

**ICWA IMPLEMENTATION PROBLEMS ADDRESSED BY H.R. 4733
"INDIAN CHILD WELFARE ACT AMENDMENTS OF 2002"**

June 17, 2002

H.R. 4733 addresses various issues that, since the Indian Child Welfare Act's (ICWA) enactment, have affected the ability of Indian tribes, families, and children to secure the full protections of the ICWA and that have complicated adoption proceedings involving Indian children. The following is a description of key problems encountered in the implementation of ICWA and provisions of H.R. 4733 that respond to these problems.

1. **PROBLEM:** Under ICWA, tribes have a right to intervene in voluntary Indian child custody proceedings. These proceedings involve both public and private agencies and are often focused on placing an Indian child in a permanent adoptive home. However, even though tribes have the right to intervene in these proceedings, ICWA does not require that notice of the proceeding be provided to tribes. A few states do provide courtesy notice in voluntary proceedings, but the vast majority do not, and in some cases, these agencies actively work to keep tribes out of the proceedings. As a result three things can happen: 1) tribes often do not learn of voluntary adoptive placements involving their tribal member children; 2) tribes learn about the proceedings when it is too late to change the placement; or 3) Indian children are placed in non-Indian homes with little regard for ICWA or tribal interests. In addition, even in involuntary child custody proceedings involving Indian children, the notices provided to tribes often provide insufficient information to enable a tribe to make appropriate decisions concerning their involvement in the case or the best interest of the child.

SOLUTION: H.R. 4733 requires detailed notice to Indian tribes in all voluntary child custody proceedings and to parents and tribes in all involuntary proceedings. The bill also lists specific information that must be provided in the notice. See section 6 of the bill for the involuntary proceeding notice provisions and sections 9 and 10 for the voluntary proceeding notice provisions.

2. **PROBLEM:** Under ICWA, even though tribes have a right to intervene at any time in voluntary child custody proceedings, they often do not learn of the proceeding until after an adoptive placement, often with a non-Indian family, has been approved for the Indian child. Even when a tribe intervenes at this late stage, the other parties, including the court, often view the tribal intervention as an unnecessary complication to an already approved adoptive placement. The tribe's ability to effectively advocate for its concerns or an alternative placement is seriously compromised. In addition, voluntary proceedings sometimes commence before the court or parties seeking the placement are able to determine if a child is an Indian child because the child's tribe was not notified and consequently did not intervene. When this happens, the child is usually considered non-Indian and ICWA is not applied,

SOLUTION: H.R. 4733 clarifies the right of Indian tribes to intervene in all voluntary state court child custody proceedings, provided that the tribe files a notice of intent to intervene or a written objection within 45 days of receiving notice of a voluntary termination of parental rights or within 100 days of receiving notice of a particular adoptive placement and certifies that a child is a member or eligible for membership at the time the tribe intervenes. This amendment will facilitate tribal participation at an early stage in voluntary Indian child custody proceedings and assure that ICWA is applied whenever an Indian child is involved. See sections 4 and 11 of H.R. 4733 for these intervention provisions.

3. PROBLEM: Under ICWA, extended family members are a preferred placement for Indian children who require foster care or adoptive placement. ICWA does not require that notice be provided to extended family members regarding children who may be placed in foster care or for adoption. Some states require notice, but most do not. As a result, extended family members often do not learn of child custody proceedings involving Indian children, and it is common for Indian children to be placed with others even when a suitable extended family placement may be available.

SOLUTION: H.R. 4733 requires notice to extended family members and recognizes their right to intervene in state child custody proceedings. This will allow for extended family members to protect their preferred placement rights by giving them the opportunity to advocate that a child be placed with a member of his or her extended family. See section 14 of H.R. 4733 for these provisions.

4. PROBLEM: Whether in a voluntary or an involuntary child custody proceeding, the parents of Indian children are frequently not fully informed of their legal rights under ICWA. As a result, the ability of parents to secure the full protections of the law is undermined. This can lead to uninformed decisions being made and unnecessary pain and suffering for both the biological parents and any prospective foster or adoptive family.

SOLUTION: H.R. 4733 requires attorneys and public and private agencies to provide detailed information to Indian parents of their rights under ICWA. See sections 6, 7 and 12 for these provisions.

5. PROBLEM: Under ICWA, consent to adoption or termination of parental rights may be revoked at any time prior to the entry of a final decree of adoption or termination and the child must then be returned to the parent. However, some courts have found that once a termination of parental rights is final and the parent has consented to that termination, there is no parental right to object to an adoption even if the adoption has not become final. In states where this interpretation has been adopted, many Indian parents have either been misled regarding their rights or have wrongly understood that their right to object to the adoption remained intact until a final decree of adoption was entered. Also, even where Indian parents clearly would have the right to object to an adoption until entry of the final decree,

parents frequently are uninformed regarding the progress of the adoption proceeding and, therefore, do not know the time frame within which their right to object must be exercised.

SOLUTION: H.R. 4733 limits parents' rights to withdraw consent to an adoption to 6 months after relinquishment of the child or 30 days after the filing of an adoption petition, whichever is later. The amendment would require parents to be notified of the exact calendar date on which the right to withdraw must be exercised. In many of the jurisdictions where a final order terminating a parent's parental rights was found to cut off any right to object to an adoption, the amendment would lengthen the time for a parent to object. See section 8 of H.R. 4733 for these provisions.

6. PROBLEM: Almost all Indian tribes in Alaska are not situated on reservations. The jurisdictional provisions of ICWA apply to Indian children who are domiciled or reside on an Indian reservation. With respect to off-reservation Indian children, ICWA permits a state court proceeding to be transferred to tribal jurisdiction. In addition, Alaska is a P.L. 83-280 state. All of these circumstances have caused confusion and litigation concerning the jurisdiction of Alaska tribes over Indian child custody proceedings

SOLUTION: H.R. 4733 clarifies tribal jurisdiction in Alaska over Indian child custody proceedings by recognizing that the State of Alaska and the tribes in Alaska have concurrent jurisdiction over child custody proceedings involving Indian children who reside in or are domiciled in Alaska, including proceedings involving these children that may arise outside of the State of Alaska. See section 2 of H.R. 4733 for these provisions.

7. PROBLEM: ICWA restricts tribal exclusive jurisdiction to tribes with reservations and tribes exercising jurisdiction over child custody proceedings after a transfer of jurisdiction from a state court. The communities of many tribes are located in areas that are not technically a "reservation" but that are cohesive in other ways. Yet, these tribes are not able to effectively protect their children, and the children are commonly the subject of state court child custody proceedings where tribal and Indian family concerns are often not appropriately considered.

SOLUTION: H.R. 4733 facilitates the ability of tribes without reservations, including tribes in Alaska and Oklahoma, to assume jurisdiction over child custody proceedings. See section 16 of H.R. 4733 for these provisions.

8. PROBLEM: ICWA permits a state court with legitimate jurisdiction over an Indian child custody proceeding to deny a request that the proceeding be transferred to the jurisdiction of the Indian child's tribe for "good cause" or based on parental objection. The failure of ICWA to define "good cause" or to limit parental objections to those that are consistent with ICWA purposes has led to the denial of transfer to tribal courts in numerous cases for reasons that go far beyond original congressional intent.

SOLUTION: H.R. 4733 narrows the grounds upon which state courts can refuse to transfer cases to tribal courts, limiting these grounds to jurisdictional and inconvenient forum considerations and limiting parental objections to those that are consistent with ICWA purposes. See section 3 of H.R. 4733 for these provisions.

9. PROBLEM: ICWA provides that Indian children who are tribal court wards remain within exclusive tribal court jurisdiction even if their residence or domicile changes. In some cases, state courts have applied this provision to deny tribal exclusive jurisdiction over children who became subject to tribal jurisdiction following a transfer of jurisdiction from a state court but who happen to be domiciled or resident outside of the tribe's territorial jurisdiction.

SOLUTION: H.R. 4733 clarifies tribal court authority to exercise exclusive jurisdiction over Indian children subject to tribal jurisdiction, following transfer by a state court, regardless of the child's residence or domicile. See section 2 of H.R. 4733 for these provisions.

10. PROBLEM: ICWA provides for certain alleged ICWA violations to be reviewed by "any court of competent jurisdiction." Generally, federal courts have used jurisprudential and other reasons for not exercising jurisdiction to review alleged ICWA violations. The federal district court in Alaska is one notable exception. This has left most review to state appellate courts with the consequence that in a number of jurisdictions, ICWA provisions, when construed in ways that limit their force and effect, cannot be enforced in federal court. A related problem is the failure of ICWA to provide for federal agency review of state compliance with ICWA requirements.

SOLUTION: H.R. 4733 provides for federal court review of specified ICWA violations, defining the circumstances under which this review may occur during a pending state court proceeding and when it may occur after a final judgment in a state court proceeding. H.R. 4733 also provides for federal agency review of state ICWA compliance and a mechanism for enforcing state compliance with ICWA requirements in the event non-compliance is determined. See sections 13 and 18 of H.R. 4733 for these provisions.

11. PROBLEM: In a number of cases, child custody proceedings involving Indian children have been held in circumstances where the court was not informed that the child was Indian despite knowledge of that fact by persons involved in the proceeding. As a result and as intended by those withholding this information, ICWA was not applied in the proceeding.

SOLUTION: H.R. 4733 provides for criminal sanctions for anyone who assists a person to lie about their Indian ancestry for the purposes of applying ICWA. See section 18 of H.R. 4733 for these provisions.

12. PROBLEM: In many states, post-adoption contact between adopted children and

their natural families is not recognized. In a number of instances where Indian families and tribes were prepared to consent to the adoption of an Indian child by a non-Indian family, the adoption was either thwarted or rendered more difficult because of the legal impediment to post-adoption contact by the natural family.

SOLUTION: H.R. 4733 allows state courts to enter enforceable orders providing for visitation or contact between tribes, natural parents, extended family, and an adopted child. See section 18 of H.R. 4733 for this provision.

13. PROBLEM: ICWA is limited to covering children who are members of or eligible for membership in federally recognized tribes. Children who are members of tribes only recognized by a state and children who are not eligible for tribal membership but who have a parent or grandparent who is a tribal member are not covered. As a consequence, tribal communities and Indian families and children who face the same types of problems motivating the enactment of ICWA are without ICWA protection.

SOLUTION: H.R. 4733 extends ICWA to cover children of state-recognized Indian tribes (in some cases), and children who reside in or are domiciled on a reservation and are the children or grandchildren of a member, but who are not eligible for tribal membership. See sections 18 and 19 of H.R. 4733 for these provisions.

14. PROBLEM: Under ICWA, Indian adoptees have a right to access state adoption records for the purpose of securing rights associated with their tribal relationship. In some jurisdictions, this right has been curtailed by both procedural and substantive obstacles.

SOLUTION: H.R. 4733 makes it easier for adoptees to gain access to their birth and adoption records. See section 15 of H.R. 4733 for this provision.

15. PROBLEM: Under ICWA, a tribally approved foster or adoptive home is equivalent to a state approved home for purposes of federal financial assistance. This facilitates the use of tribal foster or adoptive homes by states and, therefore, state compliance with placement requirements for Indian children under ICWA. However, conflicts and gaps in federal law have made it more confusing and difficult for states to use tribal foster care and adoptive homes.

SOLUTION: H.R. 4733 provides that a tribally approved foster or adoptive home shall be considered equivalent to a state approved home, regardless of conflicts in state or federal law. See section 20 of H.R. 4733 for this provision.

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