STATEMENT OF ADA E. DEER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR BEFORE THE JOINT HEARING OF THE HOUSE RESOURCES COMMITTEE AND SENATE COMMITTEE ON INDIAN AFFAIRS, ON H.R. 1082 AND S. 569, BILLS TO AMEND THE INDIAN CHILD WELFARE ACT OF 1978.

June 18, 1997

Good morning Chairman Campbell, Chairman Young, and Members of the Committees. I am pleased to be here to present the Department of the Interior's views on proposed amendments to the Indian Child Welfare Act (ICWA) of 1978. The Department of the Interior supports, without reservation, H.R. 1082 and its companion bill, S. 569, which have incorporated the consensus-based tribal amendments developed last year by tribal governments and the National Congress of American Indians (NCAI) and the adoption community to improve the Indian Child Welfare Act.

Background Information

Congress passed the Indian Child Welfare Act in 1978 (ICWA), after ten years of study on Indian child custody and placements revealed an alarming high rate of out of home placements and adoptions. The strongest attribute of the ICWA is the premise that an Indian child's tribe is in a better position than a State or Federal court to make decisions or judgments on matters involving the relationship of an Indian child to his or her tribe. The clear intent of Congress was to defer to Indian tribes issues of cultural and social values as such relate to child rearing.

In addition to protecting the best interests of Indian children, the ICWA has also preserved the cultural integrity of Indian tribes because it affirmed tribal authority over Indian child custody matters. As a result the long term benefit is, and will be, the continued existence of Indian tribes.

Implementation of the ICWA

The Indian Child Welfare Act of 1978 is the essence of child welfare in Indian Country and provides the needed protections for Indian children who are neglected. On the whole, the ICWA has fulfilled the objective of giving Indian tribes the opportunity to intervene on behalf of Indian children eligible for tribal membership in a particular tribe.

There have been concerns over certain aspects of the ICWA and the ICWA should be revised to address problem areas and to ensure that the best interests of Indian children are ultimately considered in all voluntary child custody proceedings. Although several high-profile cases were cited to support the introduction last year of ICWA amendments, which would have been detrimental to Indian tribes and families, those cases do not warrant a unilateral and unfettered intrusion on tribal government authority.

Implications of Proposed Amendments to the ICWA

The provisions contained in H.R. 1082 and S. 569 reflect carefully crafted consensus amendments between Indian tribes seeking to protect their children, culture and heritage and the interests of the adoption community seeking greater clarity and certainty in the implementation of the ICWA. First and foremost, the amendments will clarify the applicability of the ICWA to voluntary child custody matters so that there are no ambiguities or uncertainties in the handling of these cases. We know from experience that State courts have not always applied the ICWA to voluntary child custody proceedings.

The amendments will ensure that Indian tribes receive notice of voluntary ICWA proceedings and also clarify what should be included in the notices. Timely and adequate notice to tribes will ensure more appropriate and permanent placement decisions for Indian children. Indian parents will be informed of their rights and their children's rights under the Act, ensuring that they make informed decisions on the adoptive or foster care placement of their children. When tribes and extended family members are allowed to participate in placement decisions, the risk for disruption will be greatly reduced. While the amendments place limitations on when Indian tribes and families may intervene and when birth parents may withdraw their consent to an adoption, they protect the fundamental rights of tribal sovereignty. Furthermore, the amendments will permit open adoptions, when it is in the best interest of an Indian child, even if State law does not so provide. Under an open adoption, Indian children will have access to their natural family and cultural heritage when it is deemed appropriate.

An important consideration is that upon a tribe's decision to intervene in a voluntary child custody proceeding, the tribe must certify the tribal membership status of an Indian child or their eligibility for membership according to tribal law or custom. Thus, there would be no question that a child is Indian under the ICWA and ensures that tribal membership determinations are not made arbitrarily. Lastly, the amendments will provide for criminal sanctions to discourage fraudulent practices by individuals or agencies which knowingly misrepresent or fail to disclose whether a child or the birth parent(s) are Indian to circumvent the application of the ICWA.

In summary, the tribally developed amendments contained in H.R. 1082 and S. 569 clearly address the concerns which led to the introduction of Title III of H.R. 3286 (104th Congress), including time frames for ICWA notifications, timely interventions, and sanctions, definitive schemes for intervention, limitations on the time for biological parents to withdraw consent to adoptive placements, and finality in voluntary proceedings.

Effect of "Existing Indian Family" Concept

Chairman Campbell and Chairman Young, we want to express our grave concern that the objectives of the ICWA continue to be frustrated by State court created judicial exceptions to the ICWA. We are concerned that State court judges who have created the "existing Indian family exception" are delving into the sensitive and complicated areas of Indian cultural values, customs and practices which under existing law have been left exclusively to the judgment of Indian tribes. Legislation introduced last year, including H.R. 3286, sought to ratify the "existing Indian family exception" by amending the ICWA to codify this State-created concept. The Senate Committee on Indian Affairs, in striking Title III from H.R. 3286, made clear its views

that the concept of the "existing Indian family exception" is in direct contradiction to existing law. In rejecting the "existing Indian family exception" concept, the Committee stated that "the ICWA recognizes that the Federal trust responsibility and the role of Indian tribes as parens patriae extend to all Indian children involved in all child custody proceedings." [Report 104-335 accompanying S. 1962, 104th Cong., 2nd Session].

Position of the Department of the Interior

The Department of the Interior's position on the emerging "existing Indian family exception" concept is the same as previously stated in the Administration's statement of policy issued on May 9, 1996. We oppose any legislative recognition of the concept.

The Department's position is that the ICWA must continue to provide Federal protections for Indian families, tribes and Indian children involved in any child custody proceeding, regardless of their individual circumstances. Thus, the Department fully concurs with the Senate Committee on Indian Affairs' assessment and rejection of the "existing Indian family exception" concept and all of its manifestations. We share the expressed concerns of tribal leaders and a majority of your Committee members about continuing efforts to amend the ICWA, particularly those bills which would seriously limit and weaken the existing ICWA protections available to Indian tribes and children in voluntary foster care and adoption proceedings.

The United States has a government-to-government relationship with Indian tribal governments. Protection of their sovereign status, including preservation of tribal identity and the determination of Indian tribal membership, is fundamental to this relationship. The Congress, after ten years of study, passed the Indian Child Welfare Act of 1978 (Pub. L. 95-608) as a means to remedy the many years of widespread separation of Indian children from their families. The ICWA established a successful dual system that establishes exclusive tribal jurisdiction over Indian Child Welfare cases arising in Indian Country, and presumes tribal jurisdiction in the cases involving Indian children, yet allows concurrent State jurisdiction in Indian child adoption and child custody proceedings where good cause exists. This system, which authorizes tribal involvement and referral to tribal courts, has been successful in protecting the interests of Indian tribal governments, Indian children and Indian families for the past eighteen years.

Because the proposed amendments contained in H.R. 1082 and S. 569 will strengthen the Act and continue to protect the lives and future of Indian children, the Department fully embraces the provisions of H.R. 1082 and S. 569.

In closing, we appreciate the good faith efforts of tribal governments in addressing the ICWA-specific concerns raised by certain members of the Congress and in developing tribally acceptable legislative amendments toward resolving these issues within the past year. I would like to thank Chairman Campbell, Chairman Young, and the Committee members for all their hard work and heartfelt assistance to tribes in shepherding the tribal amendments through the legislative process. This Administration will endeavor to ensure that tribal sovereignty will not be compromised, specifically, the right of tribal governments to determine tribal membership and the right of tribal courts to determine internal tribal relations.

This concludes my prepared statement. I will be pleased to answer any questions the Committees may have.

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