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NORTH AMERICAN INDIAN LEGAL SERVICES, INC

An Analysis of Compliance with the Indian Child Welfare Act In South Dakota

Final Report

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A. Introduction

Senate Bill 211 established the Governor's Commission on the Indian Child Welfare Act and authorized the Commission to study the requirements of the Federal Indian Child Welfare Act (ICWA), 25 U.S.C. §§1901-63. Senate Bill 211 further states that the Governor shall *appoint an independent reviewer to complete an analysis of compliance with the Act by the Department of Social Services, the states attorney, the Unified Judicial System, and private agencies involved in foster care and adoption, and the means by which Indian tribes can assist the state and private agencies in achieving compliance.* The National Center for State Courts (NCSC), a non-profit court services organization, in partnership with the North American Indian Legal Services (NAILS), a non-profit tribal services organization was appointed by the Governor's Office as the independent reviewer to perform the ICWA compliance analysis. In performing the analysis, NCSC and NAILS focused particularly on compliance with the ICWA requirements.

This Executive Summary highlights the methodology and findings associated with the *ICWA Compliance Analysis Project*, with specific emphasis herein on ICWA compliance. The final project report *An Analysis of Compliance with the Indian Child Welfare Act in South Dakota: Final Report* is a detailed discussion of the methodology, data collection efforts, findings, and recommendations. The *Final Report* also contains a complete discussion of relevant background information including a discussion of: ICWA and its history; South Dakota laws and guidelines for judicial practice in child abuse and neglect cases; the Adoption and Safe Families Act, Public Law 105-89; the Bureau of Indian Affairs' Guidelines for State Courts, and Title IV-B state and tribal agreements. Additionally, the *Final Report* contains a discussion of issues related to ICWA compliance including training, technical assistance, written standards, and protocols. Moreover, tribal perceptions of state ICWA compliance, strategies to improve compliance, and means by which the Indian tribes can assist in pursuing the policies, procedures, spirit, and intent of ICWA are presented. Finally, the *Final Report* contains a series of thirty-four recommendations, which are intended to improve ICWA compliance, in fact and in spirit, as well as to enhance the environment for effective and optimal ICWA compliance.

B. Methodology

The NCSC/NAILS project team developed an interactive, multi stage, and multi-method approach to gather the quantitative and qualitative information necessary to complete the analysis of ICWA. The analysis included a review of the agencies (specifically referenced in SB 211 that are involved in the exercise and application of ICWA including the Department of Social Services, Office of Child Protection (DSS), the Office of the State's Attorney, the Unified Judicial System (UJS), and private adoption, licensing, and foster care agencies. Additionally, the NCSC/NAILS project team engaged in a series of interactions with each of the nine Sioux tribes in order to identify the means by which the tribes can assist in pursuing ICWA-based policies. The specific primary data collection activities included: DSS and UJS Case File Review; State Focus Groups; Tribal Focus Groups; and Intensive File Review.

C. Findings: DSS and UJS Case File Review

UJS court files and corresponding DSS files were reviewed using the "ICWA Case Record Review Instrument." From a DSS-provided list of 358 closed cases (between January 1, 2003 and June 1, 2004), 135 were selected for review proportional to the total number of ICWA cases by judicial circuit. Of these, 94 cases (involving 190 children) met review criteria. To qualify as complete for file review, the reviewers needed to have both the court file and the corresponding DSS file. Of the 94 cases reviewed 32 involved emergency removal, which means that an abuse and neglect petition was not filed and/or the children were returned to the home within 30 days of removal.

Identification of Children as Indian for the Application of ICWA

Determining how or whether DSS or the court made a determination of whether a child was Indian was one of the most difficult tasks in the record review process, as neither the court nor DSS regularly stated how they determined the heritage of a child. Reviewers checked all methods used to identify the heritage of the child, therefore the number of responses do not correlate to the actual number of case files as more than one response may have been checked for a single record. The exception to this is the number of files where there was no indication of how heritage was determined.

- In 15 percent of the records reviewed, no documentation existed of how the court or DSS determined that the child was Indian.

- Thirty-two percent of cases involved the report of the parent or custodian of the child.
- The records indicate that other than direct contact with the tribe, DSS and the courts are generally relying on non-documented evidence to establish the heritage of children to whom they believe ICWA is applicable.
- Many of the DSS files contained completed tribal enrollment applications but there was no indication that the applications were ever notarized and filed with the tribe, sent to the tribe, or whether the tribe responded to the application by denying enrollment or by issuing a tribal enrollment identification card.

Proper Notice of Proceedings Involving an Indian Child

Often more than one method had to be employed, for example, notice may have been sent by registered mail but been undeliverable, therefore, notice would be given a second time by publication. Only notice to the mother, father, tribe, and BIA for the initial hearing on the abuse and neglect petition was tracked. Tracking notice was difficult because "Certificates of Service" were not routinely used and although a copy of the return receipt would be placed in the file, there usually was no indication which documents were sent with it. ICWA requires that the tribes and the parents be advised of their right to intervene, ask for an extension, have the action transferred to the tribal court, and for parents to be represented by counsel.[1] The ICWA notice content requirements were met in the majority of the files reviewed. It is difficult from the file review to determine whether notice is being timely served. In some instances notice was given but was clearly untimely as it was not received by the party at least ten days prior to the date of the proceeding.

- In 122 instances, notice was via registered or certified mail.
- Untimely notice was given to the tribes 13 percent of the time; to the father 16 percent of the time; to BIA 19 percent of the time; to the mother 22 percent of the time; and to "others" 23 percent of the time.

Proper Exercise of Jurisdiction over Indian Children

The child's tribe has the right to intervene and/or request jurisdiction over any foster care placement or termination of parental rights action involving a child who is not domiciled or residing on the reservation.[2]

- Tribes intervened in 64 percent of the involuntary removal cases, requested jurisdiction be transferred to a tribal court in 29 percent of the cases, and accepted jurisdiction in 32 percent of the non-emergency removal cases.

[1] 25 USC 21 section 1911(b),(c) and 1912(a)-(b)
[2] 25 USC 21 section 1911(b) and (c)

- In 29 percent of the cases, the tribe did not respond after receiving notice of the proceedings.
- The most common reason for not granting jurisdiction to the tribe after it requested jurisdiction was the late stage of the proceedings at which the tribe asked for jurisdiction.

Active Efforts to Provide Remedial Services and Rehabilitative Programs

Before a child can be placed in foster care or parental rights terminated, the court must be satisfied that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that such efforts were unsuccessful.[3]

- Active efforts were not always documented by the court; however, the court usually made a finding that active efforts had been made.
- In 42 of the 62 non-emergency case files, the court determined that active efforts had been taken to prevent the breakup of the family.
- Nine of the files did not specify what active efforts had been taken while 33 case files contained documentation of at least one active effort, although in most cases multiple efforts were documented.

Qualified Expert Witnesses

An Indian child may not be placed in foster care in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.[4]

- In sixty-three percent of the non-emergency cases where the child was removed from the home, the court heard testimony from either a lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe; or a professional person having substantial education and experience in the area of his/her specialty.
- Professional persons were used almost twice as often as a lay expert with knowledge of social and cultural standards of the child's tribe.

Placement of Child Pursuant to ICWA Preferences

The ICWA placement preferences are: (a) a member of the Indian child's extended family; (b) a foster home licensed, approved, or specified by the Indian child's tribe; (c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (d) an institution for

[3] 25 U.S.C. 21 section 1912(d)
[4] 25 U.S.C. 21 section 1912(e).

children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.[5] ICWA also requires that an Indian child be placed in the least restrictive setting that approximates a family and within reasonable proximity to the child's home.[6] Specific information pertaining to the least restrictive setting was not always found in the case files.

- Forty-five percent of the files reviewed did not clearly indicate whether ICWA preferences were followed.
- Of the 62 non-emergency cases involving foster care or pre-adoptive placement, 16 cases (26 percent) had placement with an extended family member, six cases (ten percent) involved non-ICWA placement preferences, and in 28 cases (45 percent) whether ICWA preferences were followed could not be determined.
- Having multiple siblings on the same file compounded the difficulty in determining whether the ICWA preferences were followed as often siblings had different outcomes, e.g. one sibling may have been placed with an extended family member while another child was placed in foster care.
- Often the file would state that the children were placed in foster care but no information on whether the foster parents were Indian or whether the children were placed together was provided.
- The six instances of non-ICWA preferences were cases where good cause was provided by the court to justify the use of non-ICWA placements.
- Unless good cause was given or it was shown that placement met ICWA preferences, the placement type was counted as unknown. Therefore, the unknown category should not be construed as non-compliance with ICWA, but only that the record does not clearly state whether the placement was an ICWA preference.
- Specific information pertaining to the least restrictive setting was not always found in the case files and the percentages reflect court findings that the child was in fact placed in the least restrictive placement most closely approximating a family and in close proximity to his or her home. This was done in almost three-quarters of the cases reviewed.

D. Findings: State Focus Groups

Participants during the 40 individual focus group sessions included DSS supervisors and social workers, UJS judges, court services officers, and clerks of court, state attorneys, private adoption and placement agency personnel, DOC juvenile agents, and court-appointed attorneys and public defenders. During the focus group sessions participants were asked to comment upon the following areas : Positive and Negative Aspects of ICWA; ICWA Training, Technical Assistance, Written Standards; ICWA Current Practice, Determination, and Compliance; Barriers to ICWA Compliance; and Improving ICWA Compliance.

[5] 25 U.S.C. 21 section 1915(b)
[6] 25 U.S.C. 21 section 1915(b)

Identification of Children as Indian for the Application of ICWA

The determination of whether the child is an Indian child is primarily the responsibility of DSS in abuse and neglect cases and adoptions, through initial and ongoing efforts such as intake and family assessment forms.

- In most cases, the state attorney and the judges report that they rely upon the DSS representation of the child's Indian heritage.
- The role of judges regarding the determination of the applicability of ICWA and whether the child is an Indian child varies throughout the state.
- Regardless of whether there is an initial determination or not that ICWA applies, according to all focus group participants, in an abundance of caution the case proceeds as though ICWA is applicable until such time as there is a determination otherwise.
- Private adoption agencies determine whether the child is an Indian child. In the event ICWA is applicable (i.e., enrollment, enrollment eligibility, domicile, etc) birth parents are notified of the agency's requirement to notify the tribe for placement. As reported by the private adoption agencies participants, in most instances birth parents either sign an affidavit requesting that the tribes not intervene in the adoption or elect to parent their child rather than advise the tribe.

Proper Notice of Proceedings Involving an Indian Child

While practices do vary across the state (as to the format and type of notice), focus group participants convey that they engage in active notification processes.

- DSS social workers and supervisors indicate that initial notice of removal and of the 48-hour hearing is provided to the tribes and/or the ICWA worker and/or the Bureau of Indian Affairs.
- All state attorneys participating in the focus groups report that the initial petition is forwarded via registered mail to the tribes and/or the ICWA worker and/or the Bureau of Indian Affairs.

Appointment of Counsel in ICWA Cases

During focus groups, judges report that the appointment of counsel for parents and children is routine in all abuse and neglect matters, regardless of whether the case involves ICWA or not.

- Appointment of counsel for the child is required by South Dakota Statute 26-8A-18 upon the filing of the petition.
- Generally, counsel for a parent, who is present for the hearing, is also appointed early in the proceeding.
- The attorney appointment process varies across the state.
- The only reported concern with the appointment of counsel is that the quality of representation depends upon the skill, knowledge, and ability of the attorney.

Active Efforts to Provide Remedial Services and Rehabilitative Programs

A reported yet unintended benefit of ICWA was that it created within DSS a culture of active efforts for all children. According to one DSS social worker, "we provide active efforts and remedial services all the time. " ICWA requires active efforts while ASFA talks about reasonable efforts. However, for many DSS workers and supervisors articulating the difference was difficult. Active efforts were described by several DSS social workers and supervisors as case specific and "going the extra mile" for Indian children and families. According to most DSS personnel, making active efforts is truly a challenge given the lack of services and placement resources throughout the state.

Qualified Expert Witnesses

Practices throughout the state differ on the use and designation of expert witnesses in ICWA cases.

- Some judges report that they do not routinely accept DSS social workers as ICWA experts and instead require outside expert testimony on foster care placement and termination of parental rights. Other judges indicate they readily accept DSS social workers as expert witnesses if they are qualified and have the appropriate experience. Other judges indicate that they have no choice because of the lack of non-DSS expert witnesses in their circuit.
- Generally, DSS social workers and supervisors report that they are uncomfortable acting as ICWA experts because of the appearance of agency bias. While they are less uncomfortable with testifying as ICWA experts in others' cases, there is definitely a reluctance to testify in their own cases as ICWA experts.

Placement of Child Pursuant to ICWA Preferences

According to many DSS social workers and supervisors, the placement preferences provisions of ICWA are the most difficult aspect of ICWA compliance. This is primarily due to a lack of suitable or identified relative options and, secondarily, a resource issue due to the lack of American Indian foster families.

- According to DSS social workers, parents are asked at several points (during DSS involvement) to identify relatives for placement.
- When an Indian child is available for an adoption, DSS posts the child's information on a national website in order to locate an American Indian adoptive family.
- Due to the demands of their caseloads, however, DSS social workers are limited in their ability to perform independent investigations for relative placement separate and apart from the information provided by the parents.

Children in Need of Services (CHINS) Cases

The results of the focus groups point out that the application of ICWA in CHINS cases is inconsistent throughout the state. This may be due to reported factors including: the interpretation that ICWA is not applicable in CHINS cases; the infrequency with which CHINS children are removed from their homes during these proceedings; and the lack of interest and/or resources of the tribes to date.

E. Findings: Tribal Focus Groups

Participants included tribal judges, tribal attorneys general, ICWA workers, BIA social workers, ICWA legal assistants, tribal prosecutors, a tribal community health representative, ICWA program directors, child protective services case managers, non-profit Indian organization children's advocates, Indian therapists, and tribal Early Head Start Family advocates. During each tribal focus group, a written consensus statement was prepared by participants based on the discussion.

The consensus statements adhere to a three part approach including: (1) identifying ICWA sections and issues of non-compliance by the state; (2) ranking the ICWA non-compliance areas that are most critical and need to be resolved first; and, (3) suggesting possible strategies to remedy the non-compliance.

Tribal focus group participants provided a non-compliance statement linked to a corresponding ICWA section. The most frequently expressed issues are:

- Failure of the state to provide sufficient information on the child to enable the tribe to determine whether the child is an "Indian child."
- Delay in sending notification to the tribe; thereby, making the tribal presence in the case ineffective for purposes of providing culturally appropriate rehabilitative efforts, finding relative placements, and adequately preparing for court hearings.
- Receiving insufficient information as to the DSS services provided to the family making it difficult for the tribe to make informed decisions in the best interests of the child and family.
- Meeting the placement preferences in ICWA. Groups stated that there is a critical need to more timely and efficiently finish a home study on the Indian child's relative's reservation home in order for ICWA placement preferences to be met.
- The lack of training and knowledge on the part of DSS workers related to the understanding of traditional family relationships and tribal culture and rehabilitative efforts resulting in a failure of the state to provide "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.
- Although not related to any ICWA specific requirement, most of the groups expressed a need for the state to recognize that the tribal ICWA workers are under severe financial hardships and are not always able to take the time to travel to a hearing. There is a disproportionate

burden on the tribes because of the differing levels of staffing, human resources, financial resources, and geographic isolation of the reservations.

F. Findings: Intensive File Reviews

Four files were selected at random for an intensive file review. Findings fall into the following areas: the manner and timeliness in which notice is provided to tribes; the specific activities taken by state workers to place Indian children according to the placement preferences; the kind and extent of "active efforts" made by state workers to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; the extent to which cultural considerations were included as part of the actions and determinations made by DSS and the courts in case management; and the degree to which the best interests of the child have been met.

Proper Notice of Proceedings Involving an Indian Child (Identification of Children as Indian for the Application of ICWA)

Identifying the process used by DSS to determine whether the child was an "Indian child" was the most difficult task as there were neither uniform notations made in the files nor uniform forms used by DSS.

- In one file, the family had a prior case with DSS three years before, and the child was identified as an Indian child in the prior case, yet it took DSS almost two months after the court hearing and out-of-home placement date to send notice to the tribe in the second case.
- In three of the cases, the notice sent to the tribe occurred from one month after the 48 hour hearing to three months after the 48-hour hearing.
- In one of the four files, notice was sent to the tribe on the same date the children were taken out of the home.
- Frequently, the child and parent were referred to as "Native American" with no indication as to which specific tribal affiliation the child or parent(s) belonged for purposes of tribal notification.

Placement of Child Pursuant to ICWA Preferences

It was difficult to ascertain without extensive file review whether the ICWA placement preferences were followed in the out-of-home and permanent placement for the child. While the lack of documentation is a limitation in determining placement preferences, other barriers include:

- Family members are not encouraged to participate in a diligent search for relatives.
- In most cases, DSS caseworkers sent a short letter and standard form asking the tribe to identify family members.
- No record was found in any file reviewed that a tribe responded to this request.
- In the majority of files reviewed, the family system identified was limited to parents and grandparents and failed to indicate that other relatives had been identified.

- Compliance with these placement preferences differed markedly and it appeared that no standardized process for achieving compliance with ICWA placement preferences is being utilized.
- The court is taking the lead from DSS in making the determination that good cause exists to deviate from the ICWA placement preferences.
- There is a lack of documentation in one of the files as to why listed American Indian kinship placements had been determined to be inappropriate.

Active Efforts to Provide Remedial Services and Rehabilitative Programs

Failure to recognize early in the case that a child is American Indian negatively affects DSS' ability to engage in active efforts and follow other provisions of ICWA and provide timely notification to the tribe.

- In several of the cases, early identification of the child as American Indian did not take place.
- Three of the four cases showed a reasonable number of casework interventions consistent with active efforts.
- In the fourth case, no activities that would reflect active efforts were noted.
- The files reviewed indicated a lack of referrals and collaboration with community agencies, tribal programs, and other culturally appropriate services.
- Evaluations and assessments on children and other family members lacked any recognition of American Indian tribal or cultural identity, possible cultural strengths, or that any cultural factors were considered in the conclusions reached by the evaluators.
- In one case, the court consistently used the "reasonable efforts" standard in error when the standard should have been "active efforts." The court order used the term "reasonable efforts" consistently in case orders.
- DSS caseworkers show either a lack of understanding or a lack of commitment to working with extended family and keeping children connected to extended family members, customary relatives, and other tribal people.

G. Concluding Remarks

The NCSC/NAILS review of state agency information through case file review and focus groups found that the state agencies are partially in compliance with many of the technical aspects of ICWA, but not with others, such as, sending timely notification to tribes ten days prior to state court hearings involving foster care placements or terminations and the application of ICWA in CHINS cases. Additionally, the lack of direct evidence within state files of compliance documents such as inclusion of notification letters to tribes sent registered mail, return receipt requested, is another impediment to measuring the degree of compliance. These shortcomings indicate that much work needs to be done in achieving the true spirit and intent of ICWA.

Section II. Introduction

A. General Information

On February 6, 2004, Senate Bill 211[7] established the Governor's Commission on the Indian Child Welfare Act and authorized the Commission to study the requirements of the federal Indian Child Welfare Act, 25 U.S.C. §§1901-63.[8] Senate Bill 211 further states that the Governor shall *appoint an independent reviewer to complete an analysis of compliance with the Act by the Department of Social Services, the states attorney, the Unified Judicial System, and private agencies involved in foster care and adoption, and the means by which Indian tribes can assist the state and private agencies in achieving compliance.*

Through a competitive bid, proposal, and contract process, the National Center for State Courts (NCSC), a non-profit court services organization, in partnership with the North American Indian Legal Services (NAILS), a non-profit tribal services organization was appointed by the Governor's Office as the independent reviewer to perform the ICWA compliance analysis. The NCSC/NAILS ICWA Compliance Analysis is intended to provide the ICWA Commission with the information it needs to fulfill (in part) its responsibilities as articulated in SB 211.

- Review the analysis of compliance completed by the independent reviewers and based upon the results, identify and prioritize any issues or barriers preventing or hindering compliance.
- Explore and evaluate options to address and resolve identified issues and barriers preventing or hindering compliance.
- Make recommendations to improve compliance with the federal Indian Child Welfare Act.

In performing the analysis, NCSC and NAILS focused particularly on the compliance with the ICWA requirements including the following:

- Determination if the child is an Indian child (Sec. 1903(4))
- Determination of whether exclusive jurisdiction exists (Sec. 1911 (a); Sec. 1922)
- Has full faith and credit been provided to the child's Indian tribe's judicial court proceedings (Sec. 1911)
- Notice to tribe regarding court proceedings (Sec. 1911(c); Sec. 1912), including processes for notice of inquiry for tribal eligibility
- Whether counsel is appointed for the child's indigent parent and the child (Sec. 1912(b))
- Whether tribal social services may request examination of court related documents (Sec. 1912 (c))

[7] State of South Dakota, Seventy-Ninth Legislative Assembly, 2004, 228J0288, Senate Engrossed No. SB 211, 02/06/04.

[8] A complete copy of the Indian Child Welfare Act, 25 U.S.C. §§1901-63 is located in Appendix A.

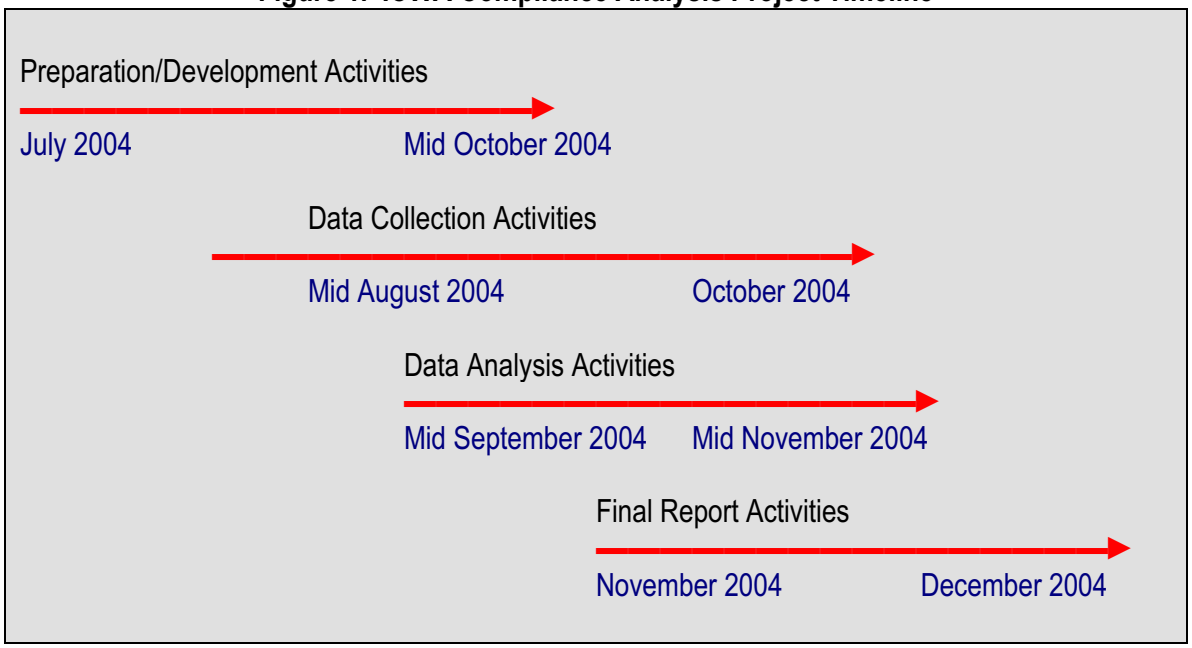
- The process by which active efforts, i.e., remedial services, are provided and documented (Sec. 1912(d)
- Whether qualified expert witnesses were involved prior to any foster care placement order and was clear and convincing evidence provided that the child's continued custody with the parent is likely to result in serious emotional or physical damage prior to invoking an involuntary proceeding and evidence beyond a reasonable doubt prior to a parental rights termination order (Sec. 1912 (e) and (f))
- Whether the parent was referred to the tribal social service agency for voluntary services
- The process by which a parent is informed of their right to withdraw consent to voluntary foster care and of other provisions of the ICWA (Sec. 1913)
- Whether after the entry of a final decree, prior to two years, of adoption an Indian child, the parent has withdrawn consent upon the grounds that consent was obtained through fraud or duress (Sec. 1913(a))
- Has a petition been filed to invalidate court proceedings due to violation of the ICWA requirements (Sec. 1914)
- Were the social and cultural standards of the Indian community applied to allow maintenance of social and cultural ties (Sec. 1915(b))
- Were placement preferences followed and documented for adoption cases, voluntary relinquishment or involuntary relinquishment cases, and any foster care or pre-adoptive placements (including "good cause not to follow preferences"); were the standards applied to the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or maintains contact; and is a record of placement, evidencing efforts to comply with the order of preference available (Sec. 1915 (a); Sec. 1915 (d); Sec. 1915(e))
- Whether the child's tribe has a tribal resolution for a different order of preference which has been applied (Sec. 1915(c))
- Has the final decree of adoption been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child; has a petition for return been filed and the child returned (Sec. 1916 (a))
- Is ICWA applied in subsequent proceedings, i.e., removal from foster care home or institution for the purpose of further foster care, pre-adoptive, or adoptive placement (Sec. 1916(b))
- Is tribal affiliation provided upon application by an Indian individual who has reached the age of 18 (Sec. 1917)
- What agreements have been entered into between the state and tribes respecting care and custody of Indian children (Sec. 1919 (a-b))
- Have the state courts declined jurisdiction in cases where an Indian child has been improperly removed (Sec. 1920)
- Is there a higher standard in state law or federal law applicable to the child custody proceeding and was the standard applied (Sec. 1921)
- Was it demonstrated to the court that active efforts were made to alleviate the need to remove the Indian child and that the removal was necessary to prevent imminent physical damage to the child (Sec. 1922)

Other factors reviewed included: intervention, transfer of jurisdiction, "best practices" to be used to serve the needs of Indian children, and the means by which the Indian tribes can assist in pursuing the policies, procedures, spirit, and intent of ICWA.

B. ICWA Compliance Analysis Timeline and Work Plan

Figure 1 identifies the ICWA Compliance Analysis project's timeline (listed by the major tasks) from beginning through conclusion. The project's tasks include: (1) preparation and development activities, (2) data collection activities, (3) data analysis activities, and (4) report writing activities. This expedited timeline was dictated by SB 211. The legislation dissolves the ICWA Commission on December 31, 2004. Therefore, the ICWA Commission required the final NCSC/NAILS *ICWA Compliance Analysis Report* by early December 2004 in order to submit its report and recommendations to the Governor and Legislature by the deadline. While primarily a linear project process, several of the project tasks did overlap each other in time. In fact, some of the earlier activities informed the later project tasks, so forward project progress was dependent upon the completion of earlier tasks. Additionally, the challenge in scheduling certain on-site events delayed forward progress at times. At times, the dates for task activities deviated from the original proposed timeline. Nonetheless, the NCSC/NAILS project team pursued every opportunity to leverage and apply information from earlier project tasks as it moved forward to completion.

Figure 1. ICWA Compliance Analysis Project Timeline



During August, September, and October 2004, members of the NCSC/NAILS project team made many in-person visits to South Dakota to facilitate focus groups with state and tribal ICWA stakeholders and to review Department of Social Services (DSS) and Unified Judicial System

(UJS) child welfare proceeding records. Additionally, the NCSC/NAILS project team invited all state and tribal ICWA stakeholders to participate in its web-based survey processes. Table 1 indicates the dates of the specific data collection activities.

The NCSC/NAILS project team found that the Governor's Office has compelling reasons to be proud of its state and tribal ICWA constituents. The NCSC/NAILS team was impressed by the active participation of the state and tribal ICWA stakeholders; the eagerness of all to improve state agency practices in order to enhance ICWA compliance; and the emphasis on state and tribal communication and collaboration to improve outcomes for Indian children. To state that there has never been a better time to come to the table to discuss ICWA issues would be an understatement.

Table 1. Data Collection Activities Work Plan

State Agency Focus Groups	• Sioux Falls → August 30-September 3, 2004 • Rapid City → September 13-17, 2004 • Pierre, Aberdeen, Huron → September 19-25, 2004
Tribal Focus Groups	• Sisseton Wahpeton Oyate → September 1, 2004 • Flandreau Santee Sioux → September 2, 2004 • Standing Rock Sioux→ September 7, 2004 • Cheyenne River Sioux → September 9, 2004 • Crow Creek/Lower Brule → September 13, 2004 • Rosebud Sioux → October 5, 2004 • Yankton Sioux → October 6, 2004 • Oglala Sioux → October 18, 2004
DSS/UJS Case File Review	• Rapid City → September 7-September 13, 2004
State Web Survey	• Announcement → October 18, 2004 • Reminder Notice →October 28, 2004 • Due Date → October 31, 2004
Tribal Web Survey	• Announcement-Faxed and Mailed → October 20, 2004 • Reminder Notice-Faxed and Mailed → October 26, 2004 • Reminder Notice-Oral → October 26, 2004 • Due Date→ October 31, 2004
Intensive File Reviews	• Denver → October 18-November 5, 2004

C. ICWA Commission Interaction

In addition to the considerable number of contacts with state and tribal ICWA stakeholders, the NCSC/NAILS project team engaged in significant interactions with the ICWA Commission throughout the ICWA Compliance Analysis. This included: (1) in-person attendance at the initial meeting of the ICWA Commission on May 25, 2004 to present the ICWA Compliance Analysis methodology and work plan; (2) telephone conference calls with the ICWA Commission co-chairs

on July 1, 2004 and July 14, 2004 to discuss logistics of the ICWA Compliance Analysis; (3) telephone participation in the August 10, 2004 and October 12, 2004 meetings of the ICWA Commission to provide written and spoken reports of the status of the Compliance Analysis and to review proposed data collection instruments (i.e. focus group protocols, web-based survey instruments); and (4) numerous e-mail communications and ad hoc phone conferences with the ICWA Commission co-chairs regarding emerging issues throughout the project.

The NCSC/NAILS project team worked diligently to keep the ICWA Commission engaged in the Compliance Analysis process and apprised of project activities. Of special note is the NCSC/NAILS suggestion for the passage of tribal resolutions to gain support for the involvement of tribal representatives and professionals that are involved in serving the needs of Indian children in ICWA cases. In fact, during the initial meeting of the ICWA Commission, the NCSC/NAILS project team prepared a draft resolution for dissemination to the tribes.[9] The tribal resolution process recognizes the sovereignty of Indian tribes and the importance of obtaining responses and involvement from the tribal communities in the Compliance Analysis. Additionally, the NCSC/NAILS project team submitted drafts of data collection instruments, most notably focus group protocols and web survey formats, to the ICWA Commission members for review, comments and feedback prior to dissemination to ICWA professionals.

D. About the ICWA Compliance Report

Based on an analysis of information from focus groups, file review, surveys, data analysis, and documents provided by DSS, UJS, the State Attorneys' Office (SAO), and private adoption and placement agencies, the NCSC/NAILS project team has prepared this *ICWA Compliance Report,* presenting its findings and recommendations. The report also includes a statement of the objectives of the project, a brief description of the methodology, a description of the legal framework, a summary of the results of the surveys, focus groups, interviews and examination of case records, a discussion of the findings, and a series of recommendations. The Appendix contains the full results of the surveys, case record examination, and the site visit summaries.

[9] Tribal Government Relations of the South Dakota Governor's Office forwarded the draft tribal resolutions to each of the nine Sioux tribes for consideration. Not all tribes passed the resolution; however, each tribe participated in the process.

Section III. Review of Background Information

A. Brief Overview of ICWA

Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. §1901-63, on November 8, 1978. This act was the result of a series of Senate oversight hearings beginning in 1974 which produced, among other things, statistical data and overwhelming expert testimony documenting the unwarranted and "wholesale removal of Indian children from their homes." *Mississippi Bank of Choctaw Indians v. Holyfield*, 109 S. Ct. 1957, 1600 (1989).

The hearings documented that throughout the 1950s, 60s and 70s; American government and social service agencies removed thousands of American Indian children from their families and their tribes and placed them in non-Indian homes, thereby causing the children to lose their cultural heritage. Though ICWA was passed in 1978, such removals continue to this day. Statistical data in 1974, for example, showed that as many as one in every eight Indian children was being taken from family and placed in a non-Indian adoptive home. *Id.*, at 1600.

During the 1950s through 1970s, social service workers rarely removed Indian children from their families and tribes for *physical* abuse. Rather, they often cited vague allegations of "neglect" or "social deprivation" as grounds for placing Indian children outside their family and tribe. Such removals from Indian tribes and families most often resulted from government authorities' lack of knowledge and cultural biases as to the home lives and cultural practices of American Indian people. For example, unlike a child in a traditional Anglo-American "nuclear" family, an Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. *Holyfield*, supra, note 2 at 1600. However, as the 1974 House Report on ICWA noted: "Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." *Id.*

Through the passage of ICWA, Congress recognized that such unwarranted, wholesale removals of Indian children from their families and tribes threatened the very "existence and integrity of Indian tribes." *Id.* Thus, the basic premise, or goal, of ICWA is "to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. *Id.,* at 1902.

Although ICWA was passed in 1978, to this day, large numbers of Indian children are still being removed at disproportionately high rates compared to children of other ethnic backgrounds.

- A 1999 research study and survey by the U.S. Department of Justice concluded that nationally, from 1992 through 1998, reports of child abuse and neglect rates increased by 18 percent among American Indians while declining among white, black, and Hispanic groups. *U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics ("BJS"), "American Indians and Crime",* Greenfield and Smith, BJS Statisticians, Feb. 1999, NCJ 173386.
- Between 1996 and 1997, there was a large increase in reports of American Indian children as victims of child abuse and neglect throughout the United States. U.S. Dept. of Health and Human Servs., National Center on Child Abuse and Neglect, *Child Maltreatment 1996: Reports from the State to the National Center of Child Abuse and Neglect* (Wash., D.C.: U.S. GPO 1998).
- The increase in reports of American Indian children as victims of child abuse and neglect was maintained in 1998. U.S. Dept. of Health and Human Servs., National Center on Child Abuse and Neglect, *Child Maltreatment 1997: Reports from the State to the National Center of Child Abuse and Neglect* (Wash., D.C.: U.S. GPO 1999).

The provisions of ICWA reflect an objective of educating courts and social services agencies on the importance of including culture in determining the best interest of the Indian child. First, a system of notice provisions requires a state court to give notice to the relevant tribe upon commencement of a child custody proceeding involving an "Indian child." Second, a tribal court may be take jurisdiction of a commenced state court child protection matter through a motion to transfer. Finally, procedural and evidentiary requirements are placed upon Indian child custody proceedings remaining in the state court system.

Specific ICWA requirements include the following: the right for a child custody proceeding to be transferred to a tribal court for any Indian child living off the reservation, absent good cause to the contrary or objection by a parent; 25 U.S.C. §1911(b); a tribe's right to intervene at any point during a child custody proceeding involving an Indian child 25 U.S.C. §1911(c); the tribe's right to a receipt of notice of any involuntary child custody proceeding involving an Indian child; 25 U.S.C. §1912(a); the requirement that state agencies show that active efforts be made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful; 25 U.S.C. 1912(d); and, finally, more stringent burdens and sources of proof than regular child abuse and neglect proceedings to substantiate the need for foster care placement or termination of parental rights. 25 U.S.C. §1903-63.

A government agency's failure to adequately notify a tribe of a child custody proceeding involving an Indian child can have devastating effects. For example, in instances when a tribe

intervenes during the very late stages of a child protection proceeding, the litigation process is substantially slowed. The tribe possibly must review the case history, do a search for relatives, conduct a home study, and prepare for a mediated settlement or litigation. In effect, the tribe must catch up to the stage of proceedings in the case. As a result, the proceeding could take months, or even years, longer than it would have in other circumstances.

ICWA entitles tribes, Indian children, and families to several rights. One such right is for them to have the opportunity to retain their unique cultural heritage and attendant federal benefits through special notice, transfer, and placement provisions. Each and every provision of ICWA requires timely adherence by state agencies and courts in order to provide the protections intended by Congress and to allow tribes to effectively participate in the state court proceeding. Efficiency is particularly significant with the impact of the Adoption and Safe Family Act, P.L. 105-89 (ASFA) time requirements on case proceedings, such as the court determinations of active efforts, filings of termination of parental rights and final disposition for the case. (A copy of ASFA, P.L 105-89, is located in Appendix A.)

Since the enactment of ICWA in 1978, several amendments have been introduced in Congress although none have been enacted. Some of the amendments have addressed the rights of parents of the "Indian child" to choose whom they want to adopt their child, that is, the parent does not want the child's tribe notified when a non-Indian family is selected by the Indian parent as the potential adopting parent.

Because ICWA provides only general requirements and does not specify time limits for notice, the content of notice to tribes, and the definition of "active efforts," and the provision that the state court determines what constitutes "good cause to the contrary," it has generated substantial litigation. To remedy the vagueness of ICWA requirements, several states and tribes have entered into Memoranda of Agreement to specify the ICWA requirements and create a more collaborative relationship between the state and the tribes. Some of these agreements are located in Appendix B of this report.

B. South Dakota Statutes and Guidelines for Judicial Process in Child Abuse and Neglect Cases

In 2004, a general statement was added to Chapter 26-5A, Chapter 25-6, and Chapter 26-8A of South Dakota's code providing that: "Due regard shall be afforded to the Indian Child Welfare Act (25 U.S.C. §§ 1901-1963), as amended to January 1, 2004, if that Act is applicable."

Prior to this addition, the state statues contained few provisions implementing ICWA or delineating the responsibilities of the state attorney or DSS vis-à-vis ICWA. The one exception is in section 26-7A-43 which requires petitions affecting children in abuse and neglect proceedings, child in need of supervision, or delinquent child to include "A statement as to whether or not the Indian Child Welfare Act appears to be applicable."

The *South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases* (SD Guidelines) were developed by the South Dakota Judicial System for the purpose of reforming the handling of child abuse and neglect court cases in South Dakota by implementing the requirements of the federal Adoption and Safe Families Act, Public Law 105-89 (ASFA). They also attempt to implement the basic ICWA requirements, but do not really achieve this intent. For example:

- On page 36, the notice requirements for 48 hour hearing state that the state attorney is required to notice, pursuant to SDCL 26-7A-15, parents. No mention of the child's tribe or Indian custodian. While this is an accurate statement of the statutory requirement, since the South Dakota statute omits any ICWA notice requirements, none are stated in the SD Guidelines.
- On page 41, paragraph 41 states that "for the end of the 48 hour hearing, one must determine whether the ICWA is applicable and accept the ICWA Affidavit (Form 6) as expert testimony regarding continued out-of-home placement." Use of an affidavit as equal to expert testimony is in violation of the requirements and spirit and intent of ICWA.
- On page 53, as part of the listing of decisions the court should make at the adjudication hearing, the following is stated: "10. The working group also <u>believes</u> that the Adoption and Safe Families Act (ASFA) overrides the Indian Child Welfare Act and that a finding that no reasonable efforts are necessary under ASFA also obviates the necessity for active efforts under ICWA because ASFA is more recent and a recent law takes precedence over amore remote law and because ASFA is more specific and a more specific law takes precedence over a more general law. Congress passed both acts and it does not seem reasonable that Congress would require 'active efforts' where no reasonable efforts are necessary."
- On page 60, the requirement of the expert witness in the adjudication hearing provides that "[I]n cases where ICWA applies, unless the court has already made such a determination at a prior proceeding, (such as the 48 hour hearing on the basis of an ICWA affidavit), a qualified expert must testify 'that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child'. . . . Since the rules of evidence apply at adjudicatory hearings it is often easier to make a record on these issues at the 48 hour hearing based on an ICWA Affidavit (se Form 6)." Again, use of an affidavit to meet the ICWA requirement for an expert witness is a misapplication of the requirement.

Recommendation 1. The South Dakota Guidelines should be revised to accurately state ICWA requirements.

While a thorough review of the contents of each state/tribal Title IV-E agreement is beyond the scope of this compliance survey, the fact that tribal Title IV-E state/tribal agreements may incorporate such time deadlines needs to be researched and identified. Applicability of such deadlines may effect any state/tribal agreements relative to case management protocols and processes.

The federal regulations for ASFA are found at 45 C.F.R. §§ 1355, 1356 & 1357. Deadlines are set for required state action in order to maintain the receipt of federal matching funds for the child. The regulations use two different starting points in defining requirement time periods: actual removal and foster care entry. Actual removal is the date the child is removed from the home. A child "enters foster care" the earlier of the date the court found the child neglected or abused; or sixty days after the child's actual removal. 45 C.F.R. §1355.20(a). Table 2 sets forth ASFA deadlines for selected case requirements.

Table 2. ASFA Deadlines for Case Requirements.

Requirement	Deadline	Starting Date
Case Plan	60 days	Actual Removal
Reasonable Efforts to Prevent Removal: A court finding that "reasonable efforts have been made to prevent the child's removal from home" must be made within 60 days of the child's actual removal from home. 45 C.F.R. §1356.21 (b)	60 Days	Actual Removal
Six-Month Periodic Review	6 Months	Foster Care Entry
Permanency Hearing: It is NOT a Title IV-E eligibility requirement. If the state fails to hold a permanency hearing for a child, it is out of compliance with the state plan. However, the child remains eligible for Title IV- E.	12 Months	Foster Care Entry
Reasonable Efforts to Finalize Permanency Plan: A court finding that the agency has made reasonable efforts to finalize a permanency plan. The permanency plan may be to reunify the family or secure the child a new permanent home. It must be made every 12 months to retain Title IV-E for the child. A negative, insufficient, late, or missing finding means the child is ineligible for Title IV-E until the court makes a positive finding.	12 Months	Foster Care Entry
Mandatory Termination Petition Filing: The state must file a termination petition whenever the child has been in a foster placement 15 of the last 22 months.	15 of the last 22 months	Foster Care Entry

There is a "compelling reason" exception not to file a termination petition within the "15 of the last 22 months" time period. The preamble to the regulation gives examples of "compelling reasons" for a court to order "another permanent planned living arrangement" as opposed to

termination. One such reason is "an Indian child for whom the tribe has identified another planned permanent living arrangement."

It is recommended that the SD Guidelines be revised to accurately state ICWA requirements. It is further interesting that, as shown in the following section discussing Title IV-B, the 2002 Progress section of the Annual Progress and Services Report (APSR) states: "Task Force will renew efforts to improve ICWA guidelines now that the UJS Guidelines are completed." The plan states that the UJS Guidelines cover the legal aspects of ICWA and procedural guidelines related to the various jurisdictions handling cases outside the court process are still needed. This will be a joint effort with the Tribal ICWA representatives. [*See* page 68, 2003 South Dakota APSR.]

C. BIA Guidelines for State Courts[10]

BIA Guidelines for State Courts (Guidelines) were finalized in 1979. Federal Register, Vol. 44, No. 709, Monday, April 23, 1979. The Guidelines are approximately 20 pages and represent the interpretation of the Interior Department of certain provisions of the Act. The Guidelines were not published as regulation because they are not intended to have a binding legislative effect. ICWA provisions covered by the Guidelines include: ICWA policy, pretrial requirements, requests for transfer to tribal court, adjudication of involuntary placements, adoptions, or terminations of parental rights, voluntary proceedings, dispositions, and post-trial rights. For purposes of this study, the Guidelines were omitted from the compliance analysis as they are not technically ICWA requirements.

Few provisions of the ICWA expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language. For example, the Secretary of Interior is directed to determine whether a plan for resumption of jurisdiction is "feasible" as that term is used in ICWA. Most of the primary responsibility for interpreting the ICWA language rests with the state courts that decide Indian child custody cases relative to the more controversial provisions. These provisions include the use of the term "good cause" to not apply the placement preferences or transfer jurisdiction to tribal courts. As a result of the use of the "good cause" language, ICWA places great discretion with the state court judge to apply the placement preference provision and transfer provision.

[10] See Appendix A for a complete copy of the BIA Guidelines for State Courts.

D. Title IV-B - Extent of Compliance with Federal Requirement, 42 U.S.C. 622

Congress amended the Social Security Act in October 1994. Among the changes adopted at that time was the addition to Section 422 (b) of paragraph (11) requiring that state plans contain:

> . . . a description, developed after consultation with tribal organizations (as defined in section 4 of the Indian Self-Determination and Education Assistance Act) in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act.

In order to assess the extent to which South Dakota has complied with this federal requirement, the NCSC/NAILS project team reviewed the 2003 South Dakota Title IV-B Child and Family Services Plan (CFSP) and the Annual Progress Services Report for 2003 (APSR). Among the many instances listed of involving tribes were:

- Objective 4 for Goal III provides: To support prevention of child abuse and neglect and provide intervention in instances of abused and neglected children that promotes family stability and ensures safety of children, objective 4 provides: "To promote and assist in the development of an effective child protection service delivery system that supports safety and permanency for children within tribal jurisdictions through July 2004." Under the listing for 2003 Progress for this objective, four tribes are listed: Sisseton Wahpeton Sioux Tribe, Standing Rock Sioux Tribe, Crow Creek Sioux Tribe, and Lower Brule Sioux Tribe. Activities described by the state "details the work with those situations where CPS has an agreement or contract with the tribes." The section states that three of the four tribes have IV-E Agreements which allows for the allocation of IV-E funding for abused and/or neglected children who are IV-E eligible, in alternative care placement and in the custody of the tribe. Lower Brule Sioux Tribe's Title IV-E Agreement was being negotiated between the state and tribe. [*See* page 56 and 57, 2003 South Dakota APSR.]
- Tribal Liaison Program Specialist: provides training and technical support to the tribes in the area of child welfare, with emphasis on services to those tribes which have existing IV-E Agreements or Contracts with the State. [*See generally* pages 52-57, 2003 South Dakota APSR.]
- There is only limited documentation in the 2003 APSR that funding is being spent to support ICWA compliance or family preservation activities other than tribal IV-E agreements. 2001 Progress activities state that CPS is spending some Child Abuse and Neglect State Grant funding on an attorney under contract to handle cases in the Rosebud Sioux Tribal Court. [*See generally* pages 57-64, 2003 South Dakota APSR.]
- The 2002 Progress section of Goal II, the APSR states: "Task Force will renew efforts to improve ICWA guidelines now that the UJS Guidelines are completed." The plan states that the UJS Guidelines cover the legal aspects of ICWA and procedural guidelines related to the various jurisdictions handling cases outside the court process are still needed. This will be a joint effort with the Tribal ICWA representatives. [*See* page 68, 2003 South Dakota APSR.]
- The 2003 Progress section states that: "A State/Tribal Foster/Adoptive Work Group continues to meet to help increase the number of available Indian foster homes for out-of-home placement of Indian children and to encourage alliances between agencies involved in licensing homes and placing children to work toward that end. The Workgroup met on 6/5/02,

8/14/02, 1/6/02, 2/12/03 and 6/403. A subgroup of tribal members met twice to work on development of a recruitment brochure, and revisions will be discussed at the 6/4/03 Workgroup meeting to finalize the brochure." [*See* page 89, 2003 South Dakota APSR.]

Table 3 reviews DSS activities with tribes as described in the CFSP 2000-2004 CFSP and APSR 2003.

Table 3. South Dakota CFSP 2000-2004 and APSR: DSS Collaborative Activities with Tribes

Tribe	Year	Collaborative IV-E Activity
Cheyenne River Sioux Tribe	2000	Trial Agreement between OCP and CRST entered into July 2000
	2001	State found CRST out of compliance w/ ASFA; CRST indicated that they would like to discontinue the agreement
	2002	
	2003	
	2004	
Crow Creek Sioux Tribe	2000	IV-E Agreement in place; initiated Jan. 1995; State-Tribal Foster Care Licensing Agreement in place; initiated 1994
	2001	IV-E and foster care licensing agreements continued
	2002	IV-E and foster care licensing agreements continued
	2003	IV-E and foster care licensing agreements continued
	2004	Meeting held between CCST CPS Staff and OCP to discuss the referral process and Title XIX funding
Flandreau Santee Sioux Tribe	2000	IV-E Agmt in place; initiated Sept. 2000; State-Tribal Foster Care Licensing Agreement in place; initiated 1994; OCP provided training to Flandreau CP dir.
	2001	IV-E and foster care licensing agreements continued
	2002	IV-E and foster care licensing agreements continued
	2003	IV-E and foster care licensing agreements continued
	2004	IV-E and foster care licensing agreements continued
Lower Brule Sioux Tribe	2000	
	2001	
	2002	
	2003	LBST expresses interest in IV-E agreement. Steps include: 1) draft foster care licensing standards for OCP review, and 2) negotiate agreement
	2004	
Oglala Sioux Tribe	2000	
	2001	
	2002	
	2003	
	2004	OCP meet with CFP & OST to discuss the creation of a full child protection funding contract beginning w/ IV-E and foster care licensing agreements SFY 2005; full contract projected in SFY 2006; April '04: OCP & tribal personnel met w/ Nat'l Child Welfare Resource Ctr. Staff to discuss ICWA & ASFA

Table 3 (cont'd). South Dakota CFSP 2000-2004 and APSR: DSS Collaborative Activities with Tribes		
Tribe	**Year**	**Collaborative IV-E Activity**
Rosebud Sioux Tribe	2000	Conversation continues regarding State licensing of Tribal foster care homes
	2001	
	2002	
	2003	
	2004	
Sisseton Wahpeton Oyate Tribe	2000	Full Child Protection funding agreement in place; initiated 1978
	2001	Full Child Protection funding agreement continued
	2002	Full Child Protection funding agreement continued; Training and Preparation for FACIS file conversion
	2003	FACIS (Family and Children Information System) conversion completed Aug. 2002; New SWO acting Child Protection director appointed
	2004	OCP Tribal Liaison attends SWO CP staff meetings, reviews case files for state & federal law compliance, and conducts training re: new CPS policies & procedures and provides technical assistance
Standing Rock Sioux Tribe	2000	IV-E Agreement in place; initiated 1995; State-Tribal Foster Care Licensing Agreement in place; initiated 1993
	2001	IV-E Agreement continued
	2002	IV-E Agreement continued; OCP review of Tribal files initiated corrective plan to ensure future compliance w/ IVE agreement
	2003	IV-E file review conducted; Tribal staff attend IVE training April 2003; SRST Staff attend May 2003 meeting for FACIS conversion
	2004	SRST staff attend IVE and XIX training; FACIS conversion scheduled for Nov. 2003 for IVE files
Yankton Sioux Tribe	2000	Site reviews conducted in Feb. & May 2000 led to discontinuing CPS State Contract. OCP cited difficulties in YST achieving acceptable levels of service.
	2001	
	2002	
	2003	
	2004	

While the minimum requirements for consultation with tribes may have been met, there is no indication in the CFSP as to who specifically was consulted in reference to creating the 2000-2004 CPS IV-B Plan.[11]

[11] Only one tribal survey respondent answered positively that their tribe was contacted by the state for obtaining comments and input, as a stakeholder in the preparation of the 2005—2009 CFSP. In total, only seven respondents, representing four tribes, responded to the tribal survey,

E. Innovation and Activities of Other States

Throughout the country, many states have implemented the provisions of ICWA to varying degrees. Several states have enacted state ICWA legislation which goes beyond the basic requirements of the federal ICWA. Minnesota's ICWA legislation, included in Appendix B, goes far beyond the federal ICWA to include provisions to carry out the spirit and goal of ICWA and provide a funding process for enforcement of the statute. Colorado's statute requires that two notices be sent to the child's tribe; one to the tribal executive and one to the tribal social worker.

Several states, including Minnesota and New Mexico, have entered into tribal/state agreements to formalize the collaborative efforts of the tribe and state to implement the provisions of ICWA. These agreements are found in Appendix B. A comparison of the states of Colorado, Minnesota, New Mexico, and Oregon, with respect to their innovative activities is listed below in Table 4, which presents a review of national activities taken by states to work with tribes to specify the implementation requirements of the ICWA and to carry out the spirit of the ICWA. All documents listed In Table 4 are located in Appendix B.

Table 4. Review of National Activities in Other States

Source	Findings	Recommended Strategy
Minnesota ICWA/MIFPA Social Worker Checklist	Assists state workers in applying all ICWA requirements to case work progress	Review to determine acceptability in SD
Minnesota Forms: Content of Petition for Involuntary Out of Home Placement of Indian Children, and Petition for Involuntary Termination of Parental Rights	Provides clarification of applicability of ICWA to case proceedings	Review to determine acceptability in SD
Oregon ICWA administrative forms	An approach to clarifying and specifying Indian ancestry for child is set out in ICWA administrative forms	Review Oregon ICWA Eligibility checklist to determine acceptability in SD
Minnesota statutes	Specified time limits are set for notification to tribe, tribal response to notification.	Review Minnesota statutes to determine acceptability in SD
Colorado notification statute	Statute clarifies the two ICWA notices are sent: one to tribe and one to tribal ICWA worker	Review Colorado legislation requiring two notices to determine acceptability in SD
Oregon State and Tribal Statement of Active Efforts	Lists expected activities to take place in the first six months of the case	Review to determine acceptability in SD
Minnesota ICWA Child Welfare Placement Preferences and Considerations Documentation	Provides a checklist of consider-ation to be taken to meet placement preferences of ICWA	Review to determines acceptability in SD
Minnesota Tribal/State Agreement	Provides implementation of ICWA	Review to determine acceptability is SD

Recommendation 2. South Dakota should review the activities of other states (discussed herein and appended to this report) to determine their applicability and acceptability.

Section IV. Methodology

A. General Information

The NCSC/NAILS project team developed an interactive, multi stage, and multi-method approach to gather the quantitative and qualitative information necessary to complete the analysis of ICWA. The analysis included a review of the agencies (specifically referenced in SB 211 that are involved in the exercise and application of ICWA including the Department of Social Services, Office of Child Protection, the Office of the State's Attorney, the Unified Judicial System, and private adoption, licensing, and foster care agencies. Additionally, the NCSC/NAILS project team engaged in a series of interactions with each of the tribes in order to identify the means by which the tribes can assist in pursuing ICWA-based policies. The NCSC and NAILS built upon and leveraged other statewide reviews of ICWA, general knowledge, and information regarding ICWA application, and available relevant statistics and information maintained by the Bureau of Indian Affairs.

The specific stages and tasks by which NCSC and NAILS completed the independent review and analysis of ICWA compliance are discussed in the following paragraphs. The tasks fell into six major categories:

- Review of Background Information and Documents
- Development of Data Collection Instruments
- State and Tribal Focus Groups
- DSS and UJS File Review
- Web-Based Surveys
- Intensive File Review

B. Review of Background Information and Documents

In order to become fully acquainted with the issues and framework for the South Dakota ICWA Compliance Analysis, the NCSC/NAILS project team performed a review of relevant literature, information, and the legal context under which South Dakota operates. This included review of ICWA assessments in North Dakota and Arizona; a review of other state ICWA compliance review materials; a review of "best practices" utilized in other venues to address the permanency needs of Indian children; a review of national trends in ICWA compliance; a review of information and statistics maintained by the Bureau of Indian Affairs; a national review of memoranda of understanding between state agencies and tribal nations, a national review of other

state ICWA laws; a review of ICWA materials promulgated by the National Council of Juvenile and Family Court Judges; a review of South Dakota laws and court rules; a review of DSS, UJS, and State Attorneys Office ICWA policies and procedures.

C. Development of Data Collection Instruments

In order to access information that will answer the research questions regarding ICWA compliance, the NCSC/NAILS project team developed and tested hard-copy data collection instruments and electronic data collection tools. Instruments developed included: (1) the DSS and UJS file review protocols, (2) the state and tribal ICWA web-based surveys, (3) the structured state and tribal focus group protocols, and (4) the intensive file review protocol. Copies of the proposed data collection instruments were forwarded and shared with the ICWA Commission for review and comment. Copies of all data collection instruments are located in Appendix C.

D. DSS and UJS File Review[12]

Court files and corresponding Department of Social Services (DSS) files were reviewed by volunteer attorneys under the direction of the NCSC project team using the "ICWA Case Record Review Instrument," developed by NCSC. The Case Record Review instrument was created to track specific sections of ICWA relating to the courts and DSS and is a modified version of the "Indian Child Welfare Act Compliance Instrument: Record Review" developed by the National Indian Child Welfare Association (NICWA). The NICWA instrument had been used in at least four other states: Idaho, Nebraska, Nevada, and North Dakota. Although the two instruments are very similar, the NCSC instrument eliminates some questions that are based only on BIA ICWA guidelines rather than ICWA requirements and gathers more specific data on which parties received notice of ICWA proceedings and what methods were employed to provide notice.

Case file review is a valuable instrument in evaluating compliance with ICWA provisions that require documentation. It should be noted that information pertaining to ICWA provisions may be recorded in agency documents not included in the court file. Therefore, care must be taken in drawing conclusions about compliance from the court records.

[12] Note, no tribal court files were reviewed during this project.

Sample Selection

The NCSC/NAILS project team requested from DSS a list of all ICWA cases closed between January 1, 2003 and June 1, 2004. The total number of cases available for review was 358 and the total number selected for review was 135. Of these, 94 cases (involving 190 children) met review criteria. To qualify as complete for file review, the reviewers needed to have both the court file and the corresponding DSS file. Often the DSS files for all children named in a case file were available; however, if the DSS file for only one of the children was available, the file was reviewed. This was done since the Record Review Instrument, with the exception of placement preferences, could generally be completed with just the court file. If either the DSS file or the court file was missing for all children involved, the case was not reviewed.

From those cases identified as being handled by a state court, NCSC randomly chose a total of 133 case files for review. The number of cases selected from each judicial circuit was proportional to the total number of ICWA cases on the DSS list. NCSC's goal was to review a total of 100 cases; therefore, additional cases were selected to account for potential lost, incomplete, or non-ICWA cases that may have been included in the random selection. Of the 94 cases reviewed, 32 involved emergency removal, which means that an abuse and neglect petition was not filed and/or the children were returned to the home within 30 days of removal.

All case files selected for review were sent to the Seventh Judicial Circuit where the on-site review was conducted. Forty attorneys from the Seventh Judicial Circuit, many with ICWA experience, volunteered to conduct the file review over a five day period. Each volunteer was given instructions on how to complete the "ICWA Case Record Review Instrument" by a member of the NCSC/NAILS project team. A NCSC project team member was available during the entire data collection period to answer questions and ensure that answers provided were consistent. An overview of the number of cases actually reviewed is shown in Table 5.

Table 5. Number of ICWA Files Reviewed for Each Judicial Circuit by Type of Proceeding				
		Type of Action		
Circuit	Number of Children	Involuntary	Emergency	Total Number of Files
1	17	6	6	**12**
2	23	8	9	**17**
3	9	3	1	**4**
4	9	3	1	**4**
5	14	3	0	**3**
6	32	10	3	**13**
7	86	29	12	**41**
Total	**190**	**62**	**32**	**94**

Table 6 shows the number of cases reviewed from each judicial circuit and reflects the relative proportion of total cases available for review for each judicial circuit[13].

Table 6. Relative Proportions for Files Available for Review and the Number Actually Reviewed for Each Judicial Circuit		
Circuit	Percent of Total Files Available For Review (N=358)	Percent of Total Files Reviewed (N=90)
1	7%	13%
2	23%	18%
3	5%	4%
4	3%	4%
5	7%	3%
6	14%	14%
7	41%	44%
Total	**100%**	**100%**

A greater proportion of First Judicial Circuit cases were reviewed because a number of the random cases initially selected included seven to eight files on a group of seven siblings, therefore a second random selection for files was done. The Fifth Judicial Circuit had fewer cases reviewed due to the fact that many of the randomly selected files were not ICWA files.

[13] The proportion of cases from each circuit was calculated based upon the total cases from the DSS list designated as being adjudicated in a particular circuit.

The tribal affiliation of the children of record included children from each of eight major tribes of South Dakota. In some instances, the children had more than one tribal affiliation; therefore, more tribal affiliations are listed than case files reviewed. Tribal affiliation distribution is shown in Table 7.

Table 7. Tribal Affiliation	
Oglala Sioux Tribe	30%
Rosebud Sioux Tribe	19%
Yankton Sioux Tribe	10%
Sisseton-Wahpeton Oyate Tribe	8%
Cheyenne River Sioux Tribe	7%
All Others	7%
Unknown	7%
Crow Creek Sioux Tribe	5%
Standing Rock Sioux Tribe	5%
Lower Brule Sioux Tribe	1%

E. State and Tribal Web-Based Surveys

The NCSC/NAILS project team conducted two statewide surveys of ICWA stakeholders including DSS social workers, DSS supervisors, tribal social workers, tribal judges, Unified Judicial System judges, and court services officers handling juvenile cases, state's attorneys, Department of Corrections juvenile agents, attorneys who represent children, parents, Court Appointed Special Advocates (CASAs), and private adoption and foster care agencies. A statewide survey was utilized to increase the likelihood that all key stakeholders would have an opportunity to participate in the data collection process (in the event they were unable to participate during on-site activity or the location was not selected for on-site activity). To facilitate responses, the NCSC/NAILS project team employed an electronic, web-based survey process. While the web-based delivery mechanism was the same for the state and tribal surveys, as discussed in the following paragraphs the scope and purpose for the state and tribal surveys were very different.

State Survey

State ICWA stakeholders (i.e., DSS social workers, DSS field program specialist, DSS supervisors, UJS judges, UJS juvenile court services officers, state attorneys, Department of

Corrections (DOC) juvenile agents, private adoption and placement agencies, public defenders, court appointed attorneys, and CASAs) were invited to participate in the state survey via a targeted e-mail invitation process. Each stakeholder was provided with information regarding: SB 211, the origins of the ICWA Compliance Analysis, NCSC and NAILS information, and the web link to the state survey. Stakeholders were also advised that individual survey responses and comments would be kept confidential. Reminder e-mail messages were sent to all stakeholders ten days after the initial survey announcement.

The NCSC/NAILS project team developed the state survey to be used primarily as a secondary data source; designed essentially to validate the findings of the state focus group sessions and to generate numeric values to these findings. Respondents were first asked to identify their professional affiliation, years working with ICWA cases, and the percentage of their workload involving ICWA cases. The state survey then asked stakeholders to react to a series of statements on a four point Likert scale between "strongly agree," "agree," "disagree," and "strongly disagree." Respondents also had the option of selecting "not applicable to my work" and "don't know/unsure." Finally, the state survey asks stakeholders to rate the state agencies on their overall compliance with ICWA on a five-point Likert scale from "excellent" to "poor." Respondents also had the option of selecting "don't know/unsure." Comments regarding each rating were also solicited.

Tribal Survey

The NCSC/NAILS project team developed a series of 30 questions to elicit primary data from tribal ICWA professionals and lay workers who have job responsibilities related to ICWA case management or the provision of services. The data received was intended to substantiate the validity of qualitative and quantitative data received from other sources in regards to the degree of compliance by the state with ICWA requirements. Specific findings are set out in *Section V. Findings* of this report.

Each question was directly related to a specific ICWA requirement and is co-related to information or data received from other sources, such as data received from the Child Protective Services offices in regards to the number of Indian children in alternative care. For example, tribal ICWA workers were asked to identify how many Indian children as of a specific time. Data received from the response was matched against the actual number of Indian children from a

respective reservation to show the general extent to which tribal ICWA workers, judges, and others are actually aware of the number of their tribal children in out-of-home placements. The result of such comparison is to gain a perception of compliance by the state with the ICWA requirement that notice be sent to the tribe.

The table in Appendix C shows the specific ICWA requirement for state compliance for each question in the tribal survey. Further, the purpose of each question in measuring state compliance is listed with reference to each question and an approximate response was sought from participants. Given the limited response time offered, tribal respondents were asked for approximate responses (e.g., around six) when precise numbers were not readily available.

F. Focus Groups

The NCSC/NAILS project team engaged in significant on-site activity to obtain a representative and robust picture of ICWA compliance in South Dakota. Most notably, qualitative information from state and tribal ICWA stakeholders was generated through a series of comprehensive structured focus groups.

State Focus Groups

State ICWA stakeholders were invited to participate in the state focus groups via a targeted e-mail invitation process. The e-mails advised each stakeholder of SB 211, the origins of the ICWA Compliance Analysis, NCSC and NAILS information, and the specific time and location for each focus group. In total, the NCSC/NAILS project team facilitated 41 focus groups with state ICWA stakeholders as follows.

- The NCSC/NAILS project team traveled to each of the four DSS districts[14] to perform structured focus groups. DSS social workers and supervisors from each local office (within the respective district) were invited to participate in the data collection process at each district headquarters.
- Simultaneously with the sessions in the Western and Southeastern DSS districts, the NCSC/NAILS project teams met with personnel from private adoption and placement agencies.[15]
- The NCSC/NAILS project team visited four of seven judicial circuits[16] to obtain a representative picture of ICWA compliance by the Unified Judicial System. These circuits were selected in

[14] The four DSS districts include Western, Central, Northeast, and Southeast. See Appendix D for the map of DSS districts.

[15] Identified personnel and staff from Bethany Christian, Catholic Family Services, Catholic Social Services, Lutheran Social Services, LDS Family Services and New Horizons were invited to participate.

consultation between the project team and ICWA Commission. During these site visits, the NCSC/NAILS project team met with judges, court services officers handling CHINS cases, clerks of court, and the Office of the State's Attorney. The sites were selected upon the suggestion of the UJS representatives on the ICWA Commission.

- The Offices of the State Attorneys, co-located within the Second, Fifth, Sixth, and Seventh Judicial Circuits were invited to participate in the focus group process.
- In conjunction with the UJS sessions, juvenile agents from the Department of Corrections located in that circuit's region met with the NCSC/NAILS project team specifically to discuss the application of ICWA in CHINS cases.
- Invitations requesting their participation were sent to public defenders and court appointed attorneys in the Fifth, Sixth, and Seventh circuits.
- Members of the state office of DSS, Office of Child Protection Services attended a separately scheduled focus in Pierre.

Each focus group session was scheduled for two hours and was led by an NCSC facilitator. Focus group participants were advised in advance that the sessions would be recorded and that their individual statements would be kept confidential and anonymous and no names would be attributed. However, it was stated that this information would be reported to the ICWA Commission by theme and by position. Each session was opened with an explanation of the background and purpose of study followed by a set of "opening" or ice breaker questions. The discussion then moved into "transition" or introductory subject matter questions before focusing on the "key" questions exploring the primary areas of interest. After the "key" questions had been addressed, a summary statement of the content of the session was presented. The session concluded with a short set of "closing" questions. Of specific interest were the areas of ICWA Training and Technical Assistance, ICWA Written Standards and Current Practice, ICWA Determination and Compliance, Barriers to ICWA Compliance, and finally, Improving ICWA Compliance. Appendix C contains the state focus group introduction dialogue and focus group questions.

Tribal Focus Groups

A discussion focus group was held on site at the respective nine Sioux reservation offices.[17] Prior to holding each focus group, the tribal ICWA worker, tribal judge, tribal prosecutor, and other tribal personnel who had job responsibilities related to ICWA cases were contacted by telephone and in writing to confirm their participation. Members of the tribal community were

[16] The four circuits were the Second, Fifth, Sixth, and Seventh. See Appendix D for the map of UJS judicial circuits.
[17] See Appendix D for the location of each of the nine Sioux reservation areas.

invited to the groups through use of tribal newspapers and by informing tribal ICWA workers that community members were encouraged to participate. In two reservation sites, community members participated.

All participants were informed that their statements would be added to the report as appendix documents.[18] Participants included: tribal judges, tribal attorneys general, ICWA workers, BIA social workers, ICWA legal assistants, tribal prosecutors, a tribal community health representative, ICWA program directors, child protective services case managers, non-profit Indian organization children's advocates, Indian therapists, and tribal Early Head Start Family advocates. Participants at each of the nine reservation sites focus groups numbered as followed:

Cheyenne River Sioux participants:	6
Oglala Sioux participants:	5
Flandreau Santee Sioux participants:	8
Lower Brule participants:	1
Crow Creek Sioux participants:	3
Rosebud Sioux participants:	5
Sisseton Wahpeton Oyate participants:	5
Standing Rock Sioux Tribe participants	5
Yankton Sioux Tribe participants	3

G. Intensive File Review

Four files (from the larger file review process discussed previously) were selected at random for an intensive file review in six areas: the quality of notice sent to the tribe; the manner in which the placement preferences were met or not met; the extent to which, if any, active efforts were used to prevent the breakup of the Indian family; the extent to which cultural considerations were taken by Child Protective Services and the Court; the extent to which the best interests of the child were served; and the best practices or lessons learned in the case. Telephone interviews were conducted with the Child Protective Service worker, state attorney, the court appointed special advocate (CASA), judge, and tribal ICWA worker in each case. Persons interviewed were asked to describe the process taken to comply with notice, placement preferences, active efforts, cultural considerations, and best interests of the child. They were also asked to comment on improvements that could be made.

[18] With the exception of the Cheyenne River Sioux Tribe all consensus statements were finalized among the discussion group participants before the end of the on site visit. The Cheyenne River Sioux community submitted their written statement several weeks after the on site visit as they stated there was insufficient time to address all of the issues.

All files reviewed involved Indian children with tribal affiliation to a tribe within the state of South Dakota. The focus of the findings in the intensive file review portion of the study was on the degree to which the state has taken actions to meet the spirit and goal of ICWA, not just the technical requirements. Its intent is to serve as a more comprehensive review of the challenges, limitations, and opportunities for improvement, successes, and failures of the application of ICWA.

H. Human Subject Protection and Confidentiality

The terms and conditions of the contract between DSS, Office of Child Protection Services and NCSC did not require NCSC to submit its evaluation design to the NCSC Institutional Review Board. The NCSC/NAILS project team, however, took many precautions to ensure that the data collection activities and the resulting data did not compromise the anonymity of the human subjects of this study and the state and tribal ICWA stakeholders participating in the data collection process. This includes administrative and physical security of identifiable data to preserve the anonymity of individuals. Steps taken to protect the confidentiality of our human subjects include:

- Hard copies of DSS and UJS child welfare files and all completed DSS and UJS case file review instruments were stored in secure file cabinets.
- Electronic data were maintained on a secure, password accessed computer. These data are backed-up nightly by the Management Information Systems (MIS) staff. The back-up data is stored in a fire-proof safe and is accessible only to MIS staff.
- No identifying information for human subjects or state and tribal ICWA stakeholders are presented in the results or the *ICWA Compliance Report.*
- All identifying information will be stripped from all electronic data at the conclusion of the project.
- Both electronic and paper files will be destroyed based on federal requirements for retention of records. Back-up electronic data will be destroyed after one year.
- Focus group and survey participants were advised that individual comments will be kept confidential and anonymous prior to participation.
- The NCSC/NAILS project team operated under a Supreme Court Confidentiality Order.[19]
- All volunteer attorneys participating in the DSS and UJS case file review process signed a confidentiality statement that incorporated the above-referenced Supreme Court Confidentiality Order.

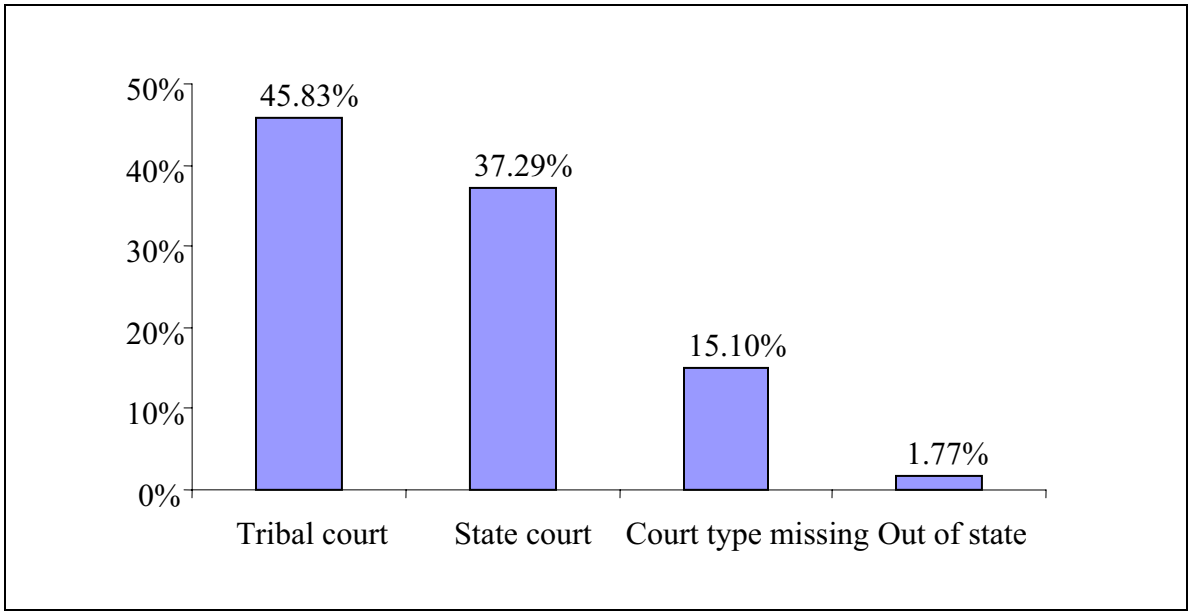
[19] *Order for Disclosure of Selected Court Records Involving the Indian Child Welfare Act,* Supreme Court of South Dakota, July 8, 2004.

Section V. Findings

A. Analysis of Department of Social Services Data

The Department of Social Services (DSS) provided the NCSC/NAIL project team with a list of ICWA cases which were closed in between 1/1/2003 and 6/30/2004. For this time period, the DSS data management system listed a total of 960 cases being closed during the time period being examined. Of the 960 cases, the majority of cases (n=440) were handled by a tribal court (see Figure 2). The record review for this study examined case files identified by the DSS data management system as being adjudicated by a state court (n=358). The remaining 162 cases were not sorted by court; or involved out of state agencies.

Figure 2. Type of Court Handling the ICWA Case (n=960)



All nine of the South Dakota tribes were represented in the 960 cases. The tribes involved in the ICWA cases closed between 1/1/2003 and 6/30/2004 are displayed in Figure 3. The majority of ICWA cases involved children from the Cheyenne River, Rosebud and Oglala Nation tribes.

Figure 3. Tribal Affiliation of All ICWA Cases Closed between 1/1/2003 and 6/30/2004 (n=960)

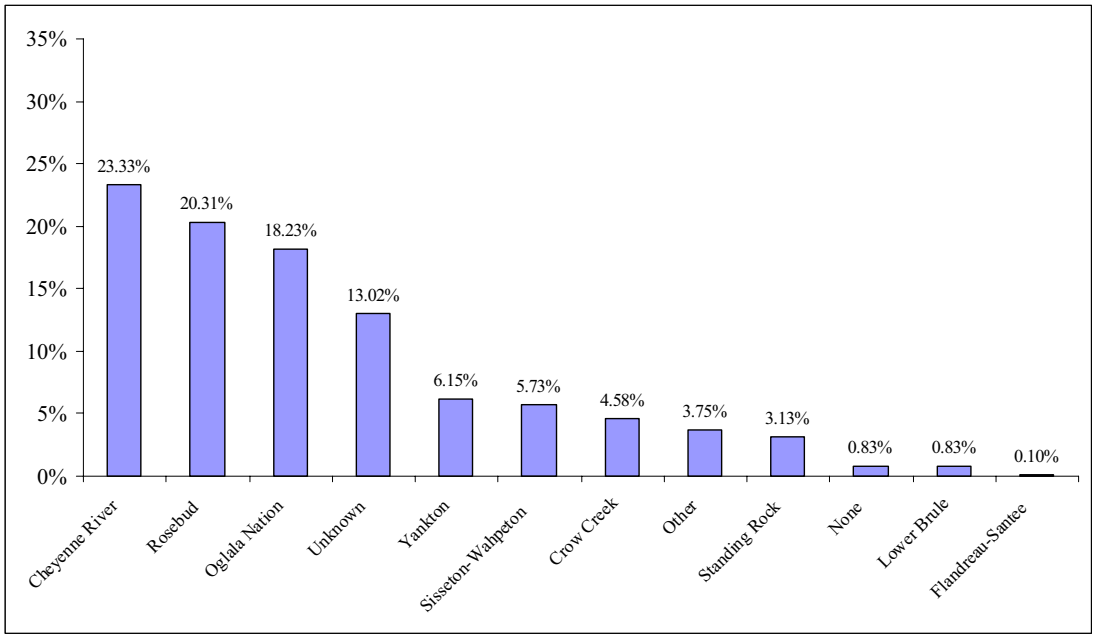


Figure 4 displays the tribal affiliation for the ICWA cases identified by the DSS data management system as being handled by a circuit court (n=358). For this group of ICWA cases, the greatest proportion (47.49 percent) involved children from the Oglala Nation and Rosebud tribes.

Figure 4. Tribal Affiliation of ICWA Cases Closed between 1/1/2003 and 6/30/2004 and Identified as Being Handled by a Circuit Court (n=358)

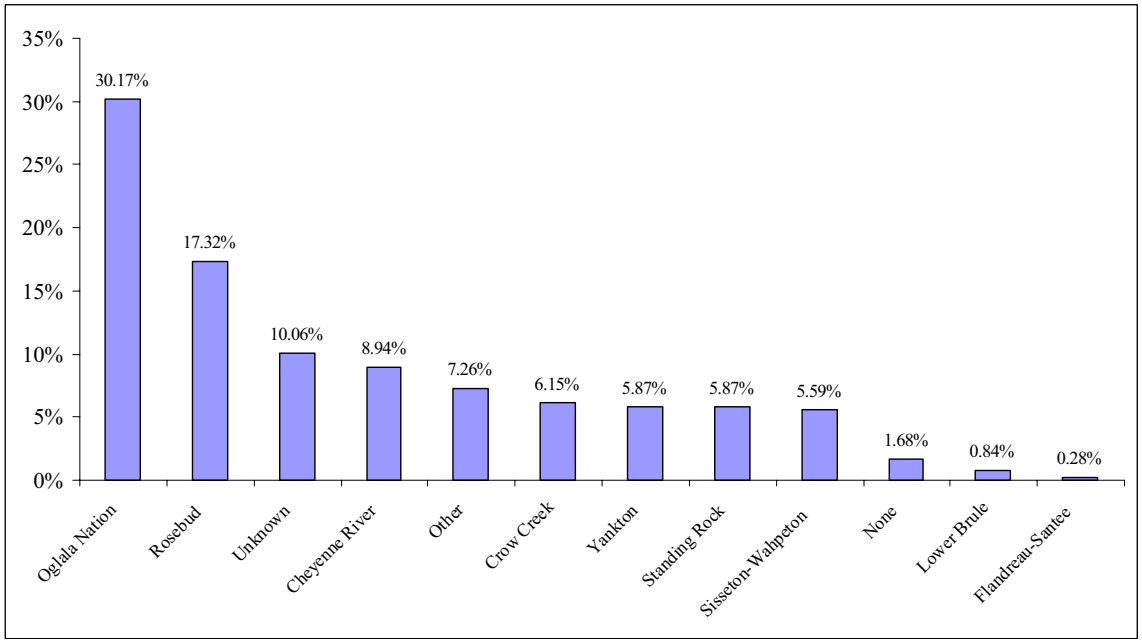


Table 8 lists the exact break-down of tribal affiliation for the ICWA case handled by each of the circuit courts. The table illustrates that for any circuit court, the ICWA cases involve children from a variety of tribes.

Table 8. Breakdown of Individual Circuit Court Tribal Affiliation of ICWA Cases Closed between 1/1/2003 and 6/30/2004 (n=358)

		Court Name							
		First Circuit	Second Circuit	Third Circuit	Fourth Circuit	Fifth Circuit	Sixth Circuit	Seventh Circuit	**Total**
Tribe Affiliation	Cheyenne River		8		2	1	11	10	**32**
	Crow Creek	4	8	1			6	3	**22**
	Flandreau-Santee		1						**1**
	Lower Brule	1	1					1	**3**
	Oglala Nation		11		2		7	88	**108**
	Rosebud	2	20	1	4	1	17	17	**62**
	Sisseton-Wahpeton		6	9	1		3	1	**20**
	Standing Rock					15		6	**21**
	Yankton	13	8						**21**
	Other	1	3	5		4		13	**26**
	Unknown	3	17	2	2	1	7	4	**36**
	None			1		1		4	**6**
	Total	**24**	**83**	**19**	**11**	**23**	**51**	**147**	**358**

All four of the South Dakota DSS Child Protective Services (CPS) districts were represented in the 960 cases. The percent of cases handled by the various CPS districts for ICWA cases closed between 1/1/2003 and 6/30/2004 are displayed in Figure 5. The majority of ICWA cases were handled by the Central CPS district.

Figure 5: Percentage of ICWA Cases Closed between 1/1/2003 and 6/30/2004 Handled by each of the CPS districts (n=960)

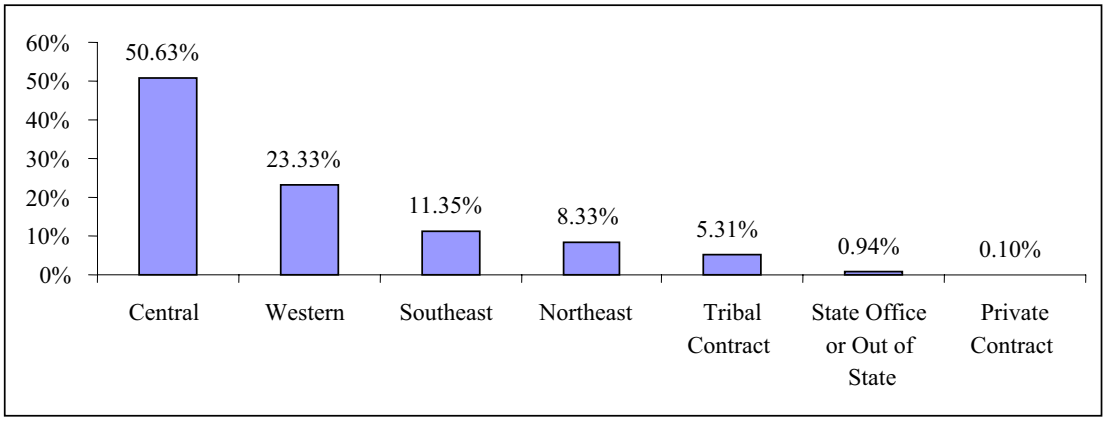
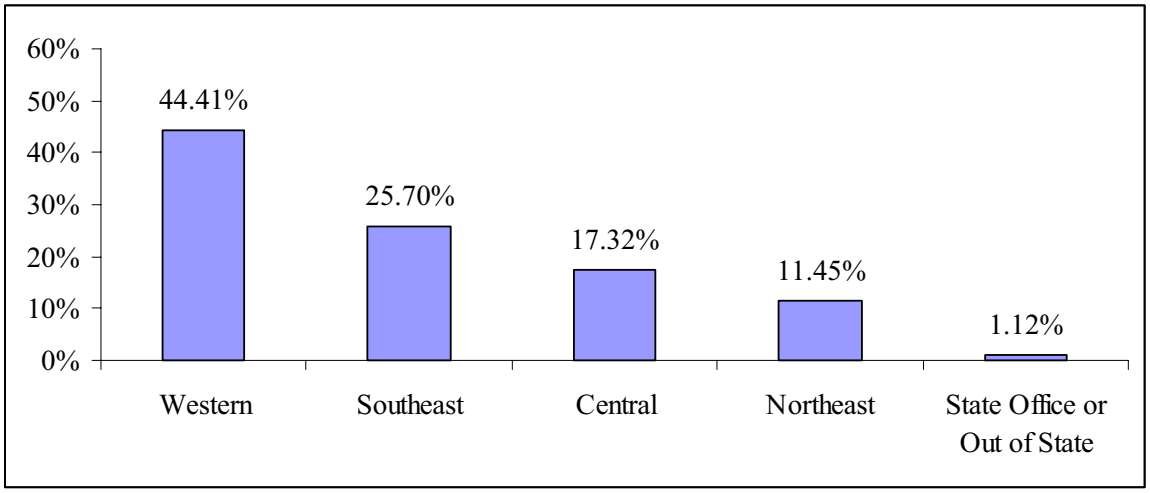


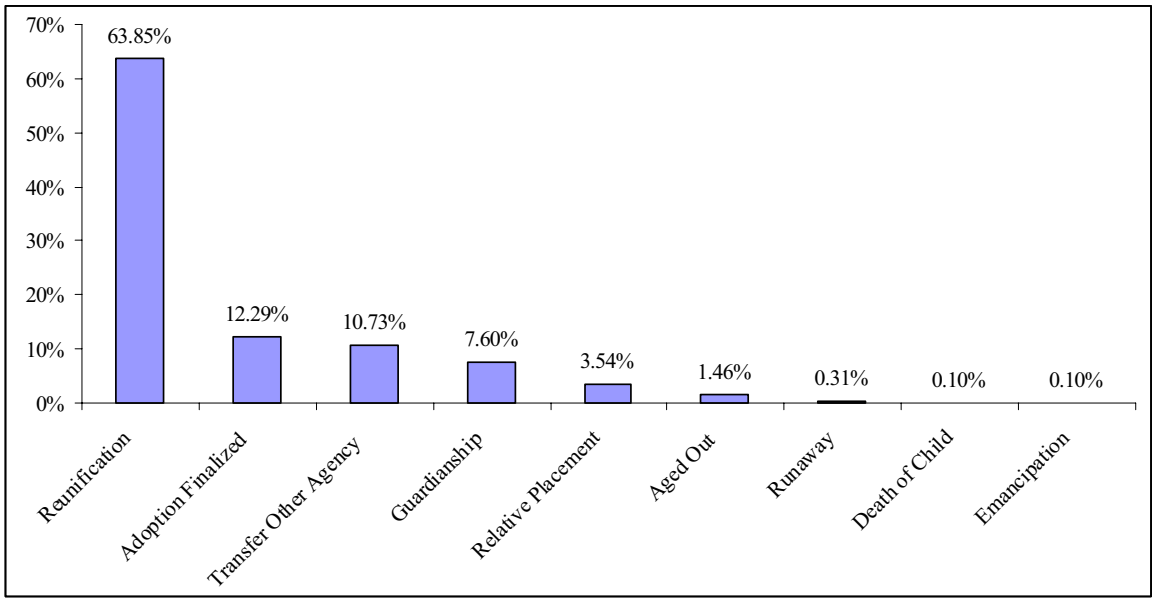
Figure 6 displays the percent of cases handled by the various CPS districts for the cases identified as being handled by the circuit courts. For this group of ICWA cases, the majority were handled by the Western CPS district.

Figure 6. Percent of ICWA Cases Closed between 1/1/2003 and 6/30/2004 Handled by each of the CPS districts for Cases Identified as Being Handled by the Circuit Courts (n=358)



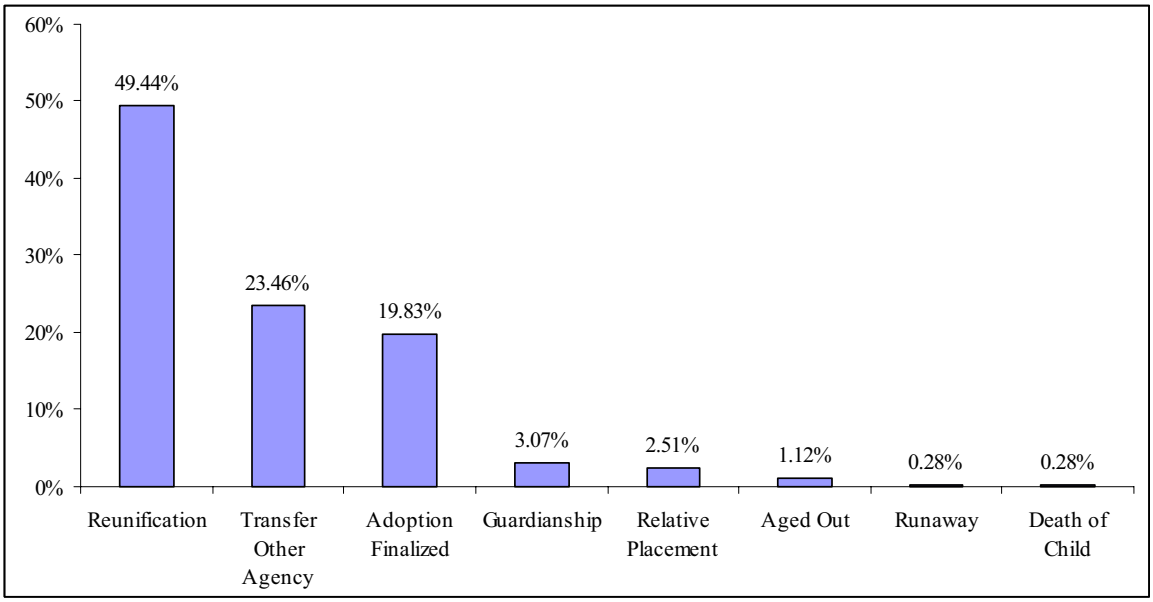
For most of the cases, the reason a case was closed was that the child was reunified with their family. Figure 7 lists all the placement discharge reasons for the ICWA cases closed between 1/1/2003 and 6/30/2004.

Figure 7. Placement Discharge Reasons for ICWA Cases Closed between 1/1/2003 and 6/30/2004 (n=960)



For cases identified as being handled by the circuit courts, the most common reason a case was closed was reunification, followed by transfer to another agency, and adoption. Figure 8 displays the placement discharge reasons for the ICWA cases closed between 1/1/2003 and 6/30/2004 and handled by the circuit courts.

Figure 8. Placement Discharge Reasons for ICWA Cases Closed between 1/1/2003 and 6/30/2004 and Identified as Being Handled by a Circuit Court (n=358)



B. DSS and UJS Case File Review

The record review instrument was designed to examine compliance with several provisions of ICWA including: (1) Identification of children for the application of ICWA; (2) Proper notice of interested parties of proceedings involving an Indian Child; (3) Proper exercise of jurisdiction over Indian children; (4) Active efforts made to maintain the integrity of the Indian Family; (5) Placement of child in an environment meeting ICWA preferences. Each of these areas as they pertain to the case file review is discussed below.

Identification of Children as Indian for the Application of ICWA

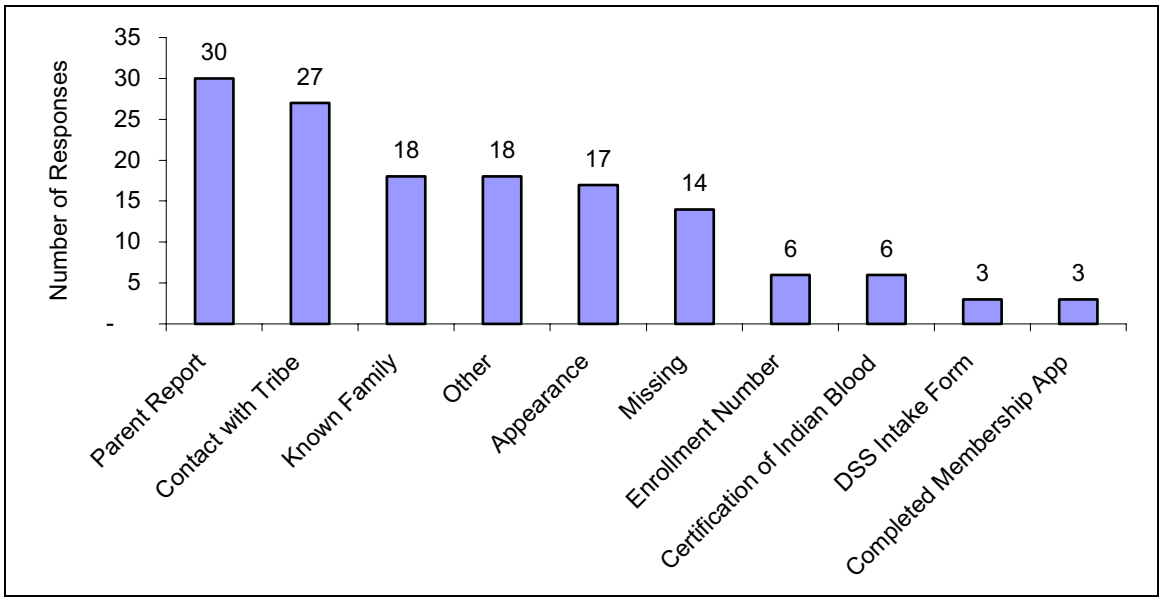
The first step in determining whether ICWA is applicable is determining whether the child is Indian. An Indian child under ICWA is an unmarried individual under the age of 18 who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.[20] Apart from the Seventh Judicial Circuit case files, determining how or whether DSS or the court made a determination of whether a child was Indian was one of the most difficult tasks in the record review process, as neither the court nor DSS regularly stated how they determined the heritage of a child. The Seventh Judicial Circuit routinely filed an ICWA

[20] 25 USC 21 Sec. 1903(4)

affidavit with the court, which stated how DSS determined that the child involved in the action was of Indian heritage. ICWA affidavits were not routinely used in other circuits; therefore; it was difficult to determine how DSS determined that ICWA was applicable.

Reviewers checked all methods used to identify the heritage of the child, therefore the number of responses do not correlate to the actual number of case files as more than one response may have been checked for a single record. The exception to this is the number of files where there was no indication of how heritage was determined. In 15 percent of the records reviewed, no documentation existed of how the court or DSS determined that the child was Indian. The most common method of determination was the report of the parent or custodian of the child. The records indicate that other than direct contact with the tribe, DSS and the courts are generally relying on non-documented evidence to establish the heritage of children to whom they believe ICWA is applicable. Direct contact with the tribe was usually by letter, fax, or phone call. Many of the DSS files contained completed tribal enrollment applications but there was no indication that the applications were ever notarized and filed with the tribe, sent to the tribe, or whether the tribe responded to the application by denying enrollment or by issuing a tribal enrollment identification card. Figure 9 shows the number of responses for the various methods employed to determine a child's heritage. Multiple methods for each file may have been tabulated, therefore, the total responses equal 142 rather the number of files reviewed.

Figure 9. Method for Identifying Children as Indian



Proper Notice of Proceedings Involving an Indian Child

All the cases reviewed involved involuntary removal of the child from the home, therefore; parents and the tribe are required to be notified of the proceedings by registered mail.[21] Reviewers attempted to determine who received and the method by which notice was given to each party. Often more than one method had to be employed, for example, notice may have been sent by registered mail but been undeliverable, therefore, notice would be given a second time by publication. Only notice to the mother, father, tribe, and BIA for the initial hearing on the abuse and neglect petition was tracked. A fifth category labeled "other" tracked notice given to other relatives or putative fathers of the child(ren). The method of notice for the various parties is shown in Table 9.

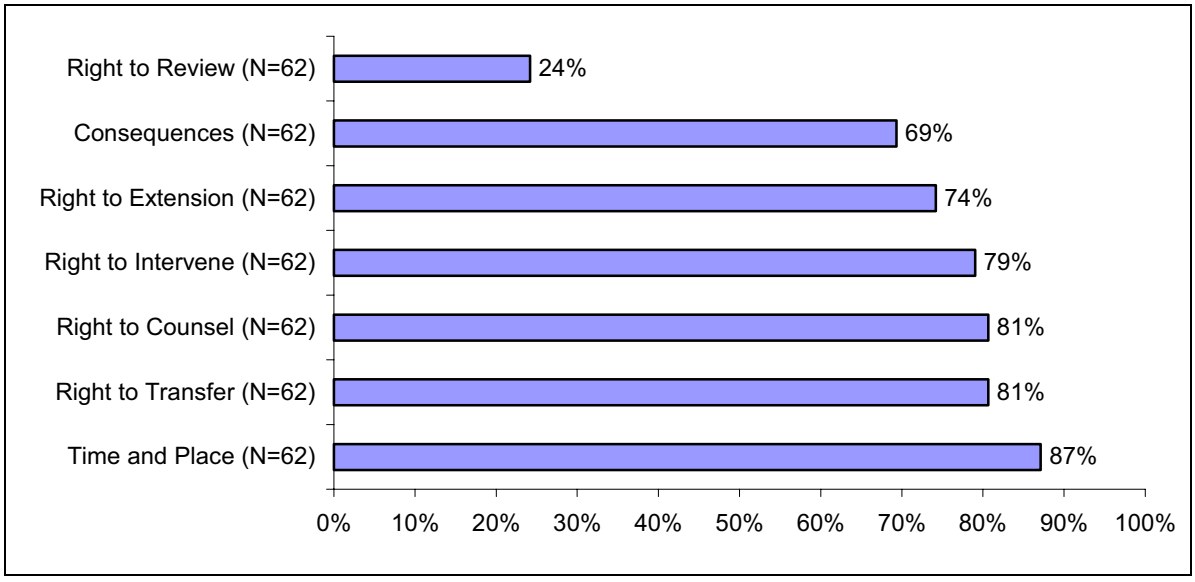
[21] 25 USC 21 section 1912(a)

Table 9. Method of Notice to Interested Parties						
Method of Notice	**Mother**	**Father**	**Tribe**	**BIA**	**Other**	**Total**
Registered or certified mail	12	12	46	36	16	**122**
Regular U.S. mail	9	4	9	6	3	**31**
Personal service	32	30	1	1	5	**69**
Publication or other means	16	17	4	0	4	**41**

Tracking notice was difficult because "Certificates of Service" were not routinely used and although a copy of the return receipt would be placed in the file there usually was no indication which documents were sent with it. When multiple receipts were filed it was difficult to determine which card corresponded to which document and whether notice was timely filed.

ICWA requires that the tribes and the parents be advised of their right to intervene, ask for an extension, have the action transferred to the tribal court, and for parents to be represented by counsel.[22] The common elements of the notice, not all of which are mandated by ICWA, are shown in Figure 10.

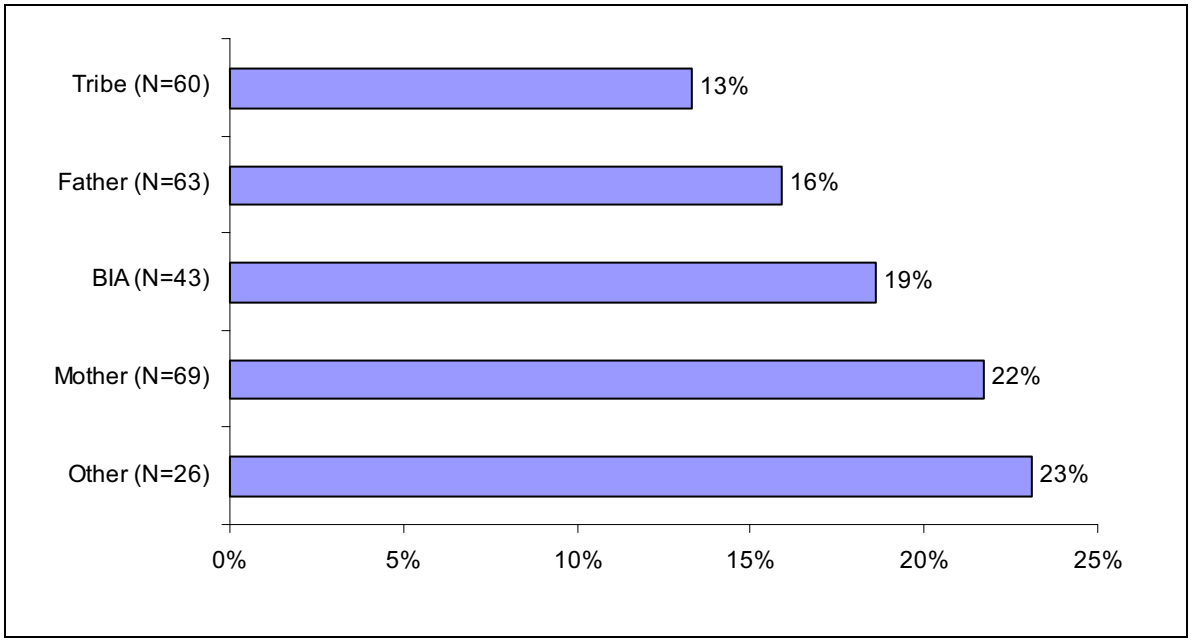
Figure 10. Notice Content



[22] 25 USC 21 section 1911(b),(c) and 1912(a)-(c)

ICWA notice content requirements were met in the majority of the files reviewed. Informing parents of the consequences of failing to appear and/or of their right to review the court file are not ICWA requirements. Sixty-nine percent of the cases files reviewed did include a statement of the consequences of failing to appear. Only 24 percent of the case files reviewed included a statement advising of the right to review the court file. When notice is given, however, it usually contains the elements required by ICWA. It is difficult from the file review to determine whether notice is being timely served. In some instances notice was given but was clearly untimely as it was not received by the party at least ten days prior to the date of the proceeding. Figure 11 shows the percentage of untimely notices served on each group of interested parties.

Figure 11. Untimely Service of Notice[23]



Proper Exercise of Jurisdiction over Indian Children

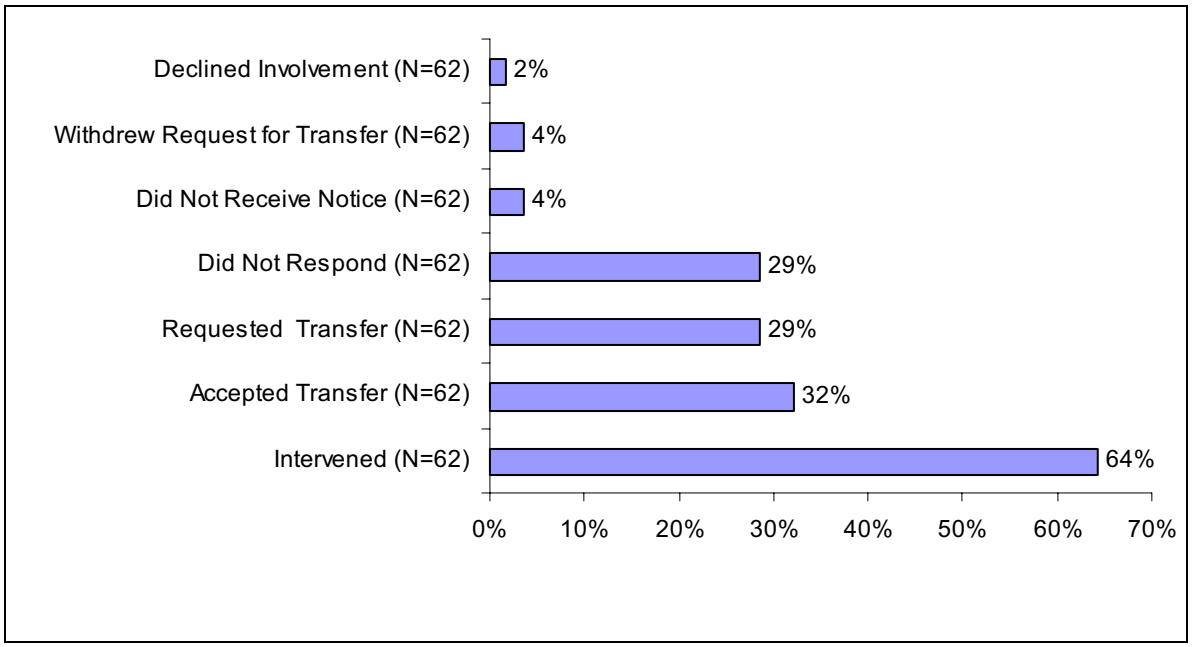
A child's Indian tribe has exclusive jurisdiction over any custody proceeding, if the child resides or is domiciled within the reservation of such tribe, unless otherwise vested to the state by state or federal law.[24] Reviewers determined that one of the pulled cases was under the exclusive jurisdiction of a tribal court and was dismissed. In a second case, the child was already under the jurisdiction of the tribal court; therefore, the case was transferred back to the tribal court and the

[23] N equals the total number of notices sent to that specific group. Notice may have been sent to the same party in the same case on more than one occasion. For example, notice by registered mail may have been unsuccessful so notice was given by publication to the same party for the same action. Both notices are included in the N value.
[24] 25 USC 21 section 1911(a)

order of the tribal court given full faith and credit, as required by ICWA.[25] Neither of these cases was included in the 94 cases reviewed.

The child's tribe has the right to intervene and/or request jurisdiction over any foster care placement or termination of parental rights action involving a child who is not domiciled or residing on the reservation.[26] The tribes intervened in 64 percent of the involuntary removal cases, requested jurisdiction be transferred to a tribal court in 29 percent of the cases, and accepted jurisdiction in 32 percent of the non-emergency removal cases. In 29 percent of the cases, the tribe did not respond after receiving notice of the proceedings. The most common reason for not granting jurisdiction to the tribe after it requested jurisdiction was the late stage of the proceedings at which the tribe asked for jurisdiction. In some instances, the children were in the adoption stage of the proceeding before the tribe intervened. Another common reason for denying jurisdiction was the failure of the tribe to respond to the court when asked for information and in some instances the tribe withdrew its request for jurisdiction. A summary of actions taken by the tribe are shown in Figure 12.

Figure 12. Tribal Response to ICWA Child Custody Proceedings



[25] 25 USC 21 section 1911(d)
[26] 25 USC 21 section 1911(b) and (c)

Active Efforts to Provide Remedial Services and Rehabilitative Programs

Before a child can be placed in foster care or parental rights terminated, the court must be satisfied that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that such efforts were unsuccessful.[27] Active efforts were not always documented by the court; however, the court usually made a finding that active efforts had been made. In 42 of the 62 non-emergency case files, the court determined that active efforts had been taken to prevent the breakup of the family. Nine of the files did not specify what active efforts had been taken while 33 case files contained documentation of at least one active effort, although in most cases multiple efforts were documented. Figure 13 illustrates the type of active effort that was undertaken based on all files where the court found active efforts were made.

Figure 13. Active Efforts Undertaken in Non-Emergency Cases

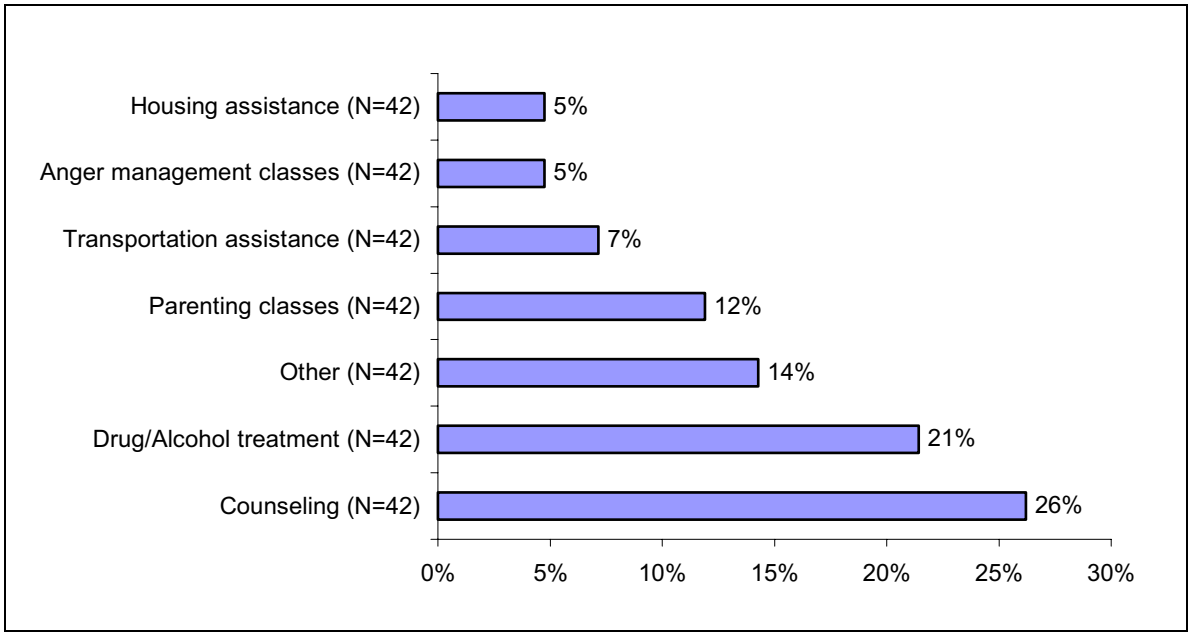
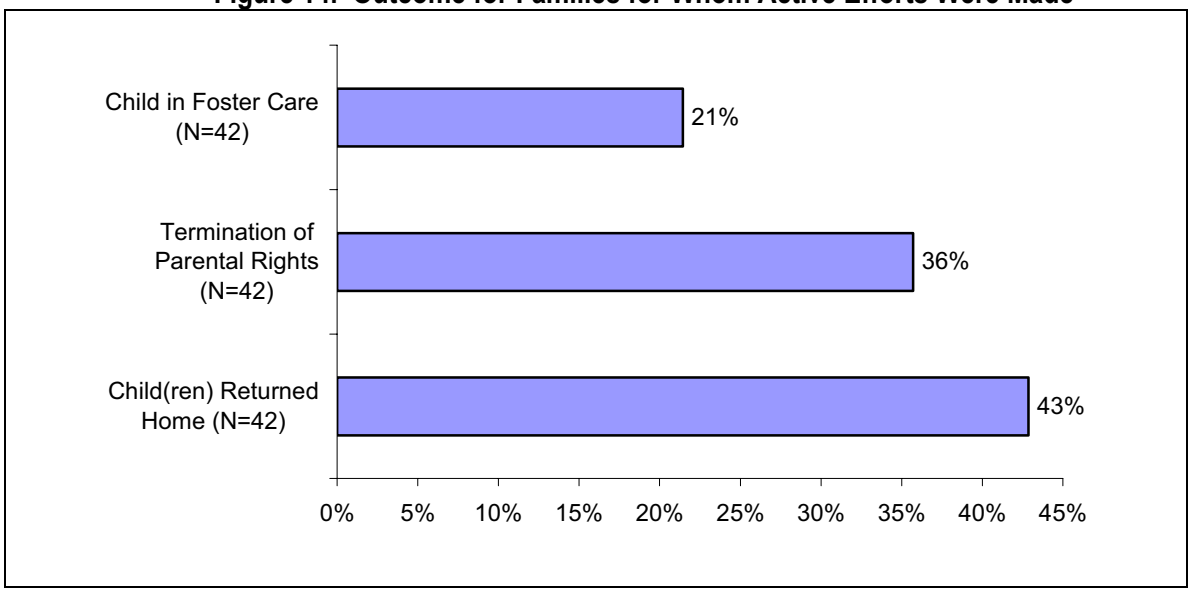


Figure 14 shows the outcomes in the 42 cases in which active efforts were undertaken. Outcomes depend on a number of variables; therefore, caution must used in drawing any correlations between active efforts and outcomes.

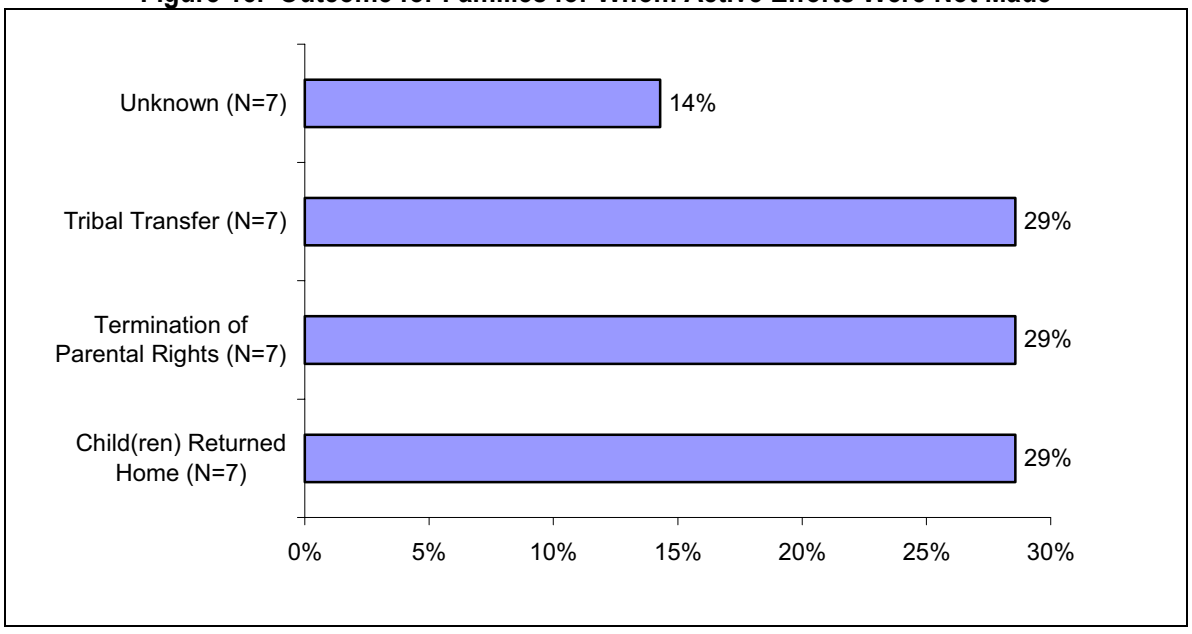
[27] 25 U.S.C. 21 section 1912(d)

Figure 14. Outcome for Families for Whom Active Efforts Were Made



Of the 42 families for whom active efforts were made, 18 resulted in the child being returned home, parental rights were terminated in 15 of the families, and nine families had the child(ren) placed in foster care, but parental rights were not terminated. Of the remaining 20 families for whom active efforts were not made, active efforts could have been made for seven families. The other 13 family cases were either transferred to another agency or the child was returned home before active efforts were initiated. Figure 15 shows the outcome in the cases where active efforts could have been made but were not.

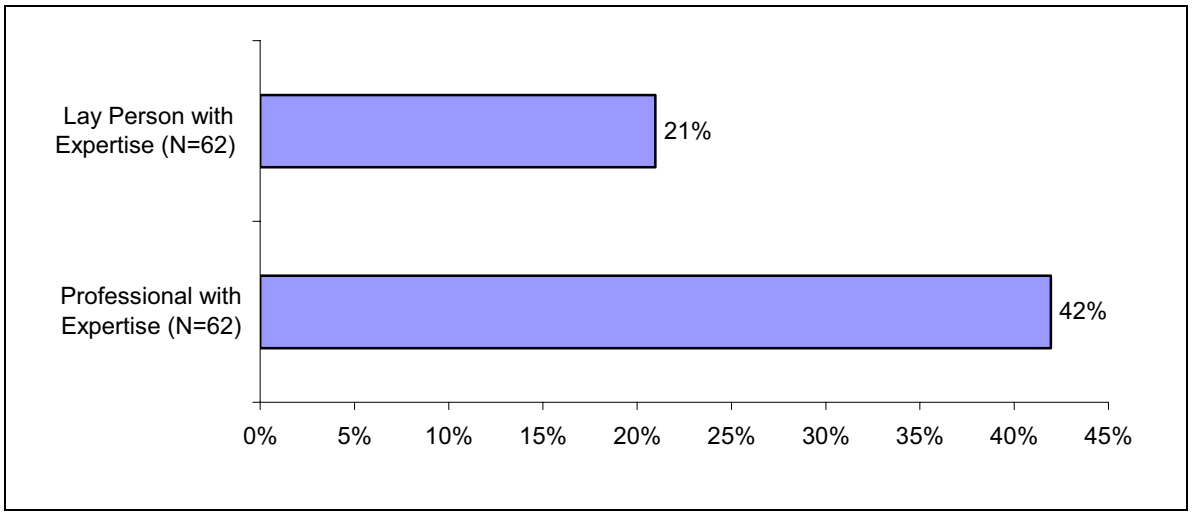
Figure 15. Outcome for Families for Whom Active Efforts Were Not Made



Active efforts were initiated for all but 13 families involving the placement of a child in foster care or the termination of parental rights. The effectiveness of active efforts depends on many variables; therefore it is not possible to draw any conclusions about the value of active efforts.

An Indian child may not be placed in foster care in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.[28] In sixty-three percent of the non-emergency cases where the child was removed from the home, the court heard testimony from either a lay expert witness having substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe; or a professional person having substantial education and experience in the area of his/her specialty. Figure 16 shows that professional persons were used almost twice as often as a lay expert with knowledge of social and cultural standards of the child's tribe. In three cases the court heard testimony from both a lay person and a professional.

Figure 16. Use of Expert Testimony Before Placing an Indian Child in Foster Care



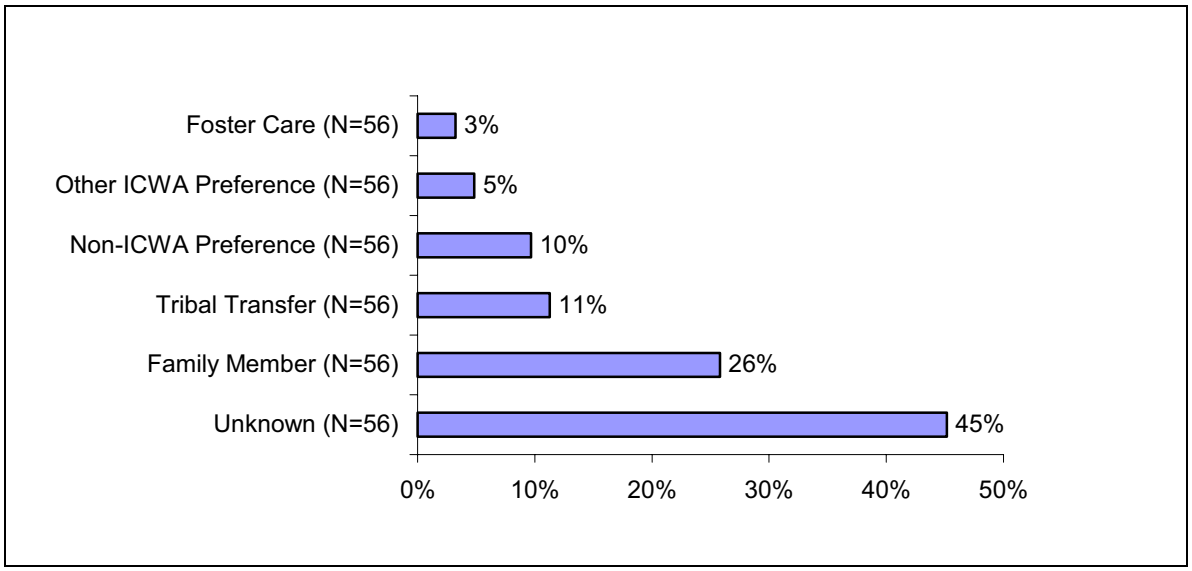
Placement of Child Pursuant to ICWA Preferences

The most challenging aspect of the file review was determining whether an Indian child in foster or pre-adoptive care was placed pursuant to the placement preferences set forth by ICWA.

[28] 25 U.S.C. 21 section 1912(e).

The ICWA placement preferences are: (a) a member of the Indian child's extended family; (b) a foster home licensed, approved, or specified by the Indian child's tribe; (c) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (d) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.[29] As Figure 17 shows, a large portion of the files reviewed did not clearly indicate whether ICWA preferences were followed. Of the 62 non-emergency cases involving foster care or pre-adoptive placement, 16 cases had placement with an extended family member, six cases involved non-ICWA placement and in 28 cases whether ICWA preferences were followed could not be determined. Having multiple siblings on the same file compounded the difficulty in determining whether the ICWA preferences were followed as often siblings had different outcomes; e.g. one sibling may have been placed with an extended family member while another child was placed in foster care. Often the file would state that the children were placed in foster care but no information on whether the foster parents were Indian or whether the children were placed together was provided. The results presented here are based on the first named child in the file as that was usually the child for whom the DSS file was also provided.

Figure 17. Foster Care or Pre-Adoptive Placement Preferences



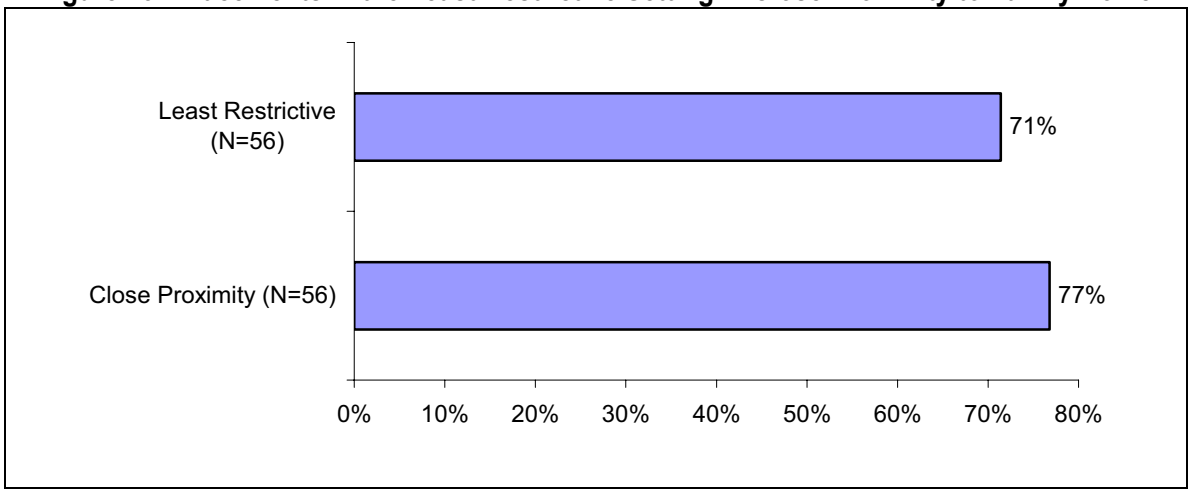
The six instances of non-ICWA preferences were cases where good cause was provided by the court to justify the use of non-ICWA placements. Unless good cause was given or it was

[29] 25 U.S.C. 21 section 1915(b)

shown that placement met ICWA preferences, the placement type was counted as unknown. Therefore, the unknown category should not be construed as non-compliance with ICWA, but only that the record does not clearly state whether the placement was an ICWA preference.

In addition to the specific placement requirements, ICWA also requires that an Indian child be placed in the least restrictive setting that approximates a family and within reasonable proximity to the child's home.[30] Specific information pertaining to these issues was not always found in the case files and the percentages reflect court findings that the child was in fact placed in the least restrictive placement most closely approximating a family and in close proximity to his or her home. Figure 18 shows this was done in almost three-quarters of the cases reviewed.

Figure 18. Placements in the Least Restrictive Setting in Close Proximity to Family Home

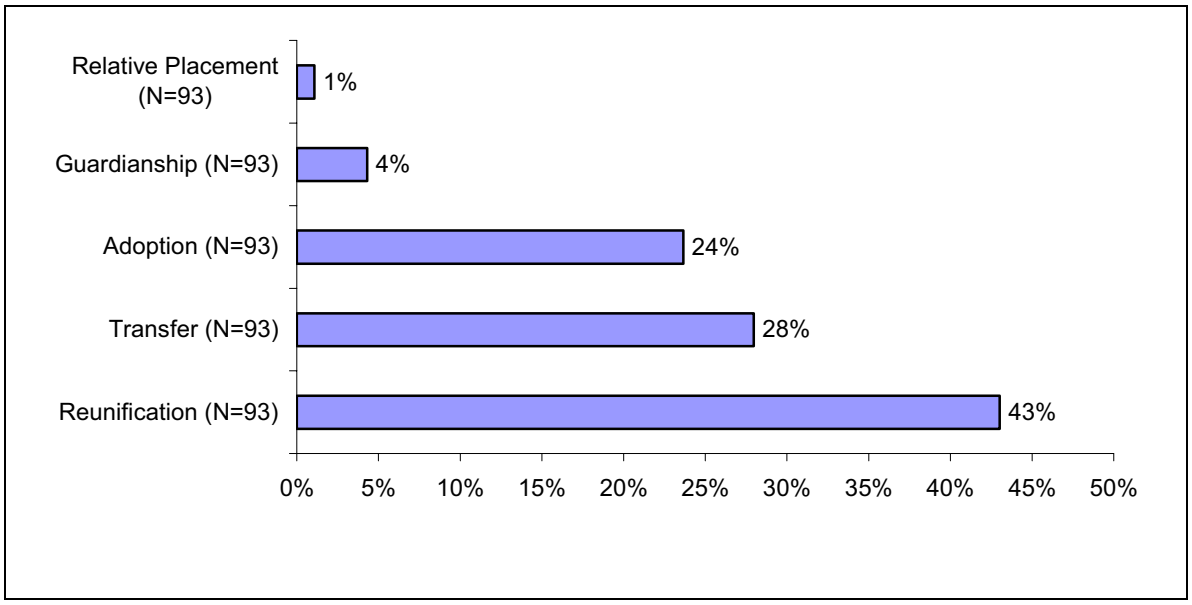


The number of children involved in non-emergency removals was 134. The DSS record management system listed 93 of the children by name. Of the 93, 40 of the children were reunited with their families; 22 children were adopted; and other agencies accepted jurisdiction over 26 of the children. Reasons for closing the file on the non-emergency removal cases are shown in Figure 19.[31]

[30] 25 U.S.C. 21 section 1915(b)

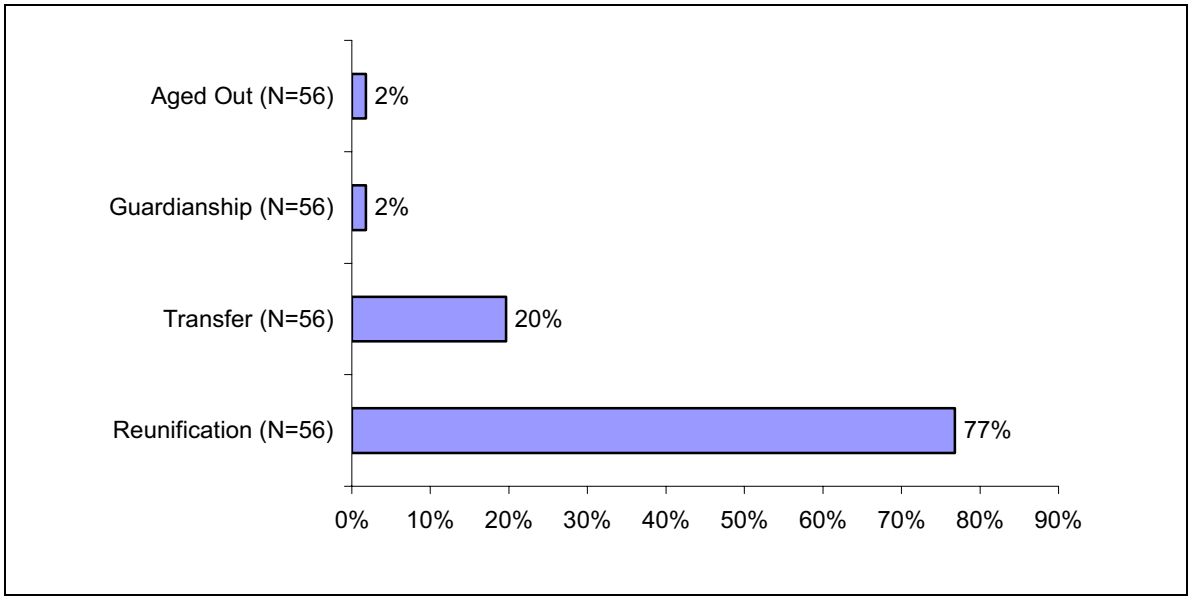
[31] The number of children in Figures 18 and 19 do not match the number of children in the 94 cases reviewed because the case files had children listed on the file that were not listed on the DSS selection list.

Figure 19. Reasons for Closing DSS Non-Emergency Removal Cases



Fifty-six children were involved in emergency removals from the home according to DSS record management system. Forty-six of these children were returned home while other agencies accepted jurisdiction over 11 children. The reasons for closing emergency removal cases by DSS are shown in Figure 20.

Figure 20. Reasons for Closing DSS Emergency Removal Cases



Best Practice Recommendations

From the sample of files examined, the following conclusions were drawn in regard to the best practices that could be implemented to assist in compliance with ICWA:

Recommendation 3. All judicial circuits should require that an ICWA affidavit be filed in every case involving an Indian Child.

Currently the Seventh Judicial Circuit is the only judicial circuit that consistently files an ICWA affidavit in abuse and neglect cases involving an Indian child. In the "South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases" (SD Guidelines) published by the South Dakota Unified Judicial System (UJS), a sample affidavit provides guidance for form and content. The affidavit should be completed by the social worker and include such information as: (a) identification of child and parents; (b) what contact was made with the child's tribe (including whether the child is a member of the tribe); (c) what efforts had been made to comply with ICWA's placement preferences; and (d) what active efforts were undertaken to maintain the integrity of the family.

The file review indicated that ICWA affidavits were filed without all of the necessary information on compliance with ICWA placement preferences or the active efforts to keep the family together for each child. An ICWA affidavit should not just be filed at the 48 hour hearing, as information pertaining to placement and active efforts is not yet available. Therefore, the affidavit should either be filed after the foster care or pre-adoptive placement or multiple affidavits should be filed at various stages of the proceedings as new information is available. Affidavits filed at the 48-hour hearing stage should not be used as a substitute for expert testimony at the adjudication phase as recommended on page 60 and 61 of the SD Guidelines. Between the time of the 48-hour hearing and the adjudication phase, active efforts are to be implemented to assist in reunification; therefore, the information in the affidavit may not accurately reflect the family situation at the time of adjudication.

Often children in the same family had different outcomes, which were not reflected in the affidavits. If a single affidavit is used for multiple children, it must clearly state whether ICWA placement preferences were followed for each child.

Recommendation 4. A clear statement of whether the foster care and pre-adoptive placement for each child is in accordance with ICWA preferences should be placed in every file.

Often children in the same family had different outcomes, which were not accurately reflected in the court files. Use of the ICWA affidavit form provided in the SD Guidelines would satisfy this requirement as long as the affidavit addressed the specific placement of each child. The type of placement – foster care, school, and etc.- was usually provided, but in 39 percent of the files it was not possible to determine whether the placement followed ICWA preferences. This is not to say that the preferences were not followed, only that it could not be determined whether they were followed.

Recommendation 5. A clear statement that parents and the tribe have the right to review court documents should be included in the notice of hearing on Petition for Abuse and Neglect.

Only 24 percent of files reviewed included documentation that the Indian child's parents and tribe were notified of their right to review the court documents that formed the basis for the abuse and neglect action. This right is one specifically provided by ICWA and should be included in the notice to the parents and the tribe of the first advisory hearing.

Recommendation 6. Certificates of Mailing should clearly indicate which documents were included in the mailing.

Determining whether notice was timely was a difficult task during the file review as Certificates of Service were not commonly used and several Return Receipts would be included in the file with no notation as to what documents had been included in the mailing. Using Certificates of Service or documenting which documents were included in a mailing on the Return Receipt would ease the difficulty in determining which parties received notice and which documents they received.

Recommendation 7. The contact person for each of the Indian tribes in South Dakota should be identified and updated quarterly to ensure that the proper representative of the tribe is receiving notice.

To foster good relations with the tribe and to ensure that the tribe receives notice, DSS should identify the appropriate contact person for each tribe. Since the contact person often changes, it would be good practice to do this quarterly so that the tribe is always informed of the

children from the tribe involved in a state court action. This also ensures that the tribe knows the DSS contact person.

Recommendation 8. "Register of Actions" should be kept in each file.

The Seventh Judicial Circuit maintains a Register of Actions (ROA) in each case file. This is a practice that should be expanded to all other judicial circuits. An ROA assists all, including judges, who have to review what are often very voluminous files, and requires relatively little time in preparing.

C. Web Based Surveys

State

General Demographics of Respondents

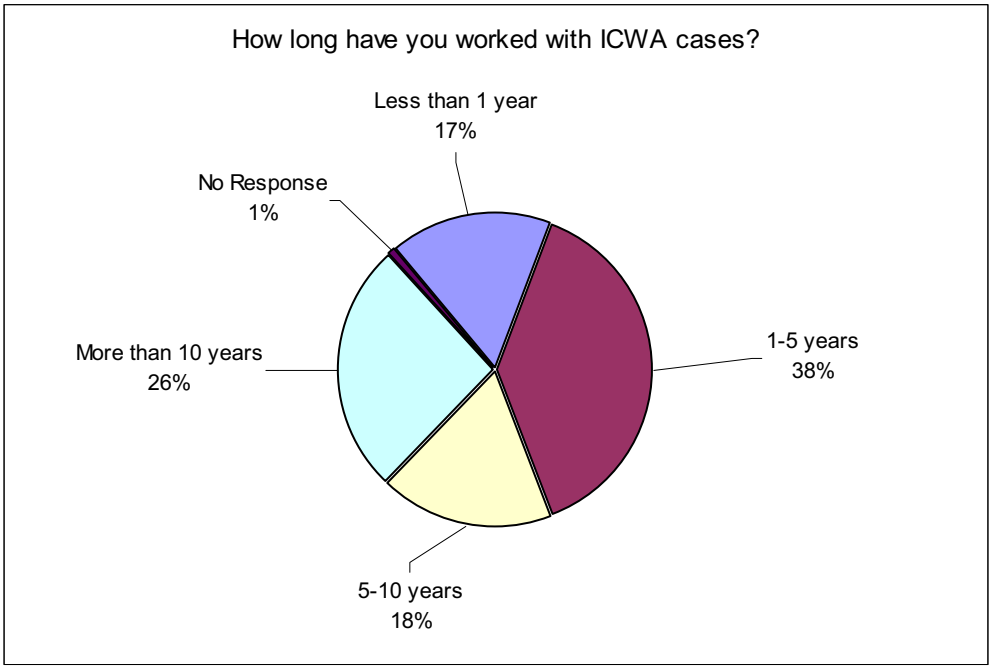
The survey contained responses from 338 individuals. The breakdown of respondents by their affiliation is contained in Table 10. The largest group participating in the survey was DSS-CPS social workers, who made up nearly 45 percent of the total.

Table 10. State Survey Participation by Respondent Affiliation

Affiliation	Frequency	Percent
CASA	18	5.40
Court Appointed Attorney	10	3.0
DOC-Juvenile Officer	15	4.5
DSS-CPS Field Program Specialist/Program Specialist	13	3.9
DSS-CPS Social Worker	151	44.9
DSS-CPS Supervisor	29	8.60
Private adoption/placement agency	11	3.30
Public Defender/Defender Services	8	2.40
State Attorney	18	5.40
UJS-CSO-Juvenile Services	46	13.7
UJS-Judge	17	5.10
Total	336	100

Initial survey questions asked respondents to describe their background in relation to ICWA. As can be seen in Figure 21, the vast majority of respondents (82 percent) indicated that they had at least greater than one year of experience with ICWA cases.

Figure 21. Length of Time Working with ICWA Cases

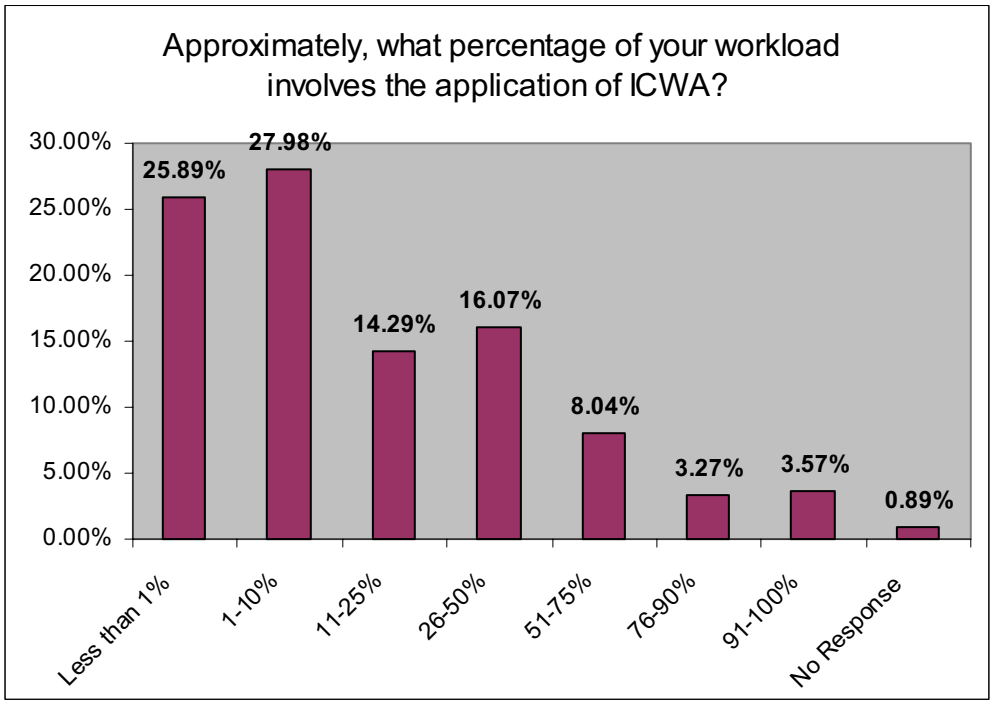


A breakdown of responses by respondent affiliation can be found in Table 11.

Table 11. Length of Time Working with ICWA Cases By Affiliation							
	How long have you worked with ICWA cases?						
		Less than 1 year	1-5 years	5-10 years	More than 10 years	No Response	Total
CASA	Count	10	6	0	1	1	18
	Percent	55.60%	33.30%	0.00%	5.60%	5.60%	100.00%
Court Appointed Attorney	Count	1	1	5	3	0	10
	Percent	10.00%	10.00%	50.00%	30.00%	0.00%	100.00%
DOC-Juvenile Officer	Count	3	9	1	2	0	15
	Percent	20.00%	60.00%	6.70%	13.30%	0.00%	100.00%
DSS-CPS Field Program Specialist/Program Specialist	Count	0	1	0	12	0	13
	Percent	0.00%	7.70%	0.00%	92.30%	0.00%	100.00%
DSS-CPS Social Worker	Count	31	84	21	14	1	151
	Percent	20.50%	55.60%	13.90%	9.30%	0.70%	100.00%
DSS-CPS Supervisor	Count	2	3	9	15	0	29
	Percent	6.90%	10.30%	31.00%	51.70%	0.00%	100.00%
Private adoption/placement agency	Count	1	4	2	4	0	11
	Percent	9.10%	36.40%	18.20%	36.40%	0.00%	100.00%
Public Defender/Defender Services	Count	1	2	2	3	0	8
	Percent	12.50%	25.00%	25.00%	37.50%	0.00%	100.00%
State Attorney	Count	0	6	3	9	0	18
	Percent	0.00%	33.30%	16.70%	50.00%	0.00%	100.00%
UJS-CSO-Juvenile Services	Count	7	10	15	14	0	46
	Percent	15.20%	21.70%	32.60%	30.40%	0.00%	100.00%
UJS-Judge	Count	1	3	1	12	0	17
	Percent	5.90%	17.60%	5.90%	70.60%	0.00%	100.00%
Total	Count	57	129	59	89	2	336
	Percent	17.00%	38.40%	17.60%	26.50%	0.60%	100.00%

Note that Table 11 above shows that the majority of DSS-CPS Social Workers (the largest group of respondents to the survey) indicated 1 to 5 years of experience with ICWA. For the most part, other groups surveyed had more experience with ICWA than the social workers– with a majority in each group indicating between five and 10 years of experience or over 10 years of experience. Only one group – CASAs – had a majority of respondents with less experience than the social workers.

Figure 22. Percentage of Workload Involving ICWA



The other initial survey question dealing with the respondent's experience with ICWA concerned the percentage of the total of a respondents' workload devoted to ICWA. The results of that question can be found in Figure 22. Note that the majority of respondents (53.87 percent) reported that ICWA involves ten percent or less of their workload. This suggests that even though large numbers of respondents have worked with ICWA for a relatively long period of time, their experience is infrequent.

A breakdown of ICWA workload by affiliation can be found in Table 12. Note that for the DSS-CPS Social Workers who responded to the survey, the percentage of their case involving ICWA runs the gamut from very few to quite a lot of cases. Social workers make up the majority of respondents to this survey, and are the only group with this varied an ICWA workload.

Table 12. Percentage of Workload Involving ICWA by Affiliation										
		Approximately, what percentage of your workload involves the application of ICWA?								
		<Less than 1%	1-10%	11-25%	26-50%	51-75%	76-90%	91-100%	No Response	Total
CASA	Count	9	3	1	0	2	0	2	1	18
	Percent	50.00%	16.70%	5.60%	0.00%	11.10%	0.00%	11.10%	5.60%	100.00%
Court Appointed Attorney	Count	3	7	0	0	0	0	0	0	10
	Percent	30.00%	70.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%
DOC-Juvenile Officer	Count	8	5	0	0	1	0	0	1	15
	Percent	53.30%	33.30%	0.00%	0.00%	6.70%	0.00%	0.00%	6.70%	100.00%
DSS-CPS Field Program Specialist/Program Specialist	Count	0	5	1	4	2	1	0	0	13
	Percent	0.00%	38.50%	7.70%	30.80%	15.40%	7.70%	0.00%	0.00%	100.00%
DSS-CPS Social Worker	Count	28	26	28	37	14	9	8	1	151
	Percent	18.50%	17.20%	18.50%	24.50%	9.30%	6.00%	5.30%	0.70%	100.00%
DSS-CPS Supervisor	Count	1	10	5	3	7	1	2	0	29
	Percent	3.40%	34.50%	17.20%	10.30%	24.10%	3.40%	6.90%	0.00%	100.00%
Private adoption/placement agency	Count	1	7	0	2	1	0	0	0	11
	Percent	9.10%	63.60%	0.00%	18.20%	9.10%	0.00%	0.00%	0.00%	100.00%
Public Defender/Defender Services	Count	2	3	2	1	0	0	0	0	8
	Percent	25.00%	37.50%	25.00%	12.50%	0.00%	0.00%	0.00%	0.00%	100.00%
State Attorney	Count	6	9	2	1	0	0	0	0	18
	Percent	33.30%	50.00%	11.10%	5.60%	0.00%	0.00%	0.00%	0.00%	100.00%

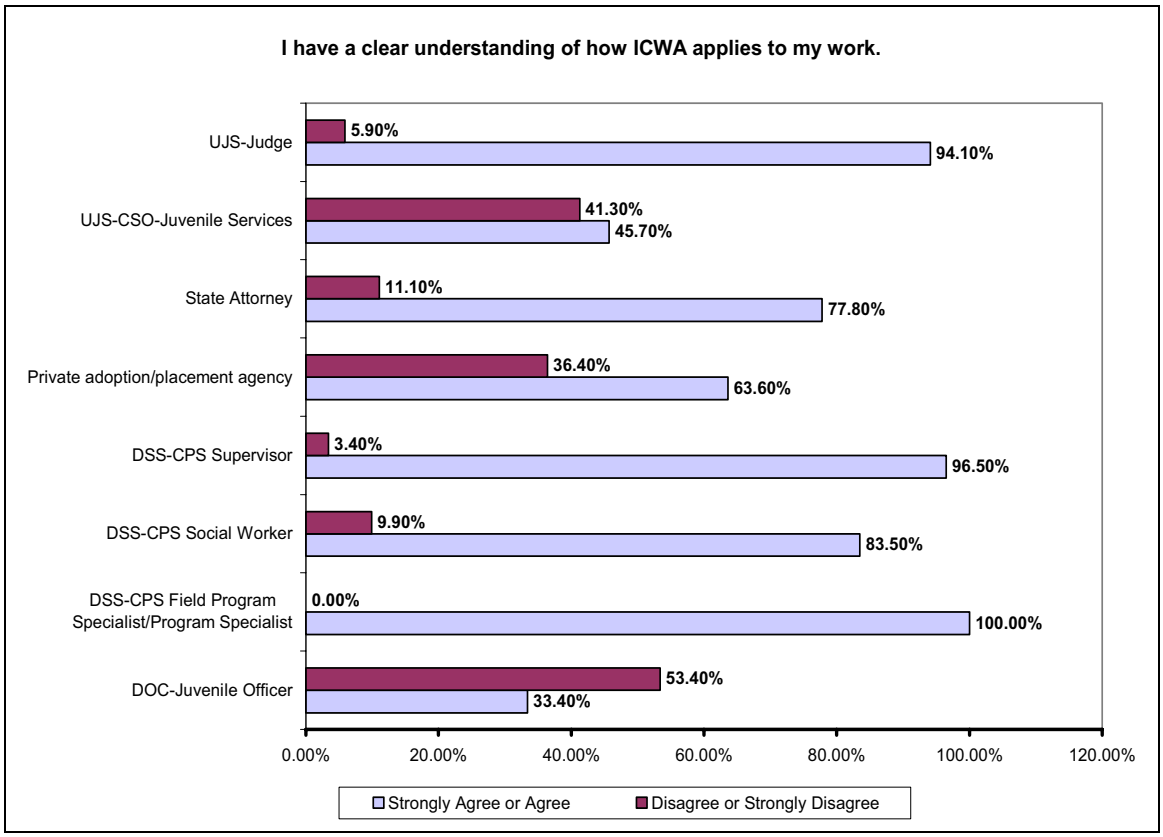
Table 12 (cont'd). Percentage of Workload Involving ICWA by Affiliation										
		<Less than 1%	1-10%	11-25%	26-50%	51-75%	76-90%	91-100%	No Response	Total
UJS-CSO-Juvenile Services	Count	21	13	7	5	0	0	0	0	46
	Percent	45.70%	28.30%	15.20%	10.90%	0.00%	0.00%	0.00%	0.00%	100.00%
UJS-Judge	Count	8	6	2	1	0	0	0	0	17
	Percent	47.10%	35.30%	11.80%	5.90%	0.00%	0.00%	0.00%	0.00%	100.00%
Total	Count	87	94	48	54	27	11	12	3	336
	Percent	25.90%	28.00%	14.30%	16.10%	8.00%	3.30%	3.60%	0.90%	100.00%

ICWA Compliance Questions

A complete set of tables showing the frequency of response by type of respondent for each question can be found in Appendix E of this report. Highlights of questions related to ICWA compliance are found below. For these analyses, the results from CASAs, Public Defenders, and Court Appointed Attorneys are omitted. ICWA compliance for these three groups goes beyond the scope of this study.

Several questions were of special interest in understanding ICWA compliance in South Dakota. The first asked if the respondents had a clear understanding of how ICWA applies to his or her work. Figure 23 shows responses by type of respondent, grouped by the percent answering "Agree" and "Strongly Agree" (combined) and the percent answering "Disagree" and "Strongly Disagree" (combined).

Figure 23. Clear Understanding of How ICWA Applies to My Work



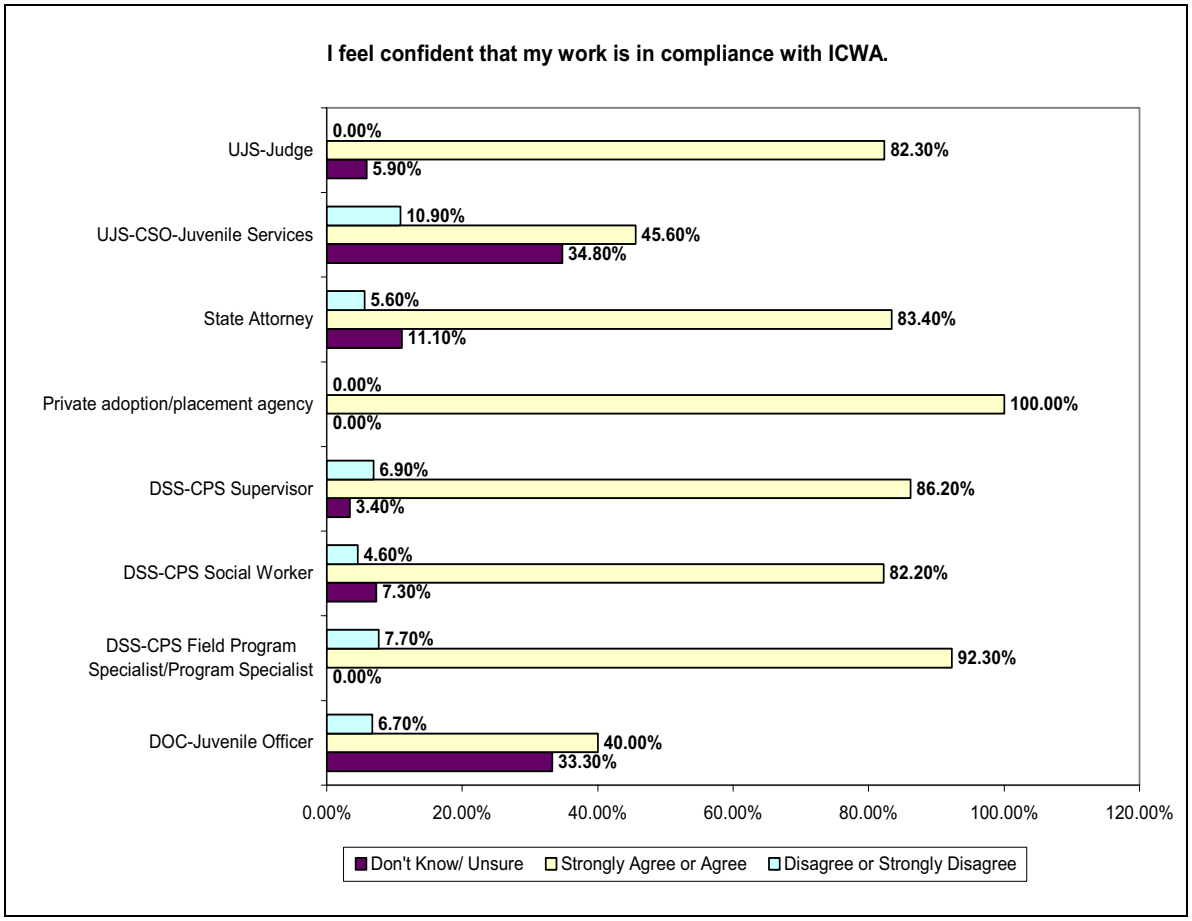
Note that in general, respondents felt that they endorsed the statement and that they had a clear understanding of how ICWA applied to their work, with two notable exceptions, both within

the Juvenile Services area. More respondents among DOC Juvenile officers disagreed or strongly disagreed with the statement, while UJS-CSO-Juvenile Services workers were almost evenly split between those who were in agreement with the statement and those who were not. This result is likely due to the few ICWA cases that respondents in these categories handle on a regular basis.

As was shown in Table 12, 86.6 percent of DOC Juvenile Officers and 74 percent of UJS Juvenile Service workers stated that their ICWA caseload was either less than one percent or no more than ten percent of their total caseload. This lack of regular, ongoing experience with ICWA or the need for clarification in the application of ICWA in CHINS cases is likely the reason that these workers have a less-than-clear understanding about how their work relates to ICWA.

Another question of special interest in the survey asked respondents about how confident they were that their work was in compliance with ICWA. An analysis of the results of that question can be found in Figure 24.

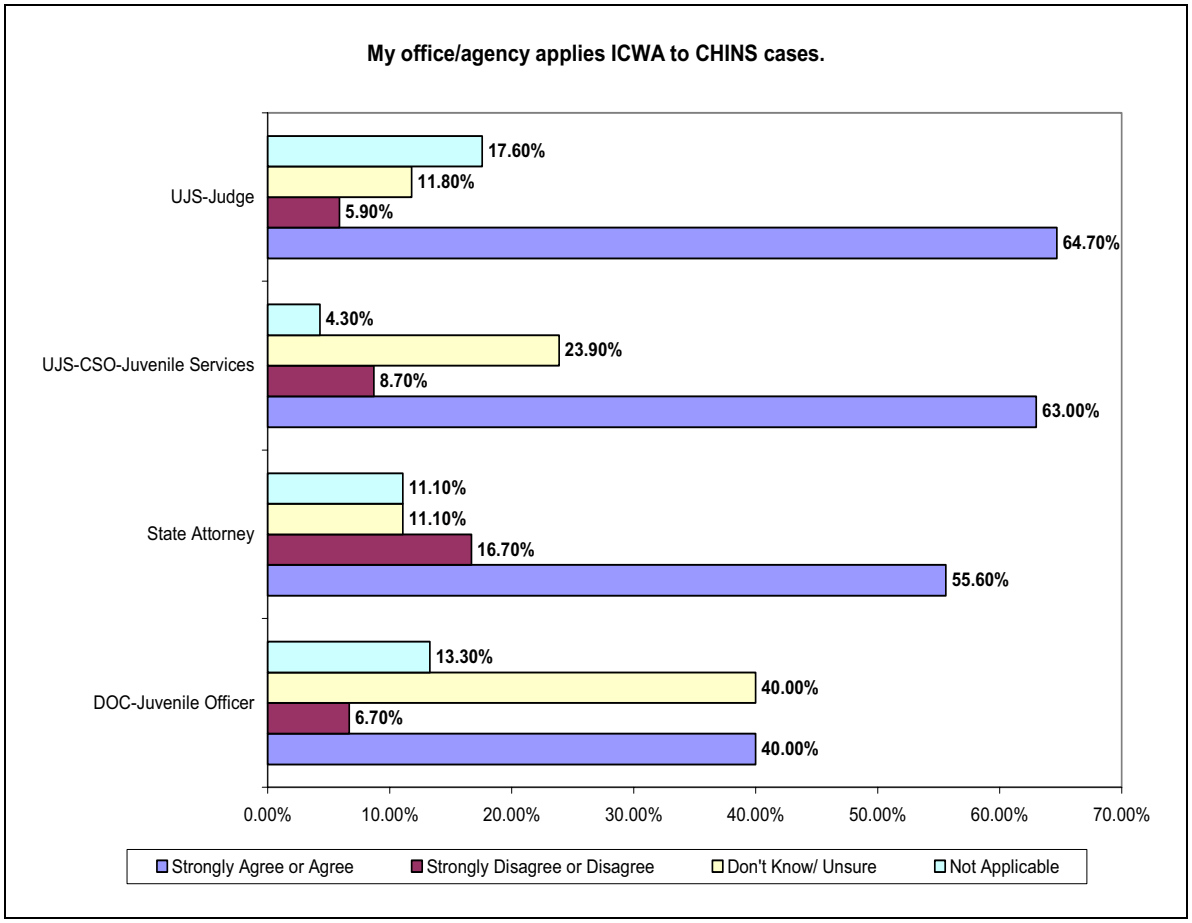
Figure 24. Confident that My Work is in Compliance with ICWA



As with the question concerning the understanding of ICWA, it is the Juvenile Services workers (DOC-Juvenile Officers and UJS-CSO-Juvenile Services workers) who indicated – in large numbers – a lack of agreement with the statement. However, for this question the pattern of responses was different. Large numbers of respondents who work in Juvenile Services indicated the answer choice, "Don't Know/Unsure." Eleven percent of State's Attorneys also indicated that they weren't sure if their work was in compliance with ICWA.

A similar pattern of results appears when analyzing the item asking if the respondent's office applies ICWA to Children in Need of Supervision (CHINS) cases. Although the number of respondents agreeing or strongly agreeing with the statement was much higher than the number disagreeing or strongly disagreeing with the statement, large numbers of respondents either indicated "Don't Know/Unsure," or "Not Applicable." Note that for Figure 25, the analysis was confined to those respondents who work most closely with CHINS cases.

Figure 25. Application of ICWA to CHINS Cases



These same three items above were analyzed by the length of time respondents have worked with ICWA cases. In general, experience with ICWA did not change the level of endorsement with the items – except that those respondents with less than one year of experience were more likely to choose the response "Don't Know/Unsure" than those with more experience.

Tribal Communication Questions

In general, the results of ICWA compliance items were positive (with large numbers of respondents answering "agree" or "strongly agree," see Appendix E). The exceptions concerned questions related to rating communication with the tribes.

As Figure 26 shows, large numbers of respondents (40.18 percent) indicated "disagree" or "strongly disagree" to the question concerning good communication between the respondent's office and the tribes. This is a larger proportion of respondents than indicated a positive response to the question.

A similar pattern can be seen in the answers to the question concerning the timeliness of responses from the various tribes (see Figure 27). In this case, a majority of respondents (60.42 percent) answered negatively to the question – the single most negative item in the survey.

Figure 26. Communication with the Tribes

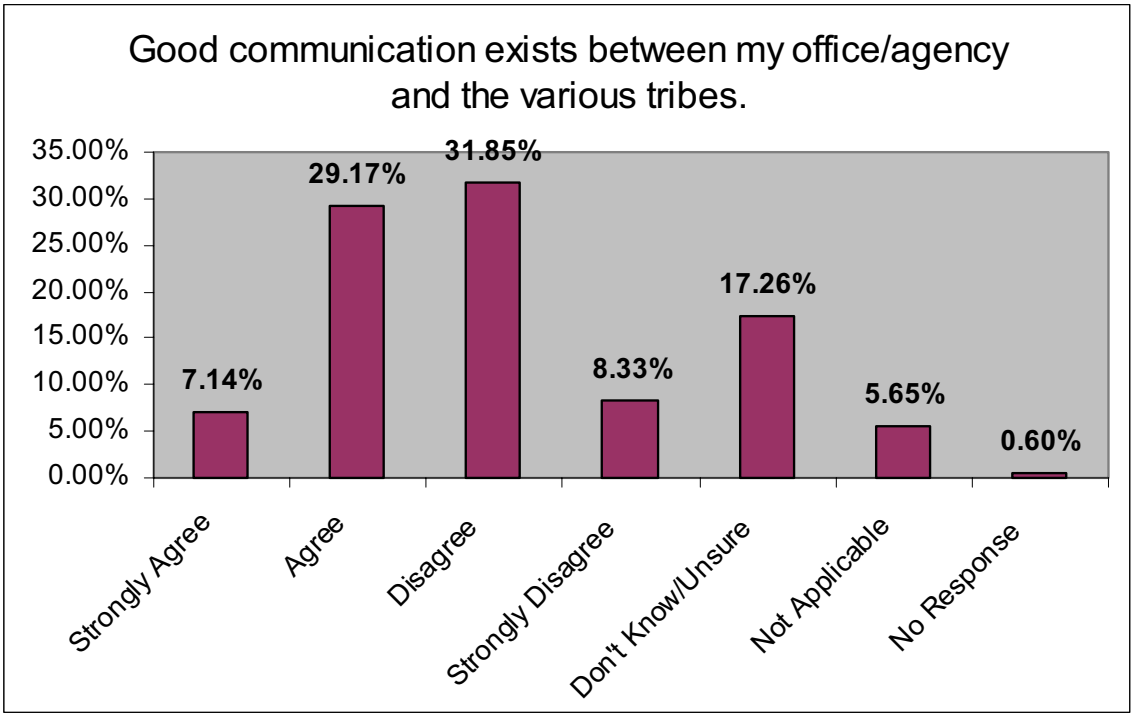
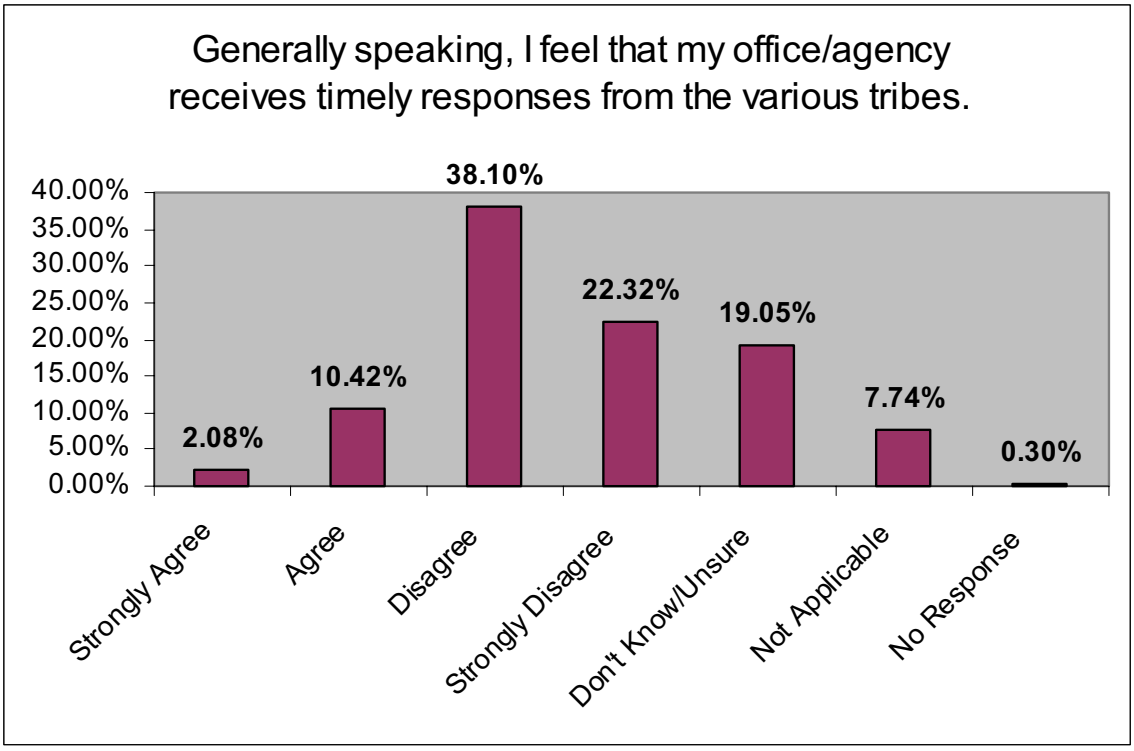


Figure 27. Timely Responses from the Tribes



Agency Performance Ratings

Respondents were asked to rate the performance of the four organizations specifically articulated in SB 211. The results are located in Figures 28-31.

Figure 28. Department of Social Services-Child Protection Services Performance Rating

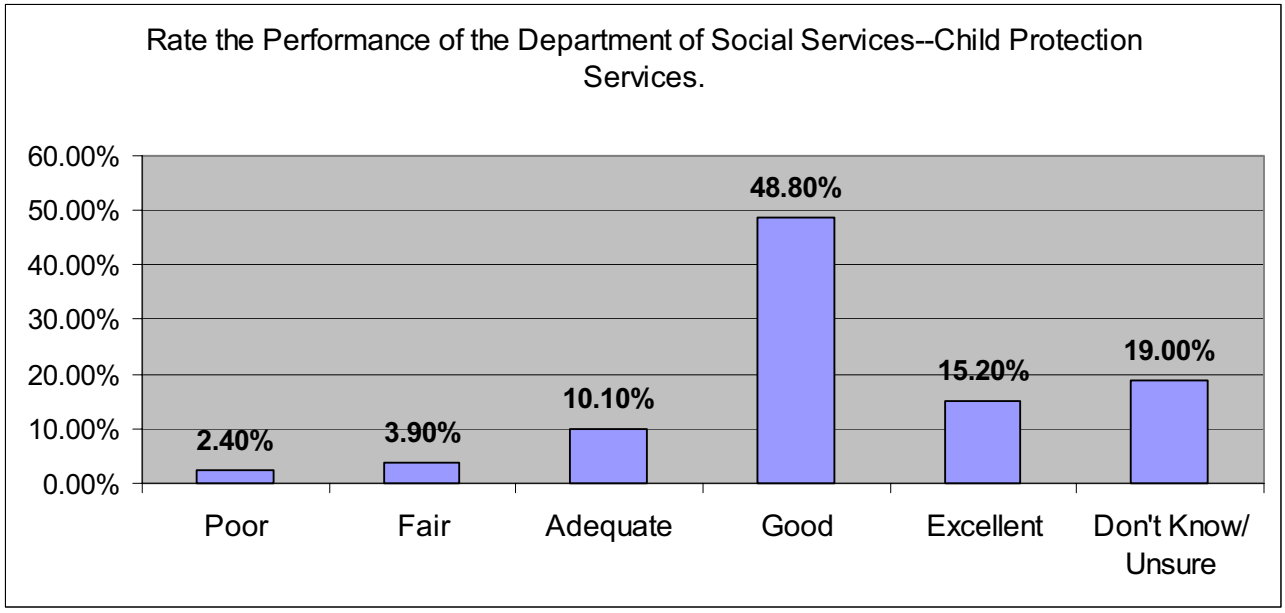


Figure 29. Unified Judicial System Performance Rating

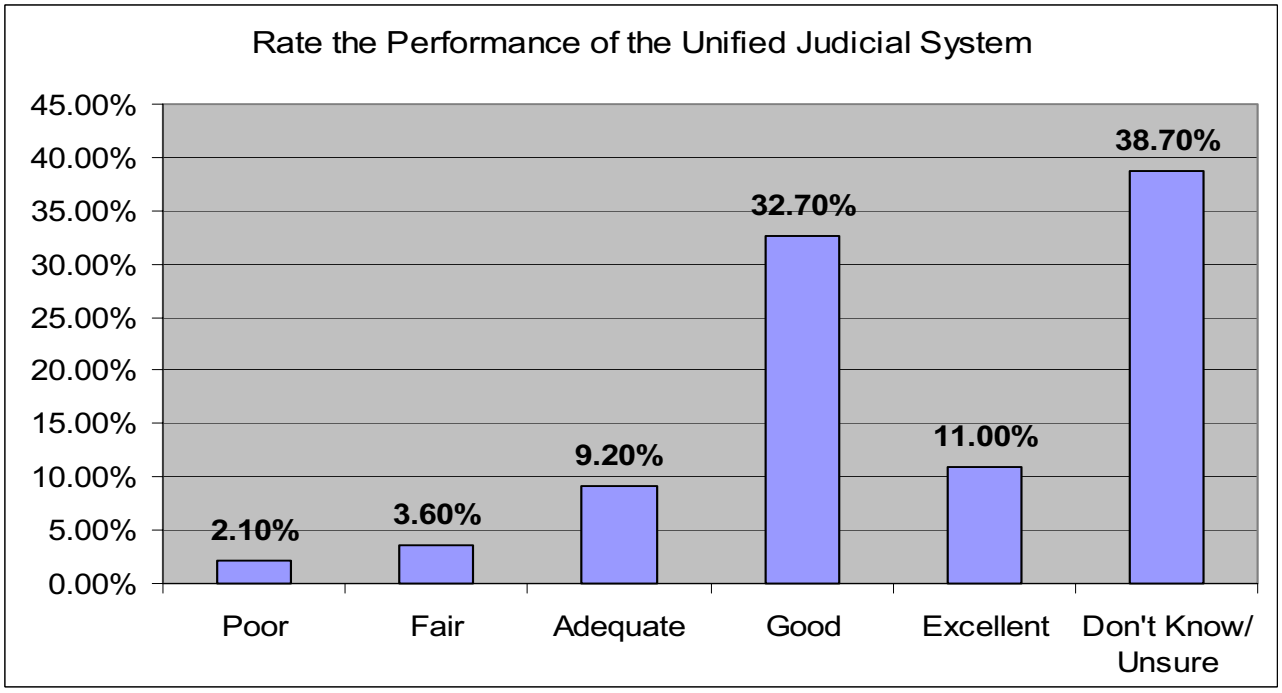


Figure 30. State Attorney Performance Rating

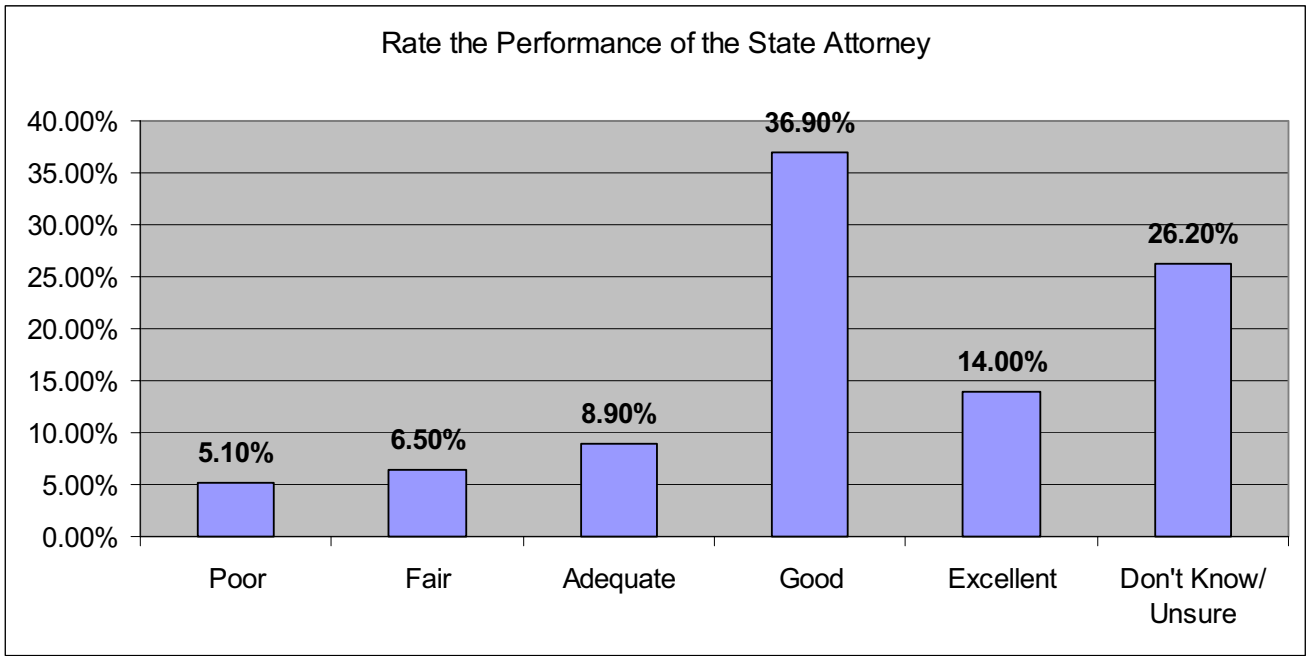
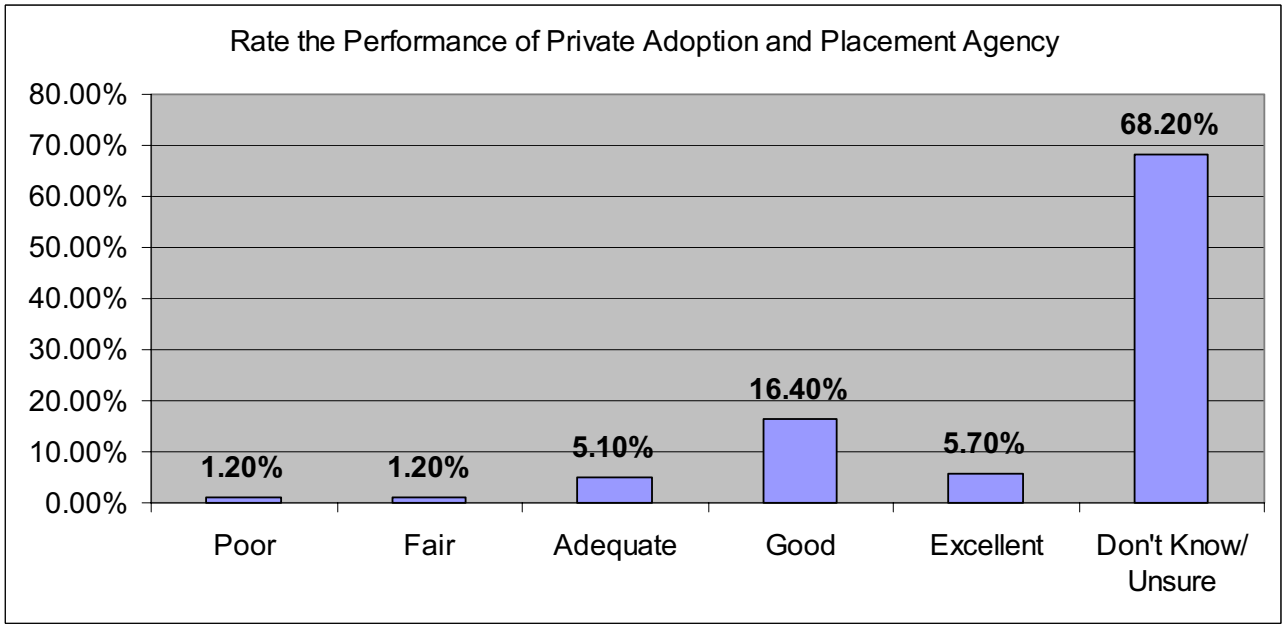


Figure 31. Private Adoption and Placement Agencies Rating

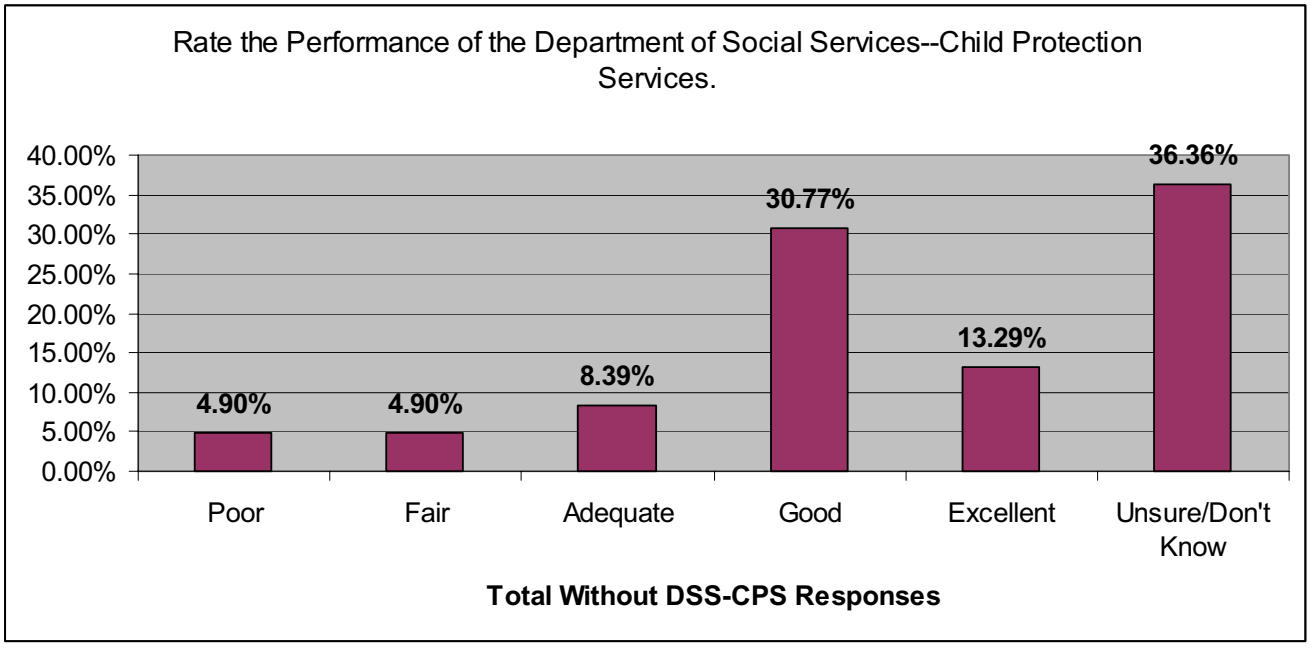


Respondents were generally positive toward DSS-CPS; with the majority (64 percent) indicating performance of the agency was either "good" or "excellent." Ratings for the UJS, state attorney's office, and private adoption and placement agencies were less positive, largely due to the influence of large numbers of respondents indicating "Don't Know/Unsure." This was especially pronounced in the case of the private adoption and placement agency item. The state attorney's office ratings included the lowest numbers – 20.5 percent gave the state attorney's office scores below "good."

It is possible that the generally high marks given to DSS-CPS were the result of a "positivity bias" shown by DSS-CPS employees toward their own agency. Given that the majority of respondents were DSS-CPS employees, results for the question concerning DSS-CPS were re-analyzed by job type, and the DSS-CPS respondents were removed.

The results (seen below, in Figure 32) show that without the large numbers of DSS-CPS respondents in the analysis, the agency remains positively rated by the other respondents, with 44.06 percent of the respondents rating the agency as either "good" or "excellent." The change in the results is the increased proportion of respondents indicating "don't know/unsure," once the DSS-CPS respondents are removed from the analysis. This essentially mirrors the results obtained for the other agency-performance questions.

Figure 32. Department of Social Services-Child Protection Services Without DSS Responses



Tribal

In total, seven tribal ICWA stakeholders participated in the tribal survey. Of the seven, three (43 percent) worked for the Oglala Sioux Tribe and two (29 percent) worked with the Standing Rock Sioux Tribe. Of the respondents, three (43 percent) identified their professional role as tribal court judicial officers. The following section briefly discusses the tribal survey results. Frequencies for each question to the Tribal Survey are presented in Appendix F. Due to the low number of responses, additional analyses were not performed.

Survey participants provided the following responses to inquiries:

- Survey participants stated that 60 percent or less of cases provide sufficient and complete information necessary to determine whether the child is an Indian child.
- Approximately one-third of responders stated on average it takes 1 to 2 weeks to determine whether the child is an Indian child and one-third of survey participants stated, on average, it takes more than 4 weeks.
- All survey participants stated they would participate in a collaborative training session between their tribal office and DSS to improve case management processes and to improve state compliance and efficiency in processing ICWA cases.
- Only one of the seven survey participants stated that the tribe they are working with was directly contacted by the state for comments as a stakeholder in the preparation of the 2005-2009 State of South Dakota's Child and Family Services Plan.

Survey participants provided the following responses for ICWA case proceedings that they were involved in for the time period from January through September, 2004.

- Approximately fifty percent of survey participants stated that 75 – 99 percent of ICWA cases are transferred from state court to tribal court upon request by the tribe.
- Approximately fifty percent of survey participants stated that in 25 percent or less of all cases, DSS efforts to prevent the breakup of the family involved or utilized the available resources of the Indian child's tribe's family preservation programs, the extended family of the Indian child, and/or any tribal social services agency.
- A little over fifty percent of survey participants stated that in less than 25 percent of ICWA cases, Indian children were placed in the least restrictive setting which most approximates a family and in which their special needs were met.
- A little over fifty percent of survey participants stated they did not know whether Indian children were placed in foster care or preadoptive placement homes according to the placement preferences, for those ICWA cases that they received notice of by the DSS or state attorney.

D. Focus Groups

State Focus Groups

State ICWA stakeholders were invited to participate in a series of focus groups, to discuss ICWA compliance and related issues, throughout the state. Participants included DSS supervisors and social workers, UJS judges, court services officers, clerks of court, state attorneys, private adoption and placement agency personnel, DOC juvenile agents, and court appointed attorneys and public defenders. In total the NCSC/NAILS project team facilitated 40 individual focus group sessions.[32]

By and large, DSS participated in the greatest number (19) of focus groups due to the sheer quantity of social workers and supervisors across the state. In total, three sessions each were held for judges, court services officers, clerks of court, and DOC juvenile agents. The NCSC facilitator led four sessions each for state attorneys and private adoption and placement agencies. Public defenders and court appointed attorneys participated in one session. Participation by DSS, UJS court services officers, and DOC juvenile agents was excellent.

During the focus group sessions participants were asked to comment upon the following areas

- Positive and Negative Aspects of ICWA
- ICWA Training, Technical Assistance, and Written Standards
- ICWA Current Practice, Determination and Compliance,
- Barriers to ICWA Compliance
- Improving ICWA Compliance

The following is a summarized and generalized discussion of the information gleaned from the sessions. Appendix G contains a complete breakdown of each focus group by location and by focus group type. While in some instances individual comments have been included, the source is anonymous.

Positive and Negative Aspects of ICWA

Focus group participants across all groups identified several positive aspects of ICWA. These primarily concerned (1) the emphasis on cultural awareness and heritage for Indian children;

[32] This figure reflects the number of focus groups actually completed. In some instances, no one appeared for scheduled focus groups. Finally, several focus groups scheduled in Pierre for September 20, 2004 (judges, court services officers, DOC juvenile agents, and public defenders/court appointed attorneys) were cancelled due to the travel delays of the NCSC/NAILS project team. Attempts to reschedule off-site conference calls were unsuccessful.

(2) the availability of additional placement resources for children; (3) the focus on family members for placement; and (4) the access to an additional support system and its network of resources. Of particular interest were the statements by several DSS participants of the unintended benefits of ICWA. In essence they stated that ICWA created a heightened awareness of culture, relative placement, and active efforts for all children served by DSS, not just American Indian children.

While focus group participants were able to articulate several positive aspects, in most instances, the negative list and related discussion were longer than the positive. This discussion of the negative aspects was also generally peppered with examples of ICWA failures. The negative features reported included (1) the lack of American Indian resources and foster homes; (2) the lack of and timeliness of tribal response to notification, intervention and transfer; (3) the revolving door syndrome of children transferred to tribal court and tribal ICWA workers who return to state court and DSS supervision; (4) the tension between ICWA and ASFA; (5) the delay in permanency for Indian children; (6) the focus on preserving a cultural heritage over the child's best interests; and (7) the infringement on the privacy rights of birth parents in private adoption situations.

ICWA Training, Technical Assistance, and Written Standards

Training

The exposure to ICWA during initial and ongoing training varied across the participant groups. UJS court services officers and DOC juvenile agents indicate that there is little to no training on ICWA. DSS personnel, generally, appeared to receive substantially more training on ICWA and related cultural issues than any other state agency according to the statements of focus group participants. For DSS social workers, ICWA is a component of initial certification training. Many DSS social workers reported that the presentation is not as effective as it could be. For example, certification training is overwhelming and ICWA gets buried until it becomes a "real" issue through case assignment. Additionally, there is a need to place ICWA within the context of social work practice (i.e., what does active efforts mean as a social worker) rather than focusing on the historical and legal aspects better left to other child welfare professionals. As one DSS focus group participant stated, "make the ICWA training come to life." Other DSS opportunities for ICWA training include written updates, speakers, case supervision, staff meetings, and handouts.

The state attorney participants report that there is no mandatory training upon election to the office. There are, however, annual state attorney conferences. According to one group of

focus group participants, ICWA was on the agenda many years back. Judges report various ICWA training opportunities including the National Judicial College and other organized trainings. Private adoption agency participants indicated that they participate in several trainings that feature ICWA and cultural matters. These include presentations by DSS personnel, the CASA programs, and other community based trainings. Orientation and initial trainings appear to differ depending upon the agency. Several of the private agencies participating in the focus groups have a mandatory orientation training that includes ICWA while other agencies report that they do not.

> ***Recommendation 9. ICWA should be mandatory subject matter for all child welfare and CHINS professionals. All state agencies should review their current training opportunities and curricula in order to develop and or enhance ICWA training. It is especially important that ICWA training focus on the specific responsibilities for each state stakeholder group.***

In addition to the substantive components of ICWA, another training issue deals with the "documentation" and record keeping aspects involving ICWA cases and automated information systems; specifically the documentation of ICWA contacts for DSS cases and the documentation of ICWA cases by the UJS. According to DSS personnel, there are inconsistent documentation practices of case-related contacts for ICWA cases among social workers. Whether a contact is a "legal," "service," or "ICWA," contact is very much the interpretation of the DSS social worker; although there are specific statements in the Family and Children Information Services (FACIS) manual. The impact of this is twofold: (1) the ability to utilize FACIS data for a future compliance assessment is questionable and (2) the limited capacity to supervise and review case activities (and specifically ICWA activity) through FACIS.

As for the UJS case management system, abuse and neglect cases and adoption cases have an "ICWA button" on the "participant" tab that identifies whether it is an ICWA case. The clerks are instructed to check this box if the child is a member of an Indian tribe, eligible for membership in an Indian tribe, or is the biological child of a member of an Indian tribe. It is not a mandatory data entry field. Race data can be entered on the demographic record but it is not required. According to discussions with clerks of court, data entry practices vary across the state; specifically with regard to the use of the "ICWA button" and race data. In some instances, they are routinely used and in others there is awareness that the fields are available, albeit optional, but the data are not entered. Finally, in some locations, clerks were not aware that the "ICWA button" was a data field at all. Therefore, the ability to utilize the UJS automated system for tracking ICWA

cases and Indian children is virtually non existent. For the purposes of this project, the UJS was unable to generate a list of cases involving Indian children or ICWA for case file review purposes. UJS cases were cross referenced through the DSS list of closed cases and then a manual search for the case number by child's name and the circuit of origin. Neither the DSS nor UJS scenario is optional for future internal or external assessments of ICWA compliance.

Recommendation 10. DSS should continue to clarify and train social workers regarding "ICWA contacts" case documentation. Quality assurance of all contact data fields should be performed periodically.

Recommendation 11. UJS should convert the "ICWA" and "race" data fields in its automated civil case management system to mandatory fields for case-related data entry. Additionally, initial and refresher trainings for clerks of court should emphasize these data fields.

Technical Assistance

During the focus groups, participants were asked to describe the type of technical assistance available to them in the event of ICWA specific questions or concerns. For the most part, all participants indicated that they had developed informal networks within their own agency. For example, DSS social workers stated that veteran workers and supervisors were often the first point of contact in the instance of ICWA related questions. Additionally, case staffings with supervisors and all-staff meetings were helpful vehicles to address not only ICWA issues but also other types of questions. Many focus group participants for all state agencies indicated that they had developed other contacts outside of their own agency. For example, private adoption and placement agency personnel indicated that they frequently relied on DSS personnel to answer ICWA questions. This approach highlights the resourcefulness of the child welfare professionals yet underscores the fact that state agencies need to enhance their infrastructure to institutionalize ICWA into the culture of their operations, rather than relying upon the individual efforts of its employees.

Recommendation 12. All state and private adoption agencies should designate specific local, regional, and state-level ICWA employee resources within their organizations. For DSS and UJS, this may include specifically designated ICWA positions. For the private adoption agencies, this might include a specifically designated individual within the private agency "network." This information should be widely disseminated throughout each organization.

Written Standards

The availability of written standards and practices varied by state agency, according to focus group participants. According to DSS personnel, the DSS *Child Protection Manual* contains information regarding ICWA processes and forms. Additionally, each social worker and supervisor has access to the *SD Guidelines* (discussed in Section II of this report). Unfortunately, according to most, the *Manual* is cumbersome, is not user friendly, and is not all that helpful to social work practice. As a result, the Manual often sits on the shelf rather than utilized as an active resource. Currently, the DSS *Child Protection Manual* is undergoing revision. According to those focus group participants involved in the process, the new version will be a significant improvement to the current version. This includes the determination and application of ICWA.

The state attorneys report, generally, that there is no specific state attorney practice manual. However, they do have access to the SD *Guidelines.* DOC juvenile agents report that there is a very limited discussion of ICWA in their written standards (*Policy and Procedure Manual for Juvenile Corrections, Juvenile Community Corrections Memoranda Manual*, and the *Department of Corrections Juvenile Corrections Manual*); primarily that ICWA does not apply to delinquency and CHINS cases. UJS court services officers report that there is no discussion of ICWA in their Source Book. For judges, there are several written sources of information including the *SD Guidelines* and Chapter 9 of the *Benchbook for South Dakota*.[33] Finally, private adoption agencies report a range of written documents and standards addressing ICWA from checklists, in-house policy, and procedure manuals, to ad hoc packets of information. It is critical that, in order to institutionalize and create a culture of ICWA, that all state agencies have solid written documentation and standards addressing the topic. This includes those organizations and departments that have limited or infrequent contact with ICWA (such as DOC juvenile agents and UJS court services officers) regardless of the fact that CHINS practices may or may not change in the future. The mere fact that these agencies operate in a state with such a large Indian population is, on its own, reason enough to raise awareness and understanding of the issue.

[33] The *Benchbook* contains a discussion on the applications of ICWA in juvenile matters; specifically abuse and neglect cases and CHINS.

Recommendation 13. Each state agency should develop written standards and protocols discussing ICWA and its practical application. For those that already have written standards in place, these documents should be reviewed and updated at regular intervals. It is especially important that ICWA standards and protocols focus on the specific responsibilities for each state stakeholder group.

ICWA Current Practice, Determination, and Compliance

Identification of Children as Indian for the Application of ICWA

It appears that through the discussion with all participant groups that the determination of whether the child is an Indian child is primarily the responsibility of DSS in abuse and neglect cases and adoptions. In most cases, the state attorney and the judges report that they rely upon the DSS representation of the child's Indian heritage. This DSS determination is accomplished through initial and ongoing efforts such as intake and family assessment forms. Additionally, DSS workers indicate that they complete and submit enrollment papers to the tribes. This enrollment activity, however, is often hampered by the difficulty and delay in obtaining enrollment packets from individual tribes.

Recommendation 14. The tribes should develop standardized forms for DSS and make them readily available for immediate use.

The role of judges regarding the determination of the applicability of ICWA and whether the child is an Indian child varies throughout the state. In some instances, judges rely solely upon the statements contained in the petition; others appear to rely upon the petition and statements in court. In some circuits judges make active inquiry and a record regarding the applicability of ICWA at each stage of the proceeding. It is the latter approach that ensures that the court is an active contributor in ICWA determination and that no cases fall through the cracks. Finally, regardless of whether there is an initial determination or not that ICWA applies, according to all focus group participants, in an abundance of caution the case proceeds as though ICWA is applicable until such time as there is a determination otherwise (i.e., that a child is not eligible for enrollment in a tribe.) In some instances, this information is not finalized during the duration of the case.

Recommendation 15. At each stage of the proceeding, judges should make an active inquiry about the applicability of ICWA and the status of the determination that the child is an Indian child. This information should be included for the record of the case and the court order. Moreover, the UJS should adopt the standards and practices set out by the National Council of Juvenile and Family Court Judges- Indian Child Welfare Act Checklists for Juvenile and Family Court Judges, June 2003. These checklists articulate best practice standards for the state court processing of ICWA cases.

In the case of private adoptions, the determination that a child is an Indian child is assessed by the private adoption agencies. Race and ethnicity data are completed for each birth parent and child. In the event ICWA is applicable (i.e., enrollment, enrollment eligibility, domicile, etc), birth parents are notified of the agency's requirement to notify the tribe for placement. As reported by the private adoption agencies participants, in most instances birth parents either sign an affidavit requesting that the tribes not intervene in the adoption or elect to parent their child rather than advise the tribe.

Proper Notice of Proceedings Involving an Indian Child

While practices do vary across the state (as to the format and type of notice), focus group participants convey that they engage in active notification processes. DSS social workers and supervisors indicate that initial notice of removal and of the 48-hour hearing is provided to the tribes and/or the ICWA worker and/or the Bureau of Indian Affairs. The type of notice ranges from telephone, fax, and written letter either by certified or regular mail. This depends upon the specific DSS worker and, in many instances, upon the tribe. In some instances all three contacts are made. Additionally, ongoing case-related notices, information and reports are forwarded to the tribe and/or the ICWA worker and/or the Bureau of Indian Affairs; again through telephone, fax, and certified or regular mail. Moreover, it is routine practice to invite ICWA workers to Permanency Plan Review Team (PPRT) meetings. Finally, DSS focus group participants indicated that notice continues through adoption to request approval for adoptive placements of Indian children. DSS maintains a list of tribal and ICWA contacts, which is updated as changes are made to tribal personnel.

All state attorneys participating in the focus groups report that the initial petition is forwarded via registered mail to the tribes and/or the ICWA worker and/or the Bureau of Indian

Affairs. It appears that there is, however, no standardized format for the petition and accompanying documents. Subsequent documents are forwarded either by registered or regular mail to the tribes and/or the ICWA worker and/or the Bureau of Indian Affairs. Proof of certified mail is generally filed with court and is also maintained in the state attorney's files.

Recommendation 16. DSS and the state attorneys should adopt a statewide and uniform notification process for notifying the tribes, the ICWA worker, and the Bureau of Indian Affairs. This should include uniform language and format.

Appointment of Counsel in ICWA Cases

During focus groups, judges report that the appointment of counsel for parents and children is routine in all abuse and neglect matters; regardless of whether the case involves ICWA or not. Appointment of counsel for the child is required by South Dakota Statute 26-8A-18 upon the filing of the petition.[34] Generally, counsel for a parent who is present for the hearing is also appointed early in the proceeding. The appointment process varies, however, across the state. In some instances, judges appoint the public defender's office; some judges select from a list of contract court-appointed attorneys; others select from a rotation list of court appointed attorneys; others make ad hoc appointments from the local bar. The only reported concern with the appointment of counsel is that the quality of representation depends upon the skill, knowledge and ability of the attorney.

Recommendation 17. In ICWA cases, judges should appoint attorneys who are knowledgeable of and functional in abuse and neglect proceedings, child welfare issues, treatment and rehabilitative services, and ICWA for effective representation.

Recommendation 18. Judges should appoint attorneys for all parents, including those who are not present during the hearings and/or those who are served through publication.

[34] SL 1984, ch 192, § 9; SL 1991, ch 217, § 126B; SDCL, § 26-10-17. 26-8A-18. Appointment of counsel--Duties of counsel--Assistance. Notwithstanding the provisions of §§ 26-7A-31 and 26-8A-9, the court shall appoint an attorney for any child alleged to be abused or neglected in any judicial proceeding. The attorney for the child shall represent the child's best interests and may not be the attorney for any other party involved in the judicial proceedings. The court may designate other persons, including a guardian ad litem or special advocate, who may or may not be attorneys licensed to practice law, to assist the attorney of the child in the performance of the attorney's duties. Compensation and expense allowances for the child's attorney shall be determined and paid according to § 26-7A-31.

Active Efforts to Provide Remedial and Rehabilitative Programs

As stated previously, a reported yet unintended benefit of ICWA was that it created within DSS a culture of active efforts for all children. According to one DSS social worker, "we provide active efforts and remedial services all the time. " ICWA requires active efforts while ASFA talks about reasonable efforts. For many DSS workers and supervisors articulating the difference was difficult. Active efforts were described by several DSS social workers and supervisors as case specific and "going the extra mile" for Indian children and families. According to most DSS personnel, making active efforts is truly a challenge given the lack of services and placement resources throughout the state.

Qualified Expert Witnesses

Practices throughout the state differ on the use and designation of expert witnesses in ICWA cases. Some judges report that they do not routinely accept DSS social workers as ICWA experts and instead require outside expert testimony on foster care placement and termination of parental rights. Other judges indicate they readily accept DSS social workers as expert witnesses if they are qualified and have the appropriate experience. Other judges indicate that they have no choice because of the lack of non-DSS expert witnesses in their circuit. Also, the focus groups highlighted, to a certain extent, the split in opinion among state attorneys regarding which agency (state attorney or DSS) is responsible for identifying and generating the ICWA experts. Generally, DSS social workers and supervisors report that they are uncomfortable acting as ICWA experts because of the appearance of agency bias. While they are less uncomfortable with testifying as ICWA experts in others' cases, there is definitely a reluctance to testify in their own cases as ICWA experts.

Recommendation 19. All of the state agencies, in consultation with the tribes, must work to develop a network of ICWA experts. This may include DSS social workers and supervisors (in the circuits where DSS testimony is accepted) if the DSS worker meets established minimum criteria (i.e. three completed ICWA cases, advanced training in ICWA, and the services available to Indian children and families and Indian culture). Additionally, at a minimum, DSS workers should not be in a position to testify as an expert witness in their own cases.

Social and Cultural Standards

It was reported by DSS social workers and supervisors that, in many instances, a child's first exposure to his/her Indian heritage and culture is due to involvement with DSS and the foster parents share in developing a cultural plan and cultural connections for the children. This includes investigation of an array of activities, events, books, and internet information. Many DSS social workers indicated that they have engaged tribes for assistance in this regard. In fact, many also indicate that they would welcome the active involvement of the tribes to identify cultural opportunities for the Indian children. Private adoption and placement agency participants indicated that this point is emphasized with their adoptive parents. Adoptive parents, generally, participate in cultural awareness training prior to adoption. In fact, several adoptions are "open" with the tribe so that the child can maintain access to his/her Indian heritage.

Recommendation 20. DSS and private adoption agencies should actively engage the tribes to determine the availability of cultural and heritage events. The tribes should provide monthly listings of cultural activities to DSS and private adoption agencies.

Placement of Child Pursuant to ICWA Preferences

According to many DSS social workers and supervisors, the placement preferences provisions of ICWA are the most difficult aspects of ICWA compliance. This is primarily due to a lack of suitable or identified relative options and, secondarily, a resource issue due to the lack of American Indian foster families. According to DSS social workers, parents are asked at several points (during DSS involvement) to identify relatives for placement (i.e., Family Fact Sheet, Family Tree, etc.). Additionally, there are multiple internal checklists that identify the steps each social worker has taken to identify relative placements and follow the placement preferences hierarchy. Additionally, at the point where an Indian child is ready for adoption, DSS posts the child's information on a national website in order to locate an American Indian adoptive family. The child's information is posted for three months. For young children, interest is expressed by all ethnic groups.

According to one DSS social worker, "we continue to explore relatives throughout for all children." Oftentimes, however, DSS is not given good information regarding relatives and/or relatives are unwilling or unable to accept placement of the child. DSS social workers report that,

in many instances, they contact their DSS colleagues on the reservations for relative information. Due to the demands of their caseloads, however, DSS social workers are limited in their ability to perform independent investigations for relative placement separate and apart from the information provided by the parents. According to several DSS social workers, a position solely devoted to locating relative placements for both Indian and non-Indian children would be helpful.

Recommendation 21. DSS should consider hiring "child placement investigators" to identify, locate, and investigate relative and kinship placements. This would be the sole responsibility of this position.

Children in Need of Services (CHINS) Cases

The results of the focus groups point out that the application of ICWA in CHINS cases is inconsistent throughout the state. In some UJS circuits, state attorneys make an ICWA statement in the CHINS petition and ICWA is addressed by the judge; in other circuits, state attorneys only indicate that ICWA is applicable in the event of removal or termination; in other circuits, CHINS notification is a fairly recent concept and the mechanics of the operations are being observed, tested and modified. Finally, in several circuits, the application of ICWA in CHINS cases is only now being discussed. It is interesting to note, however, that Chapter 9 of the UJS *Benchbook*, makes several references to the applicability of ICWA in CHINS cases.

Initially, CHINS cases are generally diverted from the court system. When a CHINS petition is filed, removal from the home is rarely contemplated. Finally, removal or termination as a sanction is rare in CHINS cases. Moreover, according to many DOC juvenile agents, when a CHINS child is committed to DOC, there is language in the court order that states ICWA is not applicable. Currently, there is a DOC internal operational recommendation pending that would remove CHINS jurisdiction from DOC to either UJS court services officers or DSS-Office of Child Protection Services. That would mean that CHINS children would no longer be committed to DOC and DOC would not be involved in providing placement or supervision services. This is still in the recommendation stage and would have to be approved by the Council of Juvenile Services; and then presented to a legislative sub committee for legislation and then approved by the legislature, at large.

From focus group discussions, it appears that there is not a lot of emphasis on the interpretation and application of ICWA in CHINS cases.[35] This may be due to reported factors including (1) the interpretation that ICWA is not applicable in CHINS cases; (2) the infrequency with which CHINS children are removed from their homes during these proceedings; and (3) the lack of interest and/or resources of the tribes to date. According to several focus group participants, however, this issue has come more to the forefront due to the changes in the "minor in consumption" provision in CHINS cases.[36] Regardless of the reasons, strictly interpreted, ICWA is applicable to status offense cases and steps should be taken by state agencies to comply.

Barriers to ICWA Compliance

Throughout the focus groups, participants identified many barriers that prevent the full realization of ICWA in South Dakota. These include (1) the lack of communication and cooperation from the tribes; (2) the lack of timely response from the tribes; (3) DSS kinship placement standards. To say that the lack of services and placement (kinship and foster care) options were the primary reported impediment would be an understatement. These resource statements are consistent with the results of the statewide survey in which 66 percent of survey respondents indicated that they lack the resources to comply with ICWA.

Tribal Focus Groups

During each tribal focus group, a written consensus statement was prepared by participants based on the discussion. With the exception of Cheyenne River Sioux Tribe, who submitted their written consensus statement several weeks after the focus group meeting, the remaining eight reservation on-site discussion groups finalized their consensus statements in final written form on the date of the on-site meeting. A hard copy of each consensus statement was left with the on-site group and they were informed that an exact copy would be attached to the report as finalized on site. See Appendix H.

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[35] This is inconsistent, however, with the responses to the statewide survey in which the majority of judges (64 percent), court services officers (63 percent), and state attorneys (55 percent) strongly agree/agree that their agency applied ICWA in CHINS cases. There was an even split among DOC juvenile agents regarding the applicability of ICWA in CHINS cases. Variances between state regions likely account for this difference.

[36] Formerly, a minor in consumption allegations was a delinquency charge. ICWA is not applicable in delinquency cases.

The consensus statements adhere to a three part approach including: (1) identifying ICWA sections and issues of non-compliance by the state; (2) ranking the ICWA non-compliance areas that are most critical and need to be resolved first; and, (3) suggesting possible strategies to remedy the non-compliance.

Table 13 reflects a summary of the consensus statements developed during the tribal discussion focus groups with respect to the first part, that is, identifying ICWA section and issues of non-compliance by the state. Each non-compliance statement is linked to the corresponding ICWA section, which sets forth the requirement not being complied with by the state. The most frequently expressed issues are: failure of the state to provide sufficient information on the child to enable the tribe to determine whether the child is an "Indian child;" delay in sending notification to the tribe thereby, making the tribal presence in the case ineffective for purposes of providing culturally appropriate rehabilitative efforts, finding relative placements and adequately preparing for court hearings; and receiving insufficient information as to the DSS services provided to the family making it difficult for the tribe to make informed decisions in the best interests of the child and family. Another frequently expressed issue is the lack of training and knowledge on the part of DSS workers related to understanding the traditional family relationship and tribal culture and rehabilitative efforts resulting in a failure of the state to provide "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. Finally, although not related to any ICWA specific requirement, most of the groups expressed a need for the state to recognize that the tribal ICWA workers are under severe financial hardships and are not always able to take the time to travel to a hearing. There is a disproportionate burden on the tribes because of the differing levels of staffing, human resources, financial resources, and geographic isolation of the reservations. "It costs the tribes more to exercise their ICWA rights than for the state to comply with ICWA." See Yankton Sioux Tribal Focus Group, October 6, 2004.

Table 13. Summarized Consensus Statements Regarding Non-Compliance Issues Developed by Focus Group Participants[37]	
ICWA Section	**Consensus Statement**
Sec. 1903(1) "child custody proceedings"	Pennington County recently began complying with ICWA notification requirements in status offenses. The rest of the state is still in violation of ICWA with regard to status offenses.
Sec. 1903(4) "Indian child" **Identified by 6 groups as an area of non-compliance**	Incomplete information from the state for eligibility of enrollment determination delays making a timely decision on whether the child is an ICWA child. State workers need to provide whatever information they have, including mother's maiden name, father's surname, dates of birth, and grandparents' names and other extended family members and dates of birth.
	In most cases, there is incomplete information in the communication from the state to make a determination on whether the child is an Indian child. In too many cases, the only information provided by the state is the child's name. The state workers don't understand that minimal family history information is needed to verify eligibility/enrollment.
	The state notices are not uniform in format throughout the state. The notices are going to different addresses for the Rosebud Sioux Tribe. This creates a delay in the right person, i.e., the tribal ICWA worker, to timely intervene in the state court proceeding. Not all notices sent by the state are sent registered mail, return receipt requested. Notification to child's tribe is not completed in a timely, effective manner.
Sec. 1903(5) "Indian child's tribe"	Where a child may be eligible for more than one tribe, the state attempts to play tribes against each other, for example by conditioning transfer to one tribal court on approval or non-objection by the other tribe.
Sec. 1903 (6) "Indian custodian"	Indian custodians, such as grandmas and other persons raising the child within tribal custom, are not recognized in state proceedings. A case is opened on the parents, often for "abandoning" the child with the custodian, and the custodian's rights under the law are ignored.
Sec. 1903(9) "parent"	The state often challenges paternity and requires a father to take a paternity test, at his own expense, before recognizing the father's rights under ICWA, even if the father has acknowledged paternity by affidavit or by paying child support. This delays and prevents fathers from asserting their right under the law and fighting for custody of their children.
Sec. 1911(a) Exclusive juris.	The state is failing to recognize exclusive tribal jurisdiction and tribal court orders. Another issue is that state courts are issuing contradictory or supplemental state court orders for the same child.

[37] For clarification purposes, this is the collective opinion of focus group participants and not a factual finding of the NCSC/NAILS project team.

Table 13 (cont'd). Summarized Consensus Statements Regarding Non-Compliance Issues Developed by Focus Group Participants[38]	
ICWA Section	**Consensus Statement**
	For enrolled tribal children living on city property, jurisdiction becomes an issue between the state and the tribe. There is no collaboration between DSS and the tribal social service programs.
	State courts refuse to dismiss and transfer cases where the Tribal court has exclusive jurisdiction. State court delay or dispute transfer, or attempt to condition transfer upon approval of the tribal case plan for the child, review of tribal court order, notice of tribal court's hearings, or other conditions which prolong the state court's involvement following transfer.
Sec. 1911(b) Transfer of proceedings	Some courts refuse to transfer cases as early as six months from the date the case was initiated and opened by DSS. State courts refuse to transfer because the proceedings are at an "advanced stage", such as past adjudication or where a termination hearing has already been scheduled, but the stage is "advanced" because the state court itself has fast-tracked the case, and ignored (or released DSS from having to meet) ICWA requirements which would have slowed the proceedings down such a diligent search for placement preferences or providing active efforts to reunite the family. .
	In some cases, ONTRAC ICWA workers are not being recognized in state court and therefore, ineffective in achieving transfer of the case to tribal court due to the fact that ONTRAC workers are not law trained in state court proceedings or processes.
Sec. 1911(c) Intervention	The tribe's and the Indian custodian's absolute right to intervene are occasionally undermined by the state by not acknowledging the custodian's rights, attempting to exclude the tribe by challenging acknowledged paternity.
Sec. 1911(d) Full faith & credit	State courts violate the full faith and credit clause in ICWA by failing to give full faith and credit to Tribal court orders and jurisdiction.
Sec. 1912(a) Notice **Identified: by all groups as an area of non-compliance**	In some counties, state's attorneys do not give tribes ten days notice of hearings. In some cases, the state is not notifying the tribe at all. The tribe is being notified by the Indian child's parent and/or other family members in a number of cases. Once notice has been given, the state is not providing proper documentation to the tribe in regards to whether the child is an Indian child. The notices themselves contain very little information. The lack of needed information in the notice causes undue delays and jeopardizes Indian parent and tribe's interest. Notices are not always going to the right party or agency within the tribe. Many notices from the state of South Dakota are not being sent as registered mail with return receipt requested. The state needs to recognize that tribal ICWA workers are under severe financial hardships and are unable to take the time to travel to hearings. There is a disproportionate burden on the tribes because of the differing levels of staffing, human resources, financial resources and geographic isolation of the reservations. It costs the tribes more to exercise their ICWA rights than for the state to comply with the ICWA

[38] For clarification purposes, this is the collective opinion of focus group participants and not a factual finding of the NCSC/NAILS project team.

Table 13 (cont'd). Summarized Consensus Statements Regarding Non-Compliance Issues Developed by Focus Group Participants[39]	
ICWA Section	**Consensus Statement**
Sec. 1912(b) Appointment of counsel	Counsel is almost never appointed for the crucial 48 – hour hearing. Parents are adjudicated by default without representation.
Sec. 1912(c) Examination of reports	Parents and custodians have an absolute right to access the court file. Few parents or custodians are aware or informed of this right.
Sec. 1912(d) Active efforts **Identified by all groups as an area of non-compliance**	The state courts are pre-empting ICWA by relying on the Adoption and Safe Families Act to terminate parental rights without making active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. Active efforts to provide remedial services needs to include utilizing tribal program, such as tribal treatment center for alcohol and drug rehabilitative services. The state is failing to recognize tribal programs which can provide culturally appropriate services on a level equivalent to state programs.
	Culturally sensitive rehabilitative services are needed. There's inadequate information on the family history or information provided is negative which makes it difficult for the tribe to decide what services are needed for family reunification. The state isn't focused on reunification for Indian families.
	DSS is not applying culturally appropriate strength based models to meet the ICWA requirement of "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. In addition, there needs to be ongoing prevention efforts. There needs to be better client follow up after the children are returned.
	The state judges have ruled that active efforts and reasonable efforts standards are the same. This was ruled in an unpublished circuit court case in Minnehaha County within year 2004 and was affirmed in the Supreme Court.
Sec. 1912(e) Foster care placement	The state courts do not make a determination supported by clear and convincing evidence, including the testimony of expert witnesses, before ordering placement of an Indian child in foster care.
Sec, 1912(f) Termination of parental rights	Often termination of parental rights orders is not supported by evidence beyond a reasonable doubt but by second-and third-hand hearsay, circular evidence (DSS workers relying on information they created) and evidence without any foundation. This is enabled by the fact that the rules of evidence do not apply in termination hearings. States have qualified numerous non-Indians, including white attorneys whose only contact with Indian youth is prosecuting them, and DSS workers, including the worker assigned to the case before the court – a clear conflict of interest.
Sec. 1913(a)	Consent documents fail to include certifications required by ICWA. The tribe has not seen a consent document which meets all the certification, recording, and execution requirements laid out in this section.

[39] For clarification purposes, this is the collective opinion of focus group participants and not a factual finding of the NCSC/NAILS project team.

Table 13 (cont'd). Summarized Consensus Statements Regarding Non-Compliance Issues Developed by Focus Group Participants[40]	
ICWA Section	**Consensus Statement**
Sec. 1913(b)	While we have less experience with voluntary placements, we have not seen a parent attempt to withdraw consent and that withdrawal be honored. It is the tribe's position that when a parent signs a voluntary stipulation to a foster care placement, when the parent withdraws that consent, the child must be returned to the parent and the state must provide active efforts to prevent the breakup of the family or hold a 1912(e) hearing justifying a foster care placement.
Sec. 1914 Invalidating state actions	The tribe has attempted to motion based on this section several times and the state court only once has recognized, or even responded to, a petition under this section.
Sec. 1915(a) Adoptive placements preferences **Identified by all groups as an area of non-compliance**.	The state needs to make more active effort to find appropriate foster placements for ICWA children according to the ICWA placement preferences. Under the current system, licensed foster homes and/or relative placements aren't receiving adequate financial assistance to pay for needed day care for children, thereby placing a time consuming financial hardship on foster families. Obtaining state financial assistance to pay for needed services for special needs children, including non-medical, is not available to the degree that it needs to be available. There is insufficient time in the legal process right now or in the DSS case management process to allow the tribe to find relative placements or alternative tribal placements. The DSS social workers need to be aware of the differing cultural standards that exist on reservations. Due to the high turnover of DSS case worker staffing, most workers are unaware of the prevailing social and cultural standards of Indian communities in order to meet the placement preferences.
	The state is spending too little time finding tribal placements for ICWA children. In too many cases, the placements are too far from the reservation for the parents to maintain contact with the children. Placements for Indian children far removed from the child's reservation make it impossible for the child to maintain his/her tribal identity and participate in tribal events and cultural activities.
	Although the tribe is noticed on permanency planning hearings in some cases, the tribe feels shut out of the process once rights have been terminated, even though the tribe is the best resource for finding potential adoptive placements that would satisfy the requirements of ICWA.
	State services are being discontinued as soon as the child's case is transferred to the child's tribe. The tribe has little resources for providing long term placement needed services to the child, such residential costs such as inpatient care or 24 hour care, behavioral modification or counseling, and/or alcohol or substance abuse rehabilitative services. Title IV-E funding should follow the child even where the child is placed in relative placement. Where there is relative placement, the relative doesn't qualify for TANF programs such as where there is a tribally defined relative connection (defined in accordance with Indian custom) between the child and placement family. The state needs to consider using a subsidized placement for relative placements.
	The state is attempting to send CHINS cases back to the tribe and this creates a problem since the tribe has inadequate resources to meet the child's needs. The state is terminating the parental rights on parents of CHINS children and turning them over to Department of Corrections and not notifying the tribe.

[40] For clarification purposes, this is the collective opinion of focus group participants and not a factual finding of the NCSC/NAILS project team.

Table 13 (cont'd). Summarized Consensus Statements Regarding Non-Compliance Issues Developed by Focus Group Participants[41]	
ICWA Section	**Consensus Statement**
	In cases where the case is not being transferred to tribal court, the state is taking too much time to do home studies on tribal reservation relatives. The state is not taking the time and making the effort to visit the tribal reservation relatives' home or to locate on reservation placement with an Indian family. The state is failing to apply the prevailing social and cultural standards of the Indian child's tribal Indian community in placing the child in a reservation relative's home. The state needs to make a more active effort to find appropriate foster placements for ICWA children according to the ICWA placement preferences.
	There is insufficient time or resources in the legal process right now or in the DSS case management process to allow the tribe to find relative placements or alternative tribal placements. The DSS social workers need to be aware of the differing cultural standards that exist on reservations. In regards to off-reservation DSS social workers and due to the high turnover of DSS case worker staffing, most workers are unaware of the prevailing social and cultural standards of Indian communities in order to meet the placement preferences.
	The state is not accepting tribal home studies for the Indian child's relatives.
Sec. 1915(b) Foster case placements	Rather than make a true effort to follow the placement preferences, the state ignores the preferences and the requirement under the Guidelines to conduct a diligent search prior to being excused from following the placement preferences. This section is completely disregarded by the state workers, who simply throw up their hands and say we don't have enough Indian foster homes.
	The state is not placing children with relatives on the reservation. The state is failing to provide the Indian child's tribe with enough information to locate a relative placement for the Indian child. The state is not considering it appropriate to place the child on the reservation when the child is in Sioux Falls or any off reservation town. The state is failing to make reasonable efforts to investigate whether there may be a relative placement on the child's reservation. The state is not taking into consideration the family cultural values and is weighing proximity over family.
Sec. 1915(d) Social cultural standards applicable	The state does not honor the social and cultural standards of the Indian child's community in choosing foster homes. However, when an Indian child is injured in a non-Indian foster home, and the tribe or parent wishes the child placed elsewhere, we are met with an attitude of denial and refusal to accept accountability.
Sec. 1920 Improper removal/decline of jurisdiction	The tribe has several times asserted that removals were improper, such as emergency removals because the children were "noisy" or the house was "filthy" or the parents were being evicted. In our experience, no state court has ever declined jurisdiction and returned a child under this section, or even acknowledged that any removal was improper.

[41] For clarification purposes, this is the collective opinion of focus group participants and not a factual finding of the NCSC/NAILS project team.

Table 13 (cont'd). Summarized Consensus Statements Regarding Non-Compliance Issues Developed by Focus Group Participants[42]	
ICWA Section	**Consensus Statement**
Sec. 1921 Higher state or federal standard	"Active efforts," which is the federal standard, is a higher standard than "reasonable efforts," the state standard. Nonetheless, state courts continue to insist there is no difference between the two, applying the lower state standard in violation of this section.
Sec. 1922 Emergency removals	The emergency removal provision is continually abused. Every removal is characterized as an emergency removal. Eviction, noisiness, head lice, truancy, and inoperable toilets have all been used to constitute a threat of "imminent physical damage" to the child. These improper "emergency" removals are used to release the state from having to provide services to the family while the family is whole, and to start an A&N case without holding a 1912(e) hearing to justify a foster care placement.

[42] For clarification purposes, this is the collective opinion of focus group participants and not a factual finding of the NCSC/NAILS project team.

Table 14 ranks the above areas of non-compliance identified by group participants according to which the issues need to be resolved first to make the most substantial and effective changes in the compliance process of the state. The fact that there is one listing for each issue is not reflective of the frequency of statement by the groups.

Six of the nine groups stated that notice is the area which must be resolved first to make the most substantial and effective change in the compliance process of the state. One group stated that it is "critical that improvements in the manner that children are identified as ICWA children and a more efficient effective process of resolving tribal jurisdictional issues be made first [as] these issues need to be resolved and established first because these determinations set the tribes' interest in the case." See Sisseton Wahpeton Oyate statement, September 1, 2004.

Another area of frequent concern was meeting the placement preferences in ICWA. Groups stated that there is a critical need to more timely and efficiently finish a home study on the Indian child's reservation relative's home in order for ICWA placement preferences to be met. Several groups mentioned that there is a cultural competency issue with non-Indian state workers conducting home studies on the reservation relative's home and that partnering with tribal ICWA workers to conduct the home study is a possible strategy. Again, several groups stated that the timeliness and adequacy of notice by the state in identifying the "Indian child" to the tribe has a substantial effect on the degree of impact the tribe may have in the case.

Table 14. Non Compliance Issue Rankings Developed by Focus Group Participants[43]	
ICWA Section	**Most Critical Issues Which Need to be Resolved First**
Sec. 1903(4) "Indian child" **Identified by six groups as an area of non-compliance**	• It's critical that improvements in the manner that children are identified as ICWA children and a more efficient effective process for resolving tribal jurisdictional issues be made first. These issues need to be resolved and established first because these determinations set the tribes interest in the case. • In addition, it's important to find relative placements or other alternative tribal placements for ICWA children. The state needs to make greater effort to communicate with the tribe in order to provide the tribe with sufficient time to find relative or other alternative tribal placements.
Sec. 1912(a) Notice **Identified: by six of the nine groups as the most critical issue.**	• Improving the state's notice process is the most critical issue for the tribe. Additionally, the communication process between the state and the tribes needs to be enhanced and improved. The state needs to include more tribal involvement in the entire process.
	• The state court needs to meet with tribes and provide funding to tribes to build the program capacity of tribal ICWA workers to participate in state court proceedings. At present, the state court judges are not giving equal credence to tribal ICWA workers in contrast to state attorney arguing the case before the court.
Sec. 1915 Placements preferences **Identified by all groups as an area of non-compliance**.	• Relative placement is the most critical issue and needs to be resolved first. The state needs to make a much better effort to timely notify the Indian child's tribe of all possible tribal relative names and birth dates at the earliest date possible in order for the tribal ICWA worker to identify possible reservation relatives of the Indian child. • The most critical issue for the tribe is to conduct and finish a home study in a timely more efficient manner on the Indian child's reservation relative's home in order for the ICWA placement preferences to be met. Right now, it takes up to six months for a home study to be completed.
	• The first issue that needs to be resolved in passage of a South Dakota ICWA law. The bill introduced last session would resolve almost all of the violations and complaints listed above. The bill also addresses other helpful issues, such as compliance monitoring.
	• At present, the state court judges are not giving equal credence to ICWA workers in contrast to state attorney arguing the case before the court.

[43] For clarification purposes, this is the collective opinion of focus group participants and not a factual finding of the NCSC/NAILS project team.

Table 15 represents a listing of the consensus statements on possible strategies to improving ICWA compliance. One of the most frequently suggested strategies is to create a uniform protocol for tribal notice and identification of children as "Indian children." Several group participants stated that the notices sent to the tribes often do not have a telephone number in the letter to enable quick communication between the tribal ICWA worker and the state DSS worker. Therefore, a frequently expressed strategy is to create a uniform protocol for providing notice to the tribe including specifying enough information to make it easier for tribal personnel to determine whether an "Indian child" is involved.

Another strategy frequently listed is to have regularly scheduled joint consultative meetings between tribal personnel and DSS personnel in order to more effectively meet the goal of ICWA for reunification of families. The objective of such meetings is to create jointly developed policies and procedures to more effectively and efficiently meet ICWA requirements. One group commented that among the ICWA requirements that could be addressed are: a uniform protocol for notice, transfer processes, and utilizing tribal programs to provide culturally appropriate services as part of "active efforts." In addition, several groups mentioned that a tribal-state registry of ICWA workers should be posted on the internet and updated annually so that ICWA notices go to the right places. Two of the groups proposed that two notices be sent for each case, one to the tribal ICWA worker and one to the tribe.

Each group was questioned as to whether their input was sought with respect to the state's Title IV-B plan. Title IV-B provides state funding for family preservation activities and requires each state to list the specific efforts and activities taken by the state to comply with ICWA and requires each state to consult with the tribes in the preparation of the Title IV-B plan. According to the participants, no tribe's input was sought by the state.

A third area for change in strategy is to provide financial assistance to tribes for special needs children and to assist the tribes build their respective program capacity in order to be a more effective partner in collaboration with the state. A fourth frequently mentioned strategy is to provide training to DSS workers on cultural sensitivity and ICWA requirements.

Table 15. Possible Strategies to Improve ICWA Compliance Developed by Focus Group Participants[44]	
ICWA Section	**Strategies**
Sec. 1903(4) "Indian child"	State ICWA workers and other personnel who deal with ICWA cases need training on ICWA, including the importance of providing family history information to tribes in order to determine whether the child is an Indian child.
Identified by six groups as an area of non-compliance	The state needs to provide training to state personnel and make clarifications to tribal ICWA workers which cases fall within the "status offenses" and are within the scope of the ICWA and the scope of abuse and neglect cases.
Sec. 1911 Jurisdiction	Funding needs to be provided to train tribal CASA workers, Cangleska Inc., Wakanyeja Pawicayapi Inc., Oglala Nation Education Coalition, tribal advocates, and ONTRAC workers in order to permit ONTRAC workers to effectively participate in ICWA cases to assert the tribe's right to transfer.
	There needs to be regular collaborative meetings between the DSS and tribal social workers regarding ICWA children. There needs to be regular annual training for DSS workers, CASA, and Child Protection teams (including local police, medical personnel, school officials, domestic abuse workers, etc.) on the applicability of ICWA. The state needs to do outreach to ask for tribal representation on Child Protection teams.
Sec. 1912 Notice Active efforts	Inform parents about ICWA rights via an informational pamphlet to be distributed on first contact by DSS. Tribes should have a list of endorsed ICWA experts to be provided to the state for their use. The ICWA expert should get involved with the state court proceedings as early as possible.
	ICWA training for unified judicial system judges on an annual basis. The training needs to include state's attorneys, DSS, child's attorney, CASA, and the court clerks. The state should develop a unified notice form for the initial communication with the tribe. The notice should contain full name, enrollment of one or both parents, and family history information. The Oregon ICWA notice should be used as a model. A tribal-state registry of ICWA workers should be posted on the internet and updated annually so that the notices go to the right place. The state should send notices by registered mail with return receipt requested as required by ICWA. The state should provide funding to tribes under their Title IV-B plan for family preservation activities. The state needs to make a greater effort to involve the tribes in their statewide child protective services plans, policies, and their implementation of those policies.

[44] For clarification purposes, this is the collective opinion of focus group participants and not a factual finding of the NCSC/NAILS project team.

Table 15 (cont'd). Possible Strategies to Improve ICWA Compliance Developed by Focus Group Participants[45]	
ICWA Section	**Strategies**
	There should be a uniform law that imposes a duty on the state to provide the tribe with copies of all documents filed with the court. A tribal representative, as a "pro se litigant" for the tribe and authorized by the tribal court, must be able to file motions, make court appearances and provide testimony in state court ICWA proceedings.
	There needs to be a consultative process and regular meetings scheduled between the tribes and the state to do case file reviews for ICWA children in order to improve collaborative efforts. Consultative processes and regular collaborative meetings for tracking children needs to be put in place so that tribes can participate in the current placement status of ICWA children. State law should require that two notices be sent to the tribe, one to the tribal ICWA worker and the other to the tribal secretary, each by registered mail with return receipt requested. The tribal secretary should be notified because they receive notification of adoptions and will be able to maintain the confidentiality.
	The DSS workers should be required to complete cultural sensitivity training to become better informed on traditional tribal family relationships. For example, within Indian families, an older sister is also mother to her younger sister's children. In order to provide effective programs specifically tailored for the family's needs, a joint consultative regularly scheduled process and meetings needs to be put in place between tribal personnel and DSS personnel. Include tribal people in the child's case file review staffing done by DSS staff for permanency planning. Collaboration between state and tribes needs to be done on a regular basis. The goals of ICWA for reunification of families can be more effectively met through regular case reviews conducted through a joint state-tribal effort.
	Each tribe should develop a list of qualified expert witnesses for the court. The list should be available to DSS workers, states attorneys, court judges, child's attorney and they should be required to utilize the list.
	A uniform statewide data system for tracking children needs to be put in place so that tribes are informed on the current placement status of ICWA children who are tribal members or eligible for enrollment. There needs to be a consultative process and regular meetings scheduled between the tribes and the state to do case file reviews for ICWA children in order to improve collaborative efforts.
	In regards to providing financial assistance for special needs children, in order to meet the needs, the legislature needs to reassess and redefine the scope or "special needs" in order that licensed foster parents and/or relative placement are not placed in a time consuming financial burden.

[45] For clarification purposes, this is the collective opinion of focus group participants and not a factual finding of the NCSC/NAILS project team.

Table 15 (cont'd). Possible Strategies to Improve ICWA Compliance Developed by Focus Group Participants[46]	
ICWA Section	**Strategies**
	The state needs to fund annual ICWA training for tribal ICWA professional workers as well as clerical staff. The Oglala Tribal judge in all cases needs to serve as prosecutor, judge and defense counsel due to resource limitations.
	State legislation needs to mandate that the state court consider and utilize tribal rehabilitative programs and incorporate such mandate into the state court order.
	The state needs to create a system where each ICWA child is appointed an attorney of record who will represent the Indian child and will keep the tribe informed of the case status, rehabilitative efforts, intervention services, and placement preferences. The attorney of record can assist in helping to coordinate services between the tribe and the state DSS.
Sec. 1915 Placements preferences **Identified by all groups as an area of non-compliance.**	Relative placement is the most critical issue and needs to be resolved first. The state needs to make a much better effort to timely notify the Indian child's tribe of all possible tribal relative names and birth dates at the earliest date possible in order for the tribal ICWA worker to identify possible reservation relatives of the Indian child. The most critical issue for the tribe is to conduct and finish a home study in a timely more efficient manner on the Indian child's reservation relative's home in order for the ICWA placement preferences to be met. Right now, it takes up to six months for a home study to be completed.
	The state court and DSS needs to consider using permanent guardianship orders to place the child with a relative and use such placement as a permanency plan for the child. Such placements should be defined as ASFA permanent placements. Where there is relative placement, the relative doesn't qualify for TANF programs such as where there is a tribally defined relative connection (defined in accordance with Indian custom) between the child and placement family. The state needs to consider using a subsidized placement for relative placements. The state needs to recognize the tribe's home studies in order to place the Indian child in a reservation relative's home. The state and tribe could possibly use a memorandum of understanding.
	There should be a documented effort recorded in each child's DSS case file with copies sent to the child's tribe of the DSS's effort to locate the child's tribal relatives. If there are siblings, there should be a documented effort recorded in the child's DSS case file with copies sent to the child's tribe of DSS's effort to place the siblings together in the same home.

[46] For clarification purposes, this is the collective opinion of focus group participants and not a factual finding of the NCSC/NAILS project team.

Table 15 (cont'd). Possible Strategies to Improve ICWA Compliance Developed by Focus Group Participants[47]	
ICWA Section	**Strategies**
	Place the burden on the state to comply with Sec. 105 -25 USC Sec. 1915(e) instead of making the placement record available upon request of the Secretary of the Indian child's tribe. The record that is required under 1915(e) should be mandatory in every case and should be made a part of the court record whenever a placement outside of the home is made.
	The idea that non-Indian families will do a better job of raising Indian children must be openly addressed and debunked before the ICWA will be able to do in South Dakota what it was intended to do: protect Indian children. The tribe could propose many technical suggestions and solutions for the compliance issues in South Dakota, but in our opinion, without first addressing and defeating this "elephant in the living room," no progress is possible.

[47] For clarification purposes, this is the collective opinion of focus group participants and not a factual finding of the NCSC/NAILS project team.

E. Intensive File Reviews

As noted earlier, four files were selected at random for an intensive file review. Findings fall into the following areas: the manner and timeliness in which notice is provided to tribes; the specific activities taken by state workers to place Indian children according to the placement preferences; the kind and extent of "active efforts" made by state workers to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; the extent to which cultural considerations were included as part of the actions and determinations made by DSS and the courts in case management; and the degree to which the best interests of the child have been met. Finally, actions that were taken by DSS as documented in the DSS file and court file as "best practices" are summarized to show DSS compliance with the spirit of ICWA.

Both the DSS and court files were reviewed, in addition to telephone interviews with DSS workers, state attorneys, the court appointed special advocates (CASA), judges, and the tribal ICWA worker for the child's tribe. Results of the file reviews are displayed through use of a rating scale of 1 to 5 for each file reviewed. Five (5) is the highest degree of compliance with the ICWA, for each of the areas. The basis for each rating is set forth by reference to documentation of actions taken or not taken by the Child Protective Services and the Court, as documented in each child's Child Protective Services and court file and listed in the tables located in Appendix I for each case file reviewed as shown below.

Proper Notice of Proceedings Involving an Indian Child

Identifying the process used by DSS to determine whether the child was an "Indian child" was the most difficult task as neither uniform notations were made in the files nor uniform forms used by DSS. In one file, the family had a prior case with DSS three years before, and the child was identified as an Indian child in the prior case, yet it took DSS almost two months after the court hearing and out-of-home placement date to send notice to the tribe in the second case. In three of the cases, the notice sent to the tribe occurred from one month after the 48 hour hearing to three months after the 48-hour hearing. In one of the four files, notice was sent to the tribe on the same date the children were taken out of the home. Frequently, the child and parent were referred to as "Native American" with no indication as to which specific tribal affiliation the child or parent(s) belonged for purposes of tribal notification.

Processes to improve notice to tribes include the use of an ancestry questionnaire and forms, such as those used by Oregon. These forms are presented in Appendix B. Another suggestion was to provide written notice, registered mail, return receipt requested to the tribal ICWA worker to assure that the ICWA notice requirement is met. Finally, it is essential that tribal notice be sent at as early a point in the case proceedings as possible with sufficient information to the tribe to determine whether the child is an "Indian child" within the meaning of ICWA.

Placement of Child Pursuant to ICWA Preferences

A common barrier in meeting placement preferences which is shown through lack of documentation in the DSS file, is that family members are not encouraged to participate in a diligent search for relatives. In the file review, it was observed that DSS caseworkers sent a short letter and standard form asking the tribe to identify family members. No record was found in any file reviewed that a tribe responded to this request. In the majority of files reviewed, the family system identified was limited to parents and grandparents and failed to indicate that other relatives had been identified.

In conducting a diligent search for relatives, DSS staff can be more effective by actively engaging the parent(s) and other family members in identifying relatives and completing the required form. A more thorough identification of family members (including customary relatives) can provide a list of potential placements for a child. This identification of family members should be completed even when children are placed with kin—in the event that the initial kinship placement is disrupted.

In many cases, DSS was aware that placement preferences for American Indian children existed under ICWA. However, compliance with these placement preferences differed markedly and it appeared that no standardized process for achieving compliance with ICWA placement preferences is being utilized. In one of the files reviewed, ICWA placement preferences were followed, with the child being placed in an American Indian adoptive home. In a second case, the child was adopted by a non-Indian with the concurrence of the tribe. In a third case, the child was placed first with maternal grandparents then later with a step-father's parents. It is questionable whether this permanent guardianship meets the ICWA standards for placement. In the fourth case, there was no indication that ICWA placement preferences were considered or followed with foster home placements, nor is there a record in the file of the ethnicity of any foster parent.

It was difficult to ascertain without extensive file review whether the ICWA placement preferences were followed in the out-of-home and permanent placement for the child. The files could benefit from a form such as the Minnesota ICWA Child Welfare Placement Preference and Considerations Documentation (shown in Appendix B) to help quickly identify whether the child was placed according to the ICWA placement preferences.

It appears that the court is taking the lead from DSS in making the determination that good cause exists to deviate from the ICWA placement preferences. In the file, statements such as "the DSS intake worker informed the DSS caseworker that there were no appropriate relatives identified at the time of removal." Another quote was that "no Native American placements were available at time of placement"; but, there was no documentation in the file indicating what steps had been taken to identify an American Indian person. Once there was a finding at intake that there was no American Indian placement available, it appeared from the files that no additional effort was undertaken subsequently to explore the possibility of any other Indian placements. Another concern noted is that there is a lack of documentation in one of the files as to why listed American Indian kinship placements had been determined to be inappropriate.

Active Efforts to Provide Remedial Services and Rehabilitative Programs

In several of the cases, early identification (i.e., at intake and investigation) of the child as American Indian did not take place. Failure to recognize early in the case that a child is American Indian negatively affects DSS' ability to engage in active efforts and follow other provisions of ICWA and provide timely notification to the tribe. In addition, it was noted in the file that the tribes were in no case received as an equal working partner on a collaborative basis to provide active efforts.

While ICWA calls for active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, the law does not specifically outline those activities which constitute active efforts. Several sources exist that suggest case work practices that go toward the provision of active efforts. Examples of these practices include:

- Early identification of American Indian children coming into the DSS system
- Conducting a diligent search for relatives—including personal interviews with family members to solicit names and information
- Recognizing and accepting the place of customary relatives in a child's life
- Using family decision-making meetings
- Soliciting and utilizing tribal input and involvement in decision-making and case planning

- Developing case and treatment plans that are relevant to client needs and abilities
- Partnering and working "hands on" with families to support them in being successful in completing their family service/treatment plans (e.g., caseworker and mother meet together with substance abuse provider to set up treatment vs. caseworker simply provides mother with telephone number of provider and expects that mother will set up services).
- Working with entire family systems (rather than solely with identified "problem" family members)
- Collaborating with and referring family members to community agencies, especially those serving American Indians
- Using American Indian or culturally responsive service providers (i.e., therapists, substance abuse programs) to meet identified family needs
- Requiring that psychological and other assessments and evaluations include cultural components
- Using cultural consultants in staffings, team decision-making meetings, case planning, evaluations, etc.
- Assisting with tribal enrollment when children are not enrolled (but eligible)
- Locating, setting up and/or supporting activities that keep children connected with extended family and other tribal peoples (i.e., visits with appropriate family members; use of cultural mentors)
- Connecting youth to cultural activities and programs
- Connecting children and young persons placed in non-Indian out-of-home care with cultural mentors
- Taking into account the "prevailing cultural standards" in home studies on American Indian placements
- Accepting tribal home studies and tribally-approved placements
- Providing non-Indian foster parents and other caregivers with information and training on the child's culture and tribal practices
- Connecting non-Indian foster and adoptive parents with cultural support persons and providing them with referrals to tribal and other programs serving American Indian children
- Using a cultural expert witness in court hearings
- Encouraging the courts to transfer jurisdiction when a child is "domiciled on the reservation"
- Developing cultural contracts that outline ways to keep the child connected to his/her tribe and cultural group in cases of non-Indian adoption

It was against the above listed types of casework practice that the files were judged. Three of the four cases showed a reasonable number of casework interventions consistent with active efforts. In the fourth case, no activities that would reflect active efforts were noted. One of the major concerns in the files reviewed was a lack of referrals and collaboration with community agencies, tribal programs, and other culturally appropriate services. It appears that DSS caseworkers lack knowledge of how to locate and work with American Indian service providers on behalf of families. Another concern noted throughout the files reviewed was that evaluations and

assessments on children and other family members lacked any recognition of American Indian tribal or cultural identity, possible cultural strengths, or that any cultural factors were considered in the conclusions reached by the evaluators.

DSS personnel could benefit from training and information on how to locate, refer and collaborate with community agencies (especially those serving American Indians) and American Indian service providers in order to increase the opportunities for American Indian families to receive culturally appropriate services. Referring families to services specific to American Indians and incorporating these services into family service/treatment plans can increase the likelihood of compliance and completion of family service plan goals.

While in some of the cases reviewed DSS case workers engaged in active efforts, in one case, the court consistently used the "reasonable efforts" standard in error when the standard should have been "active efforts." The court order used the term "reasonable efforts" consistently in case orders.

It was further noted in the files that DSS caseworkers show either a lack of understanding or a lack of commitment to working with extended family and keeping children connected to extended family members, customary relatives, and other tribal people. For example, in one case, several extended family members requested to visit with the child and were told by the case worker that DSS policy was that only parents could visit with children. In another example, the maternal (American Indian) grandmother requested to be considered as a placement for the child and was summarily dismissed because it was felt she would attempt to help the child and the mother maintain a familial bond.

Attention should be paid to developing a broader and culturally congruent definition of "family" for use in cases involving American Indian children. A more culturally congruent definition of family could allow caseworkers to feel more comfortable in engaging extended family members and customary and tribal relatives in providing support and cultural connection to American Indian children, especially when these children are placed with non-Indian foster parents. Keeping children connected to extended family and tribal people exhibits willingness on the part of DSS to comply with active efforts and prevent the break up of the Indian family.

Social and Cultural Standards

Of the areas reviewed and rated, cultural consideration ranked as the lowest. Most cases show a general lack of documentation as to what culturally appropriate actions or practices were or should be adhered to by DSS workers and there is an apparent failure to treat the child's tribe as a partner in the development of a family case plan. As such, it becomes very challenging for DSS to incorporate the critical cultural elements into their casework with American Indian families. Coupled with the apparent lack of knowledge of how to collaborate with tribal and other programs serving American Indians, American Indian families are not receiving the types of services which could be effective in helping them strengthen and preserve their families.

Examples of DSS discomfort and disregard for the importance of culture include: an evaluator noted "no reported ethnic or cultural background practices noted;" in a child's psychosocial assessment, yet, there was no indication that the evaluator had a discussion with any family member about the family's American Indian heritage. A report to the court stated that the mother "gives one word answers with no eye contact." This statement was made in a pejorative context and lacked insight into possible cultural factors in the mother's verbal responses.

In a number of cases involving several types of evaluations, there was no mention or consideration of the client's cultural or tribal identification, cultural strengths, or the place of American Indian culture in their lives.

According to the file reviews, it appears that the some of the personnel from DSS do not appear to be aware of cultural identity development in children and the importance of cultural connectedness in this process. It is important that DSS staff and non-Indian foster/adoptive parents recognize that a child's cultural identity development is an ongoing process that begins at a very young age. As such, toddlers and young children, as well as school-age children and adolescents, can benefit from interventions and services that assist them to build a positive American Indian identity and help them feel comfortable with and connected to their cultural practices and traditions. This is especially critical for American Indian children who have been placed in out-of-home care with non-Indian families.

According to the file reviews, the majority of the DSS staff are not engaging family members in any type of discussion or exploration of culture in their lives nor exploring family member's levels of cultural identification as a normal practice. DSS staff and other professionals could benefit from training on how to appropriately and comfortably engage American Indian family

members in a discussion of the effects of culture in their lives and an exploration of family members' levels of cultural identification. This type of discussion can build rapport and can assist service providers in connecting family members with services and supports that are more culturally appropriate and relevant to family members' needs.

Best Interests of Child

Agreed upon child protection standards for acting in the best interest of the child were followed by DSS, for the most part, in all cases. One possible concern was noted in one case concerning the original out-of-home placement with the maternal grandmother. It was noted that the mother was physically and emotionally abusing an older sibling in front of the child while the child was placed in the home of the maternal grandmother. Numerous reports were made to DSS of the mother hitting the sibling, in one instance causing a bloody nose. The mother was allowed to live in maternal grandmother's home with the child and the sibling for at least one month despite verified DSS reports of physical and emotional abuse.

ICWA Best Practices for Case Work and Court Processes

While caseworkers incorporated a few of the interventions falling under active efforts, there were no particularly innovative or creative practices with American Indian families noted that could be considered examples of ICWA "best practice." The listing of examples of active efforts above could be considered as ICWA casework best practice for DSS. ICWA cases incorporating a number of these casework practices could go a long way toward substantiating that DSS had engaged in active efforts and the spirit of ICWA. Additional recommendations include the following:

Active Efforts

Recommendation 23. Attention should be paid to developing a broader and culturally congruent definition of family for use in cases involving American Indian children. A more culturally congruent definition of family could allow caseworkers to feel more comfortable in engaging extended family members and customary and tribal relatives in providing support and cultural connection to American Indian children, especially when these children are placed with non-Indian foster parents. Keeping children connected to extended family and tribal people exhibits willingness on the part of DSS to comply with active efforts and prevent the break up of the Indian family.

Recommendation 24. DSS personnel could benefit from training and information on how to locate, refer, and collaborate with community agencies (especially those serving American Indians) and American Indian service providers in order to increase the opportunities for American Indian families to receive culturally appropriate services. Referring families to services specific to American Indians and/or incorporating these services into family service/treatment plans can increase the likelihood of compliance and completion of family service plan goals.

Recommendation 25. Service to American Indian families could be enhanced by DSS incorporating a strengths-based family system perspective into its work with American Indian families. By viewing families from a strengths and systems perspective, workers can move from solely focusing on re-mediating the deficits of the parent(s) to strengthening and building the capacity of other parts of the family system that may have more potential for protecting and nurturing the children. A family systems perspective is also more culturally congruent in that it allows for recognition of the important traditional cultural roles that other family members may play in the raising of children.

Recommendation 26. The provision of active efforts can be strengthened by caseworkers becoming more hands on or directly involved in helping clients achieve the goals outlined in the family service/treatment plans. For example, rather than simply providing a mother with the phone number of a program that provides parenting classes and expecting her to set up classes, the caseworker and mother could together visit with a program representative to discuss how the class will meet the needs of the mother and then discuss any barriers, such as transportation, childcare, or work schedule, that might make it difficult for the mother to attend classes.

Placement Preferences

Recommendation 27. In conducting a diligent search for relatives, DSS staff can be more effective by actively engaging the parent(s) and other family members in identifying relatives and completing the required form. In the case file review, it was observed that, in place of engaging the family in identifying its members, the caseworker often sent a letter and form to the tribe asking that it identify relatives.

Recommendation 28. A more thorough identification of family members (including customary relatives) can provide a list of potential placements for a child. This identification of family members should be completed even when children are placed with kin—in the event that the initial kinship placement disrupts.

Recommendation 29. When American Indian children must be placed with non-Indian foster/adoptive families, it can be helpful to identify a cultural mentor or resource person who can work with the family to identify ways to keep the child connected to his/her tribal culture and assist the non-Indian foster/adoptive family members to better understand the child's cultural needs.

Social and Cultural Standards

Recommendation 30. It is important that DSS staff and non-Indian foster/adoptive parents recognize that a child's cultural identity development is an ongoing process that begins at a very young age. As such, toddlers and young children, as well as school-age children and adolescents, can benefit from interventions and services that assist them to build a positive American Indian identity and help them feel comfortable with and connected to their cultural practices and traditions. This is especially critical for American Indian children who have been placed in out-of-home care with non-Indian families

Recommendation 31. DSS staff and other professionals could benefit from training on how to appropriately and comfortably engage American Indian family members in a discussion of the effects of culture in their lives and an exploration of family members' levels of cultural identification. This type of discussion can build rapport and can assist service providers in connecting family members with services and supports that are more culturally appropriate and relevant to family members' needs.

Section VI. Summary of Recommendations

As a result of the findings contained herein, the NCSC/NAILS project team makes the following recommendations.

Recommendation 1. The South Dakota Guidelines should be revised to accurately state ICWA requirements.

Recommendation 2. South Dakota should review the activities of other states (discussed herein and appended to this report) to determine their applicability and acceptability.

Recommendation 3. All judicial circuits should require that an ICWA affidavit be filed in every case involving an Indian Child.

Recommendation 4. A clear statement of whether the foster care and pre-adoptive placement for each child is in accordance with ICWA preferences should be placed in every file.

Recommendation 5. A clear statement that parents and the tribe have the right to review court documents should be included in the notice of hearing on Petition for Abuse and Neglect.

Recommendation 6. Certificates of Mailing should clearly indicate which documents were included in the mailing.

Recommendation 7. The contact person for each of the Indian tribes in South Dakota should be identified and updated quarterly to ensure that the proper representative of the tribe is receiving notice.

Recommendation 8. "Register of Actions" should be kept in each file.

Recommendation 9. ICWA should be mandatory subject matter for all child welfare and CHINS professionals. All state agencies should review their current training opportunities and curricula in order to develop and or enhance ICWA training. It is especially important that ICWA training focus on the specific responsibilities for each state stakeholder group.

Recommendation 10. DSS should continue to clarify and train social workers regarding "ICWA contacts" case documentation. Quality assurance of all contact data fields should be performed periodically.

Recommendation 11. UJS should convert the "ICWA" and "race" data fields in its automated civil case management system to mandatory fields for case-related data entry. Additionally, initial and refresher trainings for clerks of court should emphasize these data fields.

Recommendation 12. All state and private adoption agencies should designate specific local, regional, and state-level ICWA employee resources within their organizations. For DSS and UJS, this may include specifically designated ICWA positions. For the private adoption agencies, this might include a specifically designated individual within the private agency "network." This information should be widely disseminated throughout each organization.

Recommendation 13. Each state agency should develop written standards and protocols discussing ICWA and its practical application. For those that already have written standards in place, these documents should be reviewed and updated at regular intervals. It is especially important that ICWA standards and protocols focus on the specific responsibilities for each state stakeholder group.

Recommendation 14. The tribes should develop standardized forms for DSS and make them readily available for immediate use.

Recommendation 15. At each stage of the proceeding, judges should make an active inquiry about the applicability of ICWA and the status of the determination that the child is an Indian child. This information should be included for the record of the case and the court order. Moreover, the UJS should adopt the standards and practices set out by the National Council of Juvenile and Family Court Judges- Indian Child Welfare Act Checklists for Juvenile and Family Court Judges, June 2003. These checklists articulate best practice standards for the state court processing of ICWA cases.

Recommendation 16. DSS and the state attorneys should adopt a statewide and uniform notification process for notifying the tribes, the ICWA worker, and the Bureau of Indian Affairs. This should include uniform language and format.

Recommendation 17. In ICWA cases, judges should appoint attorneys who are knowledgeable of and functional in abuse and neglect proceedings, child welfare issues, treatment and rehabilitative services, and ICWA for effective representations.

Recommendation 18. Judges should appoint attorneys for all parents, including those who are not present during the hearings and/or those who are served through publication.

Recommendation 19. All of the state agencies, in consultation with the tribes, must work to develop a network of ICWA experts. This may include DSS social workers and supervisors (in the circuits where DSS testimony is accepted) if the DSS worker meets established minimum criteria (i.e. three

completed ICWA cases, advanced training in ICWA, and the services available to Indian children and families and Indian culture). Additionally, at a minimum, DSS workers should not be in a position to testify as an expert witness in their own cases.

Recommendation 20. DSS and private adoption agencies should actively engage the tribes to determine the availability of cultural and heritage events. The tribes should provide monthly listings of cultural activities to DSS and private adoption agencies.

Recommendation 21. DSS should consider hiring "child placement investigators" to identify, locate, and investigate relative and kinship placements. This would be the sole responsibility of this position.

Recommendation 22. All of the state agencies involved in CHINS cases must develop a realistic and consistent protocol for the application of ICWA in CHINS cases. At a minimum, (1) state attorneys should include an ICWA statement in the petition and notice the tribes, and (2) judges should make active inquiry and a record (at each stage of the proceeding) whether ICWA is applicable. This information should also be included in the court order. Each tribe should develop a consensus regarding how they are to respond to CHINS.

Recommendation 23. Attention should be paid to developing a broader and culturally congruent definition of family for use in cases involving American Indian children. A more culturally congruent definition of family could allow caseworkers to feel more comfortable in engaging extended family members and customary and tribal relatives in providing support and cultural connection to American Indian children, especially when these children are placed with non-Indian foster parents. Keeping children connected to extended family and tribal people exhibits willingness on the part of DSS to comply with active efforts and prevent the break up of the Indian family.

Recommendation 24. DSS personnel could benefit from training and information on how to locate, refer, and collaborate with community agencies (especially those serving American Indians) and American Indian service providers in order to increase the opportunities for American Indian families to receive culturally appropriate services. Referring families to services specific to American Indians and/or incorporating these services into family service/treatment plans can increase the likelihood of compliance and completion of family service plan goals.

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focusing on re-mediating the deficits of the parent(s) to strengthening and building the capacity of other parts of the family system that may have more potential for protecting and nurturing the children. A family systems perspective is also more culturally congruent in that it allows for recognition of the important traditional cultural roles that other family members may play in the raising of children.

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Recommendation 30. It is important that DSS staff and non-Indian foster/adoptive parents recognize that a child's cultural identity development is an ongoing process that begins at a very young age. As such, toddlers and young children, as well as school-age children and adolescents, can benefit from interventions and services that assist them to build a positive American Indian identity and help them feel comfortable with and connected to their cultural practices and traditions. This is especially critical for American Indian children who have been placed in out-of-home care with non-Indian families

Recommendation 31. DSS staff and other professionals could benefit from training on how to appropriately and comfortably engage American Indian family members in a discussion of the effects of culture in their lives and an exploration of family members' levels of cultural identification. This type of discussion can build rapport and can assist service providers in connecting family members with services and supports that are more culturally appropriate and relevant to family members' needs.

Recommendation 32. All state agencies should review their current ICWA documentation practices to identify gaps in documentation and potential ICWA compliance omissions. This will ensure that each agency's compliance actions of ICWA requirements and spirit are well documented.

Recommendation 33. There should be a South Dakota annual statewide ICWA state and tribal summit to address: (1) communication, collaboration, and coordination between state and tribal entities; (2) state and tribal resources; and the (3) state and tribal training.

Recommendation 34. The shortage of resources for tribal programs should be addressed in order to institute the development of a comprehensive working relationship between the tribes and the state. The tribes and the state should work together with Congress and the Federal departments for this additional funding need. This topic should be included in the annual statewide ICWA summit.

Section VII. Concluding Remarks

ICWA as a law, was written to require state courts and state social services agencies to recognize the importance of culture in the lives of Indian children and states 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, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." This has proven to be a very difficult concept to put into operation.

While the United States Congress set out very specific ICWA requirements, the most critical of the ICWA provisions fall within the discretion of the state family court judge. These include the "good cause to the contrary" provision for placement preferences and the transfer of jurisdiction provision. While there are some specific requirements within ICWA, some of the elements of ICWA are so amorphous that measuring compliance can be difficult to quantify. As an example, what is the measure of actual technical ICWA compliance compared to the fulfillment of the spirit and intent of ICWA? It is the latter that may be the most difficult to achieve and appears to be the most lacking in South Dakota.

This *ICWA Compliance Analysis Project* also found that there are contrasting views and opinions regarding the state agencies' ability to meet the mandates of ICWA, specifically when considering tribal perception versus state perception and practice. The information contained in this report highlights this dichotomy of views and opinions concerning both practice and perception. For the most part, as indicated in the results of the focus groups and resulting consensus statements, the tribes are not satisfied with the performance of state agencies involved in the application of ICWA. The NCSC/NAILS review of state agency information through case file review, survey, and focus groups found that the state agencies are partially in compliance with many of the technical aspects of ICWA, but, not with others, such as, sending timely notification to tribes ten days prior to state court hearings involving foster care placements or terminations and the application of ICWA in CHINS cases. Additionally, the lack of direct evidence within state files of compliance documents such as inclusion of notification letters to tribes sent registered mail, return receipt requested, is another impediment to measuring the degree of compliance. These shortcomings indicate that much work needs to be done in achieving the true spirit and intent of ICWA.

Recommendation 32. All state agencies should review their current ICWA documentation practices to identify gaps in documentation and potential ICWA compliance omissions. This will ensure that each agency's compliance actions of ICWA requirements and spirit are well documented.

The NCSC/NAILS project team recommends that South Dakota, in consultation with the tribes, create a culture and requirement for ICWA compliance that lives up to both the technical compliance aspects of ICWA as well as the spirit of ICWA. The lack of past consultations have created an apparent gap in perception between the tribes and the state as to how well ICWA compliance has progressed. This gap in fulfilling the spirit and technical aspects of ICWA appears to be due to a series of factors that can be categorized as follows: (1) the lack of communication, collaboration, and coordination between state and tribal entities; (2) the lack of state and tribal resources; and the (3) lack of adequate, focused training for all the appropriate state agencies. With respect to communication, collaboration, and coordination, the NCSC/NAILS project team heard from almost all state and tribal ICWA stakeholders that they desire to work together in multiple forums to tackle the underlying issues impeding ICWA compliance, the plight of Indian children, and developing a solid agency and tribal infrastructure to maximize outcomes for Indian children. As a result, the NCSC/NAILS project team recommends that there be a South Dakota statewide state and tribal summit to address these compelling issues. The NCSC/NAILS project team feels that substantial improvement in ICWA compliance would result from the state's consultation with the tribes so that the tribes can be considered as essential partners in carrying out the requirements and policies of ICWA. In addition, the project team feels that only with tribal presence and partnership in case management practices will the ICWA policy of preservation of the cultural heritage of Indian children be met.

Recommendation 33. There should be a South Dakota annual statewide ICWA state and tribal summit to address: (1) communication, collaboration, and coordination between state and tribal entities; (2) state and tribal resources; and the (3) state and tribal training.

Training and awareness can be strengthened at all levels. This includes initial and on-going training for state and tribal ICWA stakeholders focusing on the technical, policy, and operational aspects of ICWA. Several examples from other states exist that can assist the state government and tribes in South Dakota to accomplish a successful state tribal collaboration for ICWA implementation. These examples (such as from Minnesota, New Mexico and Oregon)

include codification of laws and the development of social work practice manuals that advance ICWA compliance not only technically but culturally, as well.

While the report focuses primarily on specifics as to the state of South Dakota's compliance with ICWA requirements, state and tribal focus group statements show a need for additional financial resources for the state agencies and the tribes. This especially appears to be true for the state in the development of American Indian foster homes and culturally appropriate social services, including mental health and rehabilitative services, so that state agencies may fully comply with the "active efforts" and placement preference provisions of ICWA. In order for the tribes to participate as functioning partners in state child welfare practices, additional resources are equally critical. In most tribal communities, tribal child welfare programs are under funded and understaffed which prevents the tribes from adequately responding and participating in ICWA cases. The project team recommends that this shortage of resources for tribal programs be addressed in order to institute the development of a comprehensive working relationship between the tribes and the state. The project team recognizes that this will be a Federal responsibility for further funding. As a result, the team recommends that the tribes and the state work together with Congress and the Federal departments for this additional funding need.

> ***Recommendation 34. The shortage of resources for tribal programs should be addressed in order to institute the development of a comprehensive working relationship between the tribes and the state. The tribes and the state should work together with Congress and the Federal departments for this additional funding need. This topic should be included in the annual statewide ICWA summit.***

Finally, the NCSC/NAILS team feels that the resources truly needing protection and development are the Indian children and their families, who would benefit from the state agencies and nine tribes consulting and acting together to best provide for their needs both culturally and as citizens. These children and families should not be viewed as "state" or "tribal," but as children and families deserving of the protection and best efforts of all.