

**Response to Request for Public Comments on Proposed Regulations by the
Department of the Interior, Bureau of Indian Affairs**

**Submitted by
The American Bar Association
May 19, 2015**

Pursuant to the notice published in the Federal Register on March 20, 2015 (80 Fed. Reg. 14880), the American Bar Association (“ABA”) submits these comments regarding the proposed Regulations for State Courts and Agencies in Indian Custody Proceedings.

In August 2013 the ABA House of Delegates approved a policy resolution and report (appended to these comments) urging full implementation of, and compliance with, the Indian Child Welfare Act (ICWA) and encouraging federal, state, and tribal governments to provide the training and resources necessary to fully implement and enforce compliance with the Act. The resolution also supports efforts to reduce the disproportionate number of American Indian and Alaska Native children removed from their homes, as well as education of the legal profession on requirements of the Act and improvement of its implementation.

The ABA, through its Center on Children and the Law, has provided training and technical assistance to states for many years to improve compliance with child welfare laws, including the Act. Through that work, which includes ongoing examination of how the law can aid reducing unnecessary foster care placement, the Center’s staff and consultants have met with numerous state and tribal staff and studied what has and has not worked in implementing the Act’s provisions.

The proposed Indian Child Welfare Act Regulations take an important step toward achieving full implementation of the Act by aiming at clarity and consistency in practice.

We would like to highlight and offer comments on several provisions of the Regulations that we believe are particularly important.

Data Collection

The data collection requirements outlined in the proposed Regulations¹ are needed to determine compliance with the Act. Currently, there are only isolated efforts to ascertain the quality of practice around the Act. This does not allow efficient targeting of state, tribal, or federal resources in efforts to improve systems.

Definition of “Child Custody Proceeding”

Section 23.2 includes a definition of child custody proceeding with the words “any proceeding or action” that we believe is not fully clear. We recommend adding “court hearing” after the word “any”. After the word “action” we would encourage adding “by an agency or court” to make it immediately clear that “proceeding” applies to both. In addition, in the description of “Foster care placement” that follows, we would add, after the words, “any action” the words “by an

¹ Regulations for State Courts & Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 54, 14884 (March 20, 2015) (to be codified at 25 C.F.R. pt. 23).

agency or the court” to again be clear that both agency ex parte foster care placements and court-ordered foster care placements are included as “proceedings”.

Consistent Inquiry

Section 23.107 of the proposed regulations indicates that the agency and courts should inquire about ICWA applicability in all cases. This targets a serious problem of inconsistent practice. There is a tendency for certain state agencies and courts that are geographically proximate to tribal lands to make greater efforts to comply with the ICWA despite the fact that 78 percent of Native Americans do not live on tribal lands.²

There are also anecdotal reports that some agencies and courts only ask about ICWA applicability if a child “looks like a Native American.” This is an inappropriate and ineffective standard; nearly half of Native Americans and Alaska Natives in the U.S. report multiple races.³

Rejection of the Existing Indian Family Exception

Section 23.103 properly rejects the Existing Indian Family Exception. This exception, which held that ICWA did not apply to a family that was not living as part of an “Indian family unit,” is problematic in many ways. For one, it is wholly contrary to the statute. It has, in fact, been repudiated even by the court that originated it.⁴ Second, it asks state courts to undertake the task of determining *Indianness*. Further, it is problematic because sovereign tribes are not bound to acknowledge the exception, which may lead to additional – often protracted – litigation.

Immediate Active Efforts

The proposed regulations indicate that active efforts should begin immediately.⁵ This is consistent with good practice in all child welfare cases. Early concentrated efforts on the part of professionals to achieve family preservation and/or permanency are part of what has led to declining foster care populations.

We would recommend that early efforts also include early appointment of legal counsel for both parents and children. Attorney representation at the earliest stage of proceedings is both consistent with good practice⁶ and with ICWA statutory and constitutional due process requirements.⁷

Limiting the Scope of What Is an “Emergency Removal”

Since Section 23.113 is meant to limit somewhat which ICWA protections for parents must be followed at the time of “emergency” situations, we suggest a limitation on this, so that it only applies to true emergency situations where a social services agency, law enforcement agency, or a judge, acting without an actual court hearing, removes a child (typically, only allowed by law for a 24-48 hour period without a court hearing) based on the presumptive belief that a child is in

² http://www.census.gov/newsroom/releases/archives/2010_census/cb12-cn06.html

³ *Id.*

⁴ *In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

⁵ § 23.106

⁶ Cohen & Cortese, *Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families*, 28 *Child Law Practice* 3 (May 2009)

⁷ *Oglala Sioux Tribe v. Van Hunnik*, 2015 WL 1466067 (D. S. D.); Also consistent with § 23.113(a)(2).

imminent danger of death or serious bodily harm. As the decision in *Oglala Sioux Tribe v. Van Hunnik*, 2015 WL 1466067 (D. S. D.) suggests, the initial hearing at which a judge or judicial officer considers evidence, and where parties appear in court, should not be considered as the “emergency removal.”

The Regulations should assure that this initial court hearing, often called the Preliminary Hearing, Shelter Care Hearing, or Preliminary Protective Hearing, does not take place without Native American parents being able to review the court petition and any associated affidavits or documents, being represented by legal counsel who is appointed prior to the beginning of the hearing, and being permitted to present evidence and cross-examine witnesses who are under oath at the hearing. What is referred to in this Section as “temporary emergency custody” for up to 30 days should only be ordered if the parents are provided with these rights.

For further information concerning these comments, please contact Bruce Nicholson, Senior Legislative Counsel, American Bar Association, bruce.nicholson@americanbar.org, or Scott Trowbridge, J.D., ABA Center on Children and the Law, scott.trowbridge@americanbar.org.

**AMERICAN BAR ASSOCIATION
INDIAN CHILD WELFARE ACT RESOLUTION
APPROVED ON AUGUST 12, 2013**

RESOLVED, that the American Bar Association urges the full implementation of, and compliance with, the Indian Child Welfare Act (25 U.S.C. §§1901-63).

FURTHER RESOLVED, That the ABA encourages federal, state and tribal governments to provide the training and resources necessary to fully implement and enforce compliance with the Indian Child Welfare Act.

FURTHER RESOLVED, That the American Bar Association urges:

- (a) State court collaborations with tribal courts, tribal court improvement programs, tribal governing bodies, and other tribal authorities to protect American Indian and Alaska Native children and to ensure appropriate treatment of, and resources for, American Indian and Alaska Native families and children at all levels of government;
- (b) Increased use of federal Title IV-E cooperative agreements and memoranda of understanding between states and Tribes to enable Tribes to operate their own child protection programs;
- (c) Assistance to Tribes and tribal courts in enhancing legal services, case management, and child welfare services functions;
- (d) Efforts to reduce the disproportionate number of American Indian and Alaska Native children removed from their homes; and
- (e) Significant increases in the financial support provided Tribes and tribal courts by the U.S. Departments of Interior, Justice, and Health and Human Services that enhance services to American Indian and Alaska Native children and their families, and to the legal and judicial systems that serve them.

FURTHER RESOLVED, That the American Bar Association encourages and supports efforts of state and local bar associations, legal services organizations, law schools, child welfare and adoption agency legal counsel, and other legal assistance providers to develop training and materials that educate the legal profession on requirements of the Indian Child Welfare Act and improvement of its implementation.

This resolution was developed and sponsored by the ABA Commission on Youth at Risk and co-sponsored by the National Native American Bar Association, Commission on Domestic and Sexual Violence, Center for Racial and Ethnic Diversity, Commission on Homelessness and Poverty, Section of Individual Rights and Responsibilities, and the Young Lawyers Division.

REPORT

In 1978, after more than four years of hearings, testimony and debate, Congress enacted the Indian Child Welfare Act¹ (hereinafter “ICWA”) in response to the “alarmingly high percentage of Indian families ...

¹ P.L. 95–608, Approved November 8, 1978 (92 Stat. 3069) Indian Child Welfare Act Of 1978. 25 U.S.C. §§1901-63.

broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.”² Congress also noted “that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”³

Prior to enactment of ICWA, state government actors followed a pattern and practice of removing between 25 and 35 percent of all Indian children nationwide from their families, placing about 90 percent of those removed children in non-Indian homes.⁴ Recognizing the disparate treatment faced by American Indian and Alaska Native (AI/AN) children and families in the mainstream child welfare and adoption systems, ICWA was drafted with the express purpose of preserving the familial and cultural ties of Indian families.

Although ICWA has done much to improve these numbers, due in large part to lack of effective implementation and compliance in 2011 the National Council of Juvenile and Family Court Judges reported:

*Across the United States, Native American children are overrepresented in foster care at a rate of 2.2 times their rate in the general population, 21 states have some overrepresentation, and 26 percent of the states that have overrepresentation have a disproportionality index of greater than 4.1. In Minnesota, the disproportionality is index 11.6.*⁵

What makes these statistics even more sobering is that in many of these states the overwhelming majority of Native Americans resided on reservations where ostensibly the state courts and state or county child welfare agencies had no authority to order the removal of Native American children.⁶

This report will provide background on ICWA and explain its actual and intended impact on the child welfare system, adoption and child custody proceedings. This report will also detail challenges and barriers to full implementation of ICWA including a recent decision of the U.S. Supreme Court, as well as the effects of non-compliance. Lastly, this report will highlight successful State-Tribal collaborations and offer recommendations for strengthening ICWA to further the best interests of AI/AN children, ensuring the security and protection of their Tribes and families.

The ABA does not currently have a policy on ICWA. However, the ABA Section of Family Law publishes a legal guide to ICWA called the *Indian Child Welfare Act Handbook*.⁷ Additionally, in August 2001, upon submission by the ABA Commission on Homelessness and Poverty, the ABA approved a resolution⁸ calling on Congress to amend Title IV-E of the Social Security Act to provide direct tribal access to federal Title IV-E foster care and adoption funding for children under tribal court jurisdiction.

² *Id.* at 1901.

³ *Id.*

⁴ Matthew L.M. Fletcher, The Origins of the Indian Child Welfare Act: A Survey of the Legislative History, Indigenous Law & Policy Center Occasional Paper 2009-04, <http://www.law.msu.edu/indigenous/papers/2009-04.pdf> (citing *Holyfield*, 490 US at 32-33 (citing Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong, 2d Sess, at 3 (statement of William Byler) (“1974 Hearings”))

⁵ Padilla, J. & Summers, A. (2011). Technical Assistance bulletin: Disproportionality rates for children of color in foster care. National Council of Juvenile and Family Court Judges: Reno, NV. Retrieved from: http://www.ncjfcj.org/sites/default/files/Disproportionality%20TAB1_0.pdf

⁶ *Indian Child Welfare Act Handbook*. B.J. Jones, Mark Tilden, Kelly Gaines-Stoner; 2nd ed. 2008).

⁷ *Id.* at 2.

⁸ Homelessness and Poverty (Report Nos.105C). 2001 AM 105C

And in August of 2008, the Commission on Youth at Risk's policy on Addressing Racial Disparities in the Child Welfare System was approved, calling on Congress to:⁹

1. Broaden federal reviews of the child welfare system to address racial and ethnic disproportionality and fund reporting, analysis and corrective action responses;
2. Help racial and ethnic minority families have ready access to services to prevent removals from home in both state and tribal systems;
3. Provide relevant cultural competence training;
4. Provide for a racially and ethnically diverse legal and judicial workforce; and
5. Make changes in law and policy to help decrease disproportionality by subsidizing permanent relative guardianships, giving relative caregivers financial support no less than non-relative caregivers, providing relative caregiver housing support and giving flexibility in having separate licensing and approval standards for kinship placements.

These policy recommendations mirror many of the goals of ICWA, including addressing the disproportionate number of AI/AN youth in the child welfare system, encouraging maintenance of the tribal kinship networks, and recognizing the need for a separate set of standards for identifying appropriate placements and interventions for AI/AN children and youth.

Overview of the Indian Child Welfare Act and the Events Preceding its Enactment

ICWA was preceded by an era of seeking to “civilize” and Christianize AI/AN people through boarding school placement and education that had the effect of permanently removing many Indian children from their families, cultures and identities. The federal government began sending American Indians to off-reservation boarding schools in the 1870s, when the United States was still at war with tribes.¹⁰ Students at federal boarding schools were forbidden to express their culture — everything from wearing long hair to speaking their native language.¹¹ About one hundred years later, an Indian Adoption Project was established by the Bureau of Indian Affairs (BIA) and the Child Welfare League of America (CWLA) to provide non-Indian adoptive homes for Indian children whose parents were thought to be incapable of providing a suitable home.¹²

Immediately prior to ICWA's passage, in some states the adoption rate of Indian children was 19 times that of non-Indian children, while foster placement of Indian children was 10 times that of non-Indian children.¹³ Many removals were the product of mainstream child welfare agency ignorance of AI/AN culture and child-rearing practices,¹⁴ a devaluing of extended AI/AN family networks,¹⁵ and mischaracterizing the poverty in Indian communities as neglect.¹⁶ Noting these findings, Congress “assumed the responsibility for the protection and preservation of Indian tribes and their resources” and

⁹ Commission on Youth at Risk (Report Nos. 107). 2008 AM 107

¹⁰ Charla Bear. *American Indian Boarding Schools Haunt Many*, NPR Report. May 2008. Available at <http://www.npr.org/templates/story/story.php?storyId=16516865>.

¹¹ *Id.*

¹² Wilkins, A. July 2008 State-Tribal Cooperation and the Indian Child Welfare Act. Pg. 1. Retrieved from: <http://www.ncsl.org/print/statetribe/ICWABrief08.pdf>

¹³ Brown, E.F., Limb, G.E., Munoz, R., & Clifford, C.A. (2001). Title IV-B Child and Family Service Plans: An Evaluation of specific measures taken by states to comply with the Indian Child Welfare Act. Seattle, WA: Casey Family Programs; Portland OR: National Indian Child Welfare Association. Pg. 9.

¹⁴ *ibid* citing Hollinger 1992; U.S., House Report, 1978.

¹⁵ *ibid*

¹⁶ *Id.* at 10

recognized “that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest in protecting Indian children.”¹⁷

ICWA recognizes the government-to-government relationship between the United States and Tribes, and affirms the political status of tribal members—ICWA is not based on either race or ethnicity.¹⁸ The stated purpose of the Act is “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children...and placement of such children in...homes which will reflect the unique values of Indian culture.”¹⁹ The long-standing clash between Indian tribal values and those of Anglo-American culture is the very problem ICWA was designed to address.²⁰

When appropriately applied, ICWA is designed to comprehensively address child custody proceedings related to Indian children and parents. The Tribal Law and Policy Institute notes²¹ that ICWA:

1. Regulates States regarding the handling of child abuse and neglect and adoption cases involving Native children by state courts, state Child Protection agencies, and adoption agencies;
2. Sets minimum standards for the handling of these cases;
3. Affirms the jurisdiction of Tribal Courts over child abuse and neglect and adoption cases involving member children; and
4. Establishes a preference for Tribal courts to adjudicate child abuse and neglect cases in situations of concurrent jurisdiction.

ICWA applies to cases in State courts only (not Tribal courts) in child custody proceedings (including foster care placement, termination of parental rights, pre-adoptive and adoptive placements), involving an Indian child (any person under the age of 18 who is a member of an Indian tribe or the biological child of a member of an Indian tribe and eligible for membership in an Indian tribe),²² and²³

1. Determines residency and jurisdiction for children and parents/custodians,
2. Outlines placement preferences,
3. Determines requirements for termination of parental rights, and
4. Explains consequences for non-compliance, including invalidation of court orders and decisions.

In accordance with Title IV-B of the Social Security Act, the Administration for Children and Families (ACF) of the U.S. Department of Health and Human Services requires states to include “specific measures” for ICWA compliance in their Child and Family Service Plans. These specific measures include “the identification of Indian children, notification of such to the relevant Indian tribe, and preferential placement with Indian caregivers when determining out-of-home or permanent placements for Indian children, provided that the Indian caregivers meet all relevant child protection standards.”²⁴ With regard to these three specific measures, a study conducted by Limb and Brown reviewed 44 state Child and Family Services Plans (CFSPs).

Out of the 44 CFSP state plans that were reviewed, 15 plans (34.1%) indicated the development of specific measures for the identification of an Indian child; 12 plans (27.3%) indicated that states had

¹⁷ 25 U.S.C. §1901

¹⁸ *The Indian Child Welfare Act Summary*. Tribal Law and Policy Institute. Available at: <http://bit.ly/Z8FmyA>

¹⁹ *Id.* citing 25 U.S.C. § 1902

²⁰ Brown, E.F., et.al., at 12

²¹ Tribal Law and Policy Institute.

²² *Id.* citing 25 U.S.C. § 1903(1, 4)

²³ *Id.* citing 25 U.S.C. § 1911(a), 1912, 1915, 1912(f), and 1914

²⁴ Limb, G.E. & Brown, E. F. (2008). An examination of the Indian Child Welfare Act section of state Title IV-B Child and Family Services Plans. *Child & Adolescent Social Work Journal*, 25(2), 99-110. See also: 2005 report from the U.S. Government Accountability Office at: <http://www.gao.gov/new.items/d05290.pdf>

developed specific measures regarding notification to the Indian child's relevant tribe; and, 18 state plans (40.9%) revealed that the state had developed specific measures that gave preference to Indian caregivers when determining out-of-home or permanent placements for Indian children. Of those 18, only one (5.6%) state plan indicated that the state had procedures in place to ensure Indian caregivers meet all relevant child protection standards.²⁵ ICWA and the ACF state plan measures have not been without their detractors, due in part to a history of lack of awareness and appreciation of Indian culture, as well as challenges implementing and monitoring the act.

Two Supreme Court Cases that Have Highlighted these Issues

ICWA non-compliance does not just threaten tribal stability. The consequences of failing to follow ICWA include invalidation of state court proceedings through appeal by either the child or the parent, the possible disruption of a long-standing foster care placement, the voiding of an adoption order, and malpractice actions.

Adoptive Couple v. Baby Girl

This case was decided on June 25, 2013 by the U.S. Supreme Court (570 U.S. ____). Veronica is the daughter of a non-Indian mother and an American Indian father. The mother and father were not in contact during the months prior to Veronica's birth. The father was not informed when she was born in Oklahoma, and was not aware that the mother intended to have the baby adopted by a non-Indian couple. Veronica was placed by her mother with a prospective adoptive couple shortly after her birth, the couple filed a notice to adopt, and they were permitted to move the child to South Carolina. The father was served four months later, and he immediately took legal steps to gain custody before he was deployed to Iraq. When he returned, Veronica had been with the couple for 27 months. The trial court found that ICWA applied to the proceeding, that the "Existing Indian Family Exception" (EIFE) was inapplicable, that the father did not voluntarily consent to adoption, and that his rights could not be involuntarily terminated due to the standards of ICWA. Thus, the adoption petition was denied and Veronica was placed with her father. The South Carolina Supreme Court affirmed.

The U.S. Supreme Court reversed the decision of the South Carolina Supreme Court and remanded the case back to the state. In a five to four decision, the Court held that ICWA did not bar a state court from involuntarily terminating the father's parental rights because he had not had "continued custody" or indeed any "custody" of Veronica prior to the trial court's decision.

As one of the five judges in the majority, Justice Breyer's concurring opinion expressed concern with the potential future broad consequences of the decision. He noted that the Court's interpretation of ICWA might (in his view, wrongly) exclude from the Act's protections too many fathers (e.g., those with visitation rights, fathers who had met their child support obligations, fathers who were deceived about their child's existence, or fathers who were prevented from providing support to their child).

In her dissenting opinion, Justice Sotomayor expressed even deeper concern:

When it excludes noncustodial biological fathers from [ICWA's] substantive protections, this textually backward reading misapprehends ICWA's structure and scope. Moreover, notwithstanding the majority's focus on the perceived parental shortcomings of Birth Father, its reasoning necessarily extends to all Indian parents who have never had custody of their children.

Because this was a private custody case, there are a number of reasons that it is very distinguishable from the more common state intervention child welfare cases that implicate ICWA. Under federal and state

²⁵ *Id.*

child welfare law, relatives, including non-custodial fathers, must receive prompt notice when a child is removed in a child welfare proceeding. In *Adoptive Couple v. Baby Girl*, the father did not apparently know about her placement with the adoptive couple until months later. Also, under federal and state child welfare law, states have an obligation to try to *engage both parents* in the development of a case plan, provision of parental visitation, and work towards a permanency goal, which is usually reunification with a parent. And in adoption cases, best practices generally require that the consent of both parents be obtained early on in the case and that both parents receive counseling and support prior to an upcoming adoption.

There is, in this decision, a stark split in the Court on interpretation of ICWA as it relates specifically to non-custodial fathers in private adoption proceedings. There is also the majority's arguably narrow holding based upon specific facts of one case. Therefore, it will be important for state judges to make sure that ICWA's provisions are immediately applied and made applicable to Indian fathers as well as mothers.

Mississippi Band of Choctaw Indians v. Holyfield

Twins whose parents were domiciled and residents of a reservation in Neshoba County, Mississippi were put up for adoption in a neighboring county where they were born after their parents consented to adoption.²⁶ They were adopted by non-Indian parents. The lower court found the twins were not domiciled and never lived on the reservation and as a result found that ICWA was not applicable. The U.S. Supreme Court, noting Congress's intent to preserve Indian families, found that Congress did not "enact a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme simply by giving birth and placing the child for adoption off the reservation."

The Center for Court Innovation noted that lack of training and education in child welfare was one of the barriers to effective implementation of ICWA, finding that:

federal court interpretation of ICWA is largely overlooked...the case of *Mississippi Band of Choctaw Indians v. Holyfield*, [at that time] the only instance in which the U.S. Supreme Court ruled upon ICWA, is taught with far less frequency than other landmark cases in the child law canon.

Other Challenges to Effective Implementation of ICWA

Overall, the National Indian Child Welfare Association (NICWA) reports that the application of the Indian Child Welfare Act has not resulted in poorer outcomes for Indian children. In three of the four states that have had more comprehensive data on ICWA cases, Indian children have done as well, if not better than, non-Indian children in state care in relation to the data [the Government Accountability Office] was looking at.²⁷ For instance, data from four states that could identify children subject to ICWA in their information systems showed no consistent differences when comparing the length of time they spent in foster care compared to Caucasian or other minority children who exited foster care in fiscal year 2003.²⁸

²⁶ 490 U.S. 30 (1989).

²⁷ Simmons, D. (2005). Summary of the 2005 Government Accountability Office Study of the Indian Child Welfare Act. National Indian Child Welfare Association. Retrieved from: http://www.nicwa.org/Indian_Child_Welfare_Act/gao_study/

²⁸ U.S. Government Accountability Office (2005). Indian Child Welfare Act: Improving compliance through state-tribal coordination. Center for Court Innovation. New York, NY. Pg. 4. Retrieved at: <http://www.gao.gov/assets/250/245936.pdf>.

While the GAO study focuses on placement outcomes, a report submitted to Congress by the Crow Creek Sioux Nation and seven other tribes in the state of South Dakota highlights the violations of ICWA that have taken place when it comes to the placement of AI children. The report, which was written with the nonprofit Lakota People's Law Project, concludes that in some instances removal of AI children in South Dakota from tribal homes occurs under questionable circumstances.²⁹ According to the report, as of July 2011, there were 440 AI children in family run foster homes in South Dakota. Of these, 381 (87% or 9 out of 10) resided in non-Native family foster care, a claim that was supported by a National Public Radio series in 2012.³⁰ At the same time, there were 65 licensed Native American foster homes and, based on requests, 13-28 of these foster homes sat empty while the 381 AI children remained in non-Native family placements.³¹

Lack of awareness, oversight and compliance reporting

Since the Act was passed in 1978, its effective implementation and state compliance with its requirements have been unclear. Recent research has uncovered problems related to the states' success in applying the Act, but no nationwide, systematically collected data is available to determine the extent and exact nature of the problems that have surfaced.³² There are likely many reasons for non-compliance, including lack of education. The failure of many state courts and child welfare agencies to follow the mandates of ICWA is often due to simple lack of knowledge.³³ In many states, ICWA and laws regarding state-tribal court interaction are seen only as issues for tribal specialists, thus resulting in far too many child welfare caseworkers, supervisors, and attorneys being unfamiliar with ICWA's requirements.³⁴

While ICWA does make it clear that non-compliance can result in vacating state court decisions, it is difficult to monitor ICWA's compliance because of lack of firm reporting requirements and because ICWA does not give any federal agency direct oversight responsibility of states' implementation of the law.³⁵ As a result, frequent barriers to successful implementation of ICWA have included:³⁶

1. Difficulty in determining a child's Indian heritage and tribal membership eligibility;
2. Lack of appropriate foster and adoptive homes;
3. Lack of tribal access to federal child welfare funding sources;
4. Lack of tribal institutional capacity;
5. Incompatible state laws; and
6. Undeveloped or poor state-tribal relationships.

One effort that should have helped address these challenges was a 1994 amendment to the Social Security Act, requiring states to complete Child and Family Service Plans (CFSRs) indicating the steps the state

²⁹ "Reviewing the Facts: An Assessment of the Accuracy of NPR's "Native Foster Care: Lost Children, Shattered Families." Lakota People's Law Project, (2013) at 9. Retrieved from: <http://www.lakotalaw.org/wp-content/uploads/2013/01/Reviewing%20the%20Facts,%20An%20Assessment%20of%20the%20Accuracy%20of%20NPRs%20Native%20Foster%20Care,%20Lost%20Children,%20Shattered%20Families.pdf>

³⁰ Sullivan, Laura & Walters, Amy. *Native Foster Care: Lost Children, Shattered Families*. NPR Report. October 2011. Available at: <http://www.npr.org/2011/10/25/141672992/native-foster-care-lost-children-shattered-families>.

³¹ Lakota at 11.

³² Wilkins at 2.

³³ Van Straaten, J. & Buchbinder, P.G. (2011). *The Indian Child Welfare Act: Improving compliance through state-tribal coordination*. Center for Court Innovation: New York, NY. Pg. 4.

³⁴ *Id.*

³⁵ U.S. GAO (2005) at 4.

³⁶ Wilkins at 4.

plans would take to comply with ICWA.³⁷ These plans are supposed to be completed in consultation with tribes and tribal organizations and report on how those consultations and collaborations will be carried out. However, while the Administration for Children and Families' (ACF) CFSRs have identified some ICWA concerns in states, the structure of this oversight tool was designed to review the overall performance of a state's child welfare system, rather than any particular law or program.³⁸ The lack of specificity means that, as a result, [the tool] does not ensure that ICWA concerns will be addressed or that identified problems will be included and monitored in states' program improvement plans.³⁹ The National Indian Child Welfare Association found that nearly 80% of CFSRs did not respond to the three required measures for ICWA compliance.⁴⁰

Measured federal action and attention is needed to overcome this major deficit in reporting and monitoring outcomes and services to tribal courts and AI/AN children and families. A lack of oversight and lack of funding for state and federal ICWA-related initiatives or to enhance tribal capacity to address these cases, significantly reduce the chances of effective implementation of ICWA. And unfortunately, in all areas of human services, tribal access to federal funding has been severely restricted by the inconsistent treatment of tribal governments by federal domestic assistance programs.⁴¹

Still, because federal Title IV-E foster care and adoption program funding was, until recently, statutorily reserved for state agencies, tribes were only able to gain access to and administer IV-E funds by entering into tribal-state agreements.⁴² In 2008, due to federal legislation, the *Fostering Connections to Success and Increasing Adoptions Act*, tribes became eligible, for the first time, to receive Title IV-E funds directly.⁴³ However, to date only a few tribes have qualified for such eligibility. The historic focus on federal funding only going to states and counties has had a major impact on the capacity of tribal child welfare services.

The Existing Indian Family Exception (EIFE) Doctrine and Other Child Welfare Law Conflicts

Incompatible laws or state court decisions have also presented challenges to effective ICWA implementation. For example, some state courts have used an "Existing Indian Family Exception" to avoid the application of ICWA when the mother from whom a child is removed is not a Native American (but where the non-custodial father is). Although the majority of states that have considered the EIFE doctrine have rejected it, finding it inconsistent with ICWA's core purpose, it has been used by a few states.⁴⁴ Courts in states that have explicitly rejected the doctrine have reasoned that such an exception was not included in the language of ICWA and that it undermines ICWA's purpose by allowing state courts to *impose their own subjective values* in determining what constitutes American Indian culture and who is an American Indian.⁴⁵

³⁷ Program Instruction - ACYF-PI-CB-95-12. Retrieved from: <http://www.acf.hhs.gov/sites/default/files/cb/pi9512.pdf>

³⁸ U.S. GAO at 5.

³⁹ *Id.*

⁴⁰ Brown, E.F., et. al., at 7.

⁴¹ Brown, E., Scheuler-Whitaker, L., et. al., Tribal/State Title IV-E Intergovernmental Agreements: Facilitating Tribal Access to Federal Resources (Portland, OR: National Indian Child Welfare Association, 2000), pg. 22.

⁴² Brown, E.F. & Scheuler-Whitaker, L., et. al., at 7.

⁴³ Fostering Connections to Success and Increasing Adoptions Act of 2008 P.L. 110-351

⁴⁴ *In the Matter of A.J.S., A Minor Child*, 204 P.3d 543 (Kan. 2009). In this decision, the court abandoned the doctrine which had earlier been applied in the case it overruled, *Baby Boy L.*, 643 P.2d 168.

⁴⁵ U.S. GAO at 20.

Additionally, some laws that should theoretically support the goals of all child welfare systems have also made ICWA implementation more challenging. For instance, the *Adoption and Safe Families Act* of 1997 (ASFA) was enacted to minimize the problem of “foster care drift”: children spending their entire childhoods drifting from one temporary placement to another.⁴⁶ In practice, ASFA and ICWA were enacted for very different purposes and their differing goals have led to potential conflicts:⁴⁷

1. In many ways, ASFA moves away from the ICWA ideal of reunifying children with their parents unless all other options are exhausted; and
2. Since ICWA heightens the standard of “reasonable efforts” (under ASFA) to reunify families to “active efforts” (ICWA’s own standard - which must include the testimony of a qualified expert witness and enhanced efforts to preserve families), it would stand to reason that any mention of “reasonable efforts” to reunify families in subsequent federal legislation absent language to the contrary should be construed as indicating “active efforts” as it relates to ICWA cases.

Unfortunately case law has provided limited guidance regarding conflicts between ICWA and ASFA, and although ICWA and ASFA should work harmoniously together, in practice too often they do not.⁴⁸

Recommendations to Enhance and Fully Implement ICWA

There are several means for encouraging and supporting full implementation of ICWA. These include state and tribal court collaboration, better training for guardians ad litem, parent’s attorneys, and state court judges, and increased financial support to Tribes and tribal courts from federal agencies.

State-Tribal Collaborations

The State Court Improvement Program (CIP) was created as part of the *Omnibus Budget Reconciliation Act* (OBRA) of 1993, Public Law 103-66, which among other things, provides federal funds to state child welfare agencies and Tribes for preventive services and services to families at risk or in crisis.⁴⁹ The National Center for State Courts notes that state CIP committees are essential to fostering better understanding among justice systems to enhance proper ICWA enforcement.⁵⁰ Examples of successful State-Tribal Court engagement include:⁵¹

1. North Carolina CIP participation as an ad hoc member of a Commission on Indian Affairs’ Standing Committee on Indian Child Welfare
2. Colorado CIP and state counterparts met with leaders of several tribes to learn about historical trauma, creation of reservations, and the removal of Indian children to be placed in boarding schools, as well as the Navajo Nation Peacemaker Court (a renowned restorative justice program).

The Child Welfare Information Gateway prepared an issue brief in August 2012 which, among other things, highlighted the components of successful Tribal-State Relations. They include mutual

⁴⁶ Van Straaten, J. & Buchbinder, P.G. See also: <http://www.nicwa.org/law/asfa/asfa-issues.pdf>.

⁴⁷ *Id* at 5-6.

⁴⁸ *Id* at 8.

⁴⁹ Children’s Bureau (2012). *Court Improvement Program*. May 2012. Retrieved from: <http://www.acf.hhs.gov/programs/cb/resource/court-improvement-program>

⁵⁰ Davis, A.K. & Jackson, G., Meaningful and Ongoing Engagement of Tribes and State Courts in Child Protection (2012). National Center for State Courts. Pg. 62.

⁵¹ *Id*.

understanding of government structures, cooperation and respect, and ongoing communication.⁵² The brief highlighted promising practices in Tribal-State relations, including:⁵³

1. California's Indian Child and Family Services was adopting evidence-based practice models to Native culture like the SPIRIT Parenting Program. That program incorporates a historical motivational interview that places families' issues within a historical context and a culturally embedded evidence-based practice (for instance, the Incredible Years Parenting Training Program).
2. The Indian Country Child Trauma Center at the University of Oklahoma Health Sciences Center adapted existing evidence-based treatments to incorporate traditional healing practices, teachings, and concepts relevant in Indian Country.
3. Tribal Court Appointed Special Advocates (CASA) Program trained community volunteers to serve as advocates to speak on behalf of the best interests of AI/AN children involved in abuse and neglect cases.

State support of judicial mechanisms that facilitate State-Tribal cooperation, such as the Court Appointed Special Advocates (CASA) programs, is another tool for improving ICWA implementation in the state system.⁵⁴

The National Council of Juvenile and Family Court Judges has noted that developing meaningful and respectful relationships with tribal partners is critical to improving a state court's ICWA compliance because it is the first step to understanding the significance of keeping Native children connected with their community.⁵⁵ In sum, these practices demonstrate that a meaningful effort will result in Tribal-State collaboration at the state and federal levels in culturally sensitive, evidence-based ways that provide significant advocacy and information exchange. Therefore, this resolution supports the increased use of such agreements, and related memoranda of understanding, to ensure compliance with ICWA and successful Tribal-State relations.

Title IV-E Cooperative Agreements

Since the passage of ICWA, Tribes have had the opportunity to run their own child welfare systems, but they were unable, until recently, to directly receive federal Title IV-E funds except through their States.⁵⁶ The purpose of these programs is to provide federal matching funds for foster care and adoption services for economically disadvantaged children and children with special needs.⁵⁷ Nationwide, there are 13 states and 71 American Indian tribal governments that currently are involved in Title IV-E agreements.⁵⁸

The passage of the *Fostering Connections to Success and Increasing Adoptions Act* (FCA) in October 2008 also increased Tribes' access to federal funding for child welfare programs. The FCA gives Tribes, among other things, the option to *directly* access Title IV-E funds to operate foster care, adoption assistance, and, if elected, kinship guardianship assistance programs. The FCA also requires each state

⁵² Child Welfare Information Gateway (CWIG). "Tribal-State relations" (2012). Retrieved from:

https://www.childwelfare.gov/pubs/issue_briefs/tribal_state/tribal_state.pdf.

⁵³ *Id.* at 8-10.

⁵⁴ Wilkins at 9.

⁵⁵ Blomquist, M. & Hall M. A. (2012). "Improving Compliance with the Indian Child Welfare Act: A Guide for Juvenile and Family Courts."

⁵⁶ CWIG at 2.

⁵⁷ Brown, E., Scheuler-Whitaker, L. at 13.

⁵⁸ *Id.* at 7.

Title IV-E agency to negotiate in good faith with any Tribe that requests to develop an agreement with a state to administer all or part of the Title IV-E program.⁵⁹

Enhancing Tribes and Tribal Court Legal Services and Case Management

In order for Tribes to successfully accept and carry out jurisdiction over Indian child welfare cases, they must have the means and ability to do so. If the child's tribe does not have the capacity to process the case, or to provide needed social or legal services, this inhibits the ability of Tribes to play meaningful roles in these cases. In addition, it is imperative that states provide appropriate services to AI/AN children. Providing state officials with proper training on applying ICWA, and requiring state court and state agency oversight, are tools that can help assure that a state is abiding by the goals of the Act.⁶⁰

One way to increase Tribal-State collaborations as well as tribal capacity to perform child welfare functions is to increase oversight of ICWA compliance and include Tribes in the review and monitoring process. The scarcity of data on outcomes for children subject to the law, along with variations in how individual states, courts, social workers, and tribes interpret and implement ICWA, make it difficult to generalize about how the law is being implemented or its effect on American Indian children.⁶¹

One successful example of promising collaboration comes out of Arizona. The Pima County Juvenile Court in Arizona integrates tribal social workers from the Tohono O'odham Nation and the Pascua Yaqui Tribe, the two largest tribal communities in southern Arizona, into the juvenile court intake process and subsequent court hearings. Tribal social workers participate regularly in hearings and are given the same access to the Pima County Juvenile Court as other child welfare stakeholders.⁶²

Alaska's Tribal State Collaborative Groups (TSCG) is another example. The TSCG is a partnership of state and Tribal organizations—Tribal members and leaders, representatives from Alaska's Office of Children's Services, and other representatives. It meets three times a year to discuss issues affecting AI/AN families involved in the child welfare system and to improve ICWA compliance.⁶³

Conclusion

The Indian Child Welfare Act remains an important effort to preserve and protect American Indian/Alaska Native families. ICWA works when it is applied in a timely, appropriate manner. Increased efforts to support training and education (to states and tribes), technical assistance, funding, Tribal-State Collaborations, and Tribal capacity-building are critical to ensuring that the Act aids tribes and state governments in meaningfully carrying out its intentions and edicts. Additionally, systematic and comprehensive state reporting requirements on compliance with ICWA will also help to assure ICWA's mandates are incorporated at all levels of state assessment, review and handling of foster care, adoption and custody proceedings.

⁵⁹ *Id.* at 3.

⁶⁰ Wilkins at 5.

⁶¹ GAO at 58.

⁶² Van Straaten at 10.

⁶³ CWIG at 8.

