



Department of Justice

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**PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL SAM HIRSCH SPEAKS
ABOUT THE JUSTICE DEPARTMENT'S INITIATIVE IN SUPPORT OF THE INDIAN
CHILD WELFARE ACT AT THE NATIONAL INDIAN CHILD WELFARE
ASSOCIATION CONFERENCE ON CHILD ABUSE AND NEGLECT**

Remarks as prepared for delivery

ST. PAUL, MINNESOTA

This is a critical time for Indian Child Welfare Act (ICWA), our nation's keystone federal law protecting Indian children. As you've already heard this morning and will hear more about during the conference, there is a lot of exciting activity in this area, at the federal, state and tribal level. Federal engagement is at unprecedented levels. But in recent years, we've also seen increasing attacks on the statute and on tribal sovereignty more generally. The need for all of us to engage on these issues has never been greater.

I'm going to talk a bit about the Department of Justice's role on Indian issues generally, and describe some of our recent work to promote implementation of and compliance with ICWA. Since the beginning of this Administration, the Department of Justice has made our relationship with Indian tribes and the safety and welfare of tribal citizens a priority. We have seen tangible results from these efforts. We're particularly proud of our progress addressing domestic violence in Indian country, most notably through the bipartisan passage of the Violence Against Women Reauthorization Act of 2013 (VAWA), which incorporated provisions recommended by the Justice Department that, for the first time in decades, empower Indian women who experience abuse by non-Native men.

That historic piece of legislation recognized tribes' inherent ability to exercise special domestic violence criminal jurisdiction over all offenders on their lands. It made clear that tribal courts are fully entitled to enforce civil protection orders. And it strengthened federal sentences for certain acts of domestic violence in Indian Country, ensuring that wrongdoers are held wholly accountable for their crimes, regardless of where they occur.

The Environment and Natural Resources Division is the part of the department tasked with defending federal laws and programs that benefit tribes and tribal sovereignty over their

lands and people. It is well established that Congress can pass laws that single out Indians and Indian tribes for special treatment, in part because there is a unique government-to-government relationship between the U.S. and tribes that dates to the founding of our country. ICWA is one of those laws – it was passed by Congress to address the widespread removal of Indian children from their parents, extended families and tribal communities. Congress recognized its responsibility to protect and preserve Indian tribes and their people and understood that Indian tribes could cease to exist if their children continued to be systematically taken away.

The statute contains many important protections for Indian children, their parents and their tribes. But it is aimed mainly at state agencies and courts and does not expressly carve out a large role for the federal government. So the federal government has traditionally had some, but not a great deal, of involvement in the implementation of the statute.

In this Administration, we heard from tribes, tribal organizations and groups like NICWA that more federal engagement was needed. At the Department of Justice, we responded by creating an initiative to make sure that the department's resources, as well as the resources of other federal agencies, were being best used to promote ICWA implementation and compliance. The initiative was announced by then-Attorney General Eric Holder in December 2014, and includes participation from many parts of the Department of Justice, including the Civil Rights Division, the Office of Tribal Justice and the Office of Justice Programs.

A top priority of the Initiative is making sure that the federal government, as a whole, is coordinating on issues surrounding ICWA implementation and compliance. As you've heard today, each of the three agencies sitting up here today works in the arena of Indian child welfare, but in different ways. Interior works extensively with tribes, including supporting tribal child welfare and other social services programs. But ICWA is primarily directed at instances where tribal children are involved in state court proceedings, and HHS has the tools and experience to work with state agencies and courts on a wide range of child welfare matters. The Department of Justice's primary emphasis is representing the U.S. in the courts, but we also have a range of juvenile justice and other programs that can intersect with ICWA work. No one federal agency can singlehandedly address implementation of and compliance with ICWA. The three agencies have recognized that we must work together to leverage the resources of each of our agencies to address these important issues.

To this end, the three departments represented here today have been engaged in extensive interagency collaboration to promote compliance with ICWA. We've been talking at all levels – from staff on the ground and in the regions, to the folks on this stage, to our bosses – about how we can creatively use the authorities and resources that each of our agency has to assess and promote compliance with this important federal law. And we've taken steps to make sure that this effort lasts beyond our time, by formalizing the agreement to continue this interagency collaboration. Just this past week, our three agencies signed a Memorandum of Understanding, in which we commit to work together on these issues, and in particular, to regularly meet as an interagency workgroup.

In our three-agency partnership, one of the Department of Justice's most significant roles is handling ICWA issues in the courts. Most ICWA issues arise in state courts – juvenile courts,

and then sometimes state courts of appeal. The United States is not a party to these cases, but we can participate as an amicus curiae, or friend of the court, and provide the views of the United States on the proper interpretation of the law. We've been doing this with much more frequency. To highlight a few cases:

In a case that I'm sure many of you have heard about in South Dakota federal district court, *Oglala Sioux Tribe v. Van Hunnik*, we filed a brief supporting the tribes' position that the state court's policies and practices for emergency removal hearings violated both ICWA and the Due Process Clause of the constitution. The court agreed with that position. The case is still pending for the court to address one remaining issue along with the proper remedy, but it is an important first step towards securing the rights of Indian parents and children.

In a case in the Alaska Supreme Court, *Tununak II* or *Native Village of Tununak v. Alaska*, we supported the tribes' request that the Court reconsider its decision to find that an Indian child's grandmother had not taken formal enough steps to seek to adopt her grandchild and thus avail herself of ICWA's placement preferences. We argued that states should diligently seek out potential preferred placements, provide those extended family and tribal members with enough information to avail themselves of the preference, and that states should have clear standards for what is required to seek to adopt an Indian child. Although the Court did not reverse its decision in that case, the case prompted significant change within the state of Alaska. After working with the Alaska Federation of Natives, the state promulgated emergency regulations which allow for a simple request by a relative, tribal member, or other Indian family in court or to the state agency to constitute a proxy for a formal petition for adoption.

We've also filed a brief in the California Supreme Court supporting the importance of a court considering whether ICWA applies at each stage of a child's case (In re Isaiah W.) And a little over a week ago, the Alaska Supreme Court announced an important decision affirming and strengthening tribal sovereignty over child welfare matters, *Alaska v. Central Council Tlingit and Haida Tribes*. We filed a brief supporting the tribes and arguing that tribal courts retain inherent, non-territorial jurisdiction to rule on child support issues for children who are members of or eligible for membership in the tribe. The Alaska Supreme Court agreed and went on to determine that tribal courts retain this authority even if the case involves a parent who is not a member of the tribe. Although this case is not technically an ICWA case, as it deals with child support issues, the Court repeatedly cited provisions of ICWA – as we had in our briefing – to demonstrate that Congress understands that tribal authority over family law matters is integral to tribal self-governance.

We're reviewing lots of other cases for potential participation. One thing we have observed is that “hard cases make bad law” – and so many cases involving decisions about what is best for children are hard. We all need to be strategic about our arguments. The core protections of the statute should be noncontroversial – that children should be kept or reunified with their parents when possible; that when this isn't possible, children should be placed with extended family or within their tribal community if possible; and that tribes have the opportunity to be involved in decisions about the welfare of their citizens. But sometimes unusual fact patterns or an overly aggressive argument for application of the statute leads

appellate courts to limit application of ICWA in ways that have negative spillover effects on other cases.

The department is also handling lawsuits challenging the constitutionality of ICWA itself, as well as BIA's guidelines interpreting the statute. I can't talk in detail about pending litigation, but it is important to note that the claims in these cases are broad attacks on ICWA and go to the heart of Congress' authority to pass legislation to benefit Indian tribes and Indian people. These cases could potentially have repercussions for other laws benefiting Indian tribes and their members.

The popular press accounts have a similar theme. There is no recognition of the sovereignty of tribes, the significance of tribal citizenship, or the legal and moral framework that underlies federal policy in this area. What we are seeing in the court cases and in the press is the notion that ICWA harms, rather than helps, Indian children and their families. We need to collectively tell the stories of how this law is valuable and benefits our country. We can't rest on the knowledge that ICWA is the law; we must persuade our fellow citizens, lawmakers and judges that it is an important law that must be maintained and should be adhered to.

I'm certain that all of you have an example of a child who has benefited from this law. A child whose parent was, with some help, able to provide a safe and loving home. Or a child who was able to live with her grandmother, or aunt and uncle, instead of a stranger. A child who was able to grow up in a home suffused with Indian culture and traditions and carry these roots with her into adulthood. A child who was able to maintain her ties to her tribal community and government, and is growing up to be a valuable citizen to that tribe and to our country. We need you to tell those stories and explain to others how ICWA works; how tribes protect children; how children are benefited by growing up knowing their tribal culture. We need you to tell your stories to your local communities, to judges, to the press.

This is a critical moment for Indian children. At the federal level, we are rising to the challenge. But we also need your help—tribes, social workers, child welfare attorneys—to ensure that Indian children, families and tribes continue to enjoy the protections of this important federal law. We want to hear your stories and ideas. Your views will inform how we do outreach, conduct training, set standards, and present our arguments in court. We're available at this conference, or you can always reach out to us at icwa@usdoj.gov.

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