February 26, 2015

Senator Les Seiler
Chair, Judiciary Committee
Room 1113, State Capitol
Lincoln, NE 68509

Chairman Seiler and members of the Judiciary Committee,

My name is Robert McEwen and I am a staff attorney in the Child Welfare Program at Nebraska Appleseed. Nebraska Appleseed is a nonprofit organization that fights for justice and opportunity for all Nebraskans.

We support LB 566 because it will help to improve Nebraska’s compliance with the Indian Child Welfare Act (ICWA), which will lead to better outcomes for Native children and families.

In 1978, Congress enacted the ICWA after recognizing that a disproportionate number of Native American children were being removed from their homes and placed in non-Native homes. At the time ICWA was passed, roughly 25-35% of all Native American children had been removed from their families and placed in adoptive homes. Congress found that, “there is no resource more vital to the continued existence and integrity of Indian tribes than their children.” The ICWA established minimum procedural and substantive standards that protect both the sovereignty of tribes and the rights of Native American children. In 1979, the Bureau of Indian Affairs (BIA) published guidelines for state courts to use in interpreting many of ICWA’s requirements in Indian child custody proceedings. In 1985, the Nebraska Legislature enacted a state version of the ICWA, mirroring the federal act, to “ensure that intent and provisions of the federal Indian Child Welfare Act are enforced.”

In 2012, the Nebraska Legislature held an interim study, LR 578, to look into the implementation of the Indian Child Welfare Act in Nebraska. Under the leadership of Sen. Coash, the Nebraska Legislature continued this investigation in 2013 in LR 262. As a result of these interim studies, Sen. Coash introduced LB 928 in 2014 to define and clarify issues that child welfare stakeholders had raised over the course of the previous two years. After opponents at the hearing on LB 928 raised some issues, Sen. Coash was able to bring together stakeholders to work to address the areas of disagreement in LB 928. After nearly nine months of discussions and negotiation, stakeholders reached a compromise, which is now reflected in LB 566. We want to thank the many stakeholders, including employees of
the Ponca tribe, the Santee Sioux Nation, the Omaha tribe, the Winnebago tribe, Nebraska Families Collaborative, and the Lancaster and Douglas County Attorneys offices, who all spent many hours thoughtfully discussing the needed solutions and practical avenues to improve ICWA in Nebraska.

As timing would have it, a significant development occurred yesterday related to ICWA. Yesterday, for the first time since 1979, the BIA published updated guidelines for state courts and agencies in Indian child custody proceedings. The BIA stated, "[a]lthough there have been significant developments in ICWA jurisprudence, the guidelines have not been updated since they were originally published in 1979. Much has changed in the 35 years since the original guidelines were published, but many of the problems that led to the enactment of ICWA persist."  

The contents of yesterday’s updated BIA Guidelines are strikingly similar to the provisions in LB 928 and LB 566 introduced by Sen. Coash. While there are a couple of minor details within LB 566 that may need to be strengthened to reconcile differences with the new BIA Guidelines, it is now more clear than ever that the requirements, language, and purpose of LB 566 is expressly consistent with federal law.

While persuasive to courts on the implementation of ICWA, the updated BIA Guidelines do not obviate the need for LB 566. To the contrary, Nebraska Appleseed believes LB 566 is still very necessary and must be codified to ensure compliance with the ICWA. While appellate courts in Nebraska have consistently looked to the BIA Guidelines to interpret the provisions of the ICWA, appellate court review by its nature is a piecemeal approach, in which individual provisions are reviewed on a case-by-case basis, which takes time to create anything approaching a comprehensive body of law, case-by-case, provision-by-provision in individual appeals. In addition, there have been numerous ICWA cases before Nebraska appellate courts. This fact alone indicates that there is confusion at the juvenile court level about the ICWA, a problem that would be remedied by LB 566, which provides a clear statutory scheme. To illustrate, since 1993, there have been fourteen published Nebraska appellate cases where the BIA Guidelines have been considered, and in nine of those cases the juvenile court was essentially reversed for failing to properly follow the BIA guidelines. Despite the existence of the BIA Guidelines, since 1993 there have been thirty-two published Nebraska appellate ICWA cases, and in twenty of those cases the juvenile court has been reversed for failing to properly apply the ICWA.

Finally, we want to make a comment about the fiscal note. We note that the fiscal estimate for LB 566 was significantly higher than the estimate for LB 928 last year. These additional costs were mostly a result of agency estimates related to family visitation. We believe the agency misinterpreted language intended to place reasonable limits on this requirement as actually broadening it. As a result, we believe this additional cost can be easily addressed by an amendment that returns to the language used in LB 928 that is also consistent with the updated BIA Guidelines.

In conclusion, it is important for judges, attorneys, and caseworkers to understand the rules that apply in ICWA cases. Placing these requirements in state statute will help ensure
that everyone understands what is required in a custody proceeding involving an Indian child.

We support LB 566 because it provides a clear guide for attorneys, judges, and caseworkers in that it defines and clarifies key issues within the ICWA. Therefore, we believe that LB 566 will lead to better outcomes for Native children and families and will ensure that Nebraska complies with the language and the purpose of the ICWA.

We want to thank Senator Coash and the Committee for your efforts to improve Nebraska’s child welfare system and we urge you to advance LB 566.

Sincerely,
NEBRASKA APPLESEED

Robert McEwen
Staff Attorney
Child Welfare Program

Attachment: LB 566 Fact Sheet

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1 25 U.S.C. § 1901
3 25 U.S.C. § 1901(3)
5 Neb. Rev. Stat. § 43-1502
6 LR 578 (2012).
7 LR 262 (2013).
8 LB 928 (2014).
11 Id.
Maintaining ties of culture and tradition are essential to the well-being of children and families. We know that children are better off when they are connected to their culture. Nebraska's Indian Child Welfare Act (ICWA) was meant to ensure that our child welfare system works to maintain the cultural ties of native families. But for a variety of reasons, the law is not being fully enforced and the result is that Nebraska's child welfare system is not serving native children as well as it should.

Our state has the third highest rate of native children in foster care. This harms native families and disconnects children from their culture. LB 566 strengthens Nebraska's ICWA by clarifying the responsibilities of child welfare stakeholders under the statute to allow for better enforcement. This will help us meet the goal of the ICWA - maintaining the ties of family, culture, and tradition that are essential to the well-being of children.

LB 566 accomplishes four primary goals:

1) LB 566 defines key components of the ICWA

- There are several key components of the ICWA that are not currently defined in federal or state statute but are still critical to ensuring cultural competency in ICWA cases.

- For example, current federal and state law require the state to provide "active efforts" to prevent the breakup of a native family. Active efforts is a requirement that the state provide native families with culturally appropriate resources to keep their family together, but there is no current definition or examples of this term in our state statute.

- LB 566 defines the "best interests" of a native child when considering placement options, if an out-of-home placement must occur, prioritizing placements that reflect the unique values of the Indian child's tribal culture.

- LB 566 also identifies individuals that are able to testify as a "qualified expert witness" in an ICWA case. The list of individuals mirrors the Bureau of Indian Affairs (BIA) Guidelines that courts in Nebraska have routinely followed and also prioritizes individuals that are familiar with the tribal customs.

2) LB 566 clarifies portions of the ICWA

- There are pieces of the ICWA that are currently defined or described in both federal and state law but are still not being implemented consistently in all parts of the state. In some cases, this has resulted in repeated litigation over certain provisions of the ICWA.