Indian homes. For example, the American Academy of Child Psychiatry testified that:

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

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[2] Final Report, May 17, 1977, American Indian Policy Review Commission, pages 422, 423.
[3] H. Rept. 95–1386, 2d Session, 1978, at page 9.
[4] Id.
[5] See, e.g., 25 U.S.C. 1912.
[6] *Mississippi Band of Choctaw Indians* v. *Holyfield,* 490 U.S. 30, 49–53 (1989).
[7] Id., at 49–50.

> vasive sense of abandonment with its attendant multiple ramifications.[8]

The Congress also received compelling evidence prior to enactment of the ICWA concerning the impact of the large numbers of placements upon Indian tribes. For example, Chief Calvin Isaac of the Mississippi Band of Choctaw Indians testified that:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.[9]

In addition, the 95th Congress received considerable testimony on the importance of the extended family in Indian culture. As the House Interior and Insular Affairs Committee explained in its report accompanying the bill:

> [T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. * * * The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing.[10]

The 95th Congress determined that much of the responsibility for the Indian child welfare crisis that was undermining Indian tribes and families, and that was working against the best interests of Indian children, rested with the policies and practices of State agencies and courts. Congress found that—

> the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[11]

This treatment of Indian children under State law persisted prior to the enactment of the ICWA despite the existence of well-settled principles of Federal law which generally established that the primary authority in matters involving the relationship of an Indian child to his or her parents or extended family was the Indian child's tribe. Years after the enactment of the ICWA, the United States Supreme Court in *Holyfield* recognized that "[t]ribal juris-

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[8] Hearings on Indian Child Welfare before the Senate Subcommittee on Indian Affairs, 95th Cong., 1st Session (1977) at 114.

[9] Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong. 2d. Sess. (1978) at 193.

[10] H. Rept. 95–1386, 2d. Sess., 1978 at pages 10, 20.

[11] 25 U.S.C. 1901(5).

diction over Indian child custody proceedings is not a novelty of the ICWA." [12]

Thus, in recognition of the best interests of Indian children and the parens patriae interest of Indian tribes in the welfare of their children, the Congress in 1978 carefully crafted the ICWA to protect the important role traditionally played by an Indian tribe and the extended family in child welfare, with a focus upon State court proceedings involving off-reservation Indian children, as well as children resident and domiciled on an Indian reservation. As explained by the United States Supreme Court:

> At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child "who resides or is domiciled within the reservation of such tribe," as well as for wards of tribal courts regardless of domicile. Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation; on petition of either parent or tribe, State-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court.[13]

## APPLICATION OF THE PROCEDURAL REQUIREMENTS OF THE INDIAN CHILD WELFARE ACT

Under the ICWA, State courts must accord tribal court judgments full faith and credit.[14] The Act establishes various procedural safeguards applicable to State Indian child custody proceedings that protect Indian families and children and ensure adequate tribal involvement in those proceedings. Thus, an Indian tribe may intervene in any State court child custody proceedings involving children who are members or eligible for membership in the Indian tribe.[15] An Indian tribe must receive notice of any State court involuntary proceedings involving such children [16] and has the right to raise a challenge to State placements that do not conform to the Act's requirements.[17] An Indian tribe may establish tribal placement preferences which are to be recognized by State courts as a matter of Federal law.[18] An Indian tribe has the right to obtain State records pertaining to the placement of Indian children [19] and is authorized to enter into agreements with States with regard to the care and custody of Indian children and the jurisdiction over child custody proceedings.[20]

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[12] *Mississippi Band of Choctaw Indians* v. *Holyfield, supra,* 490 U.S. at 42.
[13] Id. at 36.
[14] 25 U.S.C. 1911(d).
[15] 25 U.S.C. 1911(c).
[16] 25 U.S.C. 1912(a).
[17] 25 U.S.C. 1914.
[18] 25 U.S.C. 1915(c).
[19] 25 U.S.C. 1915(e).
[20] 25 U.S.C. 1919.

Indian families are protected by provisions which establish substantive standards for involuntary foster care placement of an Indian child or termination of an Indian parent's parental rights,[21] provisions which require that foster care and adoptive placements of Indian children under State law be made preferentially with the child's extended family,[22] and a requirement that the cultural and social standards of the Indian community be applied by the State court when it applies the placement preferences.[23]

In the context of voluntary proceedings, the ICWA specifically prohibits relinquishment of an Indian child for adoption for at least ten days after birth. Moreover, parental consents must be executed before a court of competent jurisdiction. Any court considering a voluntary consent to the termination of parental rights must determine that the consequences of the consent "were fully understood by the parent or Indian custodian", including, if necessary, the use of an interpreter to explain the consequences of the consent in the parent's native language.[24]

## IMPLEMENTATION OF THE INDIAN CHILD WELFARE ACT

Although implementation of the ICWA has been less than perfect, resulting in some outcomes that appear from a distance to be unreasonable, in the vast majority of cases the ICWA has provided vital protection to Indian children, families and Indian tribes. The ICWA has clarified and formalized the authority and role of Indian tribes in the Indian child welfare process under Federal law. It has compelled greater efforts and more painstaking analysis by State and private agencies and State courts before removing Indian children from their homes and communities. It has provided procedural protections to Indian tribes and families to prevent arbitrary removals of their children. It has required recognition by State and private agencies and State courts alike that an Indian child has a vital interest in retaining a connection with his or her Indian tribe. As the United States Supreme Court noted in *Holyfield,* "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." [25]

Each year thousands of child custody and adoption proceedings take place in which the ICWA is applied without remarkable incident. Nonetheless, particularly in the voluntary adoption context, there have been occasional, high-profile cases which have resulted in lengthy, protracted litigation causing great anguish for the children, their adoptive families, their birth families, and their Indian tribes.

## DESCRIPTION OF THE "TULSA" COMPROMISE AGREEMENT

### *Origins of the Bill*

S. 1962 is the product of the year-long efforts of several representatives of the adoption community and of Indian tribal governments who jointly developed compromise amendments to the

[21] 25 U.S.C. 1912(e) and (f).
[22] 25 U.S.C. 1915(a) and (b).
[23] 25 U.S.C. 1915(d).
[24] 25 U.S.C. 1913(a).
[25] *Mississippi Band of Choctaw Indians* v. *Holyfield, supra,* 490 U.S. at 50.

ICWA. Their effort was to identify changes that would address some problems with the implementation of the ICWA that would be acceptable to both adoption advocates and Indian tribes. The Committee was briefed in late 1995 and early 1996 by representatives of those participating in the compromise negotiations and these representatives were encouraged to circulate drafts to Indian tribes and the adoption community for review. Both the National Indian Child Welfare Association (NICWA) and the National Congress of American Indians (NCAI) were actively involved in these efforts, as were representatives of the American Academy of Adoption Attorneys (AAAA) and the Academy of California Adoption Attorneys (ACAA). In early June, 1996, at the mid-year convention of the NCAI at Tulsa, Oklahoma, tribal delegates labored at length and in good faith to refine the compromise amendments. After the convention, a tribally-sanctioned committee worked with adoption attorneys to fine-tune the "Tulsa" compromise language. Representatives of both the Indian tribes and the adoption community have confirmed that S. 1962 is within the parameters of, and is consistent with, the "Tulsa" compromise agreement.

S. 1962 would achieve greater certainty and speed through new guarantees of early and effective notice in all cases involving Indian children combined with new, strict time restrictions placed on both the right of Indian tribes and families to intervene and the right of Indian birth parents to revoke their consent to an adoptive placement. S. 1962 would encourage early identification of the relatively few cases involving controversy, and promote settlement of cases by making visitation agreements enforceable.

*Limitations on when and how an Indian tribe may intervene*

25 U.S.C. 1911(c) and 1913(e) would be substantially amended to curtail the present right of an Indian tribe to intervene "at any point in the proceeding." Under S. 1962, this right of intervention could be exercised only within the following periods of time: within 30 days of receipt of notice of a termination of parental rights proceeding, or within the later of 90 days of receipt of notice of an adoptive placement or 30 days of receipt of notice of a voluntary adoption proceeding. With proper notice, an Indian tribe's failure to act within these time frames early in the placement proceedings is final. An Indian tribe's waiver of its right to intervene is binding. If an Indian tribe seeks to intervene, it must accompany its motion with a certification that the child at issue is, or is eligible to be, a member of the tribe and provide documentation of this pursuant to tribal law.

*Limitations on when an Indian birth parent may withdraw his or her consent to adoption or termination of parental rights*

25 U.S.C. 1913(b) would be substantially amended by S. 1962 to curtail the present right of an Indian birth parent to withdraw his or her consent to an adoption placement or termination of parental rights at any time prior to entry of a final decree. Under S. 1962 such consent could be withdrawn before a final decree of adoption has been entered only if the adoptive placement specified by the parent is terminated, or before the end of the latter of the following two periods: 6 months after the Indian child's tribe received the re-

quired notice or 30 days after the adoption proceeding began. An Indian biological parent may otherwise revoke only under applicable State law. In the case of fraud or duress, an Indian birth parent may seek to invalidate an adoption up to two years after the adoption has been in effect, or within a longer period established by the applicable State law.

*Requirement of early and effective notice and information to Indian tribes*

25 U.S.C. 1913 would be substantially amended by S. 1962 to add a requirement for notice to be sent to the Indian child's tribe by a party seeking to place or to effect a voluntary termination of parental rights concerning a child reasonably known to be an Indian. Such notice must be sent by registered mail within 100 days following a foster care placement, within five days following a preadoptive or adoptive placement, and within 10 days of the commencement of a termination of parental rights proceeding or adoption proceeding. S. 1962 would specify the particular information that is to be provided. In addition, 25 U.S.C. 1913(a) would be amended by S. 1962 to require a certification by the State court that the attorney or public or private agency facilitating the voluntary termination of parental rights or adoptive placement has informed the birth parents of their placement options and of other provisions of the ICWA and has certified that the birth parents will be notified within 10 days of any change in the adoptive placement.

*Open adoption and enforceable visitation agreements encouraged between Indians and non-Indians*

25 U.S.C. 1913 would be amended by S. 1962 to encourage and facilitate voluntary agreements between Indian families or tribes and non-Indian adoptive families for enforceable rights of visitation or continued contact after entry of an adoption decree. This provision would have the effect of authorizing such agreements where independent authority does not exist in the law of a particular State. This should help encourage early identification and settlement of controversial cases.

*Penalties applied for fraud and misrepresentation*

S. 1962 would apply criminal penalties to any efforts to encourage or facilitate fraudulent representations or omissions regarding whether a child or birth parent is an Indian for purposes of the Act.

*Miscellaneous*

S. 1962 would clarify that the exclusive jurisdiction of tribal courts under 25 U.S.C. 1911(a) continue once a child is properly made a ward of that tribal court, regardless of any subsequent change in residence or domicile of the child.

## OTHER CONSIDERATIONS

On June 19, 1996, the committee struck the provisions of Title III from H.R. 3286, the Adoption Promotion and Stability Act of 1996, by a vote of 14 to 1 and ordered it reported with the rec-

ommendation that the Senate pass the bill without the provisions of Title III.[26]

Title III would have undone much of the progress achieved by the ICWA. The Committee struck Title III from H.R. 3286 because it had great potential for harm to Indian children, to Indian families, and to fundamental principles of Federal-tribal relations and tribal sovereignty. At the very least, Title III would have caused an explosion of litigation and disrupted tribal and State child welfare systems, thereby delaying many permanent placements to the detriment of Indian children.

At the core of Title III was a provision that would have codified in Federal statutory law a version of the so-called "existing Indian family exception" doctrine that has been created and applied in certain States by judges seeking to find that the ICWA does not apply to a particular case. In striking Title III, the Committee made clear its view that the "existing Indian family exception" doctrine is completely contrary to the entire purpose of the ICWA. In contrast, the ICWA recognizes that the Federal trust responsibility and the role of Indian tribes as parens patriae extend to all Indian children involved in all child custody proceedings. The constitutional legitimacy of Indian-specific legislation has long rested upon the basis of a political classification which is unique to Indians and not upon a racial classification.[27] It is a well settled principle in Federal-Indian law that Indian tribes have the authority to define their membership and that this authority is integral to the survival of tribes and the exercise of their sovereignty as tribal governments. The approach taken by the Title III provisions contradicts that fundamental principle. As the United States Supreme Court has explained:

> A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters. (citations omitted)[28]

When the ICWA was enacted, it is clear from the statute and from the legislative history that the Congress intended to reaffirm these principles and to provide for tribal involvement with, and Federal protections for, all children defined by their tribes as members or eligible for membership who are involved in any child custody proceeding, regardless of their individual circumstances. Moreover, this Committee's rejection of Title III and its adoption of S. 1962 is continuing evidence that the ICWA, as amended, is to be applied to all Indian children in all child custody proceedings regardless of their individual circumstances. Likewise, this Committee's rejection of Title III and its adoption of S. 1962 should be construed as a rejection of "existing Indian family exception" doctrine in all of its manifestations.

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[26] S. Rept. 104–288, 2d. Sess., 1996.
[27] See, e.g., *Morton* v. *Mancari,* 417 U.S. 535 (1974).
[28] *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 72 n.32 (1978).

SUMMARY OF THE PROVISIONS OF S. 1962, THE INDIAN CHILD WELFARE ACT AMENDMENT OF 1996

*Ward of the court*

Section 2 adds a provision to 25 U.S.C. 1911(a) to clarify that an Indian tribe retains exclusive jurisdiction over any child made a ward of a tribal court if the child subsequently changes residence and domicile. The Committee intends this amendment to clarify that exclusive jurisdiction over a ward of a tribal court occurs only if, at the time the wardship is established, the child is a resident of or domiciled on an Indian reservation or the proceeding has been transferred to the tribal court pursuant to a valid State court transfer or jurisdiction.

*Tribal interventions in State court proceedings*

Sections 3 and 8 provide new limitations on the right of an Indian tribe to intervene in State court proceedings involving Indian Children. Section 3 makes a conforming, technical amendment which recognizes that tribal interventions in voluntary proceedings under 25 U.S.C. 1911(c) will hereafter be governed by the time limitations and other provisions set forth in Section 8 of these amendments. The Committee intends Section 8 to limit the tribal right to intervene in adoption proceedings by requiring the Indian tribe to either file a notice of intent to intervene or send a written objection to a proposed adoption to the party or the State court within 90 days of receiving notice of an adoptive placement or 30 days after receiving notice of a voluntary adoption proceeding, whichever is later, or the tribe's right to intervene will be deemed waived. In the case of voluntary termination proceedings, as distinguished from adoption proceedings, the Indian tribe must take action within 30 days of having received the requisite notice. The tribal right to intervene may also be waived if the Indian tribe gives written notice of its intent not to intervene or gives written notice that neither birth parent is a member of the tribe or gives written notice that the child is not a member of, and is not eligible for membership in, the Indian tribe.

Under Section 8, an Indian tribe must simply make known its intent to intervene or, in writing, its objection to the termination of parental rights or the adoptive placement. The Committee intends that where an Indian tribe sends notice or written objection to the party seeking the adoption, but not to the court, the party receiving such notice shall notify the court that the tribe has preserved its right of intervention. This is likely to occur in cases where a placement has been made before a court proceeding has begun. The Committee has designed these provisions to give prospective adoptive parents confidence that they can go forward with an adoption after a specified time period without later action by an Indian tribe which may disrupt the adoption. Furthermore, the Committee intends that these provisions will provide an Indian tribe with a reasonable time period within which to become involved in the placement of a child if the tribe believes this would be in the best interest of the Indian child.

Section 8 also provides that if an adoptive placement specified in the notice to the Indian tribe is changed at a later date, the tribal

right to intervene is restored even if the time periods have lapsed. Such a change likely would be extremely rare, but in these cases the Indian tribe's involvement in the subsequent placement is just as important for the best interests of the child as was its involvement in the first placement. An Indian tribe must receive notice of each adoptive, preadoptive or foster care family placement within five days of when the placement is made. This legislation will ensure that Indian tribes will receive effective notice if an adoptive placement has ended. Finally, if an Indian tribe does not receive notice which complies with section 7 of these amendments, the Committee intends that the Indian tribe will retain a right to intervene at any point in the voluntary proceeding. The Committee recognizes that there may be circumstances when a child's Indian identity is discovered after the expiration of the time frames for notice and tribal response, despite the fact that the facilitators of an adoption made a reasonable inquiry concerning the Indian identity of a child on or before the beginning of a placement. In those circumstances, it is the Committee's intention that notice be provided within 10 days of the discovery of a child's Indian identity and that thereafter, the time frames for tribal intervention outlined in section 8 will apply. If, however there is evidence that a reasonable inquiry was not made concerning the Indian identity of a child on or before the beginning of a placement, the time limitations set forth in section 8 on tribal intervention shall not apply.

The Committee intends that a waiver by an Indian tribe under section 8 does not otherwise affect the applicability of the Act to the Indian child and family, including application of the placement preferences, and does not prevent any other person from asserting any rights under the Act. The Committee intends that the rights of the Indian child's extended family or others to intervene, or otherwise be involved, are to be left to existing laws and court rules on standing and are not to be altered in any way by this legislation.[29]

The Committee intends section 8 to also require that an Indian tribe must include with any motion to intervene in a voluntary proceeding, a certification that includes a statement that documents the membership or eligibility for membership of the Indian child. In recognition of long-standing and fundamental principles of Federal Indian law, this section recognizes that tribal determinations of membership under tribal law are conclusive for the purpose of determining whether a child is an Indian child subject to the ICWA and that the ICWA is applicable to all Indian children who are the subject of a voluntary placement or proceeding. By adding this requirement, it is the Committee's intent to provide assurances to other parties involved with Indian children that Indian tribes will follow a specified set of rules based upon their own membership requirements which they have established under tribal law. Under the new subsection (e)(3), the Committee intends this certification to be filed no later than when the motion to intervene is filed. It need not necessarily be filed when the Indian tribe files its written objection or notice of intent to intervene. The term "motion" is not meant, however, to suggest any particular procedure for interven-

[29] See, e.g., *E.A.* v. *State,* 623 P.2d 1210 (Alaska Sup. Ct. 1981).

tion. The Committee is aware that in many State courts, informal tribal intervention has been permitted through letter, appearance of a tribal social worker or otherwise. The Committee does not intend in any way to discourage such informal procedures. Rather the language of this subsection is simply meant to make clear that the certification requirement attaches at the actual time of intervention.

Finally, section 8 would allow State courts to enter enforceable orders providing for visitation or continued contact between Indian tribes, birth parents, extended Indian family members, and an adopted child. These orders would arise only in the context of a voluntary agreement entered into with the adoptive family. The Committee anticipates that the possibility of open adoption, as an option in all proceedings, may facilitate harmonious placements of Indian children and avoid conflict in some otherwise contentious situations. In a number of States, courts currently have no authority to recognize and enforce open adoption arrangements even where the parties have reached an agreement. It is the Committee's intention that this section authorize State courts to make enforceable any type of post-adoption arrangement or specific conditions that may be agreed to by the parties to a voluntary adoptive proceeding.

*Voluntary termination of parental rights*

Section 4 clarifies that the existing provisions of the ICWA which deal with the validation of parental consent before a judge at least 10 days after birth applies to all adoptive, preadoptive and foster care placements. In addition, the Committee intends section 4 to require a judge to certify that the birth parents have been informed of their placement options and of their rights under the ICWA. Finally, the judge must confirm that the adoption agency or attorney which facilitates an adoption has certified that the birth parents will be notified within ten days if an adoptive placement changes.

The Committee intends that the additional information required by section 4 will increase the opportunity for birth parents to fully consider their placement options at the very beginning of the process and more fully understand their right to revoke consent, the limitations placed upon that right to revoke, the potential role of the Indian tribe, and the application of the placement preference provisions in the Act. Full information to birth parents, combined with notice to the Indian child's tribe, should help ensure that a young, vulnerable Indian parent has the balanced information available which any person needs to make an informed decision. For example, when only an adoption attorney or agency is involved with a young parent considering adoption, there is a substantial possibility that extended family options will not be explored. The requirement in this section is designed to ensure that all birth parents of Indian children who are involved in a voluntary child custody proceeding understand the multiple options available to them and that they are not presented with only one placement option. Providing parents with full information at the outset of the process should help lessen the number of disputes which can arise later on in the process because parents were unclear about their available options when they placed the child for adoption.

Finally, the requirement in section 4 that the person or agency facilitating the adoption notify a birth parent when the adoptive placement ends is meant to ensure that the parent will be able to exercise his or her right to revoke consent which is guaranteed under these amendments in any circumstance where an adoptive placement is terminated. In addition, the Committee intends that an Indian custodian vested with legal authority to consent to an adoptive placement be treated as a birth parent for the purposes of the Act, including the requirements governing notice provided or received and consent given or revoked.

*Withdrawal of parental consent*

The Committee intends section 5 to clarify when a birth parent can revoke consent to an adoption or voluntary termination of parental rights before a final decree of adoption has been entered by a court. The revocation period is limited to six months after the Indian child's tribe receives notice of the adoptive placement of the child, which notice must be received within five days of the actual placement. The revocation period is longer if the birth parent has not received notice of the actual commencement of the legal proceeding to finalize the adoption at least 30 days before the end of that six month period. If the parent has not received such notice, the period for revocation is extended until 30 days after receipt of notice by the parent. The parental right to revoke is also extended if the child's adoptive placement is changed from that which was proposed at the time of the parent's consent. It should be noted that section 5 does not alter the provisions of existing law which terminate, as of the date of the final adoption decree, the parental right to revoke consent if that adoption decree is finalized prior to the end of the six month period. The only exception to this limitation occurs when a birth parent can later show to the court that his or her consent was obtained through fraud or duress, but such a claim may be brought no later than two years after the final decree of adoption is entered. Finally, the Committee intends the time limits on parental withdrawal of consent to bring consistency and certainty to the adoption process. Prospective adoptive parents will know the time frames during which parental consent can be revoked and need not fear disruption of the adoption at some unknown point in the future.

*Notice to Indian tribes*

Section 6 requires notice to an Indian tribe of all voluntary adoptive and preadoptive placements, all voluntary termination of parental rights proceedings, all voluntary adoption proceedings and all voluntary foster care placements that exceed 100 days which involve a child defined under current law as an Indian child for purposes of the Act (any child who is a member of an Indian tribe or who may be eligible for membership and is a child of a member of an Indian tribe). Notice would be required within 5 days of an adoptive or pre-adoptive placement and may be made earlier, even prior to birth, if an adoptive or preadoptive placement is contemplated. The Committee intends the language of the bill to permit a single notice to be sent covering multiple activities—for example, if an adoptive placement is made and an adoption proceed-

ing is commenced simultaneously, the Committee intends that a single notice could be written and provided in such a way as to meet the obligations of section 6 so long as such notice meets the requirements of section 7. The Committee intends that a notice will be sent within the specified time frames each time one of the specified placements or proceedings commences. If it is discovered that a child may be an Indian child after the applicable notice periods have run, notice under section 6 must be provided within 10 days of the discovery that the child may be an Indian. If after a placement the child's Indian identity is uncovered and the notice is provided within 10 days of the discovery, there are no time limitations placed upon tribal intervention following such a late notice unless the party serving the notice can show to the court that reasonable inquiry regarding whether the child may be an Indian had been made at or prior to placement of the child. With these provisions dealing with a belated discovery that the child may be an Indian and that the adoption is thus made subject to the requirements of the ICWA, the Committee intends to provide prospective adoptive parents with some protection from late intervention if they can show they made a reasonable inquiry at or before the time the placement began as to whether the child may be an Indian. Likewise, the Committee intends these provisions to provide an Indian tribe with prompt notice of the adoption placement and proceeding and some opportunity to intervene within the time limitations applicable under section 8.

The Committee has received ample testimony indicating that, because the ICWA does not include a specific notice requirement to Indian tribes in the case of voluntary adoptions, Indian tribes frequently do not learn of the adoptive placements until months and sometimes years after the placement has begun. Particularly in the case of an off-reservation birth to an unwed mother—which is frequently the circumstance in a substantial portion of these cases—there may be a significant delay in such information becoming known within the tribal community. Thus, even where an Indian tribe acts promptly upon obtaining the information, a situation may have developed where the Indian child has already spent a significant amount of time in that placement before the Indian tribe has any knowledge with which it could act to become involved in the case in the State court, whether through intervention in the proceeding, submitting a request for future contact or visitation, or other involvement. The Committee expects that, under the requirements of the bill, providing Indian tribes with prompt notice in all cases will greatly enhance the possibility that a prospective adoptive parent will know before the initial placement begins, or within a very short time thereafter, whether a member of the Indian child's family or tribe has an interest in adopting the child. The Committee intends the notice required under section 6 to help to ensure that the best interests of Indian children are served by the provision of good and loving families while at the same time ensuring that those best interests of the children are not undermined by children being removed from their families and tribes in cases where good and loving placements are available within their families or tribal communities.

Moreover, the Committee wishes to emphasize that an Indian tribe has a parens patriae relationship with all children who are members of the tribe or who are eligible for tribal membership and who are children of tribal members. Off-reservation children and parents, some of whom may be in a precarious or unstable living situation and alienated from their tribal community, are a uniquely vulnerable segment of the American Indian and Alaska Native population and the ICWA specifically recognizes the tribal interest in such individuals and the benefit to these Indian families of tribal involvement. Thus, the Committee has concluded that the best interests of Indian children and families are served by early and full notice to Indian tribes under the provisions of section 6. Although Indian tribes do not currently receive notice of voluntary proceedings in most States, several States have explicitly recognized and successfully implemented a requirement that similar notice be provided in voluntary proceedings.[30]

*Content of notice to Indian tribes*

Section 7 requires that the notice provided to Indian tribes must include the name of the Indian child involved and the actual or anticipated date and place of birth of the child, along with an identification, if known after reasonable inquiry, of the Indian parent, grandparent, and extended family members of the Indian child. The notice must also provide information about court proceedings pending in State court, if any, and the parties in such proceedings. The notice must inform the Indian tribe that it has the right to intervene in the court proceeding and must inform the tribe as to what actions or inactions by the tribe will lead to a waiver of the tribal right to intervene.

*Sanctions against fraudulent representation*

Section 9 provides for criminal sanctions to be applied to anyone who assists a person to lie about their Indian ancestry or the ancestry of a child for the purposes of avoiding the application of the ICWA. The Committee intends that these sanctions will apply to any individual, other than a birth parent, who encourages or facilitates fraudulent representations concerning whether or not a child or parent is an Indian for the purposes of the ICWA, who conspires to encourage or facilitate such representations or omissions, or who aids or abets such representations or omissions having reason to know that such representations are being made and may have a material impact upon the application of the ICWA. Criminal penalties are necessary to help assure compliance with the provisions of the ICWA which are triggered whenever an Indian child is involved in a child custody proceeding. Willful misrepresentations of Indian identity can serve to thwart the application of the Act and the intent of the Congress. The criminal sanctions will discourage attorneys and others from circumventing the ICWA. There is considerable anecdotal evidence that birth parents are often told by adoption attorneys and agencies that they should not reveal that the child may be an Indian child in order to avoid the application

[30] See, e.g., Wash. Rev. Code Ann. 13.34.245(3), (5); 26.33.090(2); 26.33.110(2); 26.33.240(1) (West Supp. 1989); Minn. Stat. Ann. 257.352(2), (3); 257.353(2), (3) (West Supp. 1989); Okla. 10 O.S. 1991, section 40.1 (as amended in 1994); Mich. Court Rules 5.980(A).

of the ICWA. Indeed, in the *In re Bridget R* case,[31] which helped give rise to legislation to amend the Indian Child Welfare Act in this Congress, there were allegations that the original adoption attorney involved facilitated the very kind of deception that the criminal sanctions in section 9 are intended to deter. The Committee received testimony which indicates that the birth father of the children in that case apparently indicated that he was Indian on the original adoption information sheet, was then informed by an attorney that this would delay the adoption, and then filled out a new form omitting the information about his Indian identity which was then used by this attorney for the purposes of the adoption even though the attorney knew that this information was not true. The Committee intends to bring to bear against such behavior the sanctions of criminal law.

## CONCLUSIONS

The ICWA was originally enacted to provide for procedural and substantive protection for Indian children and families and to recognize and formalize a substantial role for Indian tribes in cases involving involuntary and voluntary child custody proceedings, whether on or off the Indian reservation. The bill approved by this Committee is entirely consistent with, and in furtherance of, these same goals which continue to be of vital important to the well-being of Indian children, Indian families, and Indian tribes. The Committee has concluded that S. 1962, as a compromise, will greatly improve the procedures required under the ICWA in cases of voluntary child custody and adoption proceedings. While these voluntary cases are but a small fraction of the cases in which the Act has been applied, they have been the ones which have gained much of the public scrutiny the ICWA has experienced in recent years. In adopting S. 1962, the Committee is taking a measured and limited approach, actively crafted by representatives of both the tribal governments and the adoption community, to address what have become identified as the problems with how the ICWA functions in the context of voluntary adoptions.

## LEGISLATIVE HISTORY

On June 26, 1996, the Committee held a hearing on a draft discussion bill which served as the basis of S. 1962. S. 1962 was introduced on July 16, 1996 and referred to the Committee on Indian Affairs. On July 24, 1996, the Committee on Indian Affairs, by a vote of 13 for, 0 against, and 1 abstention, ordered the bill reported with the recommendation that the Senate pass the bill as reported.

## COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on June 24, 1996, the Committee on Indian Affairs, by a vote of 13 ayes, 0 nays, and 1 abstention, ordered the bill reported with the recommendation that the Senate pass the bill as reported.

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[31] *In re Bridget R.,* 41 Cal. App. 4th 1483 (2nd Dist. 1996).

SECTION-BY-SECTION ANALYSIS

*Section 1. Short title; references*

Section 1 cites the short title of the bill as the "Indian Child Welfare Act Amendments of 1996" and clarifies that references in the bill to amendment or repeal relate to the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.).

*Section 2. Exclusive jurisdiction*

Section 2 adds a provision to 25 U.S.C. 1911(a) to clarify that an Indian tribe retains exclusive jurisdiction over any child otherwise made a ward of the tribal court when the child subsequently changes residence or domicile for treatment or other purposes.

*Section 3. Intervention in State court proceedings*

Section 3 makes a conforming technical amendment conditioning an Indian tribe's existing right of intervention under 25 U.S.C. 1911(c) to the time limitations added by Section 8 of the bill.

*Section 4. Voluntary termination of parental rights*

Section 4 amends 25 U.S.C. 1913(a) to clarify that the Act applies to voluntary consents in adoptive, preadoptive and foster care placements. In addition, section 4 adds a requirement that the presiding judge certify that any attorney or public or private agency facilitating the voluntary termination of parental rights or adoptive placement has informed the birth parents of the placement options available and of the applicable provisions of the Indian Child Welfare Act, and has certified that the birth parents will be notified within 10 days of any change in the adoptive placement. An Indian custodian vested with legal authority to consent to an adoptive placement is to be treated as a parent for purposes of these amendments, including the requirements governing notice provided or received and consent given or revoked.

*Section 5. Withdrawal of consent*

Section 5 amends the Act by adding several new paragraphs to 25 U.S.C. 1913(b). The additional paragraphs would set limits on when an Indian birth parent may withdraw his or her consent to an adoption. Paragraph (2) would permit revocation of parental consent in only two instances before a final decree of adoption is entered except as provided in paragraph (4). First, a birth parent could revoke his or her consent if the original placement specified by the birth parent terminates before a final decree of adoption has been entered. Second, a birth parent could revoke his or her consent if the revocation is made before the end of a 30 day period that begins on the day that parent received notice of the commencement of the adoption proceeding or before the end of a 180 day period that begins on the day the Indian tribe has received notice of the adoptive placement, whichever period ends first. Paragraph (3) provides that upon the effective revocation of consent by a birth parent under the terms of paragraph (2), the child shall be returned to that birth parent. Paragraph (4) requires that if a birth parent has not revoked his or her consent within the time frames set forth in paragraph (2), thereafter he or she may revoke consent

only pursuant to applicable State law or upon a finding by a court of competent jurisdiction that the consent was obtained through fraud or duress. Paragraph (5) provides that upon the effective revocation of consent by a birth parent under the terms of paragraph (4)(B), the child shall be returned to that birth parent and the decree vacated. Paragraph (6) provides that no adoption that has been in effect for a period of longer than or equal to two years can be invalidated under any of the conditions set forth in this section, including those related to a finding of duress or fraud.

*Section 6. Notice to Indian tribes*

Section 6 requires notice to be provided to the Indian tribe by any person seeking to secure the voluntary placement of an Indian child or the voluntary termination of the parental rights of a parent of an Indian child. The notice must be provided no later than 100 days after a foster care placement occurs, no later than five days after a preadoptive or adoptive placement occurs, no later than ten days after the commencement of a proceeding for the termination of parental rights, and no later than ten days after the commencement of an adoption proceeding. Notice may be given prior to the birth of an Indian child if a particular placement is contemplated. If an Indian birth parent is discovered after the applicable notice periods have otherwise expired, despite a reasonable inquiry having been made on or before the commencement of the placement about whether the child may be an Indian child, the time limitations placed by section 8 upon the rights of an Indian tribe to intervene apply only if the party discovering the Indian birth parent provides notice to the Indian tribe under this section not later than ten days after making the discovery.

*Section 7. Content of notice*

Section 7 requires that the notice provided under section 6 include the name of the Indian child involved and the actual or anticipated date and place of birth of the child, along with an identification, if known after reasonable inquiry, of the Indian parent, grandparent, and extended family members of the Indian child. The notice must also provide information on the parties and court proceedings pending in State court. The notice must inform the identified Indian tribe that it may have the right to intervene in the court proceeding, and must inquire whether the Indian tribe intends to intervene or waive its rights to intervene. Finally, the notice must state that if the Indian tribe fails to respond by the statutory deadline, the right of that Indian tribe to intervene will be considered to have been waived.

*Section 8. Intervention by Indian tribe*

Section 8 adds four new subsections to 25 U.S.C. 1913, which would limit the right of an Indian tribe to intervene in a court proceeding involving foster care placement, voluntary adoption, or termination of parental rights and which would authorize voluntary agreements for enforceable rights of visitation.

Under subsection (e), an Indian tribe could intervene in a voluntary proceeding to terminate parental rights only if it has filed a notice of intent to intervene or a written objection not later than

30 days after receiving the notice required by sections 6 and 7. An Indian tribe could intervene in a voluntary adoption proceeding only if it has filed a notice of intent to intervene or a written objection not later than the later of 90 days after receiving notice of the adoptive placement or 30 days after receiving notice of the adoption proceeding pursuant to sections 6 and 7. If these notice requirements are not complied with, the Indian tribe could intervene at any time. However, an Indian tribe may no longer intervene in a proceeding after it has provided written notice to a State court of its intention not to intervene or of its determination that neither the child nor any birth parent is a member of that Indian tribe. Finally, subsection (e) would require that an Indian tribe accompany a motion for intervention with a certification that documents the tribal membership or eligibility for membership of the Indian child under applicable tribal law.

Subsection (f) would clarify that the act or failure to act of an Indian tribe to intervene or not intervene under subsection (e) shall not affect any placement preferences or other rights accorded to individuals under the Act, nor may this preclude an Indian tribe from intervening in a case in which a proposed adoptive placement is changed.

Subsection (g) would prohibit any court proceeding involving the voluntary termination of parental rights or adoption of an Indian child from being conducted before the date that is 30 days after the Indian tribe has received notice under sections 6 and 7.

Subsection (h) would authorize courts to approve, as part of the adoption decree of an Indian child, a voluntary agreement made by an adoptive family that a birth parent, a member of the extended family, or the Indian tribe will have an enforceable right of visitation or continued contact after entry of the adoption decree. However, failure to comply with the terms of such agreement may not be considered grounds for setting aside the adoption decree.

*Section 9. Fraudulent representation*

Section 9 would add a new section 114 to the Indian Child Welfare Act that would apply criminal sanctions to any person other than a birth parent who—(1) knowingly and willfully falsifies, conceals, or covers up a material fact concerning whether, for purposes of the Act, a child is an Indian child or a parent is an Indian; or (2) makes any false or fraudulent statement, omission, or representation, or falsifies a written document knowing that the document contains a false or fraudulent statement or entry relating to a material fact described in (1). Upon conviction of an initial violation, a person shall be subjected to the fine prescribed in 18 U.S.C. 3571 for a Class A misdemeanor (not more than $100,000), imprisonment for not more than 1 year, or both. Upon conviction of any subsequent violation, a person shall be subjected to the fine prescribed in 18 U.S.C. 3751 for a felony (not more than $250,000), imprisonment for not more than 5 years, or both.

## COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 1962, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, July 25, 1996.*

Hon. JOHN MCCAIN,
*Chairman, Committee on Indian Affairs,*
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1962, the Indian Child Welfare Act Amendments of 1996, as ordered reported by the Senate Committee on Indian Affairs on July 24, 1996.

S. 1962 would amend the Indian Child Welfare Act, including provisions relating to the voluntary termination of parental rights of Indian parents in adoption and foster care cases. CBO estimates that this bill would have no federal budgetary effects. Since enactment of S. 1962 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

Section 4 of the Unfunded Mandates Reform Act of 1995 excludes from the application of that act legislative provisions that enforce the constitutional rights of individuals. CBO has determined that this bill fits within that exclusion because it enforces the due-process rights of parties involved in the adoption of a Native American child.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

## REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee has concluded that enactment of S. 1962 will create only de minimis regulatory or paperwork impacts.

## EXECUTIVE COMMUNICATIONS

The Committee has received a letter in support for S. 1962 from the Department of Justice on July 23, 1996 and a letter of support for S. 1962 from the Department of the Interior on July 24, 1996, which letters are set forth below:

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
*Washington, DC, July 23, 1996.*

Hon. JOHN MCCAIN,
*Chairman, Committee on Indian Affairs,*
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: Thank you for the opportunity to provide the Department of Justice's views on S. 1962, The Indian Child Welfare Act Amendments of 1996.

The Department of Justice has only a limited role in the litigation of Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq.

("ICWA") cases, so our knowledge of how, and how well, ICWA works is premised largely on the reports of the Departments of Health and Human Services and the Interior. They report that the ICWA has generally worked well, especially when parties are informed about ICWA and it is applied in a timely manner. Consistent with our institutional role, we have reviewed S. 1962 based on our experience with civil and criminal enforcement, the United States' commitment to supporting tribal sovereignty, and basic principles of statutory construction. We hope the following comments will assist the Committee in considering the bill.

The Department supports S. 1962 and the important goals of ICWA to promote the best interests of Indian children and the stability and security of Indian tribes and families. We support the bill because it would clarify ICWA, establish some deadlines to provide certainty and reduce delay in adoption proceedings, and strengthen Federal enforcement tools to ensure compliance with ICWA. We understand that S. 1962 is, to a large extent, based on the carefully crafted compromise agreement between Indian tribes and adoption attorneys.

Regarding the provision in Section 4, "Voluntary Termination of Parental Rights," which would require courts to certify that attorneys who facilitate adoptive placements have advised the natural parents of an Indian child concerning the scope of ICWA, see Sec. 4(B), the Department has reservations about this provision to the extent that it might be construed to limit an attorney's ability to discuss the feasibility of various options with his or her client.

Otherwise, the Department believes S. 1962 represents a sound approach to amending ICWA to address the concerns of its critics without compromising tribal self-government or the best interests of Indian children.

If we may be of additional assistance, please do not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

ANNETT HARKINS
(For Andrew Fois, Assistant Attorney General).

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U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
*Washington, DC, July 24, 1996.*

Hon. JOHN MCCAIN,
*Chairman, Committee on Indian Affairs,*
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: We understand that your Committee will consider S. 1962, the "Indian Child Welfare Act (ICWA) Amendments of 1996" on July 24, 1996. We support the enactment of S. 1962, and commend the collaborative efforts of Indian tribes and organizations, adoption attorneys and congressional staff on this legislation, designed to address problems related to the adoption of Indian children.

S. 1962 provides further procedural requirements for individuals, agencies, or tribes involved in the voluntary adoption process and

clarifies their respective responsibilities. It also facilitates compliance with the requirements of the ICWA.

We would recommend that S. 1962 be narrowed in one respect. Section 6 of S. 1962 amends section 103(c)(1) of ICWA to require that the tribe be given notice of the voluntary foster care or adoptive placement of an Indian child. While we have no disagreement with this amendment as it relates to adoptive placements, we question its advisability in connection with foster care placements. Under current law, these placements are not covered by ICWA if the parent retains the right to have the child returned upon demand. The parent is thus able to use temporary foster care placements as a respite while seeking to resolve the problems that made the placement necessary. We recommend that the Committee leave current law unchanged with respect to foster care, in order to support Indian parents' exercise of responsibility in resolving their own problems and of control over the care of their children.

S. 1962 is a preferable alternative to Title III of H.R. 3286. It protects the sovereign status of Indian tribes and preserves the intent of the ICWA.

The Office of Management and Budget has advised that it has no objection to the submission of this letter from the standpoint of the Administration's program. If we can be of additional assistance please feel free to call upon us.

Sincerely,

ADA E. DEER,
*Assistant Secretary—Indian Affairs.*

## CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the enactment of S. 1962 will result in the following changes in 25 U.S.C. § 1901 et seq., with existing language which is to be deleted in black brackets and the new language to be added in italic:

### 25 U.S.C. 1911(a)

**§ 1911. Indian tribe jurisdiction over Indian child custody proceedings**

(a)*(1)* Exclusive jurisdiction—

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. [Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence of domicile of the child.]

*(2) An Indian tribe shall retain exclusive jurisdiction over any child custody proceeding that involves an Indian child, notwithstanding any subsequent change in the residence or domicile of the Indian child, in any case in which the Indian child—*

*(A) resides or is domiciled within the reservation of the Indian tribe and is made a ward of a tribal court of that Indian tribe; or*

*(B) after a transfer of jurisdiction is carried out under subsection (b), becomes a ward of a tribal court of that Indian tribe.*

* * * * * * *

25 U.S.C. 1911(c)

(c) State court proceedings; intervention—

[In any State court proceeding] *Except as provided in section 103(e), in any State court proceeding* for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

* * * * * * *

25 U.S.C. 1913(a)

**§ 1913. Parental rights, voluntary termination**

(a) Consent; record; certification matters; invalid consents—

*(1)* Where any parent of Indian custodian voluntarily consents to a [Foster care placement] *foster care of preadoptive or adoptive 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] *judge's certificate that—*

*(A) the terms* and consequences of the consent were fully explained in detail and were fully understood by the parent [or Indian custodian.] *or Indian custodian; and*

*(B) any attorney or public or private agency that facilitates the voluntary termination of parental rights or preadoptive or adoptive placement has informed the natural parents of the placement options with respect to the child involved has informed those parents of the applicable provisions of the Act, and has certified that the natural parents will be notified within 10 days of any change in the adoptive placement.*

[The court shall also certify]

*(2) The court shall also certify* that either the parent of 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,]

*(3) Any consent given prior to,* or within ten days after, birth of the Indian child shall not be valid.

*(4) An Indian custodian who has the legal authority to consent to an adoptive placement shall be treated as a parent for the purposes of the notice and consent to adoption provisions of this Act.*

* * * * * * *

25 U.S.C. 1913(b)

(b) Foster care placement; withdrawal of consent—

*(1)* Any parent or Indian 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 Indian custodian.

*(2) Except as provided in paragraph (4), a consent to adoption of an Indian child or voluntary termination of parental rights to an Indian child may be revoked, only if—*

*(A) no final decree of adoption has been entered; and*

*(B)(i) the adoptive placement specified by the parent terminates; or*

*(ii) the revocation occurs before the later of the end of—*

*(I) the 180-day period beginning on the date on which the Indian child's tribe receives written notice of the adoptive placement provided in accordance with the requirements of subsections (c) and (d); or*

*(II) the 30-day period beginning on the date on which the parent who revokes consent receives notice of the commencement of the adoption proceeding that includes an explanation of the revocation period specified in this subclause.*

*(3) The Indian child with respect to whom a revocation under paragraph (2) is made shall be returned to the parent who revokes consent immediately upon an effective revocation under that paragraph.*

*(4) Subject to paragraph (6), if, by the end of the applicable period determined under subclause (I) or (II) of paragraph (2)(B)(ii), a consent to adoption or voluntary termination of parental rights has not been revoked, beginning after that date, a parent may revoke such a consent only—*

*(A) pursuant to applicable State law; or*

*(B) if the parent of the Indian child involved petitions a court of competent jurisdiction, and the court finds that the consent to adoption or voluntary termination of parental rights was obtained through fraud or duress.*

*(5) Subject to paragraph (6), if a consent to adoption or voluntary termination of parental rights is revoked under paragraph (4)(B), with respect to the Indian child involved—*

*(A) in a manner consistent with paragraph (3), the child shall be returned immediately to the parent who revokes consent; and*

*(B) if a final decree of adoption has been entered, that final decree shall be vacated*

*(6) Except as otherwise provided under applicable State law, no adoption that has been in effect for a period longer than or equal to 2 years may be invalidated under this subsection.*

* * * * * * *

25 U.S.C. 1913(c)

**[**(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, an Indian 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, or the case may be, and the child shall be returned to the parent.]

*(c)(1) A party that seeks the voluntary placement of an Indian child or the voluntary termination of the parental rights of a parent of an Indian child shall provide written notice of the placement or proceeding to the Indian child's tribe. A notice under this subsection shall be sent by registered mail (return receipt requested) to the Indian child's tribe, not later than the applicable date specified in paragraph (2) or (3).*

*(2)(A) Except as provided in paragraph (3), notice shall be provided under paragraph (1) in each of the following cases:*

*(i) Not later than 100 days after any foster care placement of an Indian child occurs.*

*(ii) Not later than 5 days after any preadoptive or adoptive placement of an Indian child.*

*(iii) Not later than 10 days after the commencement of any proceeding for a termination of parental rights to an Indian child.*

*(iv) Not later than 10 days after the commencement of any adoption proceeding concerning an Indian child.*

*(B) A notice described in subparagraph (A)(ii) may be provided before the birth of an Indian child if a party referred to in paragraph (1) contemplates a specific adoptive or preadoptive placement.*

*(3) If, after the expiration of the applicable period specified in paragraph (2), a party referred to in paragraph (1) discovers that the child involved may be an Indian child—*

*(A) the party shall provide notice under paragraph (1) not later than 10 days after the discovery; and*

*(B) any applicable time limit specified in subsection (e) shall apply to the notice provided under subparagraph (A) only if the party referred to in paragraph (1) has, on or before commencement of the placement made reasonable inquiry concerning whether the child involved may be an Indian child.*

* * * * * * *

25 U.S.C. 1913(d)

[(d) Collateral attack; vacation of decree and return of custody; limitations—

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, 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.]

*(d) Each written notice provided under subsection (c) shall contain the following:*

*(1) The name of the Indian child involved, and the actual or anticipated date and place of birth of the Indian child.*

*(2) A list containing the name, address, date of birth, and (if applicable) the maiden name of each Indian parent and grandparent of the Indian child, if—*

*(A) known after inquiry of—*

*(i) the birth parent placing the child or relinquishing parental rights; and*

*(ii) the other birth parent (if available); or*

*(B) otherwise ascertainable through other reasonable inquiry.*

*(3) A list containing the name and address of each known extended family member (if any), that has priority in placement under section 105.*

*(4) A statement of the reasons why the child involved may be an Indian child.*

*(5) The names and addresses of the parties involved in any applicable proceeding in a State court.*

*(6)(A) The name and address of the State court in which a proceeding referred to in paragraph (5) is pending, or will be filed; and*

*(B) the date and time of any related court proceeding that is scheduled as of the date on which the notice is provided under this subsection.*

*(7) If any, the tribal affiliation of the prospective adoptive parents.*

*(8) The name and address of any public or private social service agency or adoption agency involved.*

*(9) An identification of any Indian tribe with respect to which the Indian child or parent may be a member.*

*(10) A statement that each Indian tribe identified under paragraph (9) may have the right to intervene in the proceeding referred to in paragraph (5).*

*(11) An inquiry concerning whether the Indian tribe that receives notice under subsection (c) intends to intervene under subsection (e) or waive any such right to intervention.*

*(12) A statement that, if the Indian tribe that receives notice under subsection (c) fails to respond in accordance with subsection (e) by the applicable date specified in that subsection, the right of that Indian tribe to intervene in the proceeding involved shall be considered to have been waived by that Indian tribe.*

* * * * * * *

25 U.S.C. 1913

*(e)(1) The Indian child's tribe shall have the right to intervene at any time in a voluntary child custody proceeding in a State court only if—*

*(A) in the case of a voluntary proceeding to terminate parental rights, the Indian tribe filed a notice of intent to intervene or a written objection to the termination, not later than 30 days after receiving notice that was provided in accordance with the requirements of subsections (c) and (d); or*

*(B) in the case of a voluntary adoption proceeding, the Indian tribe filed a notice of intent to intervene or a written objection to the adoptive placement, not later than the later of—*

*(i) 90 days after receiving notice of the adoptive placement that was provided in accordance with the requirements of subsections (c) and (d); or*

*(ii) 30 days after receiving a notice of the voluntary adoption proceeding that was provided in accordance with the requirements of subsections (c) and (d).*

*(2)(A) Except as provided in subparagraph (B), the Indian child's tribe shall have the right to intervene at any time in a voluntary child custody proceeding in a State court in any case in which the Indian tribe did not receive written notice provided in accordance with the requirements of subsections (c) and (d).*

*(B) An Indian tribe may not intervene in any voluntary child custody proceeding in a State court if the Indian tribe gives written notice to the State court or any party involved of—*

*(i) the intent of the Indian tribe not to intervene in the proceeding; or*

*(ii) the determination by the Indian tribe that—*

*(I) the child involved is not a member of, or is not eligible for membership in, the Indian tribe; or*

*(II) neither parent of the child is a member of the Indian tribe.*

*(3) If an Indian tribe files a motion for intervention in a State court under this subsection, the Indian tribe shall submit to the court, at the same time as the Indian tribe files that motion, a certification that includes a statement that document, with respect to the Indian child involved, the membership or eligibility for membership of that Indian child in the Indian tribe under applicable tribal law.*

*(f) Any act or failure to act of an Indian tribe under subsection (e) shall not—*

*(1) affect any placement preference or other right of any individual under this Act;*

*(2) preclude the Indian tribe of the Indian child that is the subject of an action taken by the Indian tribe under subsection (e) from intervening in a proceeding concerning that Indian child if a proposed adoptive placement of that Indian child is changed after that action is taken; or*

*(3) except as specifically provided in subsection (e), affect the applicability of this Act.*

*(g) Notwithstanding any other provision of law, no proceeding for a voluntary termination of parental rights or adoption of an Indian child may be conducted under applicable State law before the date that is 30 days after the Indian child's tribe receives notice of that proceeding that was provided in accordance with the requirements of subsections (c) and (d).*

*(h) Notwithstanding any other provision of law (including any State law)—*

*(1) a court may approve, as part of an adoption decree of an Indian child, an agreement that states that a birth parent, an extended family member, or the Indian child's tribe shall have*

*an enforceable right of visitation or continued contact with the Indian child after the entry of a final decree of adoption; and*

*(2) the failure to comply with any provision of a court order concerning the continued visitation or contact referred to in paragraph (1) shall not be considered to be grounds for setting aside a final decree of adoption.*

* * * * * * *

25 U.S.C. 1924

***§ 114. Fraudulent Representation***

*(a) IN GENERAL.—With respect to any proceeding subject to this Act involving an Indian child or a child who may be considered to be an Indian child for purposes of this Act, a person, other than a birth parent of the child, shall, upon conviction, be subject to a criminal sanction under subsection (b) if that person—*

*(1) knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device, a material fact concerning whether, for purposes of this Act—*

*(A) a child is an Indian child; or*

*(B) a parent is an Indian; or*

*(2)(A) makes any false, fictitious, or fraudulent statement, omission, or representation; or*

*(B) falsifies a written document knowing that the document contains a false, fictitious, or fraudulent statement or entry relating to a material fact described in paragraph (1).*

*(b) CRIMINAL SANCTIONS.—The criminal sanctions for a violation referred to in subsection (a) are as follows:*

*(1) For an initial violation, a person shall be fined in accordance with section 3571 of title 18, United States Code, or imprisoned not more than 1 year, or both.*

*(2) For any subsequent violation, a person shall be fined in accordance with section 3571 of title 18, United States Code, or imprisoned not more than 5 years, or both.*

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