authority to the tribe to determine a child's status as an Indian child without any articulated standards, it provides the child with no procedural safeguards or right of review.21 As the ICWA is premised on the assumption that it is in an Indian child's best interests to be placed within their tribe, it is clear Congress was not concerned about procedural due process and safeguards. Where a minor has not been represented and heard in the tribal determination regarding the child's status as an Indian child, the child should be able to attack the judgment."

My answer to this question is murky because I believe that the use of the term "Indian children" for the purpose of ICWA applicability requires serious reconsideration. I have no illusions that this Committee will undertake such a huge, controversial inquiry this year in the context of the N.C.A.I. proposals. However, to honestly address this question, I must condition my wish to see the purposes of the ICWA promoted on my belief that the statute, as written, is constitutionally defective.

Do you have reason to believe the Indian tribes will find acceptable the modifications you and Ms. Gorman have proposed?

Yes. All of our proposed modifications have been thoroughly discussed with representatives of the group that drafted the N.C.A.I. language in Tulsa. As stated by Jack Trope in his written testimony on behalf of Association on American Indian Affairs, Inc., at p. 19, footnote 4, the modifications, though important, are clarifying and not in conflict with the intent of the N.C.A.I. draft. Nevertheless, failure to make these changes would sufficiently undermine the purposes of the proposal so that we and the organizations we represent could not support it.

21 Such power delegated to an administrative body, for example, would be subject to the procedural protections afforded to an individual under the Administrative Procedures Act. (5 U.S.C. sec. 501, et seq.)
parents than if that risk were reduced or eliminated.

6. How would the compromise lead to the early identification of those cases that will be controversial? And how would this serve the "best interests" of the Indian children involved?

If enacted, the "compromise" legislation would cause tribes to get notice as soon as possible of known potential "Indian children." Lawyers and agencies planning adoptive placements would have a huge incentive to notify tribes at least 60 days before the child's birth (or placement). This would limit the time that the child would be "in limbo" in the adoptive home to a maximum of 30 days.

The tribe seeking to block a potential adoption would, likewise, have every reason to act promptly. I believe that tribes would give notice of intent to intervene as soon as they were to decide that that is their plan, in order to possibly preclude a placement and to minimize harm to the child.

Early awareness of which cases will be controversial is of immeasurable benefit to the children in question. At best, the adoptive placement could be avoided. If litigation did ensue, it would be concluded as soon as possible. This would be advantageous to the child regardless of the result.

7. What issues have been addressed in Title III of H.R. 3286 that are not addressed in the NCAI compromise language? How would you propose to address these issues, given wide spread tribal and Administration opposition to Title III?

Title III of H.R. 3286 codifies the "existing Indian family" doctrine as articulated in the decision in the Rost case. Nothing in the N.C.A.I. language addresses this issue. As I stated in my answer to question number 3 above, I believe that the question "To which children should the I.C.W.A. apply?" is a highly controversial policy issue of constitutional dimension. Were Title III to become the law, courts across the country would decide I.C.W.A. applicability on a case-by-case basis. I cannot tell this Committee that I believe that courts would not act wisely and appropriately.

Both groups of attorneys who have authorized me to speak on their behalf support Title III. Personally, based on my perhaps naive political assessment that Title III cannot be enacted into law, I believe that Congress should carefully reexamine the breadth of the "membership" basis for I.C.W.A. applicability in a future legislative session.

I do believe that the "retroactivity" problem addressed in Title III will be ameliorated if the N.C.A.I. draft becomes law. The relatively short time lines for membership and/or intervention determinations will solve the most egregious "retroactivity" horror stories by forcing tribes to take action in a timely manner or forego intervention.

I have tried to answer your questions thoroughly, but not too technically or tediously to be read easily. I continue to be at the Committee's disposal if I need to expand or explain my answers or if I can be of any further service.

While we have used words like "compromise draft" a good deal, this effort is more an attempt to do the "right" thing for all concerned than a battle of forces. All of us who have worked on this project want to see children of Indian ancestry well served and kept out of court battles as much as possible.

Thank you again for inviting my views.

Sincerely,

MARC GRADSTEIN
Attorney at Law
The Seminole Nation of Oklahoma (the SNO) appeals from the judgment terminating the parental rights of Renea Y., an enrolled tribal member, to her daughter, Alexandria. The SNO contends the trial court violated the Indian Child Welfare Act (hereinafter “ICWA” or “Act”) by failing to transfer jurisdiction of the proceedings to the SNO and failing to follow the ICWA placement preferences. We find the trial court properly refused to apply the provisions of the ICWA because neither Alexandria nor Renea had any significant social, cultural or political relationship with Indian life; thus, there was no existing Indian family to preserve.

Facts

Alexandria Y. was born in December 1990 with cocaine in her system. She was immediately taken into custody by the Orange County Social Services Agency (SSA) and placed in an emergency shelter home. She was declared a dependent of the juvenile court under Welfare and Institutions Code section 300, subdivisions (a) and (b) in February 1991. In August, when Alexandria was seven months old, she was moved to the home of the T.'s, an Hispanic family, \(^1\) where she has lived ever since. In September, the six-month review hearing was held. SSA had been unable to locate either parent and neither of them had contacted or visited Alexandria. The trial court terminated reunification services and set a selection and implementation hearing for December 1991.

In October, SSA discovered that Renea was an enrolled member of the SNO, making Alexandria eligible for enrollment and potentially subject to the ICWA. It was determined that Renea is one-eighth Seminole Indian; she was adopted as a toddler by a non-Indian family. The selection and implementation hearing was continued several times to accommodate the notice requirements of the ICWA, and the SNO indicated its intent to intervene in the proceedings by letter dated February 11.

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\(^1\) Alexandria's father is Hispanic.
The SNO filed for writ relief in this court, arguing that once a minor is
determined to be an “Indian child” as defined by the ICWA, the juvenile court has no
jurisdiction to consider the reasonableness of such determination. This court agreed,
and issued a peremptory writ of mandate directing the trial court to recognize “SNO’s
determination that Alexandria is an Indian child and therefore entitled to placement
preference under section 1915, subdivision (b) [fn. omitted].” (Seminole Nation of
Oklahoma v. Superior Court (July 31, 1992) G012836.)4

2 An Indian child is defined as “any unmarried person who is under age eighteen and
is... eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” (25
U.S.C. § 1903, subd. (a).)

3 Membership in the SNO is open to those who can prove their blood relationship, no matter
what the degree, to one of the Seminole Indians named on a tribal list prepared around 1900.

4 The SNO claims this holding is law of the case and dispositive of the question whether the trial
court should have applied ICWA’s placement preferences. But the doctrine of law of the case does not apply
where the appellate court is considering a ground that was not raised in the prior appellate proceeding. (Quartel v. Allstate Life Ins. Co. (1985) 38 Cal.3d 425, 435.) The issue before us in the writ proceeding was narrowly
framed: “Once a minor is determined to be an ‘Indian child’ as defined by the ICWA, does the juvenile court
have jurisdiction to inquire into the reasonableness of such determination?” (Seminole Nation of Oklahoma v.
Superior Court, supra, G012836.) The “Indian child” determination was a threshold issue in this case; none of
the considerations involved in applying the placement preferences or other provisions of the ICWA had yet been
presented to the trial court, let alone this court, at the time of the writ proceeding.

When proceedings resumed, the mother filed a petition to transfer
Alexandria’s case to the tribal court. (25 U.S.C. § 1911, subd. (b).) The trial court set
a hearing on the issue of whether good cause existed to deny the transfer petition,
followed by the trailing selection and implementation hearing, for September 21. The
trial court notified the SNO of the transfer petition by letter, stating, “Please be advised
that the mother of [Alexandria]... has... filed a PETITION FOR TRANSFER OF
CASE TO TRIBAL COURT... [fn] Pursuant to the Indian Child Custody Guidelines,
C. 4. (b), you have twenty days from the receipt of this notice of proposed transfer to
decide whether to decline the transfer. [fn] You may inform this court, per the
Guidelines, of your decision orally, or in writing.” SNO petitioned the tribal court to
accept jurisdiction, and Chief Magistrate Tah-Bone, thinking the trial court had already
transferred jurisdiction, issued an order accepting jurisdiction on September 8.

On September 21, the SNO orally joined in Renea’s petition to transfer,
and Renea orally joined in the SNO’s motion to enforce the ICWA placement
preferences. The hearing on the transfer motion commenced and continued for several
days over a three-month period. Dr. Roberto Flores de Apodaca, a clinical child
c clinical psychologist, testified he had performed a bonding study on Alexandria and her foster
parents when Alexandria was about 15 months old. He observed that a “secure
bonding or attachment had taken place” between them, providing Alexandria with a
sense of security which was critical to her optimum development. Removing her from
her placement with the T. family would probably cause her to “suffer negative
emotional consequences” manifested by “emotional withdrawal... indiscriminate
friendliness or provocative behavior...” Dr. Apodaca performed a supplemental
bonding study in November, and testified there was still a strong bond between
Alexandria and her foster parents. He opined she was even more vulnerable to
emotional damage from a separation than he had initially thought, and it was likely she
would suffer detrimental effects if she were to be removed from the T. family.
Dr. Dixie Noble, a Native American psychologist, testified that she believed, based on reading studies performed by others, “Native American children who grow up in non-Indian homes have greater difficulties later on when the issue of identity becomes important in adolescence.” After hearing the testimony and argument, the trial court denied the petition for transfer, finding the petition was untimely and that transfer would result in an inconvenient forum for the hearing on termination of parental rights and would be contrary to the best interests of the child.

The selection and implementation hearing concluded in March 1993. The trial court selected adoption as Alexandria’s permanent plan and terminated Renea’s parental rights. The trial court then found there was good cause, beyond a reasonable doubt, not to enforce the ICWA placement preferences. Its determination was based on the record of all proceedings in the case since December 1991, specifically including the prior testimony of Drs. Apodaca and Noble. Both Renea and the SNO appealed.

In January 1994, this court filed an unpublished opinion reversing the judgment terminating Renea’s parental rights. We found it was error to terminate reunification services and schedule the selection and implementation hearing after the six-month review hearing when jurisdiction over Alexandria had not been based on abandonment. (Welf. & Inst. Code, § 300, subd. (g), § 366.21, subd. (e).) We remanded the case for a new six-month hearing and noted: “Our disposition of this issue eliminates the need to address several of the other issues raised by Renea and the Seminole Nation of Oklahoma.” (In re Alexandria Y. (January 31, 1994) G013944.) Both SSA and Alexandria filed petitions for rehearing, urging us to address the ICWA issues because they would be relevant on remand. Both petitions were denied. A petition for review in the Supreme Court was also denied. The remittitur issued on May 9, 1994.5

After several continuances to accommodate the reappointment of counsel, the adoption of a reunification plan for Renea, and notice requirements, a new 12-month hearing was held in February 1995. Shortly before the hearing, Renea filed a petition for transfer of jurisdiction to the tribal court. At the hearing, the SNO expressly declined to join in the petition. The trial court denied the petition, erroneously finding the October 1992 order denying transfer was res judicata and thus could not be reconsidered; it also reaffirmed the previous bases for denial, finding the petition was untimely, and that transfer would result in an inconvenient forum and be contrary to Alexandria’s best interests. The trial court then addressed the 12-month review issues. The social worker reported she had received a letter from Renea expressing her desire to relinquish her parental rights to Alexandria and to have the child adopted by her present caretakers. The trial court terminated reunification services and set a selection and implementation hearing for June 1995.

On June 15, the SNO filed a motion requesting a change in Alexandria's placement based on the ICWA preferences. On June 20, the court denied the motion on several grounds: (1) no Indian family existed to which the provisions of the ICWA could be applied; (2) the preferences were unconstitutional in that they denied Alexandria equal protection of the law based on race; (3) the issue of placement preferences was res judicata, having been previously decided by the trial court and not

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5 Both Alexandria and SSA argue because we did not order Alexandria removed from the T. family home and placed with an Indian family in the first appeal, we impliedly approved her placement. Thus, they claim, the propriety of her placement is now law of the case. But the effect of our reversal was to place the case back at the six-month hearing stage, before the SNO became involved and any of the ICWA issues were raised. The posture of the case as if none of the subsequent hearings had been held. (Barnes v. Litten Systems, Inc. (1994) 28 Cal.App.4th 681, 683-684.) Although we could have addressed the issue for the guidance of the trial court on remand, we chose not to. Our refusal to speak gratuitously to an issue does not render it law of the case.
The ICWA (25 U.S.C. § 1901 et seq.) was enacted in 1978. It “was the product of rising concern in the mid-1970’s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.” (Mississippi Band of Choctaw Indians v. Holyfield (1989) 109 S.Ct. 1597, 1600.) Testimony of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, at congressional hearings indicated that tribal sovereignty in the socially and culturally determinative area of family relationships was being undermined by authorities who lacked an understanding of the Indian way of life. “One of the most serious failings of the present system is that Indian children are removed from the custody of their natural

Discussion

The SNO levels a host of challenges at the trial court proceedings, but the most significant is the viability of the judicially created “existing Indian family doctrine.” There is a split on this issue, both nationally and in California. For the reasons explained below, we follow those cases refusing to apply the ICWA unless the Indian child or at least one of his parents has a significant social, cultural or political relationship with Indian life.

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intervene. (§ 1911, subd. (c).) The Act provides that no involuntary termination of parental rights to an Indian child may be ordered unless the court determines, based on proof beyond a reasonable doubt, including the testimony of expert witnesses, that continued custody of the child by the parent is likely to result in serious emotional or physical damage. (§ 1912, subd. (f).) Absent good cause to the contrary, placement preference shall be given to: (1) a member of the Indian child's extended family; (2) a foster home approved by the child's tribe; (3) an Indian foster home approved by a non-Indian authority; or (4) a children's institution approved by an Indian tribe. (§ 1915, subd. (b).)

Cases following the "existing Indian family doctrine" refuse to apply the ICWA to situations where an Indian child is not being removed from an existing Indian family, because in that situation the underlying policies of the ICWA are not furthered. The perception of "Indian family" has differed from court to court. One group of cases has refused to apply the ICWA where the Indian child himself has never lived in an Indian family and has had no association with Indian culture, even though his biological parent has had such associations. (See, e.g., Matter of Adoption of Baby Boy L. (Kan. 1982) 643 P.2d 168; Matter of Adoption of T.R.M. (Ind. 1988) 525 N.E.2d 298; In Interest of S.A.M. (Mo. 1986) 703 S.W.2d 603; Adoption of Baby Boy D. (Okla. 1985) 742 P.2d 1059.)

In Baby Boy L., the first case to articulate the doctrine, the baby was the illegitimate child of a non-Indian mother, who voluntarily surrendered him to a non-Indian family for adoption on the day of his birth. The biological father, who was incarcerated, objected to the adoption and requested custody. Because the father was five-eighths Kiowa Indian, the Kiowa Tribe of Oklahoma was notified, and it petitioned to intervene and to transfer jurisdiction. The Kansas Supreme Court stated, "A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother. Section 1902 of the Act makes it clear that it is the declared policy of Congress that the Act is to adopt minimum federal standards 'for the removal of Indian children from their (Indian) families.' Numerous provisions of the Act support our conclusion that it was never the intent of Congress that the Act would apply to a factual situation such as is before the court." (Matter of Adoption of Baby Boy L., supra, 643 P.2d at p. 175.)

In Baby Boy D., the Oklahoma Supreme Court likewise found the ICWA inapplicable to an unwed Indian father who sought to invalidate an adoption accomplished with the non-Indian mother's consent. Although the father had attended an Indian school and had other contacts with his tribe, the court found the child was not being removed from an existing Indian family unit. "Here we have a child who has never resided in an Indian family, and who has a non-Indian mother." (Adoption of Baby Boy D., supra, 742 P.2d 1059, 1064.) In In Interest of S.A.M., a Missouri court also followed Baby Boy L. and refused to apply the ICWA where an unwed "full-blooded" Kickapoo Indian father sought custody of his seven-year-old daughter after the non-Indian mother's parental rights were involuntarily terminated. The father was not aware of the child's existence until she was almost seven, and the two had visited only twice before the litigation. She had severe emotional problems and was mentally handicapped. The court found the relationship between the father and daughter "does not constitute an 'Indian family' of the type mentioned in [ICWA]." (In Interest of S.A.M., supra, 703 S.W.2d at p. 608.) And in Adoption of T.R.M., the Indiana Supreme Court found the ICWA inapplicable to an attempt by the Oglala Sioux Indian
Tribe and the Indian mother to revoke her consent to the adoption of her daughter by a non-Indian couple. Although the child had not been formally adopted by the couple until the mother sought her return, she had lived with them as their daughter for seven years. The court held, “In the case before us, the child’s biological ancestry is Indian. However, except for the first five days after birth, her entire life of seven years to date has been spent with her non-Indian adoptive parents in a non-Indian culture. While the purpose of the ICWA is to protect Indian children from improper removal from their existing Indian family units, such purpose cannot be served in the present case before this Court. ... [W]e cannot discern how the subsequent adoption proceeding constituted a ‘breakup of the Indian family.’” (Matter of Adoption of T.R.M., supra, 525 N.E.2d at p. 303.)

Other cases have looked beyond the Indian ties of the child to those of the parents when considering the existing Indian family exception to the applicability of the ICWA. In Matter of Adoption of Crews (Wash. 1992) 825 P.2d 305, the mother, who discovered some Indian heritage after the birth of her child, sought to revoke her consent to the child’s adoption. The Washington Supreme Court reviewed the purposes of the ICWA and concluded there was no existing Indian family unit where “[n]either [the mother] nor her family has ever lived on the ... reservation in Oklahoma and there are no plans to relocate the family ... [The father] has no ties to any Indian tribe or community and opposes [the child’s] removal from his adoptive parents. Moreover, there is no allegation by [the mother] or the [tribe] that, if custody were returned to [the mother], [the child] would grow up in an Indian environment. To the contrary, [the mother] has shown no substantive interest in her Indian heritage in the past and has given no indication this will change in the future.” (Id. at p. 310.) In Hampton v. J.A.L. (La. App.2 Cir. 1995) 658 So.2d 331, the mother was 1/16th Indian and was a member of her father’s tribe. She was born on the reservation of her mother’s tribe and lived there for nine years, but had not since maintained any ties to either tribe. She agreed to the adoption of her child by a non-indian couple, who took custody the day after the birth. Six months later, the mother sought to revoke her consent under the ICWA. Citing Baby Boy L., Crews, and T.R.M., the Louisiana appellate court found the adoption would not cause the breakup of an existing Indian family or removal of a child from an Indian environment. “The child has never participated in Indian culture or heritage and more importantly based on the evidence presented, would not be exposed to such culture in the future even if returned to her biological mother or her family.” (Hampton v. J.A.L, supra, 658 So.2d at p. 337.)

In re Bridget R., supra, 41 Cal.App.4th 1483, the most recent case on the existing Indian family doctrine, involved a voluntary relinquishment of twins for adoption. The mother was not a Native American, but the father was recognized as a member of the Pomo Indian tribe, whose reservation is in northern California. The parents lived in Los Angeles County at the time of the births. Upon the execution of the relinquishment documents, the twins were immediately placed with their adoptive family, who returned with them to their home in Ohio where they have remained ever since. The father subsequently petitioned to have his voluntary relinquishment rescinded as not in compliance with the ICWA. (§ 1913, subd. (a); § 1914.) Declining to apply the existing Indian family doctrine; the trial court invalidated the relinquishments, and ordered the twins removed from their adoptive family and returned to the custody of the father’s extended family.

After extensive analysis, the appellate court reversed, holding that recognition of the existing Indian family doctrine was necessary to preserve the ICWA’s constitutionality. “We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child’s biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or
political relationship with their tribe.” (In re Bridget R., supra, 41 Cal.App.4th at p. 1492.) The court concluded that the application of the Act under these circumstances would thwart its purpose of preserving Indian culture through the preservation of Indian families and would violate the Constitution by:

1. impermissibly intruding upon a power ordinarily reserved to the states;
2. interfering with Indian children's fundamental due process rights respecting family relationships; and
3. depriving Indian children of equal opportunities to be adopted and exposing them to an unequal chance of having non-Indian families torn apart based solely on race, in the absence of a compelling state purpose. Because the trial court had not taken evidence on whether the biological parents maintained "significant social, cultural or political relationships" with the tribe, the case was remanded for a determination on that issue.8

We agree with Bridget R. that recognition of the existing Indian family doctrine is necessary to avoid serious constitutional flaws in the ICWA. But we disagree with its holding that the doctrine cannot come into play unless the child and both his parents lack a significant relationship with Indian life. We are not willing to so limit the doctrine. As demonstrated by our review of the cases, whether there is an existing Indian family is dependent on the unique facts of each situation.

Nor must the existing Indian family be limited as suggested in Bridget R. Contrary to the view of the Bridget R. court (41 Cal.App.4th at p. 1500), a broader interpretation of the doctrine has not been impliedly rejected by the Supreme Court in Mississippi Band of Choctaw Indians v. Holyfield, supra, 109 S.Ct. 1597. Holyfield involved twin babies whose parents lived on the reservation and were enrolled members of the tribe. The babies were born 200 miles from the reservation and were voluntarily relinquished for adoption to a non-Indian couple, who adopted them in state court. The trial court found the twins' were not domiciled on the reservation because they had never been physically present there; thus, the tribal court did not have exclusive jurisdiction of the proceedings under § 1911, subdivision (a). The Supreme Court disagreed. It held that the domicile of minors is generally the domicile of their parents; thus, the twins were domiciled on the reservation and the tribal court had exclusive jurisdiction.

Holyfield did not reject any form of the existing Indian family doctrine. It dealt with reservation-domiciled Indian parents who had left the reservation temporarily for the birth of their children so they could relinquish them for adoption and avoid the application of the ICWA. The Supreme Court held the application of the exclusive jurisdiction provisions of the ICWA could not be defeated by the acts of the parents. (Id. at pp. 1608-1609.)

Furthermore, the facts of the case before us do not require us to hold, in the abstract, that the existing Indian family exception will not apply (in other words, the ICWA will apply) if one of an Indian child's biological parents, no matter how removed from the child's life, has maintained a connection to Indian life that a trial court deems significant. Here, the ICWA is not applicable under any version of the doctrine. Neither Alexandria nor Renea has any relationship with the SNO, let alone a significant one. Renea was raised by a non-Indian family, and her extended family is non-Indian. The issue of the existing Indian family doctrine was fully litigated below, but no evidence was presented to suggest Renea had ever been exposed to her Indian heritage as a child or pursued such an interest as an adult. The father is Hispanic, and Alexandria is placed in a preadoptive Hispanic home where Spanish is spoken. Under

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8 Two additional California cases have recognized the doctrine, but neither relied on it as a basis for the decision. (In re Baby Girl A. (1991) 230 Cal.App.3d 1611; In re Wamani P. (1989) 216 Cal.App.3d 156.) And two California cases have refused to apply the doctrine where only the child's Indian contact was considered. (Adoption of Lindsay C. (1991) 229 Cal.App.3d 604, In re Junious Id. (1992) 44 Cal.App.3d 786.) Several other states have rejected the doctrine. (See, e.g., Master of Adoption of T.N.F. (Alaska 1989) 781 P.2d 973; Master of Baby Roy Doe (Idaho 1993) 849 P.2d 975; Master of N.S. (S.D. 1991) 474 N.W.2d 96.)
these circumstances, it would be anomalous to allow the ICWA to govern the termination proceedings. It was clearly not the intent of the Congress to do so.

On the basis of the existing Indian family doctrine, we affirm the trial court's refusal to transfer jurisdiction to the SNO and to apply the ICWA's placement preferences. The judgment terminating Renea's parental rights is affirmed.

CERTIFIED FOR PUBLICATION.

WALLIN, J.

I CONCUR:

SILLS, P. J.

9 The SNO argues the case was actually transferred to it in September 1992 when the trial court notified the tribal court of the mother's petition and the tribal court issued an order accepting jurisdiction. This argument must fail because the letter from the trial court could not function as an order. Chief Magistrate Tahb-Bone thought the trial court was transferring jurisdiction, and the trial court thought it would see if the tribal court wanted jurisdiction before it held a good cause hearing. This was a misunderstanding and does not elevate a letter to the status of a binding order.
Statement of

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Testimony before the
SENATE COMMITTEE ON INDIAN AFFAIRS
on
AMENDMENTS TO THE INDIAN CHILD WELFARE ACT
PROPOSED BY THE NATIONAL CONGRESS OF AMERICAN INDIANS

Washington, D.C.
June 26, 1996

Chairman McCain, Members of the Committee, Good Morning.

My name is Michael J. Walleri, from Fairbanks, Alaska. For the last 17 years, I have represented the Tanana Chiefs Conference, a consortium of 34 Indian tribes in Interior Alaska. I am currently, general counsel for the TCC and the tribes. The member tribes have a combined tribal population of a little over 15,000 people, and our office manages an active ICWA case load comprised of between 120-160 children's cases, one half of which are in tribal courts. Over the last year and a half, I participated with several tribal and adoption attorney's in a national workgroup to develop amendments to the Indian Child Welfare Act, which culminated in the proposal submitted for your consideration by the National Congress of American Indians (NCAI).

HOW THE PROPOSAL WAS DEVELOPED

The NCAI proposal is the product of discussions over the last year and a half between the National Indian Child Welfare Association (NICWA), the Association on American Indian Affairs (AAIA), Tanana Chiefs Conference, (TCC) and the American Academy of Adoption Attorney's (AAAA). The effort was intended to develop a consensus package of amendments which would address mutually perceived problems with the Indian Child Welfare Act. These problems tend to destabilize Indian child adoptive placements by protracted and avoidable litigation over ambiguous language in the Act. The goal was to clarify and improve various provisions of the Act to bring more stability to Indian child adoptive placements in a manner consistent with the underlying policies of the Act.

The need for this legislation is not new. In 1988, the Committee considered several amendments advanced by tribal groups. In recent years, new accounts of contentious and prolonged litigation, and the adoption of different interpretations of this federal law by various states, has highlighted problems with the Act.

Last year, several proposals to amend ICWA were filed in the House and Senate. The House held a subcommittee hearing on one of the proposals in May, and several tribal groups and adoption practitioners testified. After the hearing, representatives of the AAAA contacted representatives of NICWA and TCC to explore the possibility of developing consensus legislation. A national workgroup was formed and met over the following summer to discuss and develop such an approach.

The national workgroup produced several drafts of possible language, and finally presented a draft proposal to the Alaska Federation of Natives (AFN) in October of 1995. The AFN endorsed the package at its annual convention, and in November of 1995 the package was presented to NCAI at its annual convention in San Diego. NCAI gave the process a "yellow light" by endorsing the draft, and encouraging the process to continue, including consultation with a broader cross -
section of tribes on the national level. Substantive concerns within the adoption
attorney community required further modification of the proposal, which was
developed at a meeting in Phoenix in December, 1995. AAAA endorsed the Phoenix
draft, which contained substantive changes and required resubmission to NCAI at
its mid-year meeting in Tulsa in June, 1996. NCAI offered a further revision of the
draft proposal at that time, which is before you now. Last week, the AAAA
endorsed the NCAI proposal.

In the interim, the House passed amendments to ICWA contained in Title III
of H.R. 3286, without benefit of a hearing process. There was no tribal consultation
without a hearing process, and not a single tribe in the nation supported the
proposal. The bi-partisan leadership of the House Resources Committee strongly
objected to the provisions, and expressed its support for a more balanced and
reasoned process such as the national workgroup involving meaningful
participation by the tribes and adoption professionals. The action by this Committee,
last week, to strike Title III of H.R. 3286 demonstrates an equal commitment to a
more balanced and reasoned approach to the problem.

ANALYSIS OF NCAI PACKAGE

The amendments to the Indian Child Welfare Act (ICWA) proposed by NCAI
are an attempt to promote stability and certainty of Indian child adoptive
placements, by addressing the causes of protracted and needless litigation. The
litigation has been caused by efforts of some adoption practitioners to evade the
application of the Act, and some tribal agencies to extend the provisions of the Act
improperly.

The House version attempts to simply reclassify certain Indian children to no
longer be Indian. The approach is a disingenuous slight of hand premised upon a
rude image of Indian people and society captured in the 19th century reservation
system. The test harkens back to a discredited policy in place prior to extending the
right to vote to Indians generally, when individual Indians could apply to become
reclassified as non-Indian, if they could demonstrate that they were "civilized".
Moreover, the House version goes beyond addressing problems with voluntary
adoptions by limiting Indian tribes from intervening and providing services in
child abuse and neglect cases which arise off reservation.

The NCAI draft suggests a different approach which focuses upon specific
problems within the area of Indian child welfare practice. It proposes certain reforms
of ICWA intended to promote stability and certainty in the adoption process for
Indian children, adoptive parents, extended Indian family and Indian tribes by
providing:

* clarification of ICWA provisions and procedures,
* incentives for early dispute resolution, and
* penalties for efforts by all parties to violate ICWA provisions.

The NCAI draft also avoids the adverse consequences of the House draft
which would prevent tribes from providing services to Indian children in
involuntary child protection proceedings and needlessly interfere with tribal
membership determinations which would deny other tribal benefits to off
reservation Indian children.

The specific provisions of the NCAI proposal address the following points:

1. NOTICE TO INDIAN TRIBES (VOLUNTARY) [refer to pages 4 and 6 of NCAI
draft]

PROBLEM STATEMENT: Currently, ICWA requires that tribes receive
notice of involuntary foster care placements, but does not require tribal notice of
voluntary adoptions. This has resulted in a serious dichotomy illustrated by two
Alaskan cases which have set national precedent. In In Re JRS, 690 P.2d 10 (Alaska
1984) and Catholic Social Services v. C.A.A., 783 P.2d 1159 (Alaska, 1989) the Courts
held that tribes could intervene into voluntary adoption proceedings to enforce
ICWA placement preferences, but were not entitled to notice of these proceedings.
Consequently, tribes depend upon learning of proposed adoptions by word of
mouth, which needlessly delays the development of tribal responses and
interventions. This has been unnecessarily disruptive of adoptive placements and
prolonged litigation.

PROPOSED SOLUTION: Provide notice to tribes for voluntary adoptions.
The NCAI proposal also specifies the content of the notice to assure that tribes have
adequate information to identify the child and the child's extended family and
respond in a timely manner.

2. TIMELINESS FOR INTERVENTION (VOLUNTARY) [refer to pages 2, 3 and 5 of
NCAI draft]

PROBLEM STATEMENT: Under ICWA, Tribes can intervene at any time in
the proceedings. This can be disruptive of an adoptive family placement if the
intervention occurs after physical placement of the child in the adoptive home.
Since tribes do not currently receive notice of the adoption, and their intervention is
delayed, this can be a common problem.

PROPOSED SOLUTION: If tribes receive early notice, it is reasonable that
tribes be limited to file their intent to intervene, or objection to the adoption within
90 days, or be precluded from further intervention. Additionally, the NCAI draft
provides that if the tribe files a determination within the 90 days that the child is not
a member, the court and adoptive parents can rely upon that representation in the
adoption proceedings.
3. CRIMINAL SANCTIONS [refer to pages 6 of NCAI draft]

PROBLEM STATEMENT: In the Root case [In re Bridget R., 49 Cal. Rptr. 2d 507 (1996)] the attorney for the adoptive parents counseled the biological parents to not disclose that they were tribal members. This issue became a central part of the litigation. That attorney is now being sued by the Roots, the tribe, and the biological family, but the practice is still common among some adoption attorney's. These deceptive practices, by some unethical adoption practitioners, destabilize adoption placements and stimulate needless litigation between tribes, Indian extended family members and the adoptive families, and irreparably harm Indian children. These practices are a fraud upon adoptive parents, Indian children, and Indian extended families, which is destructive to all the involved parties.

PROPOSED SOLUTION: Efforts intended to evade application of federal law, committed by attorney's, and public or private agencies facilitating adoptions, should be a crime.

4. WITHDRAWAL OF CONSENT [refer to pages 3 and 4 of NCAI draft]

PROBLEM STATEMENT: The current ICWA does not provide specific time lines for a parent to withdraw his/her consent to adoption. Instead, ICWA precludes withdrawal of parental consent to adoption based on one of several procedural benchmarks in the termination of parental rights or adoption process. In its current form, it is very unclear as to when a parent may or may not withdraw consent, since various states have differing adoption procedures that may or may not trigger the applicable sections of ICWA. The interplay between various state laws has led to litigation in several states with varying outcomes. Additionally, the time lines between entry of consents to adoptions and the actual commencement of an adoption procedure varies with the laws and practice patterns of the various states. The longer time between parental consent to adoption and commencement of the adoption proceeding increases the potential for problems. This may become more complex with inter-state adoptions in which consents to adopt are obtained in one jurisdiction and the adoption proceedings are initiated in another state. There is a need for a national standard as to when an Indian parent may withdraw consent to adoption to provide more predictability and stability to the adoption process.

PROPOSED SOLUTION: The NCAI proposal establishes a national standard for the withdrawal of parental consent to adoption by providing that a parent may withdraw a consent to adoption up to 30 days after commencement of adoption proceedings, six months after notice to the tribe if no adoption proceeding is commenced, or entry of a final adoption order, whichever occurs first.

5. CLARIFICATION OF APPLICATION OF ICWA IN ALASKA [refer to page 2 of NCAI draft]

PROBLEM STATEMENT: Much of the litigation in Alaska over ICWA involves the issue of Indian country. The concern over the issue continues to drive protracted litigation based upon the implication of such decisions on non-ICWA concerns. This has impeded implementation of the primary goals of ICWA. Consequently, Indian children suffer the trauma of such needless litigation.

PROPOSED SOLUTION: The NCAI draft proposes to define reservations to include Alaska Native villages for ICWA purposes.

6. OPEN ADOPTIONS [refer to page 6 of NCAI draft]

PROBLEM STATEMENT: Much of the litigation over Indian children is related to the winner-take-all characteristic of child custody/adoption litigation. In many states, adoptions must totally terminate the relationship between children and biological parents. In states that allow open adoptions, this option has provided a basis for settlement of contentious litigation which allows Indian children to maintain contact with their family and/or tribe, while remaining in an adoptive placement to which the child has emotionally bonded.

PROPOSED SOLUTION: The NCAI proposal would authorize open adoptions for Indian children in all states. This would also reflect traditional customs of many Native American cultures which generally permit open adoptions by custom and tradition.

7. WARD OF TRIBAL COURT [refer to page 2 of NCAI draft]

PROBLEM STATEMENT: Ambiguity over who is a ward of a tribal court has led to some confusion and litigation. The issue is important since wards of a tribal court are subject to the exclusive jurisdiction of tribal courts.

PROPOSED SOLUTION: The NCAI proposal would clarify that for ICWA purposes, a child may become a ward of a tribal court only if the child was domiciled or resident within a reservation, or where proceedings were transferred from state court to tribal court.

8. INFORMING INDIAN PARENTS OF RIGHTS [refer to page 2 of NCAI draft]

PROBLEM STATEMENT: Currently, ICWA only provides that an Indian parent is advised of his/her rights respecting the adoption of his/her child by the court. This usually occurs long after the parent has decided to consent to the child's adoption, and for the most part is perfunctory. It is not required that the parents be advised about his/her rights before the decision respecting adoption is made. This
has resulted in Indian parents changing their minds after they have consulted a lawyer and been advised of their rights.

PROPOSED SOLUTION: The NCAI proposal would provide that attorney's, and public and private agencies must inform Indian parents of their rights and their children's rights under ICWA prior to the entry of a consent to adoption. Hopefully, this will reduce the number of parents who change their minds about adoption after consulting an attorney subsequent to signing a consent to adoption.

9. TRIBAL MEMBERSHIP.

PROBLEM STATEMENT: The most contentious ICWA litigation involves whether a particular child is a member of a tribe or eligible for membership, and therefore included within the coverage of ICWA. A central premises of US Indian self-determination policy provides that tribes have the right to determine their membership, and that different Indian tribes are free to have different membership criteria. Tribal critics have accused tribes of extending their tribal membership beyond permissible boundaries, while tribes have resisted efforts by state courts to unduly restrict tribes from employing modern tribal membership determinations adopted by the tribes.

Critics of the tribes have called for federal review of such determinations by the tribes, however, an emerging body of case law is addressing the matter. One line of cases has treated the matter as an evidentiary question capable of determination by State courts, with some cases going so far as to hold that State courts can determine tribal membership determinations without regard to established tribal membership determination processes.

On the other hand, another line of cases is emerging which holds that tribal membership must be determined by the tribe, and that review is available in by state and federal courts, after exhaustion of tribal remedies, in determining whether the tribe exceeded its lawful powers, or violated the due process provisions of the Indian Civil Rights Act, and the tribal decisions is entitled to State court full faith and credit.

PROPOSED SOLUTION: The NCAI proposal provides that tribal membership be determined by a certification by the tribe to be filed upon intervention. The proposal does not disturb emerging case law which allows state and federal court review of such determinations after exhaustion of tribal remedies.

OTHER AMENDMENTS

Last week members of the national workgroup continued to meet to discuss various concerns being raised by tribal and adoption advocates. The most recent set of concerns are:

1) allowing pre-birth notice to a tribe of a planned adoption,
2) further clarifying standards of tribal intervention,
3) prohibiting removal of a child from a jurisdiction to evade application of ICWA,
4) need for more specific language regarding Alaska,
5) further clarification of language respecting parental withdrawal of consent, and
6) language requiring information in notice to tribe only if known after a reasonable inquiry.

The national workgroup has developed language to address these concerns and transmitted the proposed language to the committee in a letter by Mr. Jack Trope of AAILA. These amendments are consistent with both the NCAI and AAAA endorsements and merely clarify the drafter's understandings of the proposal.

CONCLUSION

I hope this helps the Committee understand the logic and background behind the NCAI proposal. I believe that the proposal will greatly improve the stability and certainty of Native child adoptive placements, and will reduce the litigation which has plagued the area. I have been impressed with the improvements which have occurred as a result of ICWA when tribal, state and private agencies work together to provide safe and appropriate homes for Indian children, who might not otherwise have an opportunity to be raised in a healthy Indian family environment. On the other hand, there is too much litigation between multiple families seeking to raise the same child. These battles do as much harm to a child as might occur if no body wanted the child. I would urge the committee to take action to adopt the NCAI proposal as a rational, well balanced and thoughtful attempt to curb such destructive litigation.
DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Guidelines for State Courts; Indian Child Custody Proceedings

This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 310 DM 9.

There was published in the Federal Register, Vol. 44, No. 76/Monday, April 23, 1979 a notice entitled Recommended Guidelines for State Courts—Indian Child Custody Proceedings. This notice pertained directly to implementation of the Indian Child Welfare Act of 1978. 25 U.S.C. 1975 et seq. A subsequent Federal Register notice which invited public comment concerning the above was published on June 3, 1979. As a result of comments received, the recommended guidelines were revised and are provided below in final form.

Introduction

Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect. Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help ensure that rights guaranteed by the Act are protected. When state courts decide Indian child custody matters, to the extent that the Department's interpretations of the Act are correct, contrary interpretations by the courts would be violations of the Act. If procedures different from those recommended in these guidelines are adopted by a state, their adequacy to protect rights guaranteed by the Act will have to be judged on their own merits.

Where Congress expressly delegates to the Secretary the primary responsibility for interpreting a statutory term, regulations interpreting that term have legislative effect. Courts are not free to set aside such regulations simply because they would have interpreted that statute in a different manner.

Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance. Bartlet v. Provision, 432 U.S. 418, 434-445 (1977).

In other words, when the Department writes rules needed to carry out responsibilities Congress has explicitly imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advisory to some other agency, how it should use its own responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding. Courts will take what the Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Portions of the Indian Child Welfare Act do expressly delegate to the Secretary the primary responsibility for interpreting statutory language. For example, under 25 U.S.C. 1914(a), the Department is directed to determine whether a plan for reorganization of jurisdiction is "feasible" as that term is used in the statute. This and other areas where primary responsibility for implementing portions of the Act rest with the Department, are covered in regulations promulgated on July 31, 1979, at 44 FR 45020.

Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S. Rep. No. 95-607, 95th Cong., 1st Sess. 17 (1977). The Department's interpretation of statutory language of this type is published in these guidelines.

Some commenters asserted that Congressional delegations to the Department of authority to promulgate regulations with binding legislative effect with respect to all provisions of the Act is found at 25 U.S.C. 1913, which states, "Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this chapter." Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of the Department.

Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody cases. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step. Nothing in the language or legislative history of 25 U.S.C. 1913 compels the conclusion that Congress intended to vest the Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act.

Assignment of supervisory authority over the courts to an administrative agency is a measure so odd with concepts of both federalism and separation of powers that it should not be imposed on Congress in the absence of an express declaration of Congressional intent to that effect.

Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court. That approach has not been adopted because the Department has an obligation not to assert a duty that it concludes it does not have.

Each section of the revised guidelines is accompanied by commentary explaining why the Department believes states should adopt that section and to provide some guidance where the guidelines themselves may need to be interpreted in the light of specific circumstances.

The original guidelines used the word "should" instead of "shall" in most provisions. The term "shall" was used to communicate the fact that the guidelines were the Department's interpretations of the Act and were not intended to have binding legislative effect. Many commenters, however, asserted that the use of "should" as an attempt by the Department to make statutory requirements themselves optional. That was not the intent of a state adopting these guidelines, they asserted in introductory terms. For that reason the word "shall" has replaced "should" in the revised guidelines. The status of these guidelines as interpretative rather than legislative in nature is adequately set out in the introduction.

In some instances a state may wish to establish rules that provide even greater protection for rights guaranteed by the Act than those suggested by these guidelines. These guidelines are not intended to discourage such action. Care should be taken, however, that the...
c) Any party to the case, Indian tribe, or Indian custodian, or the Indian custodian's private agency informs the court that the child is an Indian child.

(2) Any public or state-licensed agency involved in child protection services for Indian status states that it has discovered information which suggests that the child is an Indian child.

(3) The child who is the subject of the proceeding is an Indian child as defined by the United States v. Boucha, 879 F.2d 193 (1989).

B. Determination of Indian Child's Tribe

1. Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine which tribe or tribes are entitled to the benefits of the Act. This determination may be made by the court or by the Bureau of Indian Affairs, based on the determination of the Bureau of Indian Affairs that an Indian child is entitled to the benefits of the Act.

2. The determination of the Bureau of Indian Affairs may be appealed to the court by an Indian tribe or the Indian child, or by either of them, within 30 days from the date of the determination. The court may reverse or affirm the determination of the Bureau of Indian Affairs, or may substitute its own determination in its place.
specify the rother tribe or tribes that are located near the child’s tribe, the child’s tribe, or both. The child’s tribe shall at all times be notified of the proceeding and may request information about the case. The child’s tribe shall also be notified of any change in the status of the child.

15.6 Determination That Placement is Contested

(a) After child placement proceedings

(b) The Indian tribe’s right under the Act to determine whether the Indian child’s placement is contested.

15.7 Notice Requirement

(b) The Indian tribe’s right to terminate the proceeding if the tribe does not agree to the placement.

15.8 Consent

(b) Notice of the proceeding to the Indian child’s tribe.

15.9 Jurisdiction

(a) Notice of the proceeding to the Indian child’s tribe.

15.10 Notice

(a) Notice of the proceeding to the Indian child’s tribe.

15.11 Determination of Jurisdiction

(a) Notice of the proceeding to the Indian child’s tribe.

15.12 Consent

(a) Notice of the proceeding to the Indian child’s tribe.

15.13 Notice

(a) Notice of the proceeding to the Indian child’s tribe.

15.14 Determination of Jurisdiction

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15.75 Consent

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15.76 Notice

(a) Notice of the proceeding to the Indian child’s tribe.
B.A. Commentary

This section recommends that state courts routinely inquire of parties in child custody proceedings if they are aware of an Indian. If anyone asserts that the child is an Indian, the court shall inquire whether the child may be an Indian. If the court determines that the child is an Indian, it shall determine if the child is an Indian child. It is not necessary to have more than one expert witness to determine Indian status, but if more than one expert witness is required, the court shall designate the credentials, qualifications, and expertise of all expert witnesses.

B.A. Time Limits and Extensions

(a) A tribe, parent, or Indian custodian shall make a request for an emergency custody proceeding. This request shall be granted if it is known after consultation with the Indian custodian and the tribe or the Bureau of Indian Affairs. The tribe or the Bureau of Indian Affairs shall be notified if the request is to be granted. If the tribe or the Bureau of Indian Affairs does not agree with the determination of the court, the tribe or the Bureau of Indian Affairs shall immediately notify the court and request a report by an affidavit. If the tribe or the Bureau of Indian Affairs agrees with the determination of the court, the tribe or the Bureau of Indian Affairs shall immediately notify the court.

(b) Where the tribe, parent, or Indian custodian determines that the child is an Indian child, the child shall be removed from the custody of either the parent or Indian custodian.

(c) An affidavit shall be submitted to the court by an affidavit of an expert witness. The affidavit shall be submitted within 90 days unless there are reasonable grounds for the delay. The affidavit shall be submitted within 90 days unless there are reasonable grounds for the delay. The affidavit shall be submitted within 90 days unless there are reasonable grounds for the delay.

(d) The affidavit shall be submitted to the court by an affidavit of an expert witness. The affidavit shall be submitted within 90 days unless there are reasonable grounds for the delay. The affidavit shall be submitted within 90 days unless there are reasonable grounds for the delay.

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court with their views on whether or not good cause to deny transfer exists. C.2. Comments

Subsection (c) simply states the rule proposed by the Commission. Since the Act gives the parents and the tribal court the right to make an abuse of tribal law to determine whether there is good cause, the guidelines recommend that state courts "determine good cause in a case-by-case basis." The phrase is intended that the Act that the court is that found tribal jurisdiction existed even before the children involved and any offsprings for whom no guardian had been appointed.

Although there was some support for the third and fourth criteria, the proponents of the comments on this section were criticized for being too lenient. The third criteria was whether the child had lived or not with his or her tribal for a significant period of time. The fourth was whether the child had ever resided on the reservation for a significant period of time. These criteria were criticized, in part, because they would virtually exclude transfers from infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant contact with the tribe or the reservation. Some argued that these criteria violated the state courts to be making the kind of cultural changes that the Act contemplated should be made by tribes. Some argued that the use of vague words that these criteria accord state courts too much discretion.

The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more divided and many of the criteria were ambivalent. They argued that the young boy could be too influenced by the judge or by social workers. They also argued that if the Indian court wishes to cause many teenagers to make an ill-considered decision against transfer.

The first four criteria that were to be used in the case were all directed toward the question of whether the Indian children's relationships with the reservation. The Department is aware of one case where a second-guessing the adequacy of the family court in second-guessing the adequacy of the decisions of the tribal court in second-guessing the adequacy of the decisions of the tribal court. An Indian child must have the same parents of Indian custodian has the right to examine all the reports and to authorize any decision. Each party to a foster care placement or termination of parental rights proceedings is entitled to have access to detailed procedures and criteria be established in order to determine whether there is good cause for the child's transfer. The Indian Social Services Act is clear that the Indian social services agency may want to consider the Indian child's needs under their services and agencies. The Act does not contemplate the social services agency's role in the case and they generally lack the expertise to make such judgments.

D.2. Evidence

(c) The court may not issue an order denying a foster care placement of an Indian child. Evidence is presented to the court in support of the placement of the child. The court will limit its consideration to those documents that have been filed with the court.

d.2. Efforts To Alliviate Need To Remove Children From Parents or Indian Custodians

Any party petitioning a state court for transfer or termination of parental rights to an Indian child must demonstrate to the court that the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from her or her parents or Indian custodians.

The second sentence is sometimes used as a synonym for divorce. In the context of the Indian Child Custody Act, it is clear that Congress made a situation in which it is hardly a matter of whether to transfer the child to another tribe or not is likely to endanger the child's emotional or physical welfare. This section also recommends that the parties take any action that would result in the court of the Indian child's tribe and see the court of the child's tribe and totribal court to the case.

D.3. Introduction

The Indian child is not more than twenty years of age and the child has not lived or not be involved with the tribe for a significant period of time. The Indian court shall be based on the record of the trial court or the tribal court. This rule is reflected in subsection (d).

D.4. Triable Court Declaration of Transfer

(a) A triable court may make a triable court must make its decision. The triable court has to make its decision. The triable court has to make its decision.

(b) Upon receipt of a transfer petition the state court shall notify the tribal court of the triable court to make its decision. The triable court shall be based on the record of the trial court or the tribal court. This rule is reflected in subsection (d).

The notice shall state how long the Indian child will have to make its decision. The triable court may make its decision to decline either orally or in writing.

(c) Parties shall file with the tribal court any arguments they wish to make to support or oppose the transfer. Such arguments shall be made orally or in writing. These arguments shall be made orally or in writing.

(d) If the case is transferred the state court shall provide the tribal court with all available information on the case.
E. Voluntary Proceedings

E.1. Execution of Consent

To be valid, a consent to a voluntary termination of parental rights or adoption must be executed in writing and signed before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

E.2. Consent to Placement

This section specifies the basic requirements for placements made through a judgment of consent. A consent for placement made through a judgment of consent shall be filed in the same manner as a consent to adoption, and shall contain the name and address of the prospective foster parent or adoptive parent, the name and address of the Indian child, and the reason for the consent. Consent shall be executed before either a judge or magistrate. The execution of a consent under this section must be in writing and witnessed by a person who is knowledgeable in tribal customs as they pertain to family organization and childrearing practices. Consent must be executed in the presence of the Indian child's tribe. A copy of the consent must be provided to the Indian child's tribe and the Bureau of Indian Affairs agency serving the Indian child's tribe in connection with placements provisions for services to the Indian child.

F. Adoptions

F.1. Adoptive Placement

(a) An adoptive placement of an Indian child under state law shall be by consent unless the consent is in addition to the information specified in (a), the same name and address of the person who executed the consent, or the name of any prospective adoptive parent, or in the case of Indian children, the parent or Indian custodian.

(b) An adoption of an Indian child by consent need not be followed because of any provisions that may apply to an adoption of an Indian child by consent. An adoption of an Indian child by consent may be executed before either a judge or magistrate with the consent of the biological parents or Indian custodians.

(c) A foster care placement made through a judgment of consent shall be by consent or by an Indian custodian. Consent to placement need not be followed because of any provisions that may apply to a foster care placement made through a judgment of consent. A consent to placement shall be executed before either a judge or magistrate with the consent of the biological parents or Indian custodians. Consent to placement need not be followed because of any provisions that may apply to a foster care placement made through a judgment of consent. A consent to placement shall be executed before either a judge or magistrate with the consent of the biological parents or Indian custodians.
Regulated, written notice to the child's biological parents, or any adoptive parent, must be given to the child's biological parents, or any adoptive parent, if the child is removed from foster care. In 1910, the Indian Child Welfare Act (ICWA) was passed to address the issue of Indian children being removed from their homes and placed in foster care without proper legal procedures. The act was intended to protect the rights of Indian children and their parents, and to ensure that they were not subjected to illegal or unethical treatment.

The ICWA has been amended several times since its enactment, with the most recent amendment being the Indian Child Welfare Act Amendments of 1979. These amendments were intended to address some of the criticisms of the original act, such as the lack of consultation with Indian tribes and the need for a more flexible approach to adoption proceedings.

However, despite these amendments, there have been ongoing debates about the implementation of the ICWA, particularly regarding foster care, adoption, and the rights of Indian children and their families. Some argue that the ICWA has been effective in protecting the rights of Indian children and their families, while others believe that more can be done to improve the system. As with any legislation, the ICWA has had its share of challenges, but it remains an important piece of federal law that continues to shape the lives of Indian children and their families.
improper means, the parents or next of kin of any Indian child to consent to the removal of any Indian child beyond the limits of any reservation." In addition to boarding schools, other federal practices encouraged moving Indian children away from their families and communities. In 1884, the "placing out" system placed numerous Indian children on farms in the East and Midwest in order to learn the "values of work and the benefits of civilization."

Federal policy continued throughout the twentieth century with assimilation being the key focus in the Boarding Schools up until the 1950's. The passage of Public Law 280 in 1953 represented the culmination of almost a century of federal policy of assimilation. Its ultimate goal was to terminate the very existence of all Indian tribes. This ultimate assimilation policy was reflected in the child welfare policies of this period.

Throughout the 1950 and 60s, the adoption of Indian children into non-Indian homes, primarily within the private sector, was widespread. In 1959, the Child Welfare League of America, the standard-setting body for child welfare agencies, in cooperation with the Bureau of Indian Affairs, initiated the Indian Adoption Project. In the first year of this project, 395 Indian children were placed for adoption with non-Indian families in eastern metropolitan areas.

Little attention was paid, either by the Bureau of Indian Affairs or the states, to providing services on reservations that would strengthen and maintain Indian families. As late as 1972, David Fanshel wrote in *Far from the Reservation* that the practice of removing Indian children from their homes and placing them in non-Indian homes for adoption was a desirable option. Fanshel points out in the same book, however, that the removal of Indian children from their families and communities may well be seen as the "ultimate indignity to endure."

Fanshel's speculation bore out the truth of the matter. A 1976 study by the Association on American Indian Affairs found that 25 to 35 percent of all Indian Children were being placed in out-of-home care. Eighty-five percent of those children were being placed in non-Indian homes or institutions. In a response to the overwhelming evidence from Indian communities that the loss of their children meant the destruction of Indian culture, Congress passed the Indian Child Welfare Act of 1978.

**THE INDIAN CHILD WELFARE ACT**

The unique legal relationship that exists between the United States government and Indian people made it possible for Congress to adopt this national policy. Because of their sovereign nation status, Indian tribes are nations within a nation. The Constitution of the United States provides that "Congress shall have power to regulate commerce with Indian tribes." Through this and other constitutional authority, Congress has plenary power over Indian affairs, including the protection and preservation of tribes and their resources. Finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," Congress passed the Indian Child Welfare Act.

The Act, designed to protect Indian families, and thus the integrity of Indian culture, has two primary provisions. First, it sets up requirements and standards for child-placing agencies to culturally appropriate services for Indian families before a placement occurs, notifying tribes of the placement of these children. The placement preferences start with members of Indian families. Both tribes and state courts have the ability to place Indian children with non-Indian families and often do when appropriate.

The Act also provides tribes with the ability to intervene in child custody proceedings, which results in greater participation from extended family members in many cases. Additionally, the non-reservation Indian children when state courts transfer jurisdiction to tribal courts. A result of tribal standards, and child welfare services. Today, almost every Indian tribe provides a range of child welfare services to their member children.

**INDIAN FAMILIES ARE THE LIFEBLOOD OF INDIAN COMMUNITIES**

The importance of Indian families and their extended family networks in tribal culture has been well documented, especially during hearings for the Indian Child Welfare Act:

"[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."

[House Report 95-1386, 95th Congress, 2nd Session (July 24, 1978) at 10, 20.]

The strength of tribal culture comes from the agreement by members of who they are as a tribe and the value system that supports their tribal culture. This membership views family in a very broad sense, understanding the importance of all members in helping raise children and promote the well-being of the tribe. When an Indian child is born, it is a time of celebration, not just for the immediate family, but the for the extended family and other tribal members as well. Tribal people and any changes in tribal membership or family will mean changes in culture and the viability of that culture for all members.

Acknowledging these family and community values leads to an appreciation of what it means to a tribe to lose even one child. Today, with a number of small tribes facing what can only be described as an precarious future and possibly even extinction, it becomes even more important to nurture the connections between Indian children and their tribal community.
TRIBAL MEMBERSHIP

Formal tribal membership determinations often do not happen prior to or at birth. Most tribes require a variety of information to be collected after the birth of the child before the membership process can even be initiated. The process itself can take anywhere from one month to several months depending on the accuracy of information provided, the number of tribal membership requests needing review, and the timing of the next tribal council or membership committee meeting.

The determination of tribal membership does not happen overnight and for good reasons. With the romanticism of Indian culture that began in the 1960’s many non-Indian people have made claims to Indian heritage and the services or benefits that come with membership. By necessity, health care, are available for those tribal members who qualify for them. This means that membership determinations can take time and because of limited resources to support this process, many tribes have times when enrollment applications are not accepted. The closing of the enrollment process is not of great concern to many tribes, because membership is still extended to tribal members, even if they have not completed a formal enrollment process. In addition, some tribes view enrollment lists as secondary to determinations of membership based on their intimate knowledge of what families and individuals are members of the tribe.

For those Indian families that are experiencing difficulties in trying to meet their basic needs, formal membership procedures may be a low priority. Because membership is assumed by many tribal members and the tribe under tribal traditions and customs, focusing on formalizing membership status during these stressful times would not seem necessary to many Indian people. Unlike other governments that use paper documents such as birth certificates as the primary means of establishing membership, tribes have long used and will continue to use their customary and traditional practices.

Enrollment does not equal membership in many situations. Many tribes, especially small tribes, do not have updated enrollment lists for a variety of reasons. One reason is the forced dispersion of Indian people, the Indian population as a result of failed federal policies, such as the Boarding School, the termination and relocation era. During those periods Indian communities were broken apart by their separation from their families involuntarily. The legacies of these policies are still visible in Indian country today, as adult Indian people live in isolation from their families and communities, many times not successful until years and sometimes decades have passed in these Indian peoples lives. Tribes struggle to regain these lost connections, but are not knowing their families or heritage. Tribes struggle to regain these lost connections, but are not knowing their families or heritage. Tribes struggle to regain these lost connections, but are not knowing their families or heritage.

1) Was the ICWA intended to provide protections to Indian children and families living off the reservation?

Most definitely. When Congress began hearings on the ICWA prior to 1978, it was found that the children most vulnerable to unnecessary removals and institutionalization were those Indian children that lived off the reservation. At the time of passage of the ICWA, 25% -35% of all Indian children were being unnecessarily removed from their homes and isolated from their natural families and communities. Those living off-reservation were particularly vulnerable to unnecessary removal because of their distance from tribal agencies and courts which had critical knowledge and experience to provide in a child custody proceeding. The legislative history of the ICWA and current body of federal case law makes clear that Congress intended to make ICWA protections available to all Indian children who are members of a federally-recognized tribes regardless of their place of residence.

2) Does the ICWA mandate that Indian children only be placed with Indian families?

No. The ICWA only provides preferences in the placement of Indian children with the first preference being family members - Indian or non-Indian. Furthermore, the ICWA provides state courts with the ability to alter the placement preferences upon a finding of good cause and have often done this. Furthermore, a large number of tribal child welfare programs in the United States have placed and will continue to place Indian children with non-Indian foster care or adoptive families when appropriate. It is important to understand that the process used in making placement decisions regarding any child will ultimately determine whether a foster's needs are met. If the process is exclusionary and does not include all of the important parties, the placement becomes at risk of being disrupted or harmful to the child. Inclusion of all parties - extended family members, natural parents, tribe, and prospective foster or adoptive parents - is the most successful strategy and should be a part of every placement decision. This is the standard of practice that the ICWA establishes and when used properly almost never results in a disrupted placement.

3) Why should a tribe be allowed to intervene in a voluntary adoption proceeding between aaising parents and a prospective adoptive couple?

As many states and tribes have found in their child welfare practice, many times natural parent(s) who are thinking about giving their children up for adoption have not clearly thought this decision through and may not be aware of opportunities to place the child with other family members. These parents are very young and not yet mature in their thinking, but are nonetheless trying to deal with the tremendous stress of an unexpected pregnancy or other crisis in their immediate family. This was the case in a number of adoptions that Representative Price identified in the Congressional Record where young Indian parents, some that were not even 18 years of age, were being counseled by adoption attorneys to avoid involving their extended families in decisions to adopt out their children. Regrettably, these parents were then faced with a very tough
decision, one that has lifelong consequences, with little, if any, balanced information on alternatives to placing the child outside the natural family.

Situations like these where young Indian parents are only provided one way out of their dilemma do not meet the best interests of anyone, particularly the child. Allowing tribes to be a part of the adoption process enables extended family members in the community to be notified of a potential adoption of their grandchildren, niece or nephew and be afforded the chance to discuss a possible placement in their family before it is too late.

In addition, tribes can provide assistance in locating appropriate homes for Indian children needing out of home placements. Many states and private adoption agencies find themselves with a shortage of qualified Indian adoptive homes and can benefit from the pool of homes that tribes may have available. As an example, in the state of Washington, the Yakama tribe has a pool of Indian foster care and adoptive homes which they have allowed the state Division of Social and Health Services to have access to. This agreement enables the agency facilitating the adoption to find the very best home for that child without unnecessary delays.

4) Is the ICWA a barrier to the timely placement of Indian children in foster care or adoptive homes?

No. In fact, since the passage of the ICWA, hundreds of thousands of Indian children have been successfully placed in both loving foster care and adoptive homes; both Indian and non-Indian. The ICWA has been a bright ray of hope for the vast majority of Indian children by helping them to be reunified with their families and finding new homes when there are no natural family placements available. Tribal child welfare programs, which play a pivotal role in this accomplishment, have been increasingly successful in recruiting and maintaining foster care and adoptive homes within and outside of their reservation boundaries, making it possible for tribes to place Indian children even more quickly than states and private agencies in many cases. In many cases, state and private child placing agencies look to tribal child welfare programs to assist them in developing quality foster care and adoptive homes for Indian children.

A 1988 study on the status of the Indian Child Welfare Act revealed that tribal involvement in the placement of Indian children has resulted in, 1) Indian children being reunified more often with their natural families than with state or Bureau of Indian Affairs programs, and 2) shorter stays for Indian children in substitute care (i.e. foster care) than with state or Bureau of Indian Affairs programs. These successes are not surprising given the continued growth and sophistication of tribal child welfare programs in the United States. Many of these programs are now offering a full range of child welfare services independently or in collaboration with private and state child welfare agencies.

5) Are the protections available to Indian children in the ICWA still necessary today?

Yes. While the ICWA has certainly helped to reduce the chances that Indian children will not be unnecessarily removed from their homes, families and communities, there are still too many individuals and agencies involved in the unlawful placement of children, especially Indian children. It is not an exaggeration to say that every year over a thousand Indian children who are eligible for and need the protections of the ICWA are being denied these fundamental rights to have ICWA are usually occurring.

- Tribes and extended family members are not being notified when a member child is being considered for an out of home placement.
- Qualified Indian families, often times relatives of the Indian child, are not being given consideration as a placement resource for the child.
- Child welfare agencies working with Indian families who are experiencing difficulties are not making active and reasonable efforts to provide rehabilitative services to the family, thereby precluding any chance of the child being able to return home.
- State courts, without good cause, are refusing to transfer jurisdiction of child custody proceedings to tribal courts of which Indian children are members.
- Individuals or agencies are choosing to thwart the law by counseling young Indian families to not disclose their native heritage as a way to avoid the application of the ICWA or simply are refusing to take the necessary steps to confirm or deny whether the ICWA applies in a case.

6) Does the ICWA provide any flexibility for state courts to make individualized decisions in adoption cases?

Yes. A state court has the discretion to place an Indian child outside the placement preferences in the ICWA if it finds good cause to the contrary. While an Indian tribe may seek transfer of jurisdiction to tribal court of an off-reservation case, either both parent or object to the transfer which has the effect of preventing such a transfer. Moreover, even when a parent does not object, a state court may deny transfer of jurisdiction to a tribal court.

7) Can the ICWA be used to disrupt an adoption proceeding at almost anytime?

No. If the jurisdictional and intervention provisions, and the procedures for consent to adoption in the ICWA are followed, no adoption may be disturbed once it is finalized unless there is fraud or duress. A challenge can be brought only two years after an adoption decree is final. A search of reported court decisions involving ICWA cases found only 30 cases since 1978 where adoptions were disrupted because of court disputes. Thus, where the ICWA is complied with initially, there is little threat that an adoption will be overturned.
WHY THE ICWA AMENDMENTS IN TITLE III OF H.R. 3286 WILL NOT WORK

- Contrary to the sponsor’s claims, this legislation will extend well beyond just voluntary adoption proceedings. The legislative language will also deny Indian children the important protections they need in involuntary proceedings, both foster care and adoptions.

- The amendments do much more than just “clarify” or “make minor changes” in the Indian Child Welfare Act as the sponsors have claimed. Many full-blooded Indian children could end up in homes with strangers while their own extended family members who are qualified to care for them are ignored as potential placements.

- The amendments address none of the real problems that give rise to lengthy adoption disputes. Removing tribal government and tribal court jurisdiction over child custody proceedings will not improve placement outcomes for Indian children, and in fact will likely produce worse outcomes. The blaming of tribal governments and tribal courts ignores efforts by individuals who circumvent the ICWA law in state courts and cause most of the pain and suffering that both adoptive and natural families experience. In addition, tribal governments and courts have shown time and time again that they are in the best position to determine what the best interests of Indian children are and consistently produce better outcomes for Indian children when compared to state courts and placing agencies.

- Indian families are being overlooked as viable placements for Indian children. While the sponsors of this legislation state that they are just trying to provide loving homes for Indian children, they have completely ignored the fact that many wonderful, qualified Indian families, many who are relatives of these children, are being overlooked as placements.

- The bill has many serious flaws that will cause an explosion of new litigation on virtually every section of the bill. This will only result in deterring efforts to find good homes for Indian children awaiting adoption or foster care - the very problem that supporters of Title III say they are trying to resolve. What is social, cultural, or political affiliation? What evidence proves or disapproves such affiliation? What does it mean to be affiliated as of the time of the proceeding? Does the court consider the affiliation over the last 10 years or just within the last month? What if a child maintains such relationship through a grandparent or other relative, but the parent does not? What if the child’s parent(s) are deceased? What does it mean that a determination of non-affiliation is final? Does it mean that a judges determination cannot be appealed to a state appellate court or that a state appellate court decision which violates the ICWA cannot be reviewed in a federal court? Interestingly, determinations that uphold the application of the ICWA will be eligible to be appealed or reversed. What if a natural parent claims a lack of affiliation, the judge accepts this representation and two weeks later an Indian tribe presents overwhelming evidence that the parent has substantial contacts with the tribe? Every one of these questions and many more will be litigated repeatedly.

- The bill replaces a bright line political test - membership in an Indian tribe as the trigger for the coverage of the ICWA - with a multi-faceted test that transforms the classification into more of a racial identification test. This provision is likely unconstitutional since the legitimacy of Indian-specific legislation rests upon the fact that such legislation is based upon a political classification and not a racial classification.

- The arbitrary nature of Section One could result in Indian grandparents, uncles, aunts, nieces, nephews, and siblings being considered irrelevant in the lives of Indian children. In the case of an Indian child who had very meaningful, significant relationships with their tribe and extended Indian family over a period of years, but maybe not within the last 3-6 months, the court could determine that this was sufficient evidence to exclude the child’s tribe and extended family from being any part of that placement decision.

- This section does not reflect the realities of how tribal membership mechanisms work and would likely exclude coverage of vast numbers of bona fide Indian children from coverage by the Indian Child Welfare Act. Many Indian children are not formally enrolled, but are clearly members of a tribe and could be enrolled. In addition, assertions by the sponsors that tribes are trying to make members of everyone are false. First of all, tribes reserve the right to determine their own memberships as sovereign governments. State agencies and courts are not equipped to make these kind of membership determinations and could easily make mistakes that would deny bona fide Indian children and their families from being covered by the ICWA in both foster care and adoption proceedings. Secondly, tribes have every incentive to not be enrolling children who are not legitimately connected with the tribe since ultimately these children will be eligible for benefits that the tribe provides to its members - benefits which are generally limited in nature.

- Title III would also impact Indian children and families resident or domiciled on the reservation. Typically, child custody proceedings involving these families would be under the exclusive jurisdiction of the tribal court. However, in those circumstances where a state court has become involved in an Indian child custody case, the ICWA provides clear rules that state courts must follow. These rules include a priority for tribal court jurisdiction, a presumption in favor of tribal court jurisdiction, and a requirement that state courts consult with tribal courts before making a state court adoption. In the case of an Indian child who has lived on or near the reservation, the ICWA provides a clear exception to the general rule that state courts have exclusive jurisdiction over Indian children. This section does not reflect the realities of how tribal membership mechanisms work and would likely exclude coverage of vast numbers of bona fide Indian children from coverage by the Indian Child Welfare Act. Many Indian children are not formally enrolled, but are clearly members of a tribe and could be enrolled. In addition, assertions by the sponsors that tribes are trying to make members of everyone are false. First of all, tribes reserve the right to determine their own memberships as sovereign governments. State agencies and courts are not equipped to make these kind of membership determinations and could easily make mistakes that would deny bona fide Indian children and their families from being covered by the ICWA in both foster care and adoption proceedings. Secondly, tribes have every incentive to not be enrolling children who are not legitimately connected with the tribe since ultimately these children will be eligible for benefits that the tribe provides to its members - benefits which are generally limited in nature.

- Title III will interfere with positive efforts between tribes and states to protect Indian children and provide quality foster care and adoption services. A number of states and tribes have developed inter-governmental agreements to assist compliance efforts with the ICWA and create the best possible services for Indian children and families. Many of these agreements have put into place model services, court procedures, and training projects which from states like Washington and Nevada which have gone on record to oppose the Title III ICWA amendments for these same reasons.