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Chairman Campbell, Chairman Young, and members of the Senate Indian Affairs and House Resources Committees, I am Thomas L. LeClaire, Director of the Office of Tribal Justice at the Department of Justice. Thank you for inviting the Department to present its views on S. 569 and the companion bill H.R. 1082, which would amend the Indian Child Welfare Act ("ICWA"). The Administration and the Attorney General recognize the need for caring families and nurturing homes for Indian children. The Department supports S. 569 and H.R. 1082, which evolved from a dialogue among adoption attorneys and tribal representatives on how to strengthen ICWA. The proposed legislation advances the best interests of Indian children while preserving tribal self-government.

We are informed by the Departments of the Interior and Health and Human Services that ICWA generally works well, particularly when the affected parties are apprised of their statutory rights and duties and the Act's provisions are applied in a timely manner. The implementation of ICWA in a relatively small number of voluntary adoption cases, however, has evoked intense debate, both in Congress and elsewhere. Generally, Indian parents or a tribe, in these problematic cases, allege that ICWA was not complied with and seek to recover custody of the Indian children involved. The time consumed by the legal proceedings disrupts lives and causes significant anguish. One's heart goes out to the parents, prospective parents, and especially to the children, who find themselves entangled in these disputes.

In addressing these problematic cases through legislation, Congress should be mindful of ICWA's important purposes and its affirmation of tribal rights of self-government. In the 104th Congress, the Department of Justice opposed Title III of the Adoption Promotion and Stability Act of 1996, H.R. 3286, which, in our view, was inconsistent with tribal authority over matters of tribal membership. See Letter from Andrew Fois, Assistant Attorney General for Legislative Affairs to Chairman McCain, June 18, 1996. S. 569, in contrast to Title III of the Adoption Promotion and Stability Act of 1996, preserves tribal self-governance while enhancing certainty in child custody and adoption proceedings pursuant to ICWA and while strengthening federal enforcement tools to promote compliance with ICWA in the first instance.

I. The Right Of Indian Tribes To Self-Government

Since the early days of this Nation, the United States has recognized that Indian tribes have the authority to govern their members and their territory. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The United States has entered into hundreds of treaties and agreements with Indian tribes, pledging protection for Indian tribes and securing the tribes' rights to the "highest and best" form of government, "self-government."

Ex parte Crow Dog, 109 U.S. 556, 568 (1883). ICWA is a constitutionally valid statute that is closely tied to

Congress' "unique obligations" to Indian tribes by protecting the best interests of Indian children and families while promoting tribal rights of self-government. See Morton v. Mancari, 417 U.S. 535, 555 (1972).

II. The Statutory Framework Of The Indian Child Welfare Act

The United States has a government-to-government relationship with Indian tribal governments. Protection of the sovereign status of tribes, including preservation of tribal identity and the ability to determine tribal membership, is fundamental to that relationship. To this end, ICWA establishes a dual jurisdictional system for Indian child custody proceedings: a) Congress confirmed the exclusive jurisdiction of tribal courts in Indian child custody proceedings when the Indian child is domiciled in tribal territory; 25 U.S.C. § 1911(a);[(1)] and b) Congress created a procedure to transfer off-reservation Indian child custody cases to tribal courts, but allowed state courts to retain jurisdiction of such cases where good cause exists.[(2)]

ICWA establishes substantive and procedural protections for Indian children, Indian families, and Indian tribes. In any involuntary state court proceeding to place an Indian child outside the home, ICWA requires notice to the Indian parent or custodian and the child's tribe, and imposes a ten-day stay of proceedings, which may be extended to thirty days. 25 U.S.C.

§ 1912(a). ICWA also establishes a right to counsel for indigent parents and a right to examine records, and it requires state child welfare agencies to make remedial efforts to prevent the breakup of the Indian family. 25 U.S.C. § 1912(b)-(d).

In any voluntary state court proceeding for relinquishment of custody or parental rights, ICWA requires the court to certify that it has explained the consequences of the action and that the Indian parent has understood those consequences. 25 U.S.C.

§ 1913(a). No consent to adoption is valid if made before an Indian child is born or within ten days after birth.[(3)] Id. Consent to adoption may be withdrawn prior to entry of a final decree, 25 U.S.C. § 1913(c), and consent to foster care placement may be withdrawn at any time. 25 U.S.C. § 1913(b). After entry of a final adoption decree, a collateral attack on that decree alleging fraud or duress may be initiated within two years of the decree, unless a longer period is provided for by state law.

25 U.S.C. § 1913(d).

III. The Operation Of The Indian Child Welfare Act

The Department of Justice has only a limited role in the implementation of ICWA, so our knowledge of how, and how well, ICWA works is premised largely on the reports of the Departments of the Interior and Health and Human Services.[(4)] These agencies report that ICWA generally has helped to preserve the integrity of Indian families and tribal relations with those families, especially when parties are informed

about ICWA, abide by its provisions, and it is applied in a timely manner.(5) In fact, despite some recent concern about ICWA's application to certain off-reservation cases, legislators seem to agree that ICWA works.

Under ICWA, courts are able to tailor foster care and adoptive placements of Indian children to meet the best interests of children, families, and tribes. We understand that the vast majority of these cases are adjudicated without significant problems. The application of ICWA to a limited number of cases involving adoptive placements that are later challenged by biological parents or the child's tribe, however, has drawn criticism. This criticism, in turn, provides in part the impetus for amendments to the ICWA.

These cases are difficult and heart-rending, often having tragic consequences for all parties to the dispute. It is important to reiterate, however, that these problematic cases are not indicative of the manner in which ICWA operates in the vast majority of instances. Further, many of these cases would not have been problematic if ICWA's dictates had been complied with at the outset of the adoption process.

For example, among the cases commonly cited for the need to amend ICWA is the adoption that provided the factual predicate for the In re Bridget R. decision by the California Court of Appeal. 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996), *cert. denied,* __U.S.__ (1997), 117 S. Ct. 1460. In that case, twin girls of Indian descent were placed with a non-Indian family when their biological parents relinquished them to an adoption agency. The biological parents and the interested tribe subsequently challenged the adoption. The ensuing protracted litigation has disrupted the lives of all those who are involved in the dispute.

Had ICWA been complied with in that instance, however, most of the delay -- and quite possibly the litigation itself -- would have been avoided. The biological parents would have been required to wait 10 days after birth to relinquish their rights, and prior to relinquishing their rights, they would have been instructed by a judge as to their rights under the statute and the consequences of their waiver of those rights. None of this occurred, and that created the problem. Bridget R., therefore, signals a need to fine-tune ICWA's statutory mechanisms to provide incentives for the early compliance with ICWA in the adoption process.

Many supporters of Title III of H.R. 3286 focused solely on Bridget R. and other anomalous cases and made the assumption that ICWA's application to these cases will produce a particular outcome, namely, the removal of children from non-Indian adoptive parents. Cases such as Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), demonstrate that this assumption is mistaken. In Holyfield, three years after a state court had issued an adoption order placing Indian children domiciled on the reservation with a non-Indian family, the Supreme Court reversed the order, holding that the tribal court had exclusive jurisdiction over the case. 490 U.S. at 52-53. The Supreme Court noted that "[h]ad the mandate of the ICWA been followed [at the outset] much potential anguish might have been avoided." Id. at 53-54. The Court deferred to the "experience, wisdom, and compassion of the Choctaw tribal courts to fashion an appropriate remedy." Id. at 54. Following transfer of the case to tribal court, the tribal court determined that it was in the children's best interest to remain in the current placement with Vivian Holyfield, the non-Indian adoptive parent. In order to preserve the link between the children and the tribe, the court made arrangements for continued contact with extended family members and the Tribe. As Holyfield

demonstrates, ICWA does not resolve the ultimate issue of who should have custody of a particular Indian child; rather it allows courts to make that decision on a case-by-case basis taking into account the best interests of the child.

IV. The "Existing Indian Family" Doctrine

Title III of H.R. 3286, introduced in the 104th Congress, would have codified the so-called "existing Indian family" doctrine -- a judicially-created exception to ICWA, which has been fashioned by state court judges.(6) That doctrine establishes an exemption from ICWA's mandates where the biological parents of the child fail to maintain a sufficient nexus with the tribe. Pursuant to this exception, federal statutory protections turn on a tribal member's degree of "social, cultural, or political affiliation" with an Indian tribe, rather than on a tribal government's determination of tribal membership. This doctrine is contrary to recognized rights of tribal self-government. For example, the Supreme Court held in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), that the power to determine tribal membership is a fundamental aspect of tribal self-government, akin to the power of the United States to determine citizenship. Tribal membership is thus a matter of tribal law, which should be determined by tribal government institutions.

Moreover, the "existing Indian family" doctrine grafts onto ICWA a subjective and open-ended test that, if anything, will increase the quantum of litigation. The existing trigger for ICWA -- tribal membership or eligibility for tribal membership -- is readily discernible by an inquiry to the relevant tribal government. In contrast, the "social, cultural, or political affiliation" test incorporates subjective criteria more likely to create additional litigation, with attendant delays in the adoptive placement of Indian children, than to "streamline" adoptive placements.

In the view of the Department, Title III, by incorporating the "existing Indian family" doctrine, would have undermined tribal self-government and the objectives of ICWA. The Department, therefore, opposed the Title III amendments to ICWA. The Senate Committee on Indian Affairs reached a similar conclusion, stating that the doctrine, as codified in Title III of H.R. 3286, "is completely contrary to the entire purpose of the ICWA." S. Rep. No. 335, 104th Cong., 2d Sess. 14 (1996). As a result, this Committee struck Title III of H.R. 3286 and ordered the bill reported with the recommendation that the Senate pass the bill without Title III.

V. Amendments to ICWA Through S. 569 and H.R. 1082

S. 569, and its companion bill H.R. 1082, reflect a carefully crafted agreement between Indian tribes and adoption attorneys -- an agreement designed to make Indian child adoption and custody proceedings more fair, swift, and certain. In improving the fairness and certainty of ICWA, S. 569 promises to advance the best interests of Indian children while preserving longstanding principles of tribal self-government.

Although the Department has had little experience litigating ICWA issues, we have reviewed S. 569 in light of our experience with civil and criminal enforcement, the United States' commitment to supporting tribal

sovereignty, and basic principles of statutory construction. S. 569 would clarify ICWA, establish some deadlines to provide certainty, reduce delay in custody proceedings, and strengthen federal enforcement tools to ensure compliance with the statute in the first instance.

CONCLUSION

We appreciate the efforts that the Chairman, the Vice Chairman, and the Committee have made to foster dialogue on the Indian Child Welfare Act. S. 569/H.R. 1082 amends ICWA in a manner that is both respectful of tribal self-government and conducive to certainty and timeliness in voluntary adoptions of Indian children. In conclusion, I would like to reiterate the Department's support for S. 569 and the important goals that guided Congress in enacting ICWA. In addition, we are committed to working with the Committee, tribes, and all interested parties to further ICWA's goals.

This concludes my prepared statement. At this time, Mr. Chairman, I would be pleased to respond to questions from you or other Committee Members.

1. See Fisher v. District Court, 424 U.S. 382 (1976) (tribal courts have exclusive jurisdiction over adoptions of Indian children who are domiciled on the reservation).

2. ICWA, notably, recognizes the role of biological parents in this process by reserving the right of either parent to refuse to transfer a case involving their child to tribal court. 25 U.S.C. § 1911(b).

3. The ICWA ten-day protective period is consonant with many state laws. More than half of the states do not permit parental consent to adoption until 3 days after a child is born. M. Hansen, "Fears of the Heart," ABA Journal (November, 1994) at 59.

4. See Hearing Before the Senate Committee on Indian Affairs, (1995)(statement of Joann Sebastian Morris, Acting Director, Office of Tribal Services, BIA);(statement of Terry L. Cross, Executive Director, National Indian Child Welfare Ass'n);(statement of gaiashkibos, President, National Congress of American Indians).

5. Other positive results reported under ICWA are the development of tribal juvenile codes, tribal court processes for addressing child welfare issues, and tribal child welfare services.

6. As passed by the House, Title III of the Adoption Promotion and Stability Act of 1996 would have amended ICWA to provide that:

(a) th[e ICWA] does not apply to any child custody proceeding involving a child who does not reside or is not domiciled within a reservation unless--

(1) at least one of the child's biological parents is of Indian descent; and

(2) at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member.

(b) The factual determination as to whether a biological parent maintains significant social, cultural or political affiliation with the Indian tribe of which either parent is a member shall be based on such affiliation as of the time of the child custody proceeding.

(c) The determination that this title does not apply pursuant to subsection (a) is final, and, thereafter, this title shall not be the basis for determining jurisdiction over any child custody proceeding involving the child.

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