

# Indian Child Welfare Act

A Pilot Study  
of Compliance  
in North Dakota

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**The National Indian Children's Alliance (NICA) was formed in 1999 between Casey Family Programs and the National Indian Child Welfare Association. The goal of the Alliance is to increase permanency options for Indian children through three targeted project areas: 1) the conduct of research that can contribute to policy development on issues that impact Indian children; 2) the provision of on-site technical assistance and training to tribes to enhance service options for their children and families; and 3) the development of tribal adoption codes that incorporate historically and culturally defined practices and the implementation of a campaign to develop additional foster, kinship or adoptive homes. Together, these three components will provide Indian children with a stronger foundation for achieving the permanency that all children deserve.**

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# Indian Child Welfare Act A Pilot Study of Compliance in North Dakota

The Indian Child Welfare Act (Public Law 95-608), passed by the United States Congress in 1978, was a significant effort to curtail the massive removal of Indian children from their homes and cultures by public child welfare agencies. The Act imposes certain procedural and substantive standards upon state courts and state child welfare agencies before an Indian child can be removed from his/her home and culture. The procedural aspects of ICWA allow tribal input into the decision-making authority of state courts by allowing Indian tribes to participate in state court proceedings involving their children and to transfer cases back to their own courts to determine the fate of an Indian child. The substantive aspects of the law require state agencies to place Indian children in accordance with certain placement preferences in order to assure that Indian children removed from their birth families would nonetheless be raised in homes that preserve their unique cultures and traditions.

While the Act specifies legal requirements that can be used to measure compliance with the Act, there is limited research that examines states' compliance with these provisions. The purpose of this pilot study is to examine ICWA compliance in nine North Dakota counties with the highest number of Indian children in foster care. The research team reviewed open county foster care

case records involving Indian children, administered structured interviews with county caseworkers, and conducted focus groups with tribal and county child welfare staff. Results of this study include: 1) there is a high level of county compliance to determine if a child is a member of a tribe or eligible for membership; 2) there is mixed compliance in regard to notice given to tribes, parents and Indian custodians regarding the placement of Indian children by county child welfare workers; 3) there is a high number of county workers who support tribal requests for transfers of jurisdiction; however, tribes actually made few requests for transfers of jurisdiction, and lack of requests may not be a true indicator of tribal interest to transfer; 4) over half the case records indicated that active efforts were made to prevent out-of-home placements; and 5) over half of the county foster care case records indicated that ICWA preferences were not followed in placement decisions. Throughout the research, it became evident that positive tribal-state relations facilitated compliance with the Act and may foster improvement in effective implementation of the Act in North Dakota. Recommendations were discussed in relation to the compliance criteria used.



# Indian Child Welfare Act A Pilot Study of Compliance in North Dakota

The purpose of this pilot study was to examine Indian Child Welfare Act (ICWA) compliance in nine North Dakota counties with the highest number of Indian children in foster care. Listed below is a brief summary of the research findings and recommendations for improving ICWA compliance in North Dakota.

There is a high level of county compliance to determine if a child is a member of a tribe or eligible for membership.

- Tribal and county social workers indicated lines of communication should be strengthened to help the county identify the child's tribe; establish paternity; understand tribal governmental structures, processes, and resources; and become familiar with specific tribal cultures, values and standards.
- North Dakota counties differ on intake processes used to determine whether an Indian child is involved.
- If children had no physical Indian characteristics, most county social workers did not ask any probing questions to ascertain if the child was Indian, and therefore, some Indian children may have been overlooked in the initial determination of ICWA applicability.

There is mixed compliance in regard to notice given to tribes, parents and Indian custodians regarding the placement of Indian children by county child welfare workers.

- There were serious deficiencies in the notice content in approximately half of the notices sent to tribes and parents. The notice forms being used by the counties were not uniform.
- Most counties do not make inquiry to the pertinent tribal courts regarding previous proceedings that may have rendered the Indian child a ward of the tribal court and outside of state jurisdiction.

There is a high number of county workers who support tribal requests for transfers of jurisdiction; however, tribes actually made few requests for transfers of jurisdiction, and lack of requests may not be a true indicator of tribal interest to transfer.

- Case workers indicated that some of the reasons for not supporting the transfer of jurisdiction include: the child does not wish to go back to the reservation; the child does not have access to necessary services on the reservation; and the child has formed a strong bond with an off-reservation family.
- Tribal workers stated that they would prefer to monitor and intervene in ICWA cases rather than request a transfer of jurisdiction if it would cause the child more trauma to be displaced from his or her family and community, especially if reunification is planned; if the child does not want to be placed outside of his or her community; lack of resources to

**provide appropriate services for a child who has special needs; or if there is a lack of resources, high caseloads, and limited tribal child welfare staff.**

**Over half of the case records indicated that active efforts were made to alleviate the need to remove an Indian child from his or her home.**

- **The most frequently cited culturally based interventions were tribal resources, followed by extended family members.**
- **There is wide variation in county uses of cultural considerations in providing preventive services and supports.**
- **It appears that counties with higher caseloads of Indian children considered tribal conditions more often than those with lower caseloads of Indian children.**

**Over half of the foster care case records indicated that the placement preferences set forth in the Act were not followed.**

- **The perceptions of county caseworkers regarding their diligent efforts to find appropriate placements according to ICWA were in stark contrast to actual documented efforts.**
- **Over two-thirds of the records indicated the Indian children were placed in non-Indian foster homes (including those homes approved by tribes).**

**Recommendations for improving compliance with the Act in North Dakota include:**

- **Indian Child Welfare Act training should be integrated into existing and ongoing training**

**for all state, county, and tribal child welfare staff.**

- **Standardized tribal transfer of jurisdiction and intervention forms should be developed and utilized by non-attorney tribal advocates to ensure state recognition of tribal motions and petitions.**
- **The state should work more closely with off-reservation Indian organizations to assist counties in the recruitment, development, and retention of Indian foster homes.**
- **Improved communication and collaboration is needed between county and tribal child welfare workers throughout the case planning process.**

# Indian Child Welfare Act A Pilot Study of Compliance in North Dakota

## Introduction

More than any other group of children, Indian children<sup>1</sup> have been, and remain today, the targets of complex statutory and regulatory laws that attempt to preserve their unique cultural identities while recognizing their rights to be nurtured, protected, and loved in a safe environment. Perhaps the most significant development for cultural survival was the enactment of the Indian Child Welfare Act (Pub. L. No. 95-608) in 1978. The Act represents a critical effort to curtail the massive removal of Indian children from their homes and cultures by state courts and public child welfare agencies “because of a well-documented historical abuse of that authority” (Jones, 1997, p. 396).

The philosophical underpinnings of the Indian Child Welfare Act (ICWA) call for tribal, cultural, and family protection and preservation by mandating the end of out-of-cultural placements of Indian children (George, 1997). The Act imposes certain procedural and substantive standards upon state courts and state child welfare agencies before an Indian child can be removed from his/her home and culture. The procedural aspects of ICWA allow tribal input into the decision-making authority of state courts by allowing Indian tribes to participate in state court proceedings involving their children and to transfer cases back to their own courts to determine the fate of an Indian child. The substantive aspects of

the law require state agencies to place Indian children in accordance with certain placement preferences in order to assure that Indian children removed from their birth families would nonetheless be raised in homes that preserve their unique cultures and traditions.

The impetus behind the enactment of the Act is of particular importance in North Dakota. One of the first tribes to signal distress to Congress over the destiny of their children was the Spirit Lake Tribe of Dakota Indians (formerly known as the Devil’s Lake Sioux Tribe). In the late 1960s they began questioning the placement of their children into non-Indian foster care homes by state and county child welfare agencies. In the early 1970s, other North Dakota tribes—the Standing Rock Sioux and the Three Affiliated Tribes—followed suit and passed tribal resolutions calling for the end to the practice of removing Indian children, especially when they involved trans-racial placements (Mannes, 1995). Hundreds of the tribes’ children were being placed and could not be accounted for by state and county child welfare agencies. Because the law at that time did not mandate states and counties to notify tribes when and where their children were being placed, tribes had no legal remedy to demand answers to tribal inquiries about their children.

In 1968, after becoming outraged by practices of state and county child welfare officials in North Dakota regarding the placement of their children in various forms of non-Indian out-of-home care, the Devil's Lake Sioux Tribe contacted the Association of American Indian Affairs (AAIA) requesting its involvement in the matter. This action prompted an intensive look at Indian child-removal practices throughout the country (American Indian Task Force Commission, 1978). According to a report published by the AAIA in 1969, an alarming 25%–35% of all Indian children in states with a large Native American population were being removed from their families and placed in non-Indian homes (Mannes, 1995). Differences between the removal rates of Indian children and other children were just as startling. For example, in South Dakota the number of Indian children in foster care was, per capita, 16 times greater than the rate for other children (Jones, 1995). In Washington, the adoption rate for Indian children was 19 times greater than the rate for other children (Jones, 1995). According to Jones (1995), "What makes these statistics even more sobering is that in many of these states the overwhelming majority of Native Americans resided on reservations where ostensibly the state courts and welfare agencies had no authority to order the removal of Native American children" (p. 2).

These statistics, accompanied by anecdotal information from tribal leaders and Indian families,

were used to urge Congress to pass Indian child welfare legislation in 1978. In the passage of ICWA, Congress concurred with the tribes' assertion and, as part of their special trust relationship with Indian tribes, prefaced the Act by stating the following:

There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . [A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and that the States have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families (Indian Child Welfare Act, 1978).

Over the past several years, public policymakers have developed an increased awareness of the unique needs of Indian children. However, a lack of accurate, reliable, and useful information has kept this awareness from translating into significantly improved child welfare practices for Indian children, their families, and tribes. On both state and national levels, there is a significant lack of data concerning the effects, either positive or negative, of ICWA on tribal children today. Lack of data makes it difficult to develop and implement changes that will assure state compliance with the law and protect the cultural identity of Indian children.

This study marks the beginning of collecting, analyzing, and reporting such critical data regarding Indian child welfare. Narrow in focus, this pilot study examines ICWA compliance in nine North Dakota counties with the highest number of Indian children in foster care. Key aspects of ICWA are explored and analyzed through a comprehensive review of open county foster care case records of proceedings involving Indian children in selected counties. In addition, structured interviews with county caseworkers and focus groups with county and tribal child welfare personnel were conducted to gather qualitative information surrounding the various facets of ICWA compliance.

To measure compliance with the provisions set forth in ICWA, there must be certain criteria defined to determine what constitutes compliance. Because the proper application of the Act is often the subject of much contention in the courts, this research intentionally does not gauge assessment with provisions of the Act that are frequently disputed in the courts. Rather, the researchers established seven key questions to address in the assessment of ICWA compliance in North Dakota:

1. Is ICWA being properly applied to child custody proceedings involving Indian children?
2. Is adequate and proper notice being provided to tribes and other entities at all relevant stages of ICWA proceedings?
3. Are Indian tribes being permitted to exercise their rights to intervene in child custody pro-

ceedings and transfer jurisdiction to tribal courts?

4. Are the placement preference provisions for foster care and pre-adoptive placements being complied with?
5. Do counties use culturally competent expert witnesses to sustain foster care placements and terminations of parental rights?
6. Are the counties engaged in active efforts to alleviate the need to remove an Indian child from his or her home? Are counties offering Indian families remedial and rehabilitative services designed to foster reunification?
7. What is the level of training received by county workers on ICWA issues?

North Dakota tribes were influential in garnering evidence and support necessary for changing the way decisions are made regarding the placement of Indian children. It is only befitting that the treatment of Indian children in North Dakota, a principal impetus behind the enactment of ICWA, be revisited in this research.

This report is organized into four parts. Part I presents a review of the literature that: 1) examines the current status of Indian children in North Dakota; 2) provides an overview of American Indian children and the law; 3) provides an overview of the Indian Child Welfare Act; 4) explores the potential barriers to ICWA compliance; and 5) discusses factors that support the implementation of ICWA in North Dakota. This section presents a framework to explore the

various federal policies that have shaped the lives of Indian children, their families, communities and tribes in order to outline the complexities involved in assessing ICWA compliance. The literature review draws from a variety of sources including journal articles, books, state reports, field reports, and best practice information in the field of child welfare. Part II outlines the methodology used in conducting the ICWA compliance review in North Dakota. Part III presents the findings of the three data collection methods used in this research (i.e., county case record reviews, structured interviews with county caseworkers, and focus groups with tribal child welfare workers and county social service workers). Part IV presents conclusions of the findings and makes recommendations for improving North Dakota's compliance with ICWA.

# PART I: Review of Literature

## A. Status of American Indian Children in North Dakota

American Indian children in North Dakota, and elsewhere in the United States, carry a unique legal status. In North Dakota, they are citizens of three separate political entities—the United States, the State of North Dakota, and the Indian tribe to which they belong. Five separate Indian nations exist, either wholly or partially, within the boundaries of North Dakota. Three of the tribes, the Spirit Lake Tribe, the Three Affiliated Tribes of the Fort Berthold Reservation, and the Turtle Mountain Band of the Chippewa, exist wholly in North Dakota. The Standing Rock Sioux and Lake Traverse Reservations also extend into South Dakota. Because the tribes maintain a distinctive political relationship with the United States government, they are often the subjects of discrete federal law that applies only to Indian people.

In North Dakota, the overall Indian population is relatively young. According to the 1990 census, 45% of the total Indian population in North Dakota was 19 years of age or younger. Indian youth comprise 7% of the overall North Dakota child population (Census Bureau, 1990). The 1990 census further indicates that 54% of North Dakota Indian youth live below the poverty level.

In 1993, the Child Welfare League of America (CWLA) was commissioned by the North Dakota State Legislature to examine and report on the status of children in North Dakota. Even

though results of the study ranked North Dakota as one of the top three states in several indicators of children's well-being, it also found that North Dakota's Indian children would be ranked last if they were a 51st state (CWLA, 1994). According to their findings, in North Dakota:

- The Indian infant mortality rate is 11.4 per 1,000 births, compared with the rate of 7.4 per 1,000 births for white infants,
- In 1992, the overall youth death rate per 1,000 children was almost three times higher for Indian youth (1.65) than for white youth (0.56).
- In 1993, one out of every three Indian youth in grades 9–12 considered suicide.

Further, Indian children were over-represented in the most restrictive environments and were represented anywhere between 30% to 40% in child welfare, special education, juvenile justice, and children's mental health systems (CWLA, 1994).

- In 1992, Indian youth were 28% of all juvenile detentions in North Dakota and 36% of all admissions to the Youth Correctional Center (formerly known as the State Industrial School).
- In 1992, Indian youth represented 32% of all children in foster care in North Dakota and 39% of all admissions to the State Hospital (CWLA, 1994).

## B. Overview of American Indian Children and the Law

An understanding of the fundamental tenets of law underlying the relationship between Indian tribes and the federal government is necessary to fully grasp the legal status of Indian children in North Dakota. The relationship between Indian tribes and the United States is a complex one borne of centuries of both conflict and reconciliation. Federal policy toward Indian tribes, and consequently Indian children, has been inconsistent throughout the two centuries that Congress has been legislating Indian affairs. Many commentators have noted that federal policy has shifted repeatedly from attempts to assimilate Indians into the mainstream non-Indian population, both economically and socially, to efforts that preserve tribal self-determination (Cohen, 1971).

Unfortunately, under several historic federal policies, Indian children have been viewed as the principal objects for change. Indian children have been the legal targets of a multiplicity of notions and ideas promoted by public policymakers who have conflicting agendas regarding the children's "best interests." Because Indian children were the targets of a variety of opinions regarding the future of Indian tribes, a wealth of unique laws and policies flourished simultaneously with their upbringing.

The federal legacy of the treatment of Indian children is a sad and sordid one and laid the

groundwork for the situations that led to the passage of ICWA in 1978. The federal legacy of the treatment of Indian children is important in order to understand the environmental, psychological, and political contexts that led to the passage of ICWA. The beginning of the destruction of Indian families was in the assimilation and dependency period of the late 1800s and early 1900s when the federal government was attempting to assimilate Indian families into the non-Indian mainstream. On an economic level, this attempt was made through the process of allotment under the General Allotment Act of 1887, more commonly referred to as the Dawes Allotment Act. This Act divided reservations into parcels of land that were then allotted to individual Indians and Indian families on the premise that the Indians would become farmers and ranchers and adapt to the agrarian lifestyle of their non-Indian neighbors. To facilitate this process, the policy of allotting Indian land was undertaken. Land owned by Indian tribes in common was parceled out to individual Indians, usually only male heads of households, and the surplus land was then opened up to non-Indian homesteaders. In turn, the non-Indian homesteaders would serve as teachers for the less sophisticated Indian farmers and ranchers (Cohen, 1971). Thus, the hope was to assimilate Indians into the American economy.

Many people believed that Senator Henry Dawes, one of the proponents of allotment, saw allotment in purely economic terms as a way of integrating the Indian into the agrarian economy.

A closer look at his writings, however, shows that Dawes believed that Indian people led a savage lifestyle that could only be stripped from them if they were denied the right to practice their culture and traditions. For example, he writes, “It was plain that if he [American Indian] were left alone, he must of necessity become a tramp and beggar with all the evil passions of a savage, a homeless and lawless poacher upon civilization and a terror to the peaceful citizen” (Dawes, 1899).

Throughout the mid to late 1800s, federal policymakers targeted Indian children as the agents of change in an era when Indian people were perceived as “savages” needing to be rehabilitated and Christianized in order to survive in an increasingly dominant non-Indian society. Transforming Indian children was perceived as the key to Indian survival in mainstream American society. Beginning in 1860, federal policymakers began to consider the use of boarding schools as a mechanism for removing children from their families. During the latter part of the nineteenth century and early part of the twentieth century, the majority of Indian children were forcibly removed from their families and cultures and placed in boarding schools, where a process of cultural degradation began. Often, Indian children were denied the right to speak their native languages, practice their spiritual beliefs, or even adhere to their traditional grooming and attire. All of these denials were countenanced upon the belief that Indian children needed to be “Christianized” in order to survive in contemporary society. Federal statutes were enacted that

forced Indian families to allow their children to go to boarding schools or else face losing their rations. In addition to cultural deprivation at the boarding school, there were several reported instances of Indian children being physically and sexually abused in many of these schools to the point where several Christian denominations have recently issued apologies for their behavior during this period of time (Golder and Kolker, 1994).

Peter Farb (1968) describes the boarding school experience in the following terms:

The children were usually kept at boarding school for eight years during which time they were not permitted to see their parents, relatives or friends. Anything Indian—dress, language, religious practices, even outlook on life ... was uncompromisingly prohibited. Ostensibly educated, articulate in the English language, wearing store-bought clothes and with their hair cut short and their emotionalism toned down the boarding school graduates were sent out either to make their way in a white world that did not want them or to return to a reservation to which they were now foreign (pp. 257–259).

Never before in this country has there been such a concerted effort to transform a group of people by legally manipulating their children. Many policymakers believed that this moral assimilation would be unsuccessful on adult Indians, so the focus fell upon Indian children. The result was a belief that Indian children necessarily needed to be away from the “savage” influences of their

parents and placed in places where Christian dogma and morals could be inculcated in them. This philosophy is perhaps best evidenced in a statement from the 1886 Commissioner of Indian Affairs:

It is admitted by most people that the adult savage is not susceptible to the influence of civilization, and we must therefore turn to his children, that they might be taught how to abandon the pathway of barbarism and walk with a sure step along the pleasant highway of Christian civilization ... They must be withdrawn, in their tender years, entirely from the camp and taught to eat, to sleep, to dress, to play, to work and to think after the manner of the white man (cited in George, 1997, p. 166).

The federal government played a role in this attempt at social engineering both by mandating that Indian children attend boarding schools, often great distances from their tribal homes, and by operating Bureau of Indian Affairs (BIA) boarding schools. Many boarding schools began closing in the 1930s with the passage of the Indian Reorganization Act. This Act provided tribes with greater control over the reservations (George, 1997). However, as late as 1971, 17% of school-aged Indian children were still being removed from their homes to attend BIA boarding schools (Jones, 1995).

An often overlooked provision of ICWA is section 1961, where Congress notes that the absence of conveniently located day schools for Indian students was contributing to the unwarranted

break-up of Indian families. This is the only recognition in ICWA that boarding schools for Indian children contributed to the forced destruction of Indian families. This problem is somewhat addressed by *25 U.S.C. 2001e* (1994), which stresses the need for the BIA to provide more local schools for Indian education. Although Congress emphasized that state courts and institutions were the primary vehicles for the unwarranted removal of Indian children from their homes and tribes, it is clear that the federal government, with its policy of forced cultural assimilation, influenced the destruction of Indian families.

In more recent years, child welfare policies and practices continued to have similar detrimental effects on Indian children and the integrity of their families. The 1950s saw the beginning of an adoption movement that continued the break-up of Indian families. This movement was grounded in a philosophy expressed by state and county officials in 1950:

If you want to solve the Indian problem you can do it in one generation. You can take all of our children of school age and move them bodily out of the Indian country and transport them to some other part of the United States. Where there are civilized people ... If you take these kids away and educate them to make their own lives, they wouldn't come back here (cited in George, 1997, p. 169).

In 1957, the BIA started the Indian Adoption Project through a contract with the Child

Welfare League of America (CWLA) “to operate a clearinghouse for the interstate placement of Indian children with non-Indian families” (cited in George, 1997, p. 169). The mission of the project was clear and deliberate about the break-up of Indian families. The goal was to provide adoptive placements for Indian children whose parents were deemed unable to provide a suitable home for them (Mannes, 1995). Through the project, a total of 395 Indian children were adopted, often without tribal consent (Mannes, 1995). Roughly 96% of these children were placed in either mid-western or eastern states with non-Indian families because “non-western states were believed to be less prejudiced against Indians” (George, 1997, p. 169). “In Minnesota, in the years 1971–1972, nearly one in four Native American infants under the age of one year were placed for adoption ... Ninety percent of those adoptions were in non-Indian homes” (cited in George, 1997, p. 173). This project was responsible for sparking an adoption movement that promoted the voluntary participation from Indian tribes and families in the adoption of their children. The consequences of this movement were shared with Senate subcommittee hearings in the early 1970s and eventually used to support the passage of ICWA.

The passage of Public Law 83–280 in 1953, during the termination era of federal policy, created further difficulties for many Indian families. Congress enacted this law during an era when it was attempting to terminate many tribes and vest state courts with criminal and civil jurisdiction

over certain Indian reservations. Several states, including Minnesota, Wisconsin, California, Nebraska, and later Alaska, were given jurisdiction over Indian reservations and the tribal members residing on reservation lands. One result of this expansion of state jurisdiction was the increase of Indian children on reservations who would be subject to the practices of state and county child welfare agencies. The removal practices of these child welfare agencies would continue to exacerbate the problems facing Indian families, which were still reeling from the familial destruction of the boarding school policies (Jones, 1998).

Other states, such as North Dakota, were given the option of exercising jurisdiction over the reservations within the boundaries of their state. In 1963, North Dakota passed state legislation, under the umbrella of Public Law 83–280, to assume civil jurisdiction only with the consent of the tribe or individual Indian (North Dakota Indian Affairs Commission, 2000). Based on this expressed limitation of state authority in response to the federal law, the North Dakota Supreme Court ruled, in a 1963 Indian child custody proceeding, that “there was no basis for a positive ruling on a petition to terminate the parental rights of Indian parents living on the reservation since the parents had not consented to the state’s assumption of jurisdiction” (Mannes, 1995, p. 273). This North Dakota state law remains today; however, it is unlikely to be implemented, given the tribes’ strong assertion of their sovereignty through self-determination.

## C. Overview of the Indian Child Welfare Act

With the passage of ICWA, Congress recognized that Indian tribes and tribal members have more knowledge of familial and cultural ties of Indian children than states, private social workers, and county officials. The Act protects parental rights and the child's right to tribal affiliation through specific procedural, evidentiary, dispositional, and other requirements (Plantz, Hubbell, Barrett, and Dobrec, 1988). The following is a brief description of ICWA, highlighting the specific requirements of the Act being examined under each of the outlined research questions described earlier:

The Act contains both procedural and substantive provisions. The combination of these provisions are designed to accomplish three primary objectives: 1) eliminate the need to remove Indian children from their families, both nuclear and extended, because of cultural bias and ignorance; 2) assure that Indian children who need to be removed for their own protection be placed in foster and adoptive homes that reflect their unique cultures and background; and, 3) encourage tribal court adjudication of child custody proceedings involving Indian children. Jones (1995) states, "These procedures were enacted to ensure maximum involvement from the Indian child's tribe as well as to secure the sanctity of the Indian family by ensuring that the removal of an Indian child from his or her family would be done pursuant to stringent requirements" (p. 50).

The Act applies to state court "child custody proceedings" involving "Indian children." A child custody proceeding under ICWA is defined as a foster care placement, termination of parental rights proceeding, pre-adoptive placement, or adoptive placement of an Indian child. The Act does not apply to custody disputes between parents, either as part of a divorce or non-divorce proceeding, nor does it apply to delinquency proceedings involving Indian children who commit acts that would be criminal if committed by an adult. It is important to note that the child custody proceeding need not involve some state action, such as the removal of an Indian child by a state or county child protection entity, in order for ICWA to apply. For example, the provisions of ICWA do apply to private placements and adoptions as well as those initiated by state and county agencies.

The starting point for determining the applicability of the Act is an inquiry into whether the child involved in the proceeding is Indian. An "Indian child" is defined under ICWA as an unmarried child under 18 who is a member of a federally recognized Indian tribe or eligible for membership in a federally recognized tribe and the natural child of a member of an Indian tribe. The Act reaffirms the right of Indian tribes to determine their own membership and requires state courts to defer to a tribal determination of membership. In any child custody proceeding in state court where a party believes or has reason to believe that the child involved is an Indian child, there is an affirmative obligation on the part of all parties

and their attorneys to report such to the court so notice may be given to the Indian child's tribe.

Some courts have carved out an exception to the definition of Indian child, commonly referred to as the "existing Indian family exception," and held that the Act should not apply to an otherwise qualified Indian child who has not lived with an Indian family or has lived with an Indian family with few or no ties to an Indian tribe. The language of the Act does not support such an exception, but these courts have asserted that such an exception is consistent with the legislative history of ICWA. Other courts and commentators have strongly criticized this exception and some state legislatures have taken action to repeal the judicially created exception (Jones, 1995).

The procedural requirements of ICWA are contained generally at 25 U.S.C. §1911 and §1912. §1911 distinguishes between the jurisdiction of state and tribal courts in child custody proceedings involving Indian children. Indian tribal courts are given exclusive jurisdiction over child custody proceedings involving Indian children who are domiciled on Indian reservations or are wards of tribal courts. This rule applies in all states except those commonly referred to as Public Law 280 states, which were given civil jurisdiction over Indian reservations (described earlier in this section). In those states, the state courts may exercise concurrent jurisdiction, along with tribal courts, over child custody proceedings involving Indian children. For Indian children domiciled off reservations, state courts can exer-

cise jurisdiction over child custody proceedings, but the exercise of that jurisdiction is subject to a transfer of jurisdiction to the tribal court of the Indian child's tribe. In general, ICWA favors a transfer of jurisdiction of a child custody proceeding involving an Indian child to a tribal court unless the state court judge determines there is "good cause to the contrary." The parent of an Indian child can always veto a transfer to a tribal court, and the tribal court can decline a transfer of jurisdiction to its court. Often, many tribes do not transfer jurisdiction over the majority of child custody proceedings involving their children because they lack the financial resources to provide for the children, resources the state may be able to access.

Notice is a vital procedural component of ICWA. The Act requires any party to an involuntary child custody proceeding involving an Indian child to give notice to the child's parents, Indian custodian (if one exists), and tribe at the commencement of the proceeding. Notice is triggered by any suggestion that the child is an Indian child, and any tribe with possible affiliation must be given notice. Most courts have ruled that the failure to give notice under the Act deprives the state court of jurisdiction. In many cases, more than one tribe must be given notice because of differing tribal affiliations among the parents. If a party cannot determine which tribe the child is affiliated with, notice may be given to the BIA, which in turn is responsible for the determination of tribal affiliation.

Other procedural requirements of ICWA govern the weight of the evidence and type of evidence necessary to sustain an involuntary foster care placement or involuntary termination of parental rights. To achieve an involuntary placement of an Indian child outside his or her home, the party seeking removal must establish by clear and convincing evidence, supported by the testimony of a qualified expert witness, that the child would suffer severe emotional or physical harm if left in the child's home. According to the 1979 BIA Guidelines for State Courts, a qualified expert witness is a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; a lay expert witness with substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe; or a professional person with substantial education and experience in the area of his or her specialty. The requirement that a qualified expert witness's testimony support removal or termination is an attempt by Congress to assure that a person with specific knowledge of Indian child-rearing practices testify to the cultural propriety of removal or termination.

The moving party must also establish that active remedial and rehabilitative services were offered to the family in an attempt to avoid removal. To sustain a termination of parental rights, the court

must find beyond a reasonable doubt that these requirements are shown. The need to demonstrate that active remedial and rehabilitative services are provided to Indian families is similar to the requirement found elsewhere in federal law; under ICWA, however, those services have to be provided before removal is effected as well as afterwards in an attempt to seek family reunification.

Indian parents and custodians are also entitled to the appointment of counsel in ICWA cases, notwithstanding their need. If a state would otherwise not appoint counsel in a particular matter but does because of the ICWA mandate that a state can apply to the BIA for reimbursement for the expenses of court-appointed counsel.

The Act recognizes that Indian tribes have unique rights that must be preserved in litigation regarding the placement of their children. To protect these rights, the Act gives an Indian tribe the right to intervene at any stage of an ICWA proceeding and also vests in the tribe the right to request a transfer of the proceeding to a tribal court. Tribes are also given additional time to prepare for litigation after notice is provided, and they also have a fairly unlimited right of discovery in ICWA cases. Last, Indian tribes are given an independent right to discover the placement location of their tribal members as well as the right to collaterally challenge actions taken by state courts and entities in violation of the Act.

The substantive provisions of the Act are the placement preference provisions contained in

25 U.S.C. §1913. These provisions are designed to assure that Indian children that are removed from their homes are placed in homes that reflect their unique cultures: “Those provisions reflect congressional realization that even if the Indian child’s bond to the parents or Indian custodian is severed, state court must make every effort not to dissolve that tie between the child and his or her tribe because it is that association that will protect the integrity and future viability of the tribe itself” (Jones, 1997, p. 83).

There are separate placement preference provisions governing foster care and adoptive placement. Both placement preference provisions recognize that Indian tribes should have the right to alter the placement preferences by enacting their own preferences for placement of their children. The provisions for foster care placements are described in Section 1915 (b) of ICWA. These provisions apply to voluntary and involuntary foster care placements, pre-adoptive placements, and placements made in contemplation of the termination of parental rights (Jones, 1997). The placement provisions specify that in any placement mentioned above, the Indian child shall be placed first with a member of his or her extended family (which in the case of a child of both Indian and non-Indian parents would include the non-Indian family members); second with a foster home licensed, approved or specified by the Indian child’s tribe; third in an Indian foster home licensed or approved by an authorized non-Indian licensing authority; and last in an institu-

tion 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. Despite this mandate of ICWA, many Indian children continue to be placed predominately with non-Indian foster families, primarily due to the failure of some states to recruit and retain a sufficient number of Indian foster families.

#### D. Barriers to Effective Implementation of ICWA

The provisions contained in the Act have been implemented in varying degrees throughout the United States. The level of compliance with the Act can be better understood through a review of issues that have created barriers to fully implementing the Act on a national level. Barriers to effective implementation of ICWA exist at federal, state, county and tribal levels. These barriers include lack of funding; jurisdiction issues; lack of trained personnel; lack of information about the extent of the problem; lack of appropriate service models; and community denial (Cross, Earle, and Simmons, 2000). Plantz et al. (1988) highlighted the following specific barriers to effective ICWA implementation as identified by public agencies and judicial respondents: lack of experience in working with tribes; unfamiliarity with or antipathy toward ICWA; low proportion of Indian cases in some localities; staff turnover; prejudice toward Indians; lack of tribal resources; and concern about tribal accountability in providing services. For the purposes of this report, the

following barriers will be explored as they relate to the effective implementation of ICWA: 1) lack of funding; 2) jurisdiction issues; 3) lack of information about the extent of the problem; and 4) lack of appropriate service models.

### ***Lack of Funding***

The Act has been largely unsuccessful in abating the removal rate of Indian children from their homes because of tribes' lack of funding. Indian tribes do not have access to the same types of funding that states have in order to provide a comprehensive continuum of services for Indian children and their families. Tribes are required to enter into cooperative agreements with states in which the tribe is located in order for tribes to receive federal Title IV-E foster care payments for children residing on tribal lands, limiting the ability of tribes to secure these types of federal funds. However, Title IV-E, among other significant federal sources of child welfare funding, neither requires nor encourages states to provide access to Title IV-E funds. Such agreements permit Indian tribal courts and child placement agencies to place Indian children in appropriate homes and facilities, which are reimbursed by the state under Title IV-E. Title IV-E eligibility also triggers medical assistance eligibility under Title XIX of the Social Security Act. This allows an Indian child in substitute care to receive needed medical and counseling services that many non-IV-E eligible children do not receive. Federal legislation has been introduced to allow Indian

tribes to administer Title IV-E directly, but that legislation has not been passed.

In *Native Village of Stevens vs. Smith*<sup>2</sup>, an Alaskan native village sued the Governor of Alaska after the State of Alaska refused to pay for the foster care maintenance of a child placed by the tribe. The tribe sought a declaratory judgment that tribally licensed foster homes were equivalent to state-licensed foster homes for the purposes of receiving Title IV-E funding. The tribe argued that it had unsuccessfully attempted to negotiate a cooperative agreement with Alaska. Further, the tribe stated that federal law mandated Alaska to enter into such an agreement. The court held that while the spirit to undertake such an agreement was consistent with the statutes, federal law did not require Alaska to enter into an agreement with the tribe concerning foster care. The court stated that if no agreement existed, the tribe was not entitled to federal foster care reimbursement for the placement of the Indian child.

The establishment of cooperative agreements can prove challenging. In many cases, tribes and states must circumnavigate longstanding points of contention, such as tribal sovereignty, comity, jurisdiction and land disputes (U.S. Department of Health and Human Services, 1994). ICWA encourages agreements between states and tribes regarding the care of Indian children by expressing a legal mechanism for states and tribes to enter into agreements regarding jurisdiction and other issues. However, securing otherwise unavail-

able federal funding through agreements with states continues to be problematic.

Because Title IV-E is a program governed by federal regulations which states must adhere to in order to access funding, many states suggest the funding agreement should be contingent upon a tribe adopting the policies and procedures of the state child welfare agency. States may be hesitant to enter into such cooperative agreements with tribes because the state assumes the risk for tribal compliance with the requirements of Title IV-E (Brown, Clifford, Limb, Munoz and Whitaker, 2000). Thus, states could face significant fiscal sanctions if tribal proceedings are found to be out of compliance with Title IV-E statutes.

A second factor limiting a tribe's access to Title IV-E funding is the federal requirement for a non-federal matching share when using Title IV-E funds. States use general revenue funds collected through the state tax base to meet this matching requirement, but are generally reluctant to use state taxpayer dollars to provide the non-federal match for a tribe. The 1994 Amendments to the Indian Self-Determination and Education Assistance Act allowed the use of Public Law 638 funds to serve as the tribal non-federal match for Title IV-E or Title XIX.

Another factor that may impact a tribe's ability to negotiate cooperative Title IV-E agreements is when multiple states are involved because a tribe's reservation lands extend beyond the borders of one or more states (Brown et al., 2000). These

agreements may vary depending upon the leadership of the state and tribe and the requirements of each entity. On a national level, many of these issues will remain unresolved unless legislation is passed which allows tribes to receive Title IV-E funding directly, much in the way tribes can now access federal dollars to operate certain provisions of Temporary Assistance to Needy Families (TANF). Of course, just as with the TANF program where the requirement of a tribal match proved too great an obstacle for most tribes to meet in order to operate that program, the same quandary will confront Indian tribes in the foster care arena. It remains to be seen whether or not the federal government will provide all of the funding for Indian tribes, either long-term or on an interim basis, and whether states, which must meet the match requirement will object to such a dual standard.

### *Jurisdiction Issues*

Jurisdiction issues, as they relate to tribal transfers of jurisdiction, can impact the effective implementation of ICWA. First, many Indian tribes do not request a transfer of jurisdiction because they lack the financial wherewithal to provide for the needs of Indian children who are involved in custody proceedings off the reservations (Jones, 1999). Even for children on certain Indian reservations where state courts lack jurisdiction, many Indian tribes have resorted to requesting state and county assistance in providing child protection

services in order to access financial resources and appropriate services for them.

Second, many tribes do not request a transfer jurisdiction because of their own limitations in the tribal court system (Fischler, 1980). These limitations relate to the need for more tribal court personnel and training in child welfare and ICWA. Tribal courts' ability to fully implement ICWA necessitates not only staff participation in tribal child welfare custody proceedings and related activities off the reservation, but also working knowledge of the provisions of ICWA so tribes may fully exercise their legal rights under this Act.

Third, interstate compacts allow federal Title IV-E foster care funding to follow a child who moves from one state to another. In an interstate compact, two states agree that the sending state will continue to pay Title IV-E entitlements for an eligible child who moves into a receiving state. The Interstate Compact Act allows the transferring state to retain jurisdiction and remain financially liable for the services that the Title IV-E eligible Indian child receives, while the receiving state will not be held financially responsible for that child. Jones (1999) states: "Unfortunately, most states also take the position that a child transferred into their state under the dictates of ICWA is not their responsibility citing the Interstate Compact Act" (p. 258). Therefore, this inability to access federal Title IV-E funding for eligible children because of jurisdiction can discourage tribes from making a request under ICWA.

### ***Lack of Information about the Extent of the Problem***

Since the passage of ICWA, there has been only one national study, "Indian Child Welfare: A Status Report," (1986) that made a systematic attempt to examine and analyze the comprehensive effects of ICWA. This study examined the prevalence of Indian children in substitute care and the implementation of ICWA. Plantz et al. (1988) cited the following national findings in this report:

- Indian children make up 0.9% of the total child population, but represent 3.1% of the total substitute care population, according to a nationwide mail survey.

The number of Indian children in care had risen from about 7,200 in the early 1980s to 9,005 in 1986. In contrast, there has been a decrease in the number of children of all races in substitute care during that time, according to a nationwide mail survey.

- Between 65–75% of the cases showed Indian parents are notified in custody proceedings, and 80% of the cases indicated tribal notification, according to a four-state field study of interviews and case records.
- Preventive efforts were documented in only 41% of case records of Indian children in public care, according to a four-state field study of interviews and case records.
- State and local public programs have limited Indian foster families, and their efforts to recruit Indian families range from nothing to multi-strategy campaigns. There is a lack of

information about outreach methods that build on Indian culture and traditions.

- Tribal child welfare programs rely most heavily on federal monies available through “638” contracts and ICWA Title II grants. Some use Title IV-E to support foster care payments with those tribes that have agreements with states.
- Federal-level efforts to communicate performance standards and monitor or enforce compliance have been limited. As a result, implementation of the Act has been uneven across geographic areas and governmental levels and with regard to specific provisions. In some localities, non-compliance is quite pronounced.
- The substantial national increase in tribal substitute care caseloads indicates a need for expanded preventive services to children whose needs currently cannot be met in their own homes because of a lack of such services.
- Half of all Native American children are in public agency care, and only a third of these public agency children are in Indian foster homes.

Unfortunately, these statistics collected over 14 years ago have not been updated. Therefore, no current data exist to determine whether there have been improvements in the implementation of ICWA or a decrease in the number of Indian children in substitute care. Since the Plantz et al. report, there have been no other comprehensive studies of a national magnitude dealing with ICWA compliance. However, there is limited ICWA compliance information for four states: Nevada, Idaho, Washington, and Nebraska.

For example, in 1997, the State of Idaho funded a project to assess ICWA compliance in Idaho. Some of the findings from this report indicate there was a need for greater awareness in services to prevent out-of-home placements. They had a lack of knowledge about what resources and options were available to follow ICWA placement preferences. Some comments were made requesting joint training as a means to improve relationships. There was a statewide problem in terms of compliance with notice provisions pertaining to ICWA. Very few of the records indicated tribes sought a transfer of jurisdiction. The report also recognized that ICWA case identification is essential to compliance with ICWA and that identifying Indian children was not being done in any consistent way (Idaho Department of Health and Welfare, 1997).

Until a greater number of states with significant Indian populations conduct studies to review and assess the implementation ICWA, there will not be a clear picture to determine if ICWA has met its desired intent and what other actions may be necessary to realize its goal.

### *Lack of Appropriate Service Models*

Under ICWA, Congress mandated that states must provide proactive efforts to prevent out-of-home placements of Indian children by providing preventative services and supports to Indian families. In most child welfare agencies, family preservation services are used to provide these remedial

family supports. It has been suggested, however, that these services replicate the aggressive interference in Indian family life that ICWA was designed to prevent. “However, mainstream family preservation services, despite their positive features are based on a single model of service delivery. These models emphasize intense, short-term, multi-agency, crisis intervention to stabilize the family” (McMahon and Gullerud, 1995, p. 89). McMahon and Gullerud also find that the array of available services and supports are underused by Native Americans because of a variety of shortcomings—i.e., inconvenient times and locations, incongruence of the services to Indian problems, lack of Indian input in programs, and social work practice that is culturally biased toward middle-class values and assimilative practices. Additionally, they note that non-Indian workers resist providing the home-based services and supports that Indian families prefer.

Another shortcoming of current family preservation models is that they reinforce mainstream society’s perspective that the nuclear family is the appropriate way to provide services, whether or not this is congruent with an Indian worldview and concept of an “Indian family.” Euro-American families are informed by western science, composed of nuclear families, and have relationships that are limited to human kin and focused on individualism. In comparison, American Indian families are informed by custom and traditions, rely upon extended family structures, have relationships with all things (beyond

human kin), and are rooted in communalism (Red Horse, Martinez, Day, P., Day, D., Poupart, and Scharnberg, 2000). The cultural context in which Indian families exist is characterized by the prominence of elders, centrality of spirituality, existence of Native language, and consensus as the foundation of leadership and decision-making models.

It has been suggested that ICWA’s focus on providing services to keep families together before placement decisions are made has paved the way for current family preservation practice and central focus on the family in the national child welfare policy agenda (Red Horse et al., 2000). Family preservation models are moving child welfare practice toward support services that are family centered and home and community based. However, these models do not adequately address the issue of fragmented service delivery, nor is there a comprehensive and holistic approach to meeting family needs (Red Horse, et al., 2000). Further, the models do not address the historical trauma legacy of American Indians which is “cumulative trauma over both the lifespan and the cross generations that results from massive cataclysmic events ...” (cited in Red Horse et al., 2000, p. 13).

One reason cited for the lack of appropriate service models is that ICWA practice has focused on culturally appropriate placements, with lesser attention given to providing services to preserve families (Mannes, 1995). Unless culturally appropriate service models are developed which

integrate American Indian social, cultural, political, and historical considerations of tribes, public agency efforts to provide effective remedial services will not meet the needs of Indian families.

## E. Factors that Support the Implementation of ICWA in North Dakota

Factors that support implementation will be reviewed in the same categories as the barriers described in the previous section (i.e., lack of funding, jurisdiction, lack of adequate information about the extent of the problem, and lack of appropriate service models); however, they will be discussed in the context of North Dakota.

### ***Lack of Funding in North Dakota***

In North Dakota, the lack of resources due to the tribes' inability to directly access federal Title IV-E foster care funding is slowly changing as the tribes and state continue to work together and develop positive and productive relationships. Good state/tribal relations in North Dakota are evidenced by a variety of agreements, partnerships, and unique collaborations that have recently developed in the past 10 years and have the potential to improve ICWA implementation.

Four tribes in North Dakota—Spirit Lake, Standing Rock, Turtle Mountain, and the Three Affiliated Tribes—have cooperative Title IV-E agreements with the state regarding the payment of foster care and adoptive subsidies. North

Dakota tribes utilize BIA foster care administrative funds as the non-federal match for Title IV-E thereby overcoming the inhibitive non-federal match requirements. In other states where tribes do not receive BIA foster care funds, it remains a challenge to meet the non-federal match requirement. In terms of tribes that have to negotiate with two or more states because their reservation lands extend beyond the borders of one state, Standing Rock, which straddles both North and South Dakota, has a separate Title IV-E agreements with the state.

Unique state/tribal collaborations have addressed other sources of funding to overcome the void of services that support implementation of ICWA in the provision of remedial services. The State Children Services Coordinating Committee (CSCC), the state interagency coordination and planning body for children's services, has partnered with tribes to create tribal entities with similar CSCC functions at the tribal level, known as Tribal Children Services Coordinating Committees (TCSCC). The TCSCCs have developed comprehensive five-year plans for reservation children and family services. These plans have identified the services and supports necessary to strengthen tribal families. Under a Memorandum of Agreement (MOA) with the North Dakota Department of Human Services, certain tribal programs such as tribal child welfare, tribal court, schools, substance abuse treatment, etc. that comprise the TCSCC have been designated as agents of the state in the provision of foster care related

services to eligible reservation-based Indian children. Through this MOA, tribes receive reimbursements from federal Title IV-E and Title XIX for administrative costs billable to those federal programs. Usually only state programs receive reimbursement for these administrative activities (Bossard, Myrdal, and Painte, 1998).

### ***Jurisdiction Issues in North Dakota***

Lack of funding often discourages tribes from requesting a transfer of jurisdiction to tribal courts. Increases in the availability of culturally appropriate services and supports for Indian families living on North Dakota Indian reservations may help lessen the tribal hesitancy to request a transfer of jurisdiction from other states due to lack of services for children. At present, the tribes in North Dakota are minimally affected by interstate compact issues described in the previous section, which do not allow federal Title IV-E funding for children from other states because of transfer of jurisdiction supported by ICWA.

### ***Lack of Information of the Extent of the Problem in North Dakota***

There is no current information available relating to the implementation of ICWA in North Dakota. Plantz, et al., (1988) reported the following statistics for North Dakota:

- The number of Indian children in North Dakota public care was 144 in 1980 and 172 in 1986.

- Out of the 587 children in substitute care in North Dakota in 1986, 23.9% were Native American.
- Of the Native American children in substitute care in North Dakota, 84.9% were in foster homes; 1.2% in non-final adoptive homes; 3.9% in group homes; 6.4% in child care institutions/secure facility; 1.5% in residential treatment; 0.2% in other settings; and 1.9% in unknown settings.
- Of the 320 Native American children discharged from substitute care in North Dakota, 68.7% returned home, and 13.1% were placed with relatives.

Unfortunately, these statistics are dated and may not paint an accurate picture of the current status of Indian children living in North Dakota, nor do they speak of the current implementation status of ICWA in the state. While data are available through tribal, state, and county reports, they have not been compiled, organized or reviewed in a systematic fashion that allows for easy access. These data may contain useful information to better assess the full impact of ICWA on Indian children living in North Dakota.

More than 20 years after the enactment of ICWA, Indian children in North Dakota have not seen a substantial decrease in the prevalence rates of removal from their families. In reviewing the literature for three periods of time—1976, 1986 and 2000—the statistics indicate: 1) in 1976, the prevalence rate of removal of Indian children from their families in North Dakota was 36.2 per 1,000 population for Indians (American

Indian Task Force Commission, 1978); 2) in 1986, the prevalence rate was 49.9 per 1,000 population for Indians (Plantz, 1988); and, 3) in 2000, the prevalence rate is 41.7 per 1,000 population for Indians (ND DHS, Division of Children and Family Services, personal communication, October, 2000; Casey Family Programs, personal communication, October, 2000; NACFSTI, 2000).

No other information was discovered during the review of the literature that examines similar statistics outside of these specified points of time. This lack of information makes it difficult to ascertain if certain trends in policy, practice and compliance with ICWA implementation made a significant difference in improved outcomes for Indian children in North Dakota substitute care.

### ***Lack of Appropriate Service Models in North Dakota***

The North Dakota tribes' Sacred Child Project (SCP) is a children's mental health project demonstrating the effectiveness of the wrap-around process and the development of a comprehensive system of care for seriously emotionally disturbed (SED) children on reservations. The SCP provides transitional supports and services for families whose children are still in the home, but are at extreme risk of out-of-home placement, as well those children who are returning to their families (Cross, Earle, Echo Hawk, and Manness, 2000). Two tribal child welfare agencies in North Dakota, located on the Turtle Mountain Band of

Chippewa and Three Affiliated Tribes reservations, have integrated concepts of the wraparound model into their child welfare practices.

This model holds great promise for Indian country in the delivery of services to Indian families and is a natural fit with ICWA because it provides services and supports to keep families together whose children are at-risk of out-of-home placement. This individualized service planning process includes education, child welfare, mental health, juvenile justice, substance abuse prevention and treatment. The wraparound process used by Indian communities in North Dakota creates a bridge between traditional healing practices and contemporary professional supports (United Tribes Technical College, 2000).

The 10 essential elements of a wraparound model include 1) community-based services and supports are received in the community; 2) individualized and strength based flexible plans are developed, using the unique values and strengths of the family; 3) culturally-competent—traditional values and cultural ceremonies and supports are integrated into the plan; 4) parents as partners—Indian families have equal voice and choice as professionals in decision-making; 5) team driven—multi-disciplinary teams, including families, develop the plan; 6) flexible funding and approaches—wraparound funds provide for services and activities normally not covered by existing funding streams and allow for creative interventions; 7) balance of formal and natural supports—case planning is done by both professional

**providers and natural supports of the family (i.e., extended family, community members, spiritual/cultural advisors, and other supports deemed appropriate by family); 8) unconditional commitment—services are adjusted to meet the needs and challenges of the family; 9) collaborative—members of the individual planning teams and interagency wraparound governing bodies identify and coordinate their own program and available community resources; and 10) outcomes measured—behavior is observed on a regular basis and interventions are adapted to reflect the changing needs of the child (Burns and Goldman, 1999; Osher, 2000).**

## PART II: Methodology

Three strategies were used to examine ICWA compliance in North Dakota. These strategies were A) record reviews of open foster care cases at county social service agencies; B) structured interviews with county social service workers; and C) focus groups with tribal child welfare workers and county social service caseworkers. The first strategy, record reviews, was used to extract fundamental ICWA legal requirements documented in case records of Indian children in North Dakota. The second strategy, structured interviews, was used to gather more in-depth information regarding county caseworkers' perceptions of their compliance with ICWA. The final strategy, focus groups, provided qualitative information not reflected in the record reviews about the awareness of and practical considerations regarding the implementation of ICWA. Each of these strategies is described in more detail below.

The authority over child protection issues in North Dakota is decentralized on a county or regional association of counties basis, making it necessary for the researchers to obtain permission from each participating county. In doing so, the research team requested assistance from the North Dakota Department of Human Services, Division of Children and Family Services (CFS) director to establish a protocol that would foster cooperation in accessing and reviewing case records. The CFS Division director issued a memorandum (Appendix A) to the directors of the county social service boards, directors of regional human service centers, and county social services regional supervisors explaining the project. Support for

the project was garnered at a North Dakota State Children and Family Services Committee meeting in June, 2000, where all but one of the targeted county social service directors were in attendance. The director, absent from this meeting, was later contacted and he agreed to participate in the research. At the meeting, the overall goals of the project were discussed. Toward these goals, participating county social service agencies agreed to

- assure access to ICWA case records;
- attend and participate in focus groups; and,
- partake in structured interviews.

Paul Ronnigen, CFS Division Director, stated in a memo requesting county cooperation with the research project, "It is our goal that the state be 100% in compliance with ICWA." The counties resonated this spirit of cooperation in assisting the researchers in conducting the research.

### A. Record Reviews

The researchers examined ICWA compliance in the county social service records, utilizing a 12-page record review instrument entitled the "Indian Child Welfare Act Compliance Instrument: Record Review" (Appendix B). This instrument, developed by the National Indian Child Welfare Association (NICWA), was designed to track adherence to specific provisions of ICWA. It has been utilized to measure ICWA compliance in three states: Idaho, Nebraska and Nevada. Although discussed by members of the

research team, no modifications were made to this instrument.

Three research assistants conducted on-site record reviews during July 2000. Prior to conducting the on-site reviews, the research assistants received training from B.J. Jones, Director of the Northern Plains Tribal Judicial Institute at the University of North Dakota, on the provisions of ICWA and how to use the record review instrument to assess ICWA compliance. To ensure consistency in the record reviews, the research team utilized the instrument to examine the first record together. The average amount of time required to complete subsequent record reviews was 60 minutes.

The sampling approach used in this research was threefold. First, members of the research team analyzed the CFS Division report entitled "Foster Care: Descriptive Characteristics of Children in Care by Administrative County" (FY 1999) to determine which counties had the largest unduplicated counts of Indian children in foster care. Second, the researchers identified the counties with at least 15 Indian children in foster care. Of North Dakota's 53 counties, nine met this criterion: Cass, Burleigh, Morton, Ramsey, Benson, Ward, Stark, Grand Forks and Rollette. Four of these counties were in regions of counties that combine two or more counties into one service area.

With the exception of Rollette County, these counties are primarily urban areas, to the extent that North Dakota has urban areas. Burleigh and Morton counties are north of the Standing Rock

Sioux Indian Reservation and southeast of the Fort Berthold reservation. Many tribal members from these tribes reside in these counties, which include the urban areas of Bismark-Mandan. Ward County extends onto the Fort Berthold Indian Reservation and also contains the City of Minot where many tribal members from the Fort Berthold and Turtle Mountain Indian Reservations reside. Rollette County includes the Turtle Mountain Indian Reservation and many border towns. Grand Forks County includes Grand Forks, North Dakota, where the University of North Dakota is located. Many Indian parents attend school there, and Grand Forks also has a substantial population of native people from both North Dakota and bordering Minnesota reservations (including the Red Lake Indian Reservation and the White Earth and Leech Lake Chippewa Reservations). Cass County includes the largest city in North Dakota, Fargo. It should be noted that, unlike some larger urban areas, such as Minneapolis and Denver; that have urban Indian organizations designed to support Indian parents and tribes in achieving ICWA compliance through either advocacy or other means, the cities in North Dakota do not have such programs available to Indian families and Tribes.

The selected counties represent 80% (n=466) of the 583 total unduplicated counts of Indian children in foster care in North Dakota for fiscal year 1999. This number was further reduced to 345, since 121 youth were removed from the sample because it was determined that they were under

tribal jurisdiction and, therefore, ICWA did not apply. These 121 children were included in state records because of federal Title IV-E foster care funding agreements between the State of North Dakota and the tribes. These state/tribal agreements are generally the only way Indian tribes can access and administer IV-E funds, since Congress did not provide “authority for Administration for Children and Families (ACF) to award Title IV-E funds directly to Tribes; and legislation neither required states to share funds with Tribes” (Brown et al., 2000).

Third, researchers initially attempted to review a total of 100 open county foster care case records (representing approximately 29% of the 345 children described above). However, in the process of establishing the sampling methodology, the researchers learned there were only 94 open cases at the social service agencies at the time when data were collected. Therefore, the research team made the decision to review only 94 case records. Some of the records included more than one child of the same family.

The researchers worked collaboratively with the counties to access the case records for review. Authorization for this type of research is included in North Dakota Century Code Chapter 50-06-05.1, “Powers and Duties of the Department.” Due to the high levels of sensitivity involved in child welfare cases, confidentiality was of the utmost importance in all aspects of the research. Throughout the case record reviews, no identifying information was collected. Additionally, the researchers signed agreements to adhere to confi-

dentiality standards for research established by Casey Family Programs.

## B. Structured Interviews

The second strategy of this research was to conduct structured interviews with county caseworkers in selected counties, using an interview instrument, also developed by NICWA, entitled, “Indian Child Welfare Act Compliance Instrument: Interviews” (Appendix C). The interview questions were designed to measure basic ICWA compliance requirements, with queries similar to the record reviews. The 12-page interview instrument was modified to better meet the environmental context of this study. For example, legal jargon was replaced with more “user-friendly” language. Modifications were also made to clarify what social service caseworkers considered “good cause” to deny transfer of custody proceedings to tribal courts. The reason for these modifications was that caseworkers have some input into asking if “good cause” applies, even though the courts make the final determination.

The researchers contacted the social service directors in each of the participating counties to schedule the interviews with available staff. There are 106 county social service caseworkers who work with Indian children and families in the nine counties researched. Twenty (20) structured interviews were conducted, representing 19% of the workers. At the time the interviews were conducted, only 20 individuals were available to interview.

## C. Focus Groups

In addition to the case record reviews and structured interviews, focus groups were used to gather more in-depth qualitative information on ICWA compliance from the perspective of both tribal and county child welfare workers. Members of the research team facilitated focus groups after receiving the training “How to Conduct Focus Groups” by Susan Paulson, Director of the Native American Children and Family Services Training Institute (NACFSTI). The fidelity of the focus group process, as defined by Robert A. Krueger, University of Minnesota, was maintained to the greatest extent possible throughout the research. “In summary, a focus group is a carefully planned discussion designed to obtain perceptions on a defined area of interest in a permissive, non-threatening environment . . . . Nondirective interviews use open-ended questions and allow individuals to respond without setting boundaries or providing clues for potential response categories” (Krueger, 1994, pp. 6–7). Focus group protocols were developed and explained to the participants. These protocols encouraged open and honest discussions.

The research team developed two sets of questions, one specific to each type of focus group (Appendix D). Attempts were made to make the focus group questions uniform; however, slight differences exist to address the unique perspectives and experiences of each group of participants. The county focus group questions

concentrated on state compliance issues (e.g., notice, use of qualified expert witnesses, determining Indian heritage, working with tribal social services, extent of training available to workers, etc.), as well as state and county perceptions of the purpose of ICWA and tribal participation. The tribal focus groups concentrated on tribal perceptions of county and state compliance with the provisions of ICWA and served to gain a better understanding of tribal capacity to exercise their rights under ICWA.

### *County Social Services Focus Group*

Even though the research includes nine North Dakota counties, only five were represented in the three focus groups conducted with county social service workers. Four of the counties did not have a sufficient number of staff available to constitute a viable focus group at the time the focus groups were conducted. The social service directors at each of the participating counties were contacted to discuss the research and the plan to conduct the focus group in their county. The directors selected and invited focus group participants. Two of the focus groups each had seven participants, and one group had four participants. While the integrity of the focus groups was maintained to the fullest extent possible, county social service directors participated in two of the county focus groups. This deviates from the recommended procedures as identified by Krueger. According to Krueger (1994), the group

should be homogeneous and should not include persons who have supervision over the staff. The inclusion of supervisors may have limited the ability of participants to express their true concerns and experiences. The average child welfare experience of the focus group participants was 14 years.

### ***Tribal Child Welfare Worker Focus Group***

Members of the research team conducted focus groups during the month of June on four reservations in North Dakota. Tribal social service staff were contacted in May to plan for a focus group at each designated location. The ICWA directors selected and invited participants to attend the information-gathering session. Each of the four focus groups had three participants: 1) a tribal ICWA worker or member of the tribal ICWA committee with authority to decide ICWA related matters; 2) a tribal child welfare caseworker; and/or 3) an attorney who represents the tribe on ICWA-related cases. The average child welfare experience of the focus group participants was four years.

## **D. Strengths and Limitations of the Research**

The variety of strategies used to collect information for this research (i.e., record reviews, focus groups and structured interviews) has a number of strengths. In particular, the combination of both quantitative and qualitative methods used to gather information provides a more comprehensive

understanding of the issues being examined.

Second, this study required cooperation with the North Dakota tribes, CFS Division, and county social services throughout all phases of the research. Participating entities viewed this research as critical to improving ICWA compliance and enhancing the relationship between the counties and tribes in North Dakota. CFS Division and the tribes have developed positive working relationships that have manifested themselves into innovative services and funding mechanisms for Indian children and families. These relationships set the tone for timely and straightforward protocols to conduct this research.

Third, separate focus groups were conducted with workers from county social service agencies and tribal social services. This method allowed researchers to gather information, experiences and viewpoints from differing agencies that serve Indian children. In turn, a more comprehensive understanding of the implementation of ICWA can be presented.

A number of limitations were noted throughout the data-gathering phases of this research. First, this research was not designed to assess whether North Dakota counties are properly determining what types of proceedings involve the application of ICWA. As a result, no attempt was made to conduct record reviews of cases not identified as ICWA cases by county and court personnel. Similarly, no

attempt was made to assess whether, in certain cases, the counties failed to notify the Indian tribes of children involved who may have been members of or eligible for membership in Indian tribes, but did not physically appear to be Indian. None of the instruments specifically asked how the county social worker identified whether the child was Indian or not, although one of the structured interview questions asked, "Do you make a close observation of the physical characteristics of the child, parents, siblings and relatives?" There were no other probing questions that would determine if children are Indian if they or their family did not have apparent physical Indian characteristics. All of the county case records reviewed were pre-identified by the counties as cases involving Indian children.

Second, the research was designed to assess county social service compliance with ICWA in open foster care cases involving Indian children. This limited scope makes it difficult to gauge the extent to which North Dakota courts comply with ICWA, since the research does not involve the examination of court records or interviews with court personnel. In addition, the research does not examine closed cases of adoption or foster care involving Indian children or the provision of adoption and/or foster care services to Indian children through private agencies.

Third, the members of the research team expressed concerns with the record review and interview instruments used to assess ICWA

compliance. However, time constraints did not allow for pilot testing of the instruments in North Dakota and further revision. One area of concern noted was that the record review instrument did not provide detailed information regarding the length of time in foster care, permanency goals, and tribal affiliation. The spirit of ICWA is to keep Indian children connected with their families and culture. The gathering of such information would be useful in linking the rudimentary elements of ICWA compliance to the outcomes and quality of care for Indian children.

Another major concern with the record review instrument was that it did not assess the level or type of tribal intervention on a case. Intervention by a tribe is not a compliance requirement; however, it is an important mechanism by which tribes can assist with ICWA compliance efforts by the counties. Types of tribal interventions may include monitoring the case, requiring contact with relatives, participating in permanency plans for the child, attending court hearings, etc. Intervention activity is often informal, and may not be documented in the county case records.

Finally, data collection occurred during the months of June and July. The availability of county and tribal staff was limited because many workers were on vacation. Access to a larger pool of workers could have allowed for a randomized sampling in the interviews and focus groups.

Overall, the three data collection strategies used in this research have yielded valuable information

**regarding ICWA compliance in North Dakota. The inherent strengths and limitations of the research design outlined above may serve as a reference for future examination of ICWA compliance in other states.**

## PART III: Results

The results of the research are organized and presented in seven areas: A) Application of ICWA; B) Notice Requirements; C) Intervention and Transfers of Jurisdiction; D) Active Efforts to Alleviate the Need to Remove an Indian Child and Rehabilitate the Family After Removal; E) Use of Qualified Expert Witnesses; F) Placement Preferences; and G) Training Needs. Each area summarizes the overall findings in the respective ICWA provision by presenting the results of the information collected through the county case record reviews, structured interviews with county caseworkers, and focus groups with county and tribal social service workers. A complete summary of the focus group meetings conducted with both the county and tribal workers is in Appendix E. The results of the data collected are presented in aggregate form, rather than by individual county or association of counties.

### A. Application of the Indian Child Welfare Act

#### *Case Record Review Findings*

Of the 94 open foster care case records reviewed, 86 (91%) documented efforts by the caseworker to determine whether the child is a member of or eligible for membership in a tribe. Eight records (9%) did not have any documentation of efforts made by the caseworker to determine tribal membership. In the case records where inquiries were made (n=86), 54% of the inquiries were by letter; 21% by personal contact, 15% by telephone, and

3% undetermined. This early recognition that an Indian child was involved is generally indicative that the county is inquiring about the tribal status of the child. This often pre-ordains future compliance with the Act by assuring early identification that the Act applies.

In 12 of the 14 case records that indicated the father was unknown, documentation showed the county worker did make an attempt to identify the father. This is a critical step that is often overlooked by state and county agencies in assessing whether ICWA applies to a particular child. By actively attempting to identify the father of a child born out of wedlock, the county is assuring that Indian children, through their paternal lineage, will be identified early in the process.

The North Dakota counties participating in this research use different intake processes to determine whether an Indian child is involved in a particular proceeding. There does not appear to be a uniform intake form that commands inquiry in every child custody case whether an Indian child is involved. Rather, it appears to be left up to the caseworker to make such inquiry, based upon whatever particularized knowledge the worker has gained from the initial review of the file or other factors in the case.

#### *Structured Interview Findings*

The results of the structured interviews with county caseworkers are depicted in Figure 1: Initial Determination that the Child Involved is Indian. In five key areas of initial determination

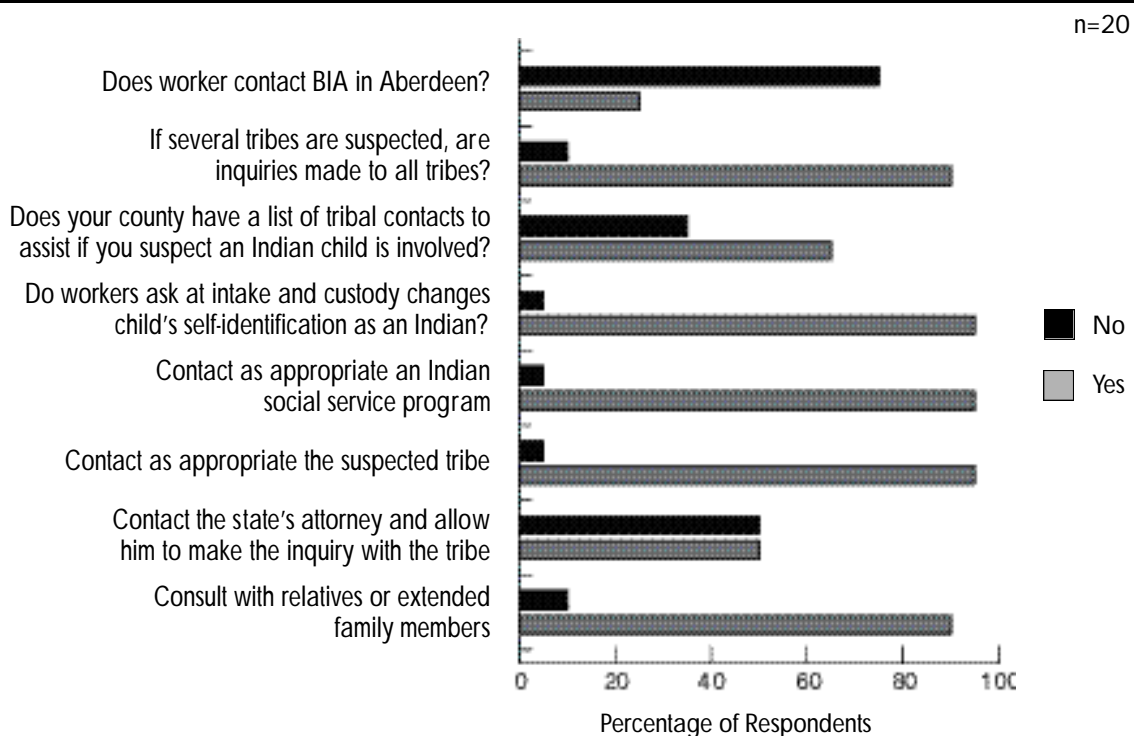
(i.e., multiple tribal inquiries, contact with tribal social services, contact with suspected tribe, contact with extended family, child self-identification) caseworkers complied with ICWA at least 90% of the time.

The caseworker interviews also strongly suggest that individual caseworkers have a firm grasp on which cases require the application of ICWA. All of the workers interviewed knew that ICWA applies to voluntary and involuntary child custody proceedings. Nineteen out of 20 (95%)

knew that ICWA applies to involuntary termination of parental rights, while 4 out of 20 (20%) were not aware that ICWA applies to adoptive placements.

In instances where the workers were not as familiar with certain types of proceedings, such as juvenile delinquency proceedings where termination of parental rights is sought, workers appear to be confused regarding the applicability of ICWA. ICWA does not apply to out-of-home placements based upon acts committed by Indian

FIGURE 1. INITIAL DETERMINATION THAT THE CHILD INVOLVED IS INDIAN



minors that would be criminal conduct if committed by adults. It does apply to termination proceedings resulting from a deprivation hearing due to inadequate parental supervision or neglect contributing to the child's delinquent behavior. Eleven out of the 20 caseworkers interviewed were not aware of this distinction. This may be due to the lack of involvement of workers in delinquency proceedings. Nine workers interviewed were not aware that ICWA applies to status offenses, and 13 were not sure whether ICWA applies to private custody disputes between parents. ICWA does not apply to custody disputes between natural parents of an Indian child that arise in the course of a divorce action.

### ***Focus Group Findings***

There was some discussion in the focus groups with county workers about the process used to determine whether an Indian child was involved in a proceeding. Several workers expressed frustration with the perceived lack of response from tribal agencies when inquiries were made about the membership status of certain children. Typical comments iterated the difficulty in trying to get a response or a call back from the tribe. Other concerns included the perceived rate of turnover of staff in tribal social services programs. Focus group participants felt such turnover severely impeded their ability to gain information about the membership status of certain children in a timely manner.

Tribal focus groups participants expressed apprehension regarding the plight of their children in the county child welfare system. One participant commented that once an Indian child was entrenched in the county foster care system, it was very difficult to get the child out of the system. Many expressed the sentiment that off-reservation Indian children in county social services care were culturally deprived and lacked knowledge of their extended families on the reservation. A general theme expressed by tribal workers was that some county workers appear to lack cultural competence when working with Indian families.

## **B. Notice Requirements**

### ***Case Record Review Findings***

Based upon the results of the case record reviews, it appears North Dakota counties have an uneven record of compliance regarding the notice provisions of ICWA. Of the 94 records reviewed, only 63% indicated that a notice was served to an Indian tribe, parent or Indian custodian.

The North Dakota counties involved in this research are very good at providing tribes with notice of all subsequent proceedings involving an Indian child, even when the tribe does not respond to the initial notice. In 73% of the cases where the tribe did not respond to the initial notice, the county continued to provide subsequent notices. In 63% of the cases where tribes affirmatively indicated they did not wish to participate, the county still continued to provide notices.

There were three major concerns noted with this ICWA provision during the case record review process. First, a serious deficiency was found in approximately half of the notices that were sent to parents or tribes. In some notices, parents and tribes were not notified of the consequences of failure to respond or to participate in proceedings. In addition, the notice did not inform the parent and the tribe of their right to review the county social service records containing the evidence relevant to the decision to remove the child or their right to file a petition to transfer jurisdiction of the child custody proceedings to tribal court. Further, approximately 10% of the notices to the tribes did not notify them of their rights to intervene in the proceedings.

Second, North Dakota, like most states, is out of compliance with the Department of Interior regulations that require the BIA area office to be notified of all child custody proceedings involving Indian children that commenced in state court (Department of the Interior, 1994). Very few notices referenced the BIA. Even in those cases where no response was received from the tribes regarding whether a child was a member or eligible for membership, there was no attempt to utilize the BIA as an agency to assist in determining tribal membership.

Third, a potential pitfall in the notice process utilized by the counties is that most notices do not make inquiries to the pertinent tribal court regarding previous proceedings that may have rendered the Indian child a ward of the tribal

court. Thus, custody proceedings would be outside the county or state's jurisdiction. The Act states that Indian children who are wards of tribal courts remain within the exclusive jurisdiction of the tribal courts, regardless of where they are physically located or residing. These types of child custody proceedings would therefore be outside the county or state's jurisdiction. Only 19 of the records reviewed indicated the tribal court was contacted to determine if it had previous court proceedings involving the child. In practice, the majority of notices are sent to the tribe's address or to the tribal social services program, with no notice to the tribal court.

### ***Structured Interview Findings***

Seventy-five percent (75%) of the county workers interviewed stated they had never contacted the BIA about an Indian child involved in a state court proceeding. Nineteen of 20 indicated they either contact the tribe directly or they relay the information to the state's attorney so he/she can contact the tribe. Only seven workers were aware the county had a list of tribal contacts for reference and use by the caseworkers.

### ***Focus Group Findings***

A common concern noted among county workers in the focus groups was their fear that notices sent to the tribe were not reaching the appropriate person with the authority to intervene. A few workers stated they did not feel they had ade-

quate knowledge of governmental structures of the various tribes. In turn, they did not know whom to contact.

Tribal focus group participants indicated they were overwhelmed with initial determination queries of ICWA cases and ongoing ICWA cases. Often, ICWA workers will only monitor the cases from afar unless there is an extreme risk of termination of parental rights, at which time they attempt to intervene.

## C. Intervention and Transfers of Jurisdiction

### *Case Record Review Findings*

The transfer provisions of ICWA apply only to foster care placements and termination of parental rights proceedings. This provision serves to “further the best interest of Indian children by permitting a tribal judge, who optimally would have more knowledge of traditional native child-rearing practices, to assess a family’s capability to provide for a child” (Jones, 1995, p. 35). The state court must transfer jurisdiction unless the tribal court declines jurisdiction, either parent objects such transfer, or the court determines “good cause” exists to deny transfer.

The research reveals few requests by Indian tribes to transfer Indian child custody proceedings pending in North Dakota state courts to the tribal courts. Of the 94 county case records reviewed, there were only 12 requests for transfer. Eight of

these requests were denied. One of the denials was attributed to lack of timely response from the tribe. The other case records did not have written explanations of what constituted the reason for denial of a transfer request. Ultimately, the decision to transfer jurisdiction is made by the courts; however, caseworkers may have input into the process.

### *Structured Interview findings*

From the interviews, 16 of the 20 workers (80%) indicated they routinely support transfer requests when tribal courts or Indian tribes make them. Other findings from the structured interviews are depicted in Figure 2: “Good Causes” to Deny Transfer of Jurisdiction. It should be noted that ICWA does not define “good cause” not to transfer jurisdiction back to the tribal court. However, several reasons are enumerated and relied upon by numerous courts in the BIA “Guidelines for States Courts” issued in 1979. They include: the proceeding was at an advanced stage when the request was made; a child over the age of 12 objects to the transfer; the tribe lacks a tribal court; a child has little contact with tribe and members; and evidence could not be presented in the tribal courts without undue hardship to the parties involved.

When caseworkers were given a list of several options in the structured interview as to what constitutes a “good cause” for denial of transfer, the top three reasons cited were 1) the Indian child does not wish to go back to the reservation;

2) the child does not have access to necessary services on the reservation; and 3) the child has formed a strong bond with an off-reservation foster family.

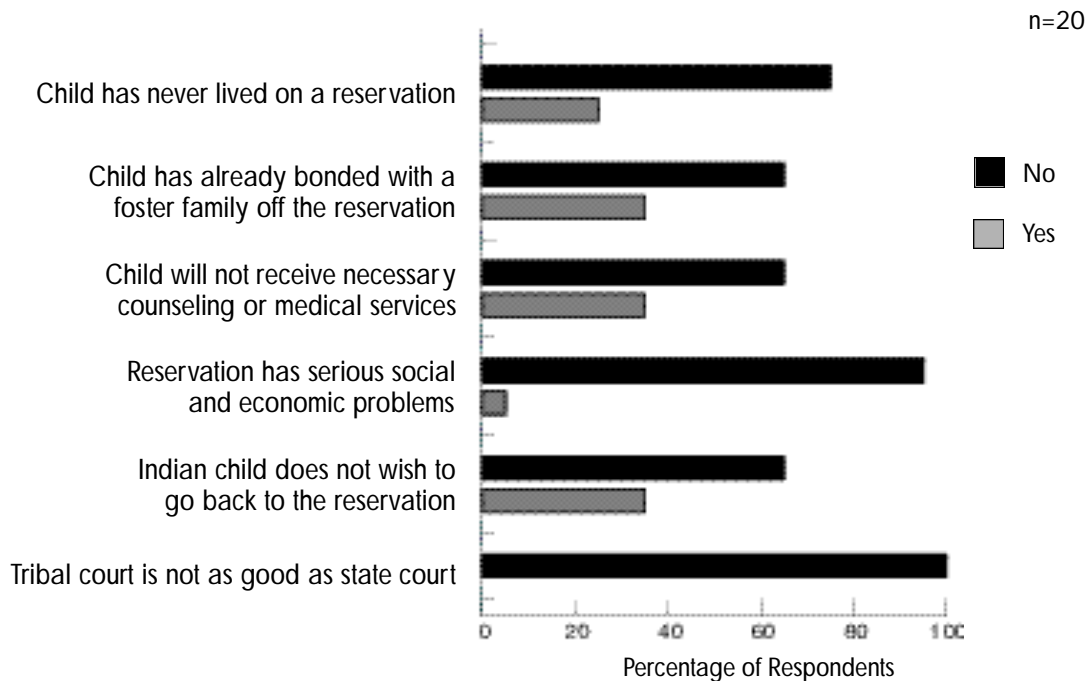
### Focus Group Findings

There was limited information gathered during the focus group meetings with county caseworkers regarding transfer of jurisdiction to tribal courts. One worker recounted a single instance when a tribe assumed jurisdiction and returned the child to the parents. As far as the county social worker was concerned, nothing had changed

about the parents' ability to care for the child.

Information gathered through tribal focus groups indicates that tribes prefer to monitor and intervene in ICWA cases, rather than request transfers of jurisdiction. The reasons cited most often in the focus groups for not requesting a transfer are 1) it would cause the child more trauma to be displaced from his or her family and community, especially if reunification is planned or the child is residing in an extended family placement; 2) the child does not want to be placed outside his or her community; 3) lack of resources to provide

FIGURE 2. "GOOD CAUSES" TO DENY TRANSFER OF JURISDICTION



appropriate services and supports for a child who has special needs; and 4) lack of resources, high caseloads, and limited tribal child welfare staff.

Some tribal workers did not understand the distinction between intervening in a proceeding and requesting a transfer of jurisdiction. They believed intervention is the same as requesting a transfer of jurisdiction, which it is not. This confusion may explain the relatively few transfer requests identified in this research.

A final observation noted by some tribal workers was that interstate transfers of jurisdiction are problematic, in that children involved are not eligible for federal Title IV-E foster care services in North Dakota absent an interstate compact agreement between the sending state and North Dakota. One worker did indicate, however, that the state was good at assuring continued IV-E eligibility for an Indian child transferred intrastate under ICWA. An important consideration for tribes in the decision to accept such a transfer is the availability of resources to meet the needs of the child. Federal Title IV-E funds are a significant and important resource for children placed out-of-home. Few tribes have direct access to Title IV-E reimbursement and/or other types of foster care funding.

## D. Active Efforts to Alleviate the Need to Remove an Indian Child and Rehabilitate the Family After Removal

### *Case Record Review Findings*

ICWA requires that active efforts must be undertaken to provide remedial services subsequent to an investigation and before a decision to place a child out of his or her home. According to the 94 county case records reviewed, 66% of the records had documentation that active efforts were made to prevent an out-of-home placement. Thirty-four percent (34%) indicated there were no active preventative efforts made. Documentation in county case records to prevent out-of-home placements includes the use of extended family (39%), tribal resources (44%), and urban Indian resources (17%).

Family service plans made after the child has been removed seemed to be more congruent with the ICWA requirements of active efforts. Figure 3: Documented Culturally-Based Active Efforts After Placement illustrates that in 66% of the case records reviewed, tribal community resources were used in the joint development of case plans by caseworkers and families. Nearly 71% of the case records reviewed included reference to cultural conditions in the Indian community as a factor in determining appropriate services. In-depth analysis of the records after the child has

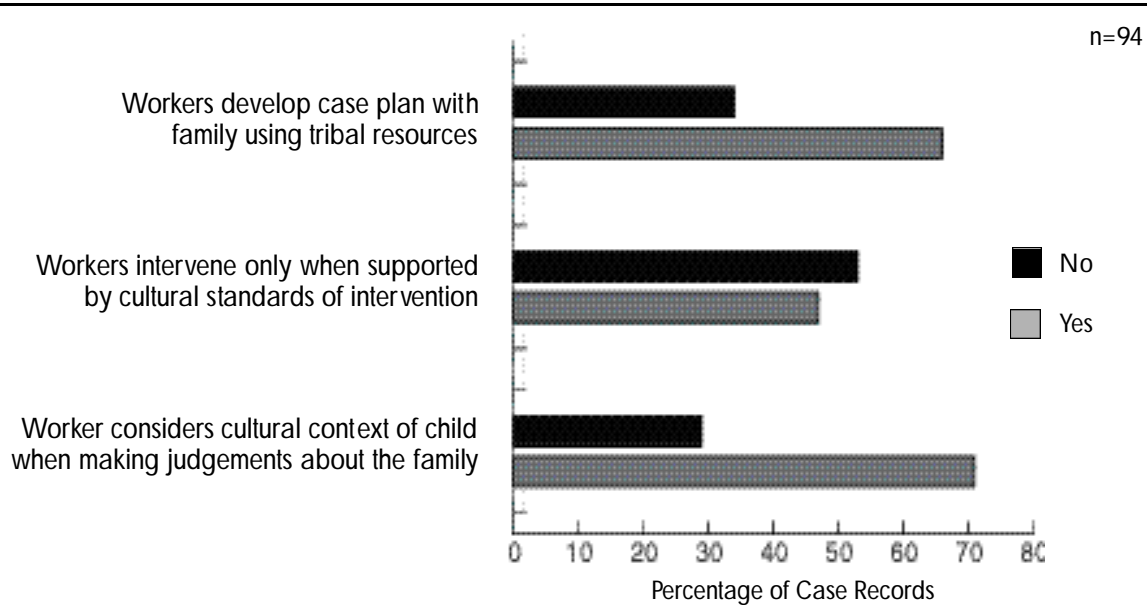
been removed revealed a wide variation among counties' consideration of tribal cultural conditions and way of life. While one county considered tribal cultural conditions 95% of the time, another county considered them only 12% of the time. Counties with a higher caseload of Indian children appeared to consider tribal conditions more often than those with lower caseloads of Indian children.

### Structured Interview Findings

The structured interviews conducted with county caseworkers indicated they frequently look to extended family members as potential resources to avoid removal of a child. All of the interviews

reflected the importance caseworkers give to facilitating the return of custody of the child to the family, despite the fact that only 55% were knowledgeable of the specific cultural considerations set forth in ICWA. Figure 4: Perceptions of Culturally-Based Active Efforts After Placement summarizes the caseworkers' perceptions of providing culturally-based remedial services for Indian families after the child has been placed. Interestingly, all of the county workers report they consider cultural consideration and way of life of the child's tribe and/or Indian community in making judgment about the family. Eighty percent (80%) of the workers interviewed develop a case plan, with assistance of the parent/custodian, that involves the use of tribal Indian community resources.

FIGURE 3. DOCUMENTED CULTURALLY-BASED ACTIVE EFFORTS AFTER PLACEMENT



### Focus Group Findings

The focus groups conducted with the county workers reveal a lack of awareness of the existence of community services designed specifically to assist Indian families. Many workers indicated they look to the tribes for information and felt tribes were obliged to advise them of the availability of such resources. One worker stated, “We don’t know what services are available on every reservation, to me that’s part of the responsibility of the reservation to let us know what services are there and available to the parents.”

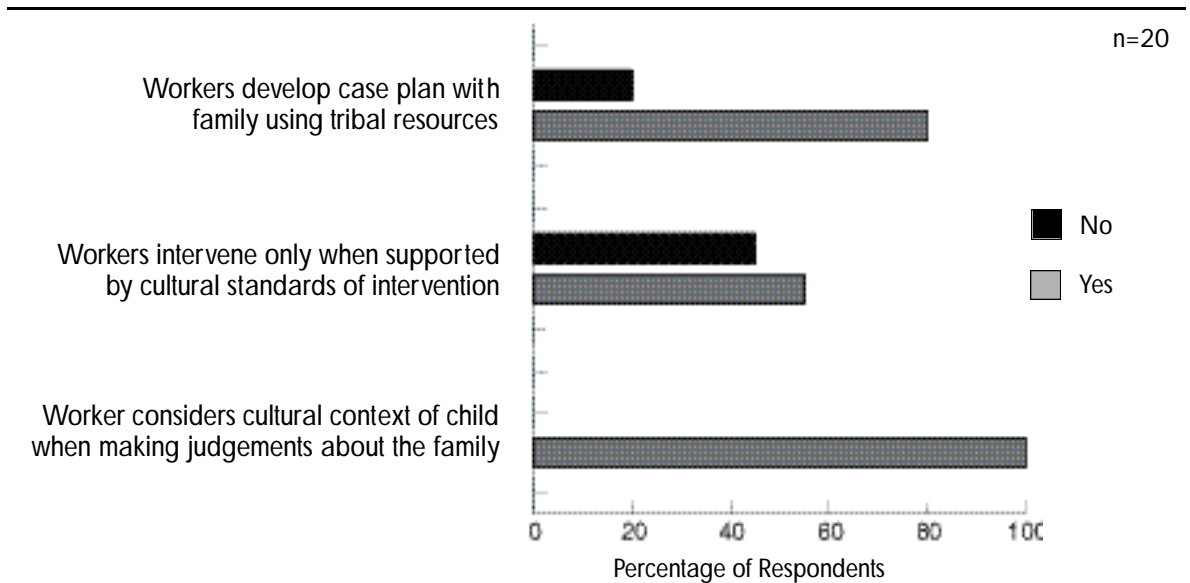
No specific information was gathered on this issue during the tribal focus groups.

### E. Use of Qualified Expert Witnesses

#### Case Record Reviews Findings

Before a court can order the foster care placement or termination of parental rights under ICWA, the court must be persuaded by clear and convincing evidence that continued custody by the parent or Indian custodian will result in serious emotional or physical damage to the child (25 U.S.C. §912 [e]). That finding must be supported by the testimony of a “qualified expert witness.” The 1979 BIA “Guidelines for State Courts” serve to better understand the qualifications of a qualified expert witness: 1) a member

FIGURE 4. PERCEPTIONS OF CULTURALLY-BASED ACTIVE EFFORTS AFTER PLACEMENT



of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices; 2) 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 child rearing practices within the Indian child's tribe; and 3) a professional person having substantial education and experience in the area of his or her specialty.

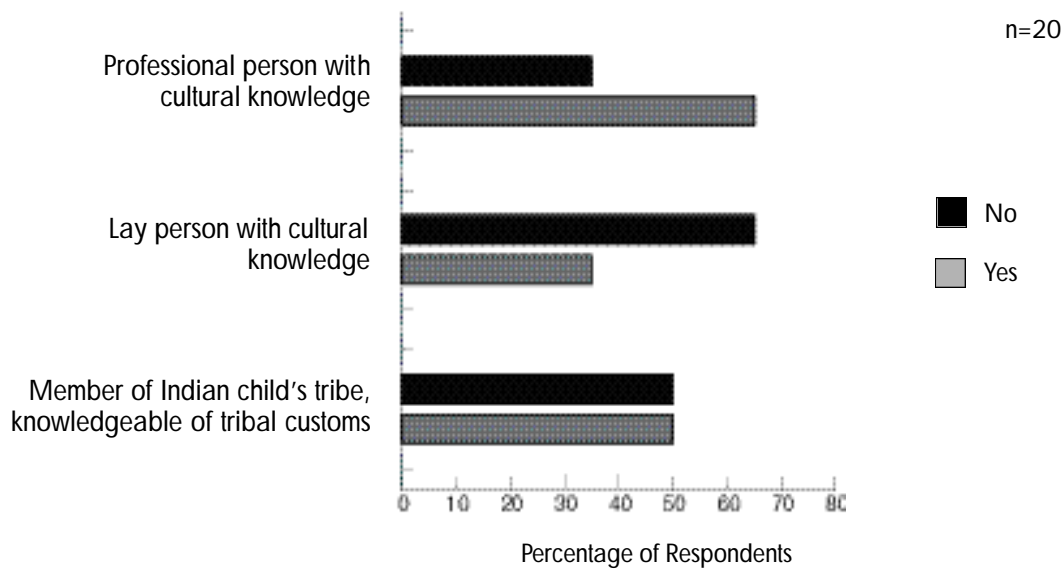
Record reviews indicate that a qualified expert witness was used in 12 of the 14 cases that proceeded to adjudication or termination of parental rights. In 10 of those cases, a member of the

child's tribe was used as the "qualified expert witness". In three of the cases, the qualified expert witness was selected based upon his or her educational qualifications. Eleven (11) of the records reviewed indicated that the tribe was consulted in determining who would be an appropriate qualified expert witness.

### Structured Interview Findings

Sixteen (80%) of the caseworkers interviewed stated they were aware of the need for a qualified expert witness in cases involving either a foster care placement or termination of parental rights. An expert with particularized knowledge of Indian child-rearing practices was only cited in

FIGURE 5. TYPE OF QUALIFIED EXPERT WITNESS USED



seven (35%) of the interviews as a preferable qualified expert witness. Figure 5: Type of Qualified Expert Witness Used summarizes the other types of qualified expert witnesses used. According to the interviewees, tribes were consulted as a source for an expert witness 60% of the time, while the BIA was only cited as a potential source 25% of the time.

### ***Focus Group Findings***

There was no consensus by county case workers regarding how often qualified expert witnesses were used. A few county caseworkers insisted that qualified expert witnesses were always used, while most seemed unaware of their use or usefulness. There were some very interesting comments regarding the need for a qualified expert witness in state and county court proceedings. One worker suggested that such witnesses are never utilized and the worker was confused about the question of why an expert witness would be needed. Another worker stated, “The expert witness serves no purpose in cases where the child was being removed due to the conduct of the parents of the child.” Others suggested that obtaining such witnesses was the job of the state’s attorney, and that they did not get actively involved in recruiting such persons.

In contrast, several workers stressed that such witnesses were always used and that many times the tribal ICWA directors would serve as the qualified expert witness in state court. This was confirmed in the tribal focus groups, where several tribal workers stated that they are often consulted

by the counties and are called upon to testify in state court proceedings involving Indian children.

No specific information was gathered on this issue during the tribal focus groups.

## **F. Placement Preferences**

### ***Case Record Review Findings***

Over half of the records in the North Dakota counties participating in this research do not comply with the foster care placement preferences and adoption placement preferences expressed in ICWA. ICWA foster care placement preferences are 1) placement with a member of a child’s extended family; 2) placement in a foster home licensed or approved by the Indian child’s tribe; 3) placement in an Indian foster home licensed by a non-Indian licensing authority; and 4) placement in an institution approved by an Indian tribe or an institution operated by an Indian organization which has a program suitable to meet the child’s needs. ICWA adoptive placement preferences are 1) with a member of a child’s extended family; 2) with other members of the Indian child’s tribe; 3) with other Indian families including families of single parents; or 4) with other placement preferences specified by the child’s tribe.

Fifty-nine percent (59%) of the case records indicated that ICWA placement preferences for foster care were not followed. Case record reviews indicated 41% (n=39) followed ICWA foster care placement preferences. Figure 6: Foster Care

**Placements Following ICWA Preferences** shows that 28% of case records indicated a placement was made with a member of a child's extended family; 23% of the placements were in a foster home licensed or approved by the child's Indian tribe; 21% of placements were in Indian foster homes licensed by a non-Indian agency; and 28% of placements were in institutions. Over two-thirds of the case records (68%) indicated that Indian children were placed in non-Indian foster homes.

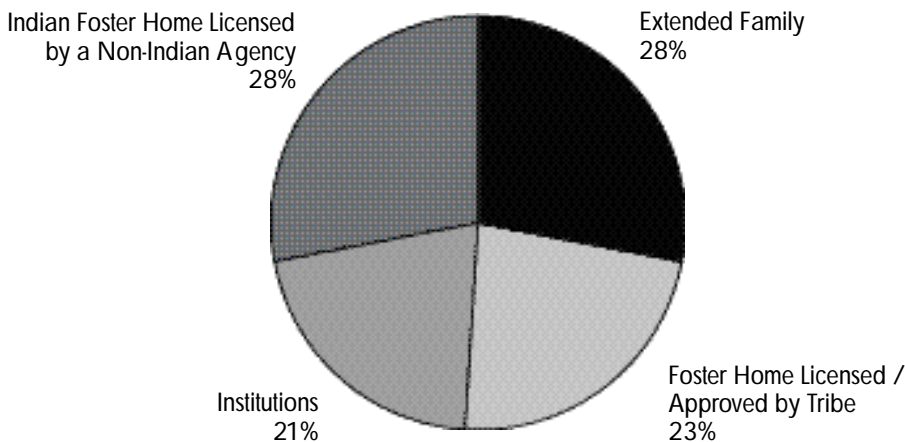
The records did not indicate clear communication and cooperation between the counties and tribes on the issue of ICWA foster care placement preferences. For example, 35 case records indicated the worker contacted the tribe to inquire

whether the tribe had alternative placement preferences other than those specified in ICWA. Only 5% of the records revealed any search of other county and state agencies for the availability of suitable Indian families for placements. Most North Dakota county social services offices do not use a family tree document that is commonly used by other states, in an effort to determine both the applicability of ICWA and the existence of relatives who may be eligible for a relative placement.

Because North Dakota county social services agencies are not involved in adoption placements, information was collected only on the pre-adoption phase, when foster care is necessary. In this respect, 11 of the foster care case records

FIGURE 6: FOSTER CARE PLACEMENTS FOLLOWING ICWA PREFERENCES

n=39



reviewed showed that adoption was considered as an option in the case planning for the Indian child. Ten of these eleven case records specified the child involved was placed in a non-Indian foster home. In North Dakota, all adoptions are handled by a partnership called Adults Adopting Special Kids (AASK), a private-state collaboration between the Village Family Service Center, Lutheran Social Services, and the North Dakota CFS Division.

### ***Structured Interview Findings***

The caseworker interviews suggest that diligent efforts have been made to comply with the placement preference provisions of ICWA. Ninety percent (90%) of the interviewees indicated they contact the tribal social services program when seeking appropriate placements. Seventy percent (70%) of the interviewees indicated they search state and county lists for Indian homes for child placement. Sixty percent (60%) state they contact other tribes and Indian organizations. All the caseworkers interviewed indicated they contact the extended family members of the child for placement decisions. However, only 55% of the caseworkers stated that they inquire of the tribes' customary definitions of the extended family. Additionally, 75% stated they contacted the tribe to inquire if they have different placement preferences than ICWA.

One of the questions asked during the interviews was "What does the agency (worker) consider to be 'good cause to the contrary' not to place a child within the placement preferences?" Some of the reasons given by the county workers include:

- lack of Indian homes in a particular geographic region;
- past negative experiences with certain placements;
- inability to access certain services or treatment in certain homes;
- dysfunctional extended families;
- tribal assent to placements outside preferences;
- loss of jurisdiction;
- new licensing regulations; and
- the unavailability of homes that comply with the placement preferences.

Of these reasons cited above, only two (unavailability of homes and special needs of the child that cannot be met in a particular home) are cited as grounds to deviate from the placement preferences in the BIA "Guidelines for State Courts; Indian Child Custody Proceedings" (1979).

### ***Focus Group Findings***

A common theme that emerged in the caseworker focus groups was the caseworkers' perceived inability to develop positive relations with tribal social services workers. In one focus group, a county

**social worker articulated the need to build better communication between counties and tribes:**

**They (the tribe) don't have the resources to do the kind of job they ought to do. One of the things I think all of us would say is that there ought to be a way for the communication to flow in the planning process instead of after the planning process is over with respect to the tribe. The tribe ought to be able to say, "We're very concerned about this kid. This is what we're thinking," just as we're saying, "We're concerned about this kid. This is what we're thinking." It ought to all flow together. It's sort of disjointed.**

**There were some concerns raised during the focus groups regarding the tribal caseworkers' abilities to find appropriate placements for children.**

**These concerns included placing too many kids in a home or placing the children with their grandmother who allows the parents to stay in the house.**

In contrast, the majority of tribal focus group participants were concerned with county social workers' lack of knowledge about Indian culture. They also felt that many non-Indian county workers placed their values on Indian parents who enter the system. One participant summarized this sentiment: "You're dealing with social workers who really don't know anything

about Indian culture or Indian families most of the time. And they make a judgment based on their own standard of conduct which is not applicable."

## **G. Training Needs**

**One area that impacts the level of compliance with ICWA is the extent and duration of training received by child welfare workers in North Dakota regarding ICWA. Only 30% of the county caseworkers interviewed during the structured interviews responded they received regular, ongoing training on ICWA. All of the workers participating in the county focus groups said that training on ICWA is part of the child welfare certification process in North Dakota. For some, this may have been as long as 15 years ago, when they were initially certified. Despite the lack of ICWA training opportunities, workers indicated they did have a variety of resources to tap into as questions arose regarding the implementation of ICWA.**

## PART IV: Conclusions and Recommendations

Based upon the information collected and analyzed through this research, North Dakota has varying levels of compliance with the ICWA provisions being examined. Concerns were noted by the researchers in one of the key provisions of ICWA: placement preferences. Despite substantial compliance with many provisions of ICWA, placement outcomes for Indian children in the state child welfare system have not dramatically improved since the initial passage of ICWA. For example, in 1986 only 3% of Indian children in foster care in North Dakota were placed in non-Indian foster homes (Plantz et al, 1988).

Currently, 29% of all Indian children in foster care are placed with non-Indian foster homes (NACF-STI, 2000; NDHS, personal communication, 2000; Casey Family Programs, North Dakota Division, personal communications, 2000).

In this section, the authors will address each of the identified compliance areas of ICWA and present recommendations that may serve as a blueprint for continuing and improving ICWA compliance in North Dakota. ICWA compliance is a key factor in protecting the best interests of Indian children and promoting the stability and security of Indian tribes and families in the future.

### A. Application of the Indian Child Welfare Act

In determining whether the child is a member of or eligible for membership in a tribe, both the case record reviews and structured interviews revealed high levels of compliance in adhering to the ICWA requirements. In the structured interviews, county workers stated they contact, as appropriate, the child's tribe(s) 95% of the time, and case record reviews similarly indicated documented contact with the child's tribe 91% of the time. Additionally, in the structured interviews, 50% of the time county workers stated they contact the state's attorney and allow them to make a tribal inquiry.

During the tribal and county focus group sessions, it was evident that communication between both county and tribal child welfare systems had been enhanced as a result of the passage of ICWA. However, both groups indicated lines of communication could be further strengthened in terms of assisting the county in identifying the child's tribe, establishing paternity, understanding tribal governmental structures, processes, and resources, and becoming familiar with specific tribal cultures, values, and standards. Despite increased opportunities for communication, there is still a certain degree of mistrust, as evident in the responses generated by both county and tribal focus group participants.

There were no questions on the record review instrument that addressed the process used by counties to initially determine whether the child involved was an Indian. There was one question on the interview instrument: “Do you make a close observation of the physical characteristics of the child, parents, siblings and relatives?” which on its surface begins to look at the process for initial determination. However, there were no other probing questions that would ascertain what other criteria would be used to determine if a child is an Indian. As one tribal worker so poignantly stated during a focus group, “Bring the ones I couldn’t get back, back. The ones with blond hair and blue eyes, they (the state) want to keep.” While 91% of the time, counties documented attempts to make an initial determination in the case record, they may have missed Indian children because they did not physically appear to be Indian.

### ***Recommendations***

To address the issues raised by the researchers surrounding initial determination, future research should include a random sampling of non-Indian foster care case records to determine if any Indian children without apparent Indian physical characteristics were being overlooked during the initial determination process. It would be of great benefit to the county and state social workers in North Dakota if a uniform form were developed that required workers in all cases to make appropriate inquiry about the tribal status of all children placed in foster care in North Dakota. In

addition, increased training, with the involvement of tribes, on how to identify whether a child is Indian and therefore covered under ICWA would also be beneficial.

### **B. Notice Requirements**

Case record reviews documented mixed compliance results with ICWA provisions pertaining to notice to tribes, parents, and Indian custodians about the placement of Indian children by county child welfare workers. The majority of case records indicated that a notice was served to tribe(s), parent or custodian as required by ICWA. Further, this notification process continued when no response was received from the tribe after initial notification, and even when the tribe indicated it did not wish to participate in the case.

During the record review process, members of the research team noted several weaknesses in the notice itself (discussed under “Results”) as well as lack of uniformity in the forms being used by the counties. The state has been proactive in addressing these concerns through the efforts of the ICWA Subcommittee of the North Dakota Court Improvement Project. This committee is in the process of developing a uniform notice form that contains all the requirements of ICWA and notifies the tribe, parents and Indian custodians of their rights under ICWA. Upon completion, it is expected that counties and private agencies will use this form.

## ***Recommendations***

Results of this research also suggest that improvements in the notification process can be made. Specifically, the dissemination of the notice should be broadened, and the process for serving notices should be made more uniform. For example, notification should be mailed to the key stakeholders involved in Indian child welfare cases, i.e., the BIA area office of the child's tribe, the tribal court, and tribal social services, as available. In addition, copies of all notices served should be maintained in the county case record.

### **C. Intervention and Transfer of Jurisdiction**

While the structured interviews suggest a high percentage of county workers support tribal requests for transfer of jurisdiction, only 12 reviewed records indicated a request for a transfer. It should be noted the record review sample included only open, county foster care cases at the time the data were collected. Therefore, the low number of transfer requests may not be a true indication of tribal interest in transfer of jurisdictions. Results from the focus groups may shed some light on reasons for the low number of transfer requests. The tribal focus group participants stated they prefer to monitor and intervene in ICWA cases rather than request a transfer of jurisdiction for a variety of reasons already summarized in the results. County focus group partic-

ipants revealed potential attitudinal barriers that may impact the level of intervention and transfers. Some participants felt that minimal participation of tribes was an active choice on the tribes' part. Others felt that tribes are constrained by a very real lack of resources and simply cannot become more involved.

## ***Recommendations***

ICWA assumes that it would be in the best interest of an Indian child to have the case involving that child transferred back to the tribal court. To increase the number of tribal requests for transfer of jurisdiction, lack of resource barriers could be addressed through the following recommendations. First, tribes and counties should work collaboratively to facilitate more transfers of jurisdiction. This may include better notification to Indian parents and custodians that they have rights to request transfer of jurisdiction and better training of guardian ad litem and attorneys representing parents and Indian children of their legal rights to request transfer. Second, a memorandum of understanding could be developed between tribes and states to address issues regarding services for which an Indian child is eligible after transfer back to the tribal court from within or outside of North Dakota. Third, a process should be developed to ensure the state is immediately contacted regarding interstate transfers the tribe is contemplating in order to assure continued Title IV-E and medical assistance eligibility for the child. Fourth, standardized tribal transfer and

intervention motion forms need to be developed and utilized to assure non-attorney tribal advocates that their motions and petitions will be recognized.

#### D. Active Efforts to Alleviate the Need to Remove and Rehabilitate the Family after Removal

One distinctive feature of ICWA is the provision requiring remedial and rehabilitative services before placement of an Indian child. While remedial services to prevent out-of-home placement were documented in 66% of the case records reviewed, the spirit of ICWA necessitates greater emphasis and use of active remedial efforts. Current child welfare practices reflect federal funding streams, which usually provide more resources for children who have already been removed from their families than for resources to prevent out-of-home placements. The most frequently cited culture-based interventions were tribal resources, followed by extended family members.

After placement, county caseworkers documented a significant consideration (71%) of culture when making decisions about an Indian child. In comparing structured interviews and case record review findings for cultural-based active efforts after placements, the county worker perceptions were higher than what was actually documented

in the case records. Less than half of the case records reviewed indicated that the workers intervened only when supported by cultural standards of intervention.

#### *Recommendations*

To increase the use of culturally appropriate preventative measures, the State of North Dakota, counties, and tribes should continue to develop their relationship-building efforts and joint training initiatives. The cultural considerations set forth in ICWA should be part of the training provided to county workers to ameliorate the concern of lack of cultural-based active efforts before and after foster care placement.

Further expansion of the wraparound model by two tribal child welfare agencies should be expanded to other North Dakota tribes. This would enhance the tribal child welfare systems' abilities to provide remedial services that are community-based and culturally appropriate and increase their abilities to provide technical assistance to counties in the area of culturally appropriate remedial services.

#### E. Use of Qualified Expert Witnesses

Overall, participating counties complied with the use of qualified expert witnesses and generally consulted tribes for determination of a qualified expert witness. Instrumentation differences make

it difficult to cross-analyze the data collected in this area. Throughout this research, it became evident that qualified expert witness compliance criteria were the least understood. The use of qualified expert witnesses is the responsibility of the state court or state's attorney; further information was not available since this research included the review of case records in the county social service agencies.

### ***Recommendations***

Future studies should examine court records to glean more information about the use of qualified expert witnesses. It is also apparent that training and education is needed to better understand the purpose and rationale for the use of a qualified expert witness.

## **F. Placement Preferences**

Of all of the compliance criteria in ICWA, this is one of the most critical, since the Act was passed in response to the high number of Indian children being placed in non-Indian families by public and private agencies throughout the country. Over half (59%) of the foster care case records indicated that ICWA preferences were not followed. In fact, case records indicated that 68% of the Indian children under state custody represented in the case records were placed in non-Indian foster homes. This is in stark contrast to the perceptions of county caseworkers regarding their diligent efforts to find appropriate placements

according to ICWA preferences. Despite the county caseworkers' efforts, it may not be possible to find placements that meet the requirements of ICWA.

### ***Recommendations***

One option for the increased adherence with the placement provisions of ICWA would be for the state to work more closely with off-reservation Indian organizations to assist counties in the recruitment, development and retention of Indian foster homes. Another solution may lie in one of the themes articulated in both county and tribal focus groups: improved communication and collaboration throughout the case planning process. One such model that could be adapted and used to fit the needs of North Dakota is family group conferencing. The family group decision-making model is used in child welfare practice to help develop placement decisions, treatment planning, and safety plans for children. Family group conferencing allows the family and extended family to participate in deciding where a child will be placed. This ensures that cultural standards will be a consideration in that decision. Further, this model identifies extended family members who could serve as a potential placement.

This family group conferencing model could positively impact other areas of ICWA compliance, such as determining if the child is an Indian, notifying tribes and families of child custody proceedings, and attempting to prevent out-of-home placements. The family group conferences engage "as many people as possible who have an interest

and knowledge of the child in order to make better, more informed decisions about the case” (McNevins, 2000, p. 1). These conferences are always preliminary to any court hearings and help keep children in their communities. “That the shift to neighborhood-based services marks a dramatic change in child welfare services ... Preventive services will be community-based and if it becomes necessary to remove children from the home, they will be placed with foster parents in their neighborhood, ... to help facilitate more productive relationships between foster parents and birth parents” (New York Administration for Children’s Services, 1998, p. 1). The family group conference model would be an excellent practice model to use to meet the intent of ICWA.

## G. Training Needs

### *Recommendations*

Information collected in this research shows that ICWA training is minimal and occurs on an irregular basis. To improve North Dakota county and tribal worker understanding of ICWA, training on the Adoption and Safe Families Act (Public Law 105–89) could be integrated into existing and ongoing training for all state, county, and tribal child welfare staff. In addition, joint training and dialogue surrounding ICWA should occur between all levels of stakeholders in state and tribal child welfare agencies and court personnel. This may serve to promote a greater cross-systems understanding of tribal and state

systems and also strengthen existing working relationships. An end result of shared knowledge and problem solving may be improved outcomes for Indian children and their families.

Training is also recommended in cross-cultural understanding since it is evident through this research that ICWA placement preferences are not being followed and active efforts after the removal of an Indian child need greater enhancement. In part, this may be due to the attitudinal barriers that exist toward ICWA and cultural biases in applying the placement preference standards outlined in ICWA.

North Dakota is perhaps emblematic of the difficulty in assessing state compliance with the Indian Child Welfare Act. While the state does an outstanding job of reaching out to the North Dakota Indian tribes to offer funding opportunities for the Indian children residing on reservations and for those children transferred back to tribal control, its compliance with ICWA standards for those children that remain in state and county care is not so promising. At a recent state and tribal human service meeting, Hugh Baker, the Director of the Three Affiliated Tribes Social Services, stated: “It’s been more than twenty years since the passage of the Indian Child Welfare Act. By now, compliance with the Act should be in our bones.”

This observation reveals the chasm in thinking between the State of North Dakota and Indian tribes regarding Indian children in county foster

**care. Tribal workers cannot understand, and do not tolerate, a situation where most native children are placed in non-Indian foster homes. State and county workers believe that Indian tribes must be more aggressive in assisting them in locating appropriate native homes for tribal children and that this must be a shared responsibility. The disparity in these mindsets can only be overcome by a shared commitment to objectively examine the plight of native children in state and county care and to discern why some of the shortcomings noted in this report exist and how they can be overcome.**

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## APPENDIX A

# ICWA Compliance Model

## ND CFS Division Director Memorandum

**DATE:** June 14, 2000

**TO:** Directors, County Social Service Boards  
Directors, Regional Human Service Centers  
Regional Supervisors, County Social Services

**FROM:** PAUL RONNINGEN, Director  
Children and Family Services

**SUBJECT:** RESEARCH REGARDING ICWA (Indian Child Welfare Act) COMPLIANCE

This memo is to inform you of a research project the state of North Dakota is participating in with the Native American Children and Family Services Training Institute (NACFSTI). The Casey Family Foundation and the National Indian Child Welfare Association commissioned NACFSTI of Bismarck to do a study on ICWA compliance in North Dakota. The study will be expanded nationally next year. I would appreciate having all state and county staff working with ICWA cases give their full cooperation to this study. This includes making case records readily available and meeting for interviews and focus groups with the staff of the NACFSTI. Results from this study will be referenced in the North Dakota Child Welfare Services State Plan (Title IV-B) report to the federal government.

### CURRENT STATUS

There is a significant lack of data concerning the effects, both positive and negative, of the Indian Child Welfare Act on tribal children today, both nationally and in North Dakota. The impact of ICWA and the state's compliance to it is vague. With this lack of data, we have a difficult time analyzing ICWA compliance and implementing changes that will assure the federal law is followed and that native children will be protected. The focus of the research is as follows:

1. Assess current ICWA compliance: NACFSTI will examine ICWA compliance at the state, county, and tribal levels. The Training Institute will discern what state, county, and tribal workers regard as ICWA compliance. Methods of establishing ICWA compliance will be examined at all levels.
2. Identify problems facing ICWA compliance: In cases where ICWA has not been followed appropriately, NACFSTI will review the situation to find the cause. By getting to the root of the problem, the Training Institute will help identify any confusion regarding compliance, and further the needs of Indian children.

**3. Determine the need for ICWA training:** By examining what contributes to ICWA compliance or non-compliance, NACFSTI will assess the need for additional ICWA training. This will ensure a more fluid process on all ICWA matters.

#### **SPECIFIC ACTION REQUESTED**

As state, regional and county employees, I would appreciate your full cooperation on this project. This includes, but is not limited to:

- 1. Assure access to ICWA records:** NACFSTI will be reviewing ICWA cases throughout the state to determine whether or not ICWA protocol was followed. Hence, it is of utmost importance that these records are released to NACFSTI staff, for their review. Authorization for this type of research is included in North Dakota Century Code chapter 50-06-05.1, "Powers and Duties of the Department". Naturally any employee of NACFSTI is bound to confidentially of all information shared with them.
- 2. Participate in site interviews:** The staff of NACFSTI will be interviewing state and county workers in regards to their views of ICWA compliance. These interviews will take place on the individual level.
- 3. Partake in focus groups:** The Training Institute will also be organizing several focus groups of state and county workers to discuss ICWA compliance.

I very much appreciate your cooperation in helping us determine if North

Dakota is in compliance with ICWA. It is our goal that the state be 100% in compliance. From current feedback, North Dakota appears to be doing quite well in this area.

B.J. Jones, Director of the Northern Plains Tribal Judicial Institute, University of North Dakota, is coordinating the project. I hope to have a conference call with regional and county staff in the very near future to have B. J. explain this research project. In addition, this is a very focused project that will include only nine counties. These counties are Burleigh, Morton, Grand Forks, Cass, Stark, Ward, Benson, Rolette and Ramsey. Finally, this project will be an agenda item for the CFS Committee Meeting on June 20–21.

If you have questions regarding this project, please call B.J. Jones at 777-6176 or me at 328-1725.

## APPENDIX B

# ICWA Compliance Model

## Indian Child Welfare Act Compliance Instrument: Record Review

Instructions:

- **Complete the entire instrument for records of known Indian cases in which a custody order is present and for all adoption cases, voluntary or involuntary.**
- **For known Indian cases with no custody orders and for voluntary foster/kinship care placement cases complete only the shaded areas.**
- **For randomly selected cases not known to be Indian complete only the “Initial Determination” section. Questions 1 and 2a-e.**

**At the time of this record review, what is the status of the case?**

**Child(ren) in their own home (with parent or Indian custodian) Check all that apply.**

- Investigation of alleged abuse or neglect: no custody proceeding pending**
- Non-emergency family services, family preservation, or other service to the child in their own home: No custody proceeding pending**
- In home protective services (court ordered)**
- past custody proceeding child(ren) returned home.**

**Child(ren) in Out of home care (Check all that apply)**

- Emergency removal pending full investigation of alleged abuse or neglect: custody proceeding pending**
- Voluntary foster care**
- Voluntary kinship placement**
- Voluntary guardianship**
- Voluntary adoption**
- Custody proceeding for foster care completed or pending**
- Involuntary foster care placement**
- Involuntary kinship placement**
- Termination of parental rights completed or pending**
- Adoption proceeding completed or pending**

**Case closed due to transfer of jurisdiction**

- Yes**  **No**

**Did this case involve an emergency removal at any point?**

\_\_\_\_\_ Yes \_\_\_\_\_ No

**Other:** \_\_\_\_\_

**Initial Determination (The ICWA says that "If the agency has reason to believe that a child is Indian")**

**Is there evidence in the file that the agency has reason to believe that the child may be covered by ICWA**

**Affirmative answer to Intake question/form**

**Parent/custodian/child report**

**Known Indian family/community**

**Appearance of persons or home**

**Other:** \_\_\_\_\_

**How many children in this case were identified as potentially being covered by ICWA? \_\_\_\_\_**

**When the agency has reason to believe that a child may be covered by ICWA then it must determine if the child is covered by the law.**

**YES NO COMPLIANCE CRITERIA**

**1a. \_\_\_\_\_ Is there evidence in the file regarding the Initial Determination that a child is Indian? (e.g. Family history chart, tribal enrollment number, tribal ID card, certificate of Indian blood.)**

**1b. \_\_\_\_\_ If the father is unknown have there been attempts to establish his identity and Indian status?**

**Is there evidence in the file that the worker:**

**2a. \_\_\_\_\_ Inquired of child's tribe(s), to determine if the child is a member or eligible for membership? (If several tribes are suspected, contact with all the tribes.)**

**Tribe one**

**\* No documentation that the tribe was contacted, however the worker noted that the child is a enrolled member of a tribe.**

**Form of contact**

**Letter**

**Phone call**

**Person**

**Other:** \_\_\_\_\_

- 2b. \_\_\_\_\_ \_\_\_\_\_ **If by phone, Are any phone conversations documented in the case record with a letter to the effect, "As we discussed by phone today, you believe (stated) ... etc."?**
- 2c. \_\_\_\_\_ \_\_\_\_\_ **If the tribe did not respond, is there evidence in the file that the worker called the tribal enrollment officer or other tribal employee or official responsible for or knowledgeable about tribal membership?**
- 2d. \_\_\_\_\_ \_\_\_\_\_ **If the tribal enrollment officer or other tribal employee or official responsible for or knowledgeable about tribal membership was called Is there a follow-up letter documenting the conversation?**
- 2e. \_\_\_\_\_ \_\_\_\_\_ **Does the record provide evidence that a determination was made that a child is not a ward of a tribal court? \*\*\*\***

Tribe three

Form of contact

- Letter
- Phone call
- Person
- Other: \_\_\_\_\_

***Child Not Eligible for Membership***

YES NO COMPLIANCE CRITERIA

\_\_\_\_\_ \_\_\_\_\_ **Was this child(ren) determined by their reputed tribe(s) to be a member of the Indian tribe or eligible for membership and the biological child(ren) of a member of an Indian tribe?**

How many?

YES NO COMPLIANCE CRITERIA

\_\_\_\_\_ \_\_\_\_\_ **If a tribe determined that a child is neither a member nor eligible for membership and the biological child of a member of an Indian tribe, is the response documented in the case record, including date and source of documentation?**

3a. \_\_\_\_\_ \_\_\_\_\_ **Does the file document all steps taken to determine the child's Indian or tribal ancestry?**

3b. \_\_\_\_\_ \_\_\_\_\_ **Does the file include the tribe's written statement declaring the child(ren) ineligible for membership?**

3c. \_\_\_\_\_ **Is there evidence that the tribe's written statement declaring the child ineligible for membership was incorporate in the court record?**

If child(ren) were determined to not be members nor eligible for membership and the biological child of a member of a federally recognized Indian tribe end case record review here.

NOTE:

If the child(ren) was determined to be covered by ICWA (or if eligibility is not yet determined) and there are no past or pending custody proceedings, skip questions 4–7 and go directly to questions 8 and 9.

If the child(ren) was determined to be covered by ICWA (or if eligibility is not yet determined) and there are past or pending custody proceedings complete entire review.

NOTICE

**No requests for a court proceeding (with the exception of emergency removals) can be made until the tribe(s), parents, and Indian custodian have received proper notification.**

	YES	NO	COMPLIANCE CRITERIA
4a.	_____	_____	<b>Was notice sent to a tribe or tribes</b> <b>How many tribes?_____</b> <b>How many proceedings required notice?_____</b> <b>In how many proceedings was notice sent?_____</b> <ul style="list-style-type: none"><li>• <b>No notices were in case file, but tribal documentation was good. = 4</b></li><li>• <b>No record in file.</b></li><li>• <b>No notice in file but the tribe was involved with the case.</b></li><li>• <b>No notices in case file. All contacts with the tribe were documented with phone calls or letters.</b></li></ul>

***Timelines and Contents***

**Were timelines required by ICWA for notice met? Answer questions for each proceeding**

4b. \_\_\_\_\_ **At least ten days after receipt of notice by parents or custodian, OR after 30 days if 20 days is requested by the parents or custodian to prepare for the proceedings;**  
**OR**

- 4c.    \_\_\_    \_\_\_    **At least ten days after receipt of notice by the tribe, OR after 30 days if the tribe requests an additional 20 days to prepare or the proceeding; OR**
- 4d.    \_\_\_    \_\_\_    **No fewer than 15 days after receipt of notice by the Bureau of Indian Affairs?  
(See below)**
- 4e.    \_\_\_    \_\_\_    **Did the notice include information about the child's residence and domicile?**
- 4f.    \_\_\_    \_\_\_    **Did the notice include information about the parents' residence and domicile?**
- 4g.    \_\_\_    \_\_\_    **Did the notice include information about the agency and the court with contact names, addresses and numbers?**
- 4h.    \_\_\_    \_\_\_    **Did the notice include information about rights under ICWA**
- 4i.    \_\_\_    \_\_\_    **Tribes right to intervene?**
- 4j.    \_\_\_    \_\_\_    **Parents' right to counsel?**
- 4k.    \_\_\_    \_\_\_    **Consequences of a failure to reply?**
- 4l.    \_\_\_    \_\_\_    **Time and place of proceeding?**
- 4m.    \_\_\_    \_\_\_    **Timeline for filing a response?**
- 4n.    \_\_\_    \_\_\_    **Right to ask for a twenty-day extension?**
- 4o.    \_\_\_    \_\_\_    **Right to seek transfer of jurisdiction to tribe?**
- 4p.    \_\_\_    \_\_\_    **Right to review documents in the agency's file that form the basis for the petition?**
- 4q.    \_\_\_    \_\_\_    **Was the notice written in simple, easy to understand language?**

Who Received ICWA Notice (for each proceeding)

- |     | YES | NO  | COMPLIANCE CRITERIA   |
|-----|-----|-----|---|
| 5a. | ___ | ___ | <b>Parents</b>  |
|     | ___ | ___ | <b>Mom</b>  |
| 5b. | ___ | ___ | <b>Custodian, (if one is involved)</b>  |
|     |     |     | <b>Did the notice include language about rights to due process under ICWA</b>   |
| 5c. | ___ | ___ | <b>Tribe</b>  |
| 5d. | ___ | ___ | <b>Additional tribes (If child is affiliated with or eligible for membership in more than one tribe, all tribes should receive notice.)</b> |
| 5e. | ___ | ___ | <b>BIA (Only if identity/location of parents or custodians cannot be determined.)</b>   |

Service of Notice(for each proceeding)

	YES	NO	COMPLIANCE CRITERIA
6a.	_____	_____	Was notice provided by personal service?
6b.	_____	_____	Was notice provided by registered mail, return receipt requested?
6c.	_____	_____	Was a notice filed with the court, along with any returned receipts or other proof of service? (Evident in files)
6d.	_____	_____	Even if a tribe does not respond to an official notice sent are notices of every future proceeding sent?
6e.	_____	_____	Even if a tribe replies that it does not wish to intervene in the proceeding, are notices of every future proceeding sent?
6f.	_____	_____	Was a determination made that the parent was English proficient?
6g.	_____	_____	If there is a reason to believe that the parent or Indian custodian will not understand the notice because of possible limited English proficiency, is a copy of the notice sent to the BIA area office nearest to the residence of that person and a request made of BIA staff to arrange to have the notice explained to that person in the language that he or she best understands (Documented in the file).

Determination of Jurisdiction

The state cannot properly exercise jurisdiction if the child is resident or domiciled on federally recognized reservation or if the child is a ward of the tribal court.

	YES	NO	COMPLIANCE CRITERIA
	_____	_____	Was the residence of the child determined?
	_____	_____	If yes, was the residence within the boundaries of an Indian reservation?
	_____	_____	Was the domicile of the child determined?
	_____	_____	If yes, was the residence within the boundaries of an Indian reservation?
	_____	_____	If the child's residence or domicile was determined to be within the boundary of an Indian reservation was the case either transferred to the tribe or dismissed?
	_____	_____	Was inquiry made regarding whether the child was ward of the tribal court under any prior tribal court proceeding?
	_____	_____	If an order establishing tribal court wardship is currently in force did the state accord full faith and credit to those orders?

Transfer to Tribal Court

**Section 1911.(b) of the ICW Act allows the parent or custodian or Indian tribe to transfer the proceeding to tribal court. The state court must transfer unless the tribal court declines jurisdiction, either parent objects to such transfer, or if the court determines that good cause exists to deny the transfer.**

**Answer if a Tribe received notice of a custody proceeding (see 4, 5c, 5d. above)**

	YES	NO	COMPLIANCE CRITERIA
	___	___	Did the parent/custodian request in writing or orally a transfer of jurisdiction to tribal court
	___	___	Did the tribe request in writing or orally a transfer of jurisdiction to tribal court
	___	___	Was jurisdiction transferred?
7a.	___	___	If any party believes that good cause exists not to transfer the proceeding: Do they document in writing their reasons for such belief? If transfer was denied, list the reasons given for "good cause" * Transfer was dropped, reason unknown = 3
7b.	___	___	Are written statements distributed to all parties so that everybody has the opportunity to provide the court with their views?

If the child(ren) was determined to be covered by ICWA (or if eligibility is not yet determined) and there are no past or pending custody proceedings Answer questions 8, 9 only.

Services to Prevent Out-of-Home Placement

**Active efforts must be undertaken to provide remedial services subsequent to an investigation and before a decision is made to place the child out of the home:**

	YES	NO	COMPLIANCE CRITERIA
			Did worker use other community services specifically designed for Indian families.
8a.	___	___	* extended family * tribal services
8b.	___	___	* urban Indian program, when appropriate;
8c.	___	___	* individual Indian caregivers, such as medicine men. 8d. ___ ___
			Other Active Efforts:

Definition of Active Efforts

Active efforts means not just an identification of the problems or solutions, but efforts showing an active attempt to assist in bridging the gap.

	YES	NO	COMPLIANCE CRITERIA
			Does the case record demonstrate that the worker:
9a.	___	___	Considered cultural conditions and way of life of the child's tribe and/or Indian community?
9b.	___	___	Intervened only when supported by relevant, prevailing Indian social and cultural standards regarding intervention in familial relationships by non-family?
9c.	___	___	Developed a case plan with assistance of parent/custodian that involves use of tribal Indian community resources?
9d.	___	___	Encouraged maintenance of the child in his or her own family except where physical or emotional harm may result?
9e.	___	___	Involved the child, if of sufficient age, in the design and implementation of case plan?
9f.	___	___	Provided time and resources to prevent family breakup in at least equal measure to time and resources provided to other families?
9g.	___	___	Assist parents or custodian and child to maintain an ongoing familial relationship?
9h.	___	___	Other Active Efforts: * Decided to terminate.

Documentation Before Placement

Documentation in the case record should relate indications of the likelihood of serious emotional or physical damage to particular conditions in the home, showing a causal relationship between the conditions and the serious damage that is likely to result to the child. (For example, it is not adequate to show that the parent abuses alcohol. It is necessary to show how, because of alcohol abuse, the parent may cause emotional or physical damage to the child.)

	YES	NO	COMPLIANCE CRITERIA
10.	___	___	In case of placement, is there documentation showing the active efforts to be unsuccessful?

	YES	NO	COMPLIANCE CRITERIA
			Does the case record document that before initiating court proceedings to remove a child, that: * Abandonment
11.	_____	_____	Conduct or condition of the parent will result in serious physical or emotional harm to the child, and that: _____ Efforts were made to counsel and change the parents' behavior, but did not work.

Foster Care Placement: Clear and Convincing Evidence

**The Indian Child Welfare Act states that a court may not issue an order effecting a foster care placement of an Indian child in the absence of a determination, supported by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, that the child's continued custody with the child's parents or Indian custodian is likely to result in serious emotional or physical damage to the child.**

Termination of Parental Rights: Evidence Beyond a Reasonable Doubt

**In order to ask the court to terminate parental rights, the agency as petitioner must prove to the court by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.**

	YES	NO	COMPLIANCE CRITERIA
12a.	_____	_____	Does the record show that "Qualified Expert Witnesses" were used in the hearing?  If expert witnesses were used which of the following are documented as "Qualified Expert Witnesses?"
12b.	_____	_____	A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices;
12c.	_____	_____	A lay person having a substantial education and experience in the area of his or her specialty along with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe;

- 12d.   A professional person having substantial education and experience in the area of his or her specialty along with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community.
- 12e. Other experts used: (list)
- Complete 12f-12i regardless if expert witnesses were used.
- 12f.   Did the worker enlist the assistance of the Indian child's tribe in locating persons qualified to serve as expert witnesses?
- 12g.   Did the worker enlist the assistance of the BIA in locating persons qualified to serve as expert witnesses?
- 12h.   Does the record show a finding of "clear and convincing evidence" for placement orders? (Examine court orders)
- 12i.   Does the record show a finding of "beyond a reasonable doubt" if the case went to termination? (Examine court orders)

PLACEMENT OF INDIAN CHILDREN

YES	NO	COMPLIANCE CRITERIA
<input type="checkbox"/>	<input type="checkbox"/>	Was the child(ren) placed in the least restrictive setting available? 25 U.S.C. 1915 (b)
<input type="checkbox"/>	<input type="checkbox"/>	Does it appear from the record that the child(ren) was placed in reasonable proximity of the child's permanent home? 25 U.S.C. 1915 (b)
<input type="checkbox"/>	<input type="checkbox"/>	Does the record document that an inquiry was made of the child's tribe regarding the tribes' customary definition of extended family? 25 U.S.C. 1903 (2)
<input type="checkbox"/>	<input type="checkbox"/>	Was the child(ren) placed within the preferences set out by ICWA? Which one? (check all that apply)
		<input type="checkbox"/> 1. Member of child's extended family; * Placed with father
		<input type="checkbox"/> 2. Foster home licensed, approved, or specified by the Indian child's tribe;
		<input type="checkbox"/> 3. Indian foster home licensed or approved by an authorized non-Indian.
		<input type="checkbox"/> 4. An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs

**Attempt for extended family.**

**If not what type of placement(s)?** \_\_\_\_\_

**Non Indian foster home was NOT approved by the tribe.**

**Foster Home not approved by the tribe.**

**Placed in a residential group home = 5**

**Does the record document a diligent search to follow the Act's placement preferences? If so, what activities are documented.**

**13a.** \_\_\_\_\_ **Contact with tribe's social service program;**

**13b.** \_\_\_\_\_ **Contact with child's extended family;**

**13c.** \_\_\_\_\_ **Search of state and county lists of Indian homes;**

**13d.** \_\_\_\_\_ **Contact with other tribes and Indian organizations with available placement resources.**

\_\_\_\_\_ **If the placement is outside the preferences established by ICWA does the record document why?**

**List reasons:**

**Was going to place with maternal uncle, did not due to previous domestic violence abuse in the home.**

**Bonded with initial family, children were afraid to leave. = 3**

**No Native foster homes available. = 4**

**Juvenile delinquent.**

**Special needs child.**

\_\_\_\_\_ **If any party believed the "good cause" exists to place the child outside the placement preferences, are the reasons for that belief documented in the record?**

**List reasons use to establish "good cause"**

**The child was mentally ill so other services were needed that the tribe could not provide.**

**Juvenile delinquent.**

**Special needs child.**

**Child needed supervision for his behavioral problem.**

**Child is mentally and physically handicapped.**

\_\_\_\_\_  Is there a finding(s) in a court order of good cause to place a child(ren) outside the placement preferences of ICWA? **Juvenile Delinquent. Special Needs child.**

Foster Care/Pre-adoptive

	YES	NO	COMPLIANCE CRITERIA
14.	_____	_____	<b>Did the worker contact the tribe to ask if they have a different placement preference than the following:</b> <b>1. Member of child's extended family;</b> <b>2. Foster home licensed, approved, or specified by the Indian child's tribe;</b> <b>3. Indian foster home licensed or approved by an authorized non-Indian;</b> <b>4. An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.</b>

Change of Placement: Notify Parents

	YES	NO	COMPLIANCE CRITERIA
15a.	_____	_____	<b>If a child was to be moved from one placement to another, or if the foster family plans to move, were the child's parents or custodians notified in writing?</b>
15b.	_____	_____	<b>If a child was to be moved from one placement to another, or if the foster family plans to move, was the child's tribe notified in writing?</b>

Adoptive Placement (leave blank if not an adoption case)

	YES	NO	COMPLIANCE CRITERIA
	_____	_____	<b>Was the child(ren) placed within the preferences set out by ICWA?</b> <b>Which one?_____</b> <b>1. Child's extended family;</b> <b>2. Other members of the child's tribe;</b> <b>3. Other Indian families.</b> <b>If not what type of placement?_____</b>
16.	_____	_____	<b>Did worker contact the tribe to ask if they have a different placement preference than the following:</b>

1. Child's extended family;
2. Other members of the child's tribe;
3. Other Indian families.

\_\_\_\_\_ If the placement is outside the preferences established by ICWA does the record document why?

List reasons:

\* Non-Native home available. = 2

No foster family found by ICWA worker, special needs child, Non-Native foster home was approved by the tribe.

Child is physically and mentally handicapped.

\_\_\_\_\_ If any party believed the "good cause" exists to place the child outside the placement preferences, are the reasons for that belief documented in the record?

List reasons use to establish "good cause."

\_\_\_\_\_ Is there a finding(s) in a court order of good cause to place a child(ren) outside the placement preferences of ICWA?

Disrupted Adoptive Placements (leave blank if not applicable)

- |      | YES   | NO    | COMPLIANCE CRITERIA   |
|------|-------|-------|---|
| 17a. | _____ | _____ | If the adoption was set aside, or adoptive parents voluntarily consented to termination of parental rights, were the Indian parents or custodians notified? (25 U.S.C. 1916 and BIA Guidelines section g,3)                             |
| 17b. | _____ | _____ | Did notice of their right for a return of their child include a statement that such petition will be granted unless the court rules it is not in the child's best interest as defined by the Indian Child Welfare Act (25 U.S.C. 1912). |

Documentation

Written records are to be maintained on each child, separate from the court record, of all placements and efforts to comply with required placement records.

- |      | YES   | NO    | COMPLIANCE CRITERIA                                   |
|------|-------|-------|---|
| 18a. | _____ | _____ | Does the record contain<br>The petition or complaint? |

- 18b.   All substantive orders entered?
- 18c.   Complete record of placement determination?
- 18d.   Where required placement preferences have not been followed, are efforts to find suitable placements within those priorities documented in detail?

Voluntary Placements (leave blank if not applicable)

- |      | YES                      | NO                       | COMPLIANCE CRITERIA   |
|------|--------------------------|--------------------------|---|
|      |                          |                          | <b>Was consent accepted under the following conditions:</b>   |
| 19a. | <input type="checkbox"/> | <input type="checkbox"/> | The child is over 10 days old;  |
| 19b. | <input type="checkbox"/> | <input type="checkbox"/> | the consent is in writing and recorded before a judge;  |
| 19c. | <input type="checkbox"/> | <input type="checkbox"/> | the consent is accompanied by the judge's certificate ensuring that terms and consequences of the consent were fully explained in detail and fully understood by the Indian parents or custodians;                |
| 19d. | <input type="checkbox"/> | <input type="checkbox"/> | the consent is accompanied by the judge's certificate ensuring that terms and consequences of the consent were fully explained in English or interpreted into a language understood by the parents or custodians. |
| 19e. | <input type="checkbox"/> | <input type="checkbox"/> | Was consent obtained from both parents?   |
| 19f. | <input type="checkbox"/> | <input type="checkbox"/> | If not, was the non-consenting parent's rights terminated involuntarily?  |
| 19g. | <input type="checkbox"/> | <input type="checkbox"/> | If the case involved an unwed father did the father seek to acknowledge or establish paternity?   |
| 19h. | <input type="checkbox"/> | <input type="checkbox"/> | If yes, did the agency dispute the father's assertion that he had acknowledged or established paternity.  |
|      |                          |                          | <b>Does the consent signed by Indian parents or custodians contain</b>  |
| 20a. | <input type="checkbox"/> | <input type="checkbox"/> | Name and birthdate of child;  |
| 20b. | <input type="checkbox"/> | <input type="checkbox"/> | Name of child's tribe;  |
| 20c. | <input type="checkbox"/> | <input type="checkbox"/> | Child's enrollment number or other indication of membership in the tribe;   |
| 20d. | <input type="checkbox"/> | <input type="checkbox"/> | Name and address of consenting parents or custodians;   |
| 20e. | <input type="checkbox"/> | <input type="checkbox"/> | Name and address of prospective parents, if known, for substitute care placements;  |
| 20f. | <input type="checkbox"/> | <input type="checkbox"/> | Name and address of person or agency through whom placement arranged, if any, for adoptive placements.  |

- 20g.   Were efforts made to place the child for voluntary foster care in a setting that follows the placement priorities established by the tribe or the Indian Child Welfare Act?
1. A member of the child's extended family;
  2. A foster home licensed, approved, or specified by the Indian child's tribe;
  3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority;
  4. An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

EMERGENCY REMOVALS

- |      | YES                      | NO                       | COMPLIANCE CRITERIA  |
|------|--------------------------|--------------------------|--|
| 21a. | <input type="checkbox"/> | <input type="checkbox"/> | Was the racial/ethnic status of the child immediately determined?  |
| 21b. | <input type="checkbox"/> | <input type="checkbox"/> | If Indian: was the name of tribe and/or band determined?   |
| 21c. | <input type="checkbox"/> | <input type="checkbox"/> | Was it determined that the child was not resident or domiciled on the reservation of a tribe that has jurisdiction over child custody proceedings? |
| 21d. | <input type="checkbox"/> | <input type="checkbox"/> | Was it determined and documented that the child is in danger of imminent physical damage or harm.  |

Emergency Placement Type

- |     | YES                      | NO                       | COMPLIANCE CRITERIA   |
|-----|--------------------------|--------------------------|---|
| 22. | <input type="checkbox"/> | <input type="checkbox"/> | Were efforts made to place the child during emergency care in a setting that follows the placement priorities established by the tribe or the Indian Child Welfare Act? |
|     |                          |                          | 1. A member of the child's extended family;   |
|     |                          |                          | 2. A foster home licensed, approved, or specified by the Indian child's tribe;  |
|     |                          |                          | 3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority;  |
|     |                          |                          | 4. An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.                 |

Termination of Placement

	YES	NO	COMPLIANCE CRITERIA
			<b>Was emergency custody terminated when:</b>
23a.	_____	_____	<b>Removal was no longer necessary to prevent imminent physical damage or harm to the child, OR</b>
23b.	_____	_____	<b>The appropriate tribe exercises jurisdiction over the case?</b>
23c.	_____	_____	<b>If the emergency custody was not terminated, did the agency expeditiously initiate a child custody proceeding; or</b>
23d.	_____	_____	<b>transfer the child to the jurisdiction of the appropriate Indian tribe?</b> <b>Did not transfer jurisdiction, but has contacted the tribe</b>

## APPENDIX C

# ICWA Compliance Model

## Indian Child Welfare Act Compliance Instrument: Case Worker Interview

**Following is an interview schedule measuring Indian Child Welfare Act compliance. Information gathered in the interviews will provide information to supplement a case record review which will be completed using a separate instrument. Both the Federal Indian Child Welfare Act and North Dakota administrative regulations have been considered in developing the instruments.**

### DETERMINING WHEN THE ACT APPLIES

**The first precaution in applying the Indian Child Welfare Act is to make sure there is no tribal-state agreement that has specific procedures to follow.**

- |    | YES | NO  | COMPLIANCE CRITERIA   |
|----|-----|-----|---|
| 1. | ___ | ___ | Are you aware of the existence of any tribal-state agreements regarding the Indian Child Welfare Act? 1a. ___ ___ Are Tribal-State agreements referenced in the policy and procedure manual?<br><b>Comment:</b> |
| 2. | ___ | ___ | Are you aware whether North Dakota or your county has adopted regulations specific to the application of the Indian Child Welfare Act? -<br><b>Comment:</b>   |

B. Workers must know in which situations the act does and does not apply.

- |     | YES | NO  | COMPLIANCE CRITERIA   |
|-----|-----|-----|---|
| 3.  | ___ | ___ | Do individual workers receive regular training on the Indian Child Welfare Act?.  |
| 3a. | ___ | ___ | Are there specific persons or other resources available to individual workers who have questions about the Indian Child Welfare Act?<br><b>Comment:</b> |

Not Covered

- |     | Respondent knew | Respondent did not know | Situations Not Covered/Exceptions  |
|-----|-----------------|-------------------------|--|
| 4.  |                 |                         | Do you work in the following areas, If so do you know which custody situations are not covered by the ICWA and the exceptions to those exclusions? |
| 4a. | ___             | ___                     | Juvenile delinquency proceedings (violations of criminal law) with two exceptions:   |

**Termination of parental rights because of delinquent acts committed by child Status offenses (juvenile delinquency proceedings that involve an offense that would not be a crime if committed by an adult, e.g., drinking, runaway, truancy, etc.).**

**4b.     \_\_\_    \_\_\_    Divorce proceedings or custody disputes between unmarried parents when one parent is granted custody.**

**Comment :**

Covered

	<b>Respondent knew</b>	<b>Respondent did not know</b>	<b>Situations Covered</b>
<b>5.</b>			<b>Do you work on the following types of placements and know which custody situations ARE covered by the ICWA?</b>
<b>5a.</b>	<b>___</b>	<b>___</b>	<b>Foster care placements.</b>
<b>5b.</b>	<b>___</b>	<b>___</b>	<b>Involuntary termination of parental rights; voluntary termination of parental rights</b>
<b>5c.</b>	<b>___</b>	<b>___</b>	<b>Pre-adoptive placements (placements of a child after rights of parents have been terminated)</b>
<b>5d.</b>	<b>___</b>	<b>___</b>	<b>Adoptive placements. (Includes conversion from foster care to adoptive placement.)</b>
<b>5e.</b>	<b>___</b>	<b>___</b>	<b>Both voluntary and involuntary placements.</b>
<b>5f.</b>	<b>___</b>	<b>___</b>	<b>Divorce proceedings in which neither parent will get custody.</b>
<b>5g.</b>	<b>___</b>	<b>___</b>	<b>Juvenile delinquency proceedings where parental rights may be terminated.</b>
<b>5h.</b>	<b>___</b>	<b>___</b>	<b>Status offenses (juvenile delinquency proceedings that involve an offense that would not be a crime if committed by an adult, e.g., drinking, runaway, truancy, etc.).</b>

**Determination and Documentation I would like to talk briefly about how workers determine when to notify the State's Attorney that an Indian child is involved in a proceeding in state court**

	<b>YES</b>	<b>NO</b>	<b>COMPLIANCE CRITERIA</b>
<b>6.</b>			<b>Do workers make an oral inquiry at intake, and in every change or potential change in custody regarding the client's self-identification as an Indian?</b>
<b>6a.</b>	<b>___</b>	<b>___</b>	<b>Do the workers have regular contacts with tribal social service programs on issues</b>

such as tribal membership of children and families that county workers work with? Comment:

7.     \_\_\_    \_\_\_    If the clients respond that they are Indian, or believe there is Indian ancestry, do workers fill out a family tree chart with the help of client family or other form provided by the agency?

Comment:

7a.    \_\_\_    \_\_\_    Is there a standard questionnaire that workers are required to fill out in all cases involving foster care placement to determine if the child is Indian?

***Indian Heritage  
Uncertain***

If the parents are unavailable or unable to provide a reliable answer regarding the Indian heritage of their children, does the worker:

8a.    \_\_\_    \_\_\_    Make a thorough review of all documentation in the case record?

Comment:

8b.    \_\_\_    \_\_\_    Contact the previous caseworker, if any?

Comment:

8c.    \_\_\_    \_\_\_    Make a close observation of the physical characteristics of the child, parents, siblings, and relatives?

Comment:

8d.    \_\_\_    \_\_\_    Seek to determine if the child is living in an Indian community?

8e.    \_\_\_    \_\_\_    Inquire about the Indian heritage of any unwed father and encourage the mother to reveal the father and for the father to acknowledge or establish paternity.

8f.                    Other Methods: (list)

***Indian Tribe  
Unknown***

If the worker has reason to believe the child is Indian, he/she needs to identify the Indian tribe. Does the worker:

9a.    \_\_\_    \_\_\_    Consult with other relatives or extended family members?

Comment:

10.                    Contact the state's Attorney and allow him or her to make an inquiry with the tribe?

Comment:

10a.   \_\_\_    \_\_\_    Contact as appropriate the suspected tribe?

Comment:

10b.   \_\_\_    \_\_\_    Contact as appropriate an Indian social services organization?

**Comment:**

10c.    \_\_\_    \_\_\_    **Contact the Bureau of Indian Affairs area office in Aberdeen, South Dakota?**

**Comment:**

10d.    **Does your county have a list of tribal contacts that are regularly contacted in cases where you suspect that an Indian child is involved?**

**Comment:**

***Inquiry to Indian Tribe***

11a.    \_\_\_    \_\_\_    **Do workers consistently inquire of child's tribe, to determine if the child is a member or eligible for membership?**

**Comment:**

11b.    \_\_\_    \_\_\_    **If several tribes are suspected are inquires made to all the tribes?**

**How are inquiries made?**

\_\_\_    \_\_\_    **Inquiry made by letter?**

\_\_\_    \_\_\_    **Inquiry made by phone?**

**Comment:**

11c.    \_\_\_    \_\_\_    **Do workers encounter problems making inquiries?**

**Comment:**

***Tribe Does Not Respond***    **If the tribe does not respond, do workers**

12a.    \_\_\_    \_\_\_    **call the tribal enrollment officer or other tribal employee or official responsible for or knowledgeable about tribal membership?**

12b.    \_\_\_    \_\_\_    **follow call up with a letter documenting the conversation**

**Comment:**

***Child Eligible for Membership***    **If the tribe responds that the child is eligible for membership and the biological child of a member of an Indian tribe, do workers**

13a.    \_\_\_    \_\_\_    **Request (or assist the family in filling out) application forms?**

13b.    \_\_\_    \_\_\_    **Counsel parents hesitant to enroll a child by emphasizing the positive benefits of tribal membership?**

**Comment:**

***Child Not Eligible for Membership***    **Once a tribe has determined that a child is not a member and not eligible for membership (and the biological child of a member of an Indian tribe), do workers:**

- 14a.    \_\_\_    \_\_\_    Document all steps taken to determine the child's Indian or tribal ancestry?
- 14b.    \_\_\_    \_\_\_    File in the case record the tribe's written statement declaring the child is neither a member of the tribe nor eligible for membership (and the biological child of a member of an Indian tribe)?
- 14c.    \_\_\_    \_\_\_    Incorporate in any court hearing the tribe's written statement declaring the child is neither a member of the tribe nor eligible for membership (and the biological child of a member of an Indian tribe)?

DETERMINING THE STATES JURISDICTION

Exclusive Jurisdiction

**The state cannot properly exercise jurisdiction if the child is resident or domiciled on federally recognized reservation or if the child is a ward of the tribal court unless an emergency situation exists**

- |      | YES | NO  | COMPLIANCE CRITERIA  |
|------|-----|-----|--|
| 15a. | ___ | ___ | Do workers routinely try to determine the residence of the child?  |
| 15b. | ___ | ___ | Do workers routinely try to determine whether the child and family are only temporarily residing off the reservation and still consider an Indian reservation their home |
| 15c. | ___ | ___ | If a child's residence or domicile is determined to be within the boundary of an Indian reservation is the case either transferred to the tribe or dismissed?            |
| 15d. | ___ | ___ | Is inquiry routinely made regarding whether the child is ward of the tribal court under any prior tribal court proceeding?   |
| 15e. | ___ | ___ | If an order establishing tribal court wardship is currently in force does the state court accord full faith and credit to those orders.                                  |

Transfer to Tribal Court

**Section 1911. (b) of the ICWA Act allows the parent or custodian or Indian tribe to transfer the proceeding to tribal court. The state court must transfer unless the tribal court declines jurisdiction, either parent objects to such transfer, or if the court determines that good cause exists to deny the transfer.**

- |      | YES | NO  | COMPLIANCE CRITERIA  |
|------|-----|-----|--|
| 16a. | ___ | ___ | If the tribe requests orally or in writing, a transfer of the proceeding to its tribal court, do workers standardly recommend such transfer? If not, on what grounds would workers oppose a transfer petition? |

**Comment:**

**Do you think any of the following are good causes to deny transfer:**

- 16b.    \_\_\_    \_\_\_    Tribal court is not as good as state court
- 16c.    \_\_\_    \_\_\_    The Indian child does not wish to go back to the reservation
- 16d.    \_\_\_    \_\_\_    The reservation has serious social and economic problems such as alcoholism and abuse of children
- 16e.    \_\_\_    \_\_\_    The child will not receive necessary counseling or medical services on the reservation
- 16f.    \_\_\_    \_\_\_    The child has already bonded with a foster family off the reservation
- 16g.    \_\_\_    \_\_\_    The child has never lived on a reservation
- 16h.    \_\_\_    \_\_\_    If any party believes that good cause exists not to transfer the proceeding, do they document in writing their reasons for such belief?
- 16i.    \_\_\_    \_\_\_    Are written statements distributed to all parties so that everybody has the opportunity to provide the court with their views?

**Comment:**

Services to Prevent Out-of-Home Placement

**Active efforts must be undertaken to provide remedial services subsequent to an investigation and before a decision is made to place the child out of the home.**

- |      | YES | NO  | COMPLIANCE CRITERIA  |
|------|-----|-----|--|
| 17a. | ___ | ___ | Do workers use other community services specifically designed for Indian families? |
| 17b. | ___ | ___ | * extended family resources  |
| 17c. | ___ | ___ | * tribal services  |
| 17d. | ___ | ___ | * urban Indian programs, when appropriate;   |
| 17e. | ___ | ___ | * individual Indian caregivers, such as medicine men.                              |

**Comment:**

Definition of Active Efforts

**Active efforts mean not just an identification of the problems or solutions, but efforts showing an active attempt to assist in bridging the gap.**

- |      | YES | NO  | COMPLIANCE CRITERIA  |
|------|-----|-----|--|
| 18a. | ___ | ___ | Do workers consider cultural conditions and way of life of the child's tribe and/or Indian community in making judgments about the family? |

- 18b.    \_\_\_    \_\_\_    Do workers intervene only when supported by relevant, prevailing Indian social and cultural standards regarding intervention in familial relationships by non-family?
- 18c.    \_\_\_    \_\_\_    Do workers develop a case plan with assistance of parent/custodian that involves use of tribal Indian community resources?
- 18d.    \_\_\_    \_\_\_    Do workers encourage maintenance of the child in his or her own family except where physical or emotional harm may result?
- 18e.    \_\_\_    \_\_\_    Do workers involve the child, if of sufficient age, in the design and implementation of case plan?
- 18f.    \_\_\_    \_\_\_    Do workers provide time and resources to prevent family breakup in at least equal measure to time and resources provided to other families?
- 18g.    \_\_\_    \_\_\_    Do workers assist parents or custodian and child to maintain an ongoing familial relationship?
- 18h.                    Other Active Efforts: (List)  
                          Comment:

#### BURDEN OF PROOF

**Through the Indian Child Welfare Act, Congress has declared that an Indian child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be “in the best interests of the child” for him or her to live with someone else. Nor can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are “unfit parents.” It must be that it is dangerous for the child to remain in his or her present conditions.**

Foster Care Placement: Clear and Convincing Evidence

**The Indian Child Welfare Act states that a court may not issue an order effecting a foster care placement of an Indian child in the absence of a determination, supported by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, that the child’s continued custody with the child’s parents or Indian custodian is likely to result in serious emotional or physical damage to the child.**

Termination of Parental Rights: Evidence beyond a Reasonable Doubt

**In order to ask the court to terminate parental rights, the agency as petitioner must show the court by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.**

- |      | YES | NO  | COMPLIANCE CRITERIA   |
|------|-----|-----|---|
| 19a. | ___ | ___ | Are “Qualified Expert Witnesses” used routinely in the ICWA hearings? Which of the following “Qualified Expert Witnesses” are used:   |
| 19b. | ___ | ___ | A member of the Indian child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices;   |
| 19c. | ___ | ___ | A lay person having a substantial education and experience in the area of his or her specialty along with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child’s tribe;  |
| 19d. | ___ | ___ | A professional person having substantial education and experience in the area of his or her specialty along with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community.<br><br>Other experts used: (list)<br>Comment: |
| 20.  | ___ | ___ | Do workers enlist the assistance of the Indian child’s tribe in locating persons qualified to serve as expert witnesses?<br><br>Comment:  |
| 21.  | ___ | ___ | Do workers enlist the assistance of the BIA in locating persons qualified to serve as expert witnesses?<br><br>Comment:   |

PLACEMENT OF INDIAN CHILDREN

- |  | YES | NO  | COMPLIANCE CRITERIA   |
|--|-----|-----|---|
| <b>What constitutes a diligent search to follow the Act’s placement preferences:</b> |     |     |   |
| 22a.   | ___ | ___ | Contact with tribe’s social service program;  |
| 22b.   | ___ | ___ | Search of state and county lists of Indian homes;   |
| 22c.   | ___ | ___ | Contact with other tribes and Indian organizations with available placement resources. 22d. ___ ___ Contact with child’s extended family; |
| 22d.   |     |     | Other (list)<br>Comment:  |

Foster Care/Pre-adoptive

	YES	NO	COMPLIANCE CRITERIA
23.	_____	_____	<b>Do workers contact the tribe to ask if they have a different placement preference than the following:</b> <b>1. Member of child’s extended family;</b> <b>2. Foster home licensed, approved, or specified by the Indian child’s tribe;</b> <b>3. Indian foster home licensed or approved by an authorized non-Indian.</b> <b>4. Institution for children approved by an authorized non-Indian licensing authority.</b>
	_____	_____	<b>Do workers routinely inquire of the child’s tribe the tribe’s customary definition of extended family? 25 U.S.C. 1903(2)</b> <b>What does the agency (worker) consider to be “good cause to the contrary” not to place a child within the placement preferences?</b> <b>Comment:</b>

Change of Placement: Notify Parents

	YES	NO	COMPLIANCE CRITERIA
24.	_____	_____	<b>If a child is to be moved from one placement to another, or if the foster family plans to move, are the child’s parents or custodians notified in writing?</b> <b>Comment:</b>

Adoptive Placements

	YES	NO	COMPLIANCE CRITERIA
25.	_____	_____	<b>Do workers contact the tribe to ask if they have a different placement preference than the following:</b>
25a.	_____	_____	<b>1. Child’s extended family;</b>
25b.	_____	_____	<b>2. Other members of the child’s tribe;</b>
25c.	_____	_____	<b>3. Other Indian families.</b> <b>Comment:</b>
25d.	_____	_____	<b>Do you think psychological bonding with a non-Indian foster home should be considered in determining good cause not to comply with the placement preferences?</b>

EMERGENCY REMOVALS

	YES	NO	COMPLIANCE CRITERIA
27a.	___	___	Unless circumstances do not permit such inquiry, is the racial/ethnic status of the child immediately determined?
27b.	___	___	If Indian: is the name of tribe and/or band determined?
27c.	___	___	Is it determined that the child is not resident or domiciled on the reservation of a tribe that has jurisdiction over child custody proceedings;
27d.	___	___	Is it determined that the child is in danger of imminent physical damage or harm.  Comment: Is emergency custody terminated when:
27e.	___	___	Removal is no longer necessary to prevent imminent physical damage or harm to the child, OR
27f.	___	___	The appropriate tribe exercises jurisdiction over the case? When emergency custody is not terminated, does the agency
27g.	___	___	expeditiously initiate a child custody proceeding; or
27h.	___	___	transfer the child to the jurisdiction of the appropriate Indian tribe?

Placement

	YES	NO	COMPLIANCE CRITERIA
28.	___	___	If the child is believed to be Indian, are efforts made to place the child during emergency care in a setting that follows the placement priorities established by the tribe or the Indian Child Welfare Act?
	___	___	1. A member of the child's extended family;
	___	___	2. A foster home licensed, approved, or specified by the Indian child's tribe;
	___	___	3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority;
	___	___	4. An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.
			Comment:

Continuation of Custody

**YES NO COMPLIANCE CRITERIA**

**If termination of an emergency removal is not possible, a court order should be obtained authorizing continued protective custody. Does the petition filed in such a proceeding include the following:**

- 29a.   The name, age, tribal affiliation, and last known address of the Indian child;
- 29b.   The name and address of the child's parents and/or Indian custodian, if any, and tribe;
- 29c.   If unknown, the agency provides a detailed description of efforts made to locate the child's parents and/or affiliation to a tribe?
- 29d.   If known, whether the residence or domicile of the parent, Indian custodian, or child is on or near a reservation, and which reservation;
- 29e.   A specific and detailed account of the circumstances that led to the conclusion that the child would suffer imminent physical damage or harm.
- 29f.   A specific plan of action to restore the child to his or her parents or Indian custodian.
- 29g.   A specific plan of action to transfer the child to the jurisdiction of the appropriate Indian tribe.

**Comment:**

Other Provisions

**YES NO COMPLIANCE CRITERIA**

- Do you review state law to determine if there is any instance where it provides a higher standard of protection to the rights of the parents or Indian custodian?
- If so, are those more protective standards applied to Indian child custody proceedings?
- Are all reports or other documents filed with the court routinely made available to the parent or Indian custodian?
- Are all reports or other documents filed with the court routinely made available to the Indian child's tribe?
- Does the agency routinely submit to the Secretary of the Interior (BIA) notices of Indian adoptions which include information that will allow adopted individuals to retain their rights to membership in an Indian tribe.

## APPENDIX D

# ICWA Compliance Model

## Tribal and County Focus Group Questions

### *Caseworker Focus Group Questions*

#### PURPOSE

To gain perspective on county/state compliance of the Indian Child Welfare Act and to assess levels of ICWA training.

#### INTRODUCTION

Hello and welcome to our session. Thank you for taking the time to join this discussion of ICWA compliance. My name is Kelly Dunham and I work at the Native American Children and Family Services Training Institute. Assisting me is Merle Bears Tail, also from the Training Institute. We are attempting to gain information about county and state compliance with the Indian Child Welfare Act and we are looking at caseworker perspectives in handling ICWA cases.

You were selected because you have certain things in common that are of particular interest to us. You all have a great deal of experience with the Indian Child Welfare Act and its process at the county level. We are interested in your views because you present the range of views within the community.

There are no right or wrong answers but only differing points of view. Please feel free to share your point of view even if differs from what others have said.

Before we begin, let me share the ground rules. Please speak up. Only one person should talk at a time. We're tape recording the session because we don't want to miss any of your comments. If several people are talking at the same time, the tape will get garbled and we'll miss your comments. We will be on a first name basis today, and in our later reports there will not be any names attached to the comments. We will keep all of your comments confidential. Keep in mind that we're just as interested in negative comments as positive comments, and at times the negatives comments are the most helpful.

Our session will last about an hour and a half and we will not take a formal break. Well, let's begin. We've placed name cards on the table in front of you to help us remember each other's names. Let's find out some more about each other by going around the room one at a time.

## Caseworker Focus Group Questions

1. **Tell us your name, if you have any children, and if so, their ages.**
2. **How many years have you worked with Indian children in foster care?**
3. **What do you see as the positive aspects of ICWA?**
4. **What aspects, if any, of ICWA concern you?**
5. **Do individual workers receive regular training on ICWA?**
  - a. **How often does training occur?**
  - b. **Who provides this training?**
  - c. **Is this training mandatory or voluntary?**
  - d. **If you have a question in regards to ICWA is there someone you can ask? Who?**
6. **One of the first steps in determining whether ICWA applies is determining whether or not a child is Indian. This involves making inquiries of probable tribes to find out if a child is a member or qualifies for membership. How are these inquiries made?**
  - a. **What problems do you encounter making inquiries?**
  - b. **If the child is not enrolled, do you ever attempt to try to gain the enrollment of the child?**
7. **Active efforts must be made to provide services that seek to heal or help the family after an investigation and before a decision is made to place a child out of the home. Do workers use other community services specifically designed for Indian families?**
  - a. **Extended family resources? How?**
  - b. **Tribal services? How?**
  - c. **Urban Indian programs, when appropriate? How?**
  - d. **Individual Indian caregivers, such as medicine men? How?**
8. **In order to terminate parental rights, the agency must show the court by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. How often are qualified expert witnesses used?**

- a. Where do you find qualified expert witnesses?
  - b. Do you seek the assistance of the tribe in locating qualified expert witnesses?
9. In what percentage of cases involving Indian children do you feel that the Tribe is playing an active role in participating in the case? If it is a low number, how do you feel counties can contribute to more tribal participation?
- a. How often are you in contact with the ICWA committee or director of the tribe involved when working on a case?
  - b. Do you document your contacts? How?
10. If you could snap your fingers and make anything happen at the tribal, county, state, or federal level to improve the lives of children touched by ICWA (and make your job run a bit more smoothly) what would you do?
11. Merle will now give a brief summary of the key questions, themes, and ideas that emerged. Merle, will you please highlight these areas?

Again, I would like to remind the group the purpose of our discussion today is to assess state and county compliance with the Indian Child Welfare Act and to look at the caseworker's perspective in handling ICWA cases. So again, our last question:

12. Have we missed anything?

If not, I want to thank you all for sharing your comments about ICWA compliance. We appreciate and value your insights.

## ICWA Compliance Model

### ***Tribal Worker Focus Group Questions***

#### **PURPOSE**

To gain perspective on county/state compliance of the Indian Child Welfare Act and to assess tribal capacity to exercise their rights in ICWA cases.

#### **INTRODUCTION**

Hello and welcome to our session. Thank you for taking the time to join this discussion of ICWA compliance. My name is Kelly Dunham and I work at the Native American Children and Family Services Training Institute. Assisting me is Merle Bears Tail, also from the Training Institute. We are attempting to gain information about county and state compliance with the Indian Child Welfare Act and we are looking at caseworker perspectives in handling ICWA cases.

You were selected because you have certain things in common that are of particular interest to us. You all have a great deal of experience with the Indian Child Welfare Act and its process at the tribal level. We are interested in your views because you present the range of views within the community.

There are no right or wrong answers but only differing points of view. Please feel free to share your point of view even if differs from what others have said.

Before we begin, let me share the ground rules. Please speak up. Only one person should talk at a time. We're tape recording the session because we don't want to miss any of your comments. If several people are talking at the same time, the tape will get garbled and we'll miss your comments. We will be on a first name basis today, and in our later reports there will not be any names attached to the comments. We will keep all of your comments confidential. Keep in mind that we're just as interested in negative comments as positive comments, and at times the negatives comments are the most helpful.

Our session will last about an hour and a half and we will not take a formal break. Well, let's begin. We've placed name cards on the table in front of you to help us remember each other's names. Let's find out some more about each other by going around the room one at a time.

## Tribal Worker Focus Group Questions

1. **Tell us your name, if you have any children, and if so, their ages.**
2. **How many years have you worked with the Indian Child Welfare Act?**
3. **What are some positive things your tribe does for its youth?**
4. **What are some of the most serious concerns facing tribal children who live off the reservation? (tribal youth in general, not just foster care)**
5. **What are your concerns about tribal children who enter the state child welfare system?**
  - a. **Does the state continue to fund services for children who are transferred back to tribal care?**
6. **Please complete the following sentence, and feel free to expand upon it: My tribe decides what action they will take in ICWA cases by ...**
  - a. **Who gets notice and is it timely?**
  - b. **How do you decide which cases your tribe will transfer?**
  - c. **How do you decide which cases your tribe will participate in?**
  - d. **Do you monitor cases if you do not intervene or transfer?**
7. **How does the state involve the tribe in state proceedings to remove Indian children?**
  - a. **Have you ever been consulted?**
  - b. **Have any of you ever testified or do you know any other tribal members who have testified in state court proceedings?**
8. **If you could snap your fingers and make anything happen for these children involved in ICWA, what would you do?**
9. **Merle will now give a brief summary of the key questions, themes and ideas that emerged. Merle, will you please highlight these areas?**

**Again, I would like to remind the group the purpose of our discussion today is to assess state and county compliance with the Indian Child Welfare Act and to look at the tribe's perspective in handling ICWA cases. So again, our last question:**

10. **Have we missed anything?**

**If not, I want to thank you all for sharing your comments about ICWA compliance. We appreciate and value your insights.**

## APPENDIX E

# ICWA Compliance Model

## Summary of County and Tribal Focus Group Meetings

### NATIVE AMERICAN CHILDREN AND FAMILY SERVICES TRAINING INSTITUTE (NACFSTI) COUNTY CASEWORKERS ICWA COMPLIANCE FOCUS GROUPS

Information about the focus groups:

- **Ramsey /Benson counties; July 14, 2000; four participants (one county director of social services, and three caseworkers)**
- **Cass county; July 19, 2000; seven participants (seven caseworkers)**
- **Burleigh/Morton; July 25, 2000; seven participants (one county director of social services and six caseworkers)**

**Moderator: Kelly Dunham**

**Assistant Moderators: Merle Bears Tail and Melissa Hood**

Goal of focus group discussions:

**To gain perspective on county/state compliance of the Indian Child Welfare Act, and to assess the training level of caseworkers on the ICWA.**

Background information and methodology:

**There is a significant lack of data concerning the effects, both positive and negative, of the Indian Child Welfare Act on tribal children today, both nationally and in North Dakota. The impact of ICWA and the state's compliance to it is vague. With this lack of data, we have a difficult time analyzing ICWA compliance and implementing changes that will assure the federal law is followed and that native children will be protected.**

**Each discussion question is presented below, followed by a summary of common themes which were reflected in the responses.**

How many years have you worked with Indian children in foster care?

**The average amount of experience is 14 years.**

What do you see as the positive aspects of the Indian Child Welfare Act?

**Each time this question was asked, a long pause occurred. Then, after an additional probe, some common responses emerged. The participants felt that ICWA gives tribal children another advocate. They also felt that ICWA ensures involvement from the tribe, keeps the tribe informed, and helps relative searches go more smoothly.**

What aspects, if any, of ICWA concern you?

**Some of the main concerns included lack of tribal involvement until a termination of parental rights occurs, the high turnover rate and lack of training of ICWA workers at the tribe, multiple gray areas as to what the exact process is from both ends, the child's view not being important to the ICWA workers, and lack of acknowledgement when bonding has taken place. A few workers stated that they do not feel that they have adequate training on the hierarchy and political systems of the various tribes, which leaves them not knowing who to contact. There were also some concerns regarding the tribal case workers' ability to place children—ie., too many kids in a house, placing children with a grandmother who allows the parents to stay in the house, etc.**

Do individual workers receive regular training on the Indian Child Welfare Act?

**All of the workers said that training on ICWA consists of a few days at the time of certification. For some, this may have been fifteen years ago. There is voluntary training available maybe once a year at general foster care conferences. If the individual workers have questions, they go to the ICWA directors at the tribes, state's attorneys, other workers they perceive as having considerable knowledge about ICWA, and sometimes Dr. Gene Delorme at the University of North Dakota.**

**One of the first steps in determining whether ICWA applies is determining whether or not a child is Indian. This involves making inquiries of probable tribes to find out if a child is a member, or qualifies for membership. How are these inquiries made?**

**Depending on the age of the child, the caseworker will ask the child or the parents about the heritage. Then they proceed to make a phone call to the tribe, or send a letter inquiring about the enrollment of the child, or whether or not the child is eligible for enrollment. The participants expressed a sense of frustration with the tribes' lack of response. A few workers have attempted to gain the enrollment of the child. Most said that enrollment is the parents' responsibility.**

Active efforts must be made to provide services that seek to heal or help the family after an investigation and before a decision is made to place the child out of the home. Do workers use other community services specifically designed for Indian families?

**There is a real lack of awareness of community services specifically designed for Indian families. The workers do call extended family for support and possible placement. Some workers have also called**

**tribal social services for information regarding treatment centers/wellness centers. All of the participants expressed a need for treatment centers in the state with culturally appropriate services. When probed about the use of medicine men, pow-wows, sweats, etc., the participants said that they had never initiated anything of the sort but that family members had taken kids to these activities. One county obtains passes for a pow-wow for its Indian children in foster care.**

In order to terminate parental rights, the agency must show the court by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. How often are qualified expert witnesses used?

**There was not a consensus on this question. A few workers insisted that qualified expert witnesses are always used, while most seemed unaware of their use or usefulness. When they are used, caseworkers said that they call the ICWA directors or a medical doctor.**

In what percentage of cases involving Indian children do you feel that the tribe is playing an active role in participating in the case? If it is a low number, how do you feel that counties can contribute to more tribal participation?

**All participants felt that it is a very low number. Some even claimed zero percent. While some participants felt that this was an active choice on the part of the tribe, others felt that the tribe is constrained due to a very real lack of resources, and simply cannot become involved. Most of the participants felt that there is something that can be done from the county's end to improve the tribe's responsiveness. One method of encouraging the tribe's participation is scheduling a group of permanency planning meetings on the same day, to allay the cost of travel.**

If you could snap your fingers and make anything happen at the tribal, county, state, or federal level to improve the lives of children touched by ICWA (and make your job run a bit more smoothly), what would you do?

**Everyone expressed the desire for more staff at the tribal level. The participants explained that the caseworkers at the tribe are very overworked and this contributes to the low response time on cases. Other desires include greater uniformity between the way tribal social services are run, a culturally based treatment center for adolescents and children, Indian mentor families for Indian children in foster care, more Indian foster homes, more training for all caseworkers-county and tribal. Another plan included an ICWA office for the state that is composed of one ICWA worker from each tribe.**

## Conclusion

**A great deal of information has been collected from the participants in the three focus groups conducted for this project. Each county did have its unique experiences and concerns; however, common themes emerged as the facilitator reviewed the proceedings. Ample information is available in this report as NACFSTI develops an ICWA statewide training curriculum.**

**NATIVE AMERICAN CHILDREN AND FAMILY SERVICES TRAINING INSTITUTE (NACFSTI)  
TRIBAL INDIAN CHILD WELFARE ACT COMPLIANCE FOCUS GROUPS**

Focus groups:

- **Fort Berthold Reservation; June 15, 2000; three participants (one ICWA director, one caseworker and an attorney)**
- **Turtle Mountain Reservation; June 26, 2000; three participants (one ICWA director and two caseworkers)**
- **Spirit Lake Reservation; June 27, 2000; three participants (one ICWA director and two caseworkers)**
- **Standing Rock Reservation; June 28, 2000; three participants (two ICWA board members and one caseworker)**

**Moderator: Kelly M. Dunham**

**Assistant Moderators: Merle Bears Tail and Melissa Hood**

Purpose of focus group discussions:

**To gain perspective on county/state compliance of the Indian Child Welfare Act, and to assess tribal capacity to exercise their rights.**

**Each discussion question is presented below, followed by a summary of common themes, which were reflected in the responses.**

How many years have you worked with the Indian Child Welfare Act?

**The average amount of time was four years.**

What are some positive things your tribe does for its youth?

**Pause. The groups mentioned a number of activities that instill a sense of pride for the youth, including pow-wows, mentoring, incentives for good grades and good attendance. They also felt that the tribe works to take care of its foster youth through looking for relatives on the reservation or finding foster families. The public health system, Family Focus, I-ki-pi, and the Sacred Child program were also said to be strengths.**

What are some of the most serious concerns facing tribal children who live off the reservation?

(Tribal youth in general, not just in foster care)

**The most serious concern is deprivation. The participants felt that a lot of kids off the reservation live in poverty and experience abuse and neglect. Prejudice, loss of identity, lack of extended family support, and therefore, loss of stability, were also major concerns. About half of the participants mentioned concerns such as drugs and gang activity.**

What are your concerns about tribal children who enter the state child welfare system?

**The participants' main concern is that youth get locked in the state child welfare system once they enter. Tribal workers also felt that most county social workers are non-Indian and place their values on Indian parents who enter the system. Almost all thought that state social workers need a better understanding of Indian culture.**

Please complete the following sentence, and feel free to expand upon it: My tribe decides what action they will take in ICWA cases by...

**Everyone stated that they leave the decision to the ICWA committee, or director. The tribe transfers cases if there are relatives who are willing to take the child in on the reservation, a foster family available on the reservation, if the child is an infant, or if there is a termination of parental rights. They do not bring a child back if the parents want the child back and live off the reservation, or if there is extended family who want the child off the reservation. The tribes would like to intervene across the board, but do not due to the lack of resources. Some participants said that they try to monitor all cases that are not transferred through letters and phone calls. Participants stated that notice is timely if it is addressed properly.**

How does the state involve the tribe in state proceedings to remove Indian children?

**The state involves the tribe through notice, and by using the ICWA workers as qualified expert witnesses. About half of the participants felt that communication between the county and the tribes has improved. A few mentioned that the county workers should work to inform Indian parents of their rights under ICWA.**

If you could snap your fingers and make anything happen for these children involved in ICWA, what would you do?

**The recurring theme that came up in this question is that parents need to learn how to take care of their kids. Workers also wished for no more problems with alcohol. Others wished for a centralized data bank of Indian foster homes, a treatment center for parents, money for tribal social services, more Indian foster homes, parenting classes, and resources to assist kids with special needs on the reservation.**

## Conclusion

**A great deal of information has been collected from the participants in the four focus groups conducted for this project. Each reservation has its unique issues and concerns; however, common themes emerged as the facilitator reviewed the proceedings. Ample information is available in this report as NACFSTI develops an ICWA statewide training curriculum.**

## Footnotes

<sup>1</sup> The term “Indian children” as used in this report refers to a person who is a member of a federally recognized tribe, or eligible for membership in a federally recognized tribe and the biological child of a member of a federally recognized Indian tribe. This is also the definition of an “Indian child” under ICWA.

<sup>2</sup> *Native Village of Stevens v. Smith*, 770 F.2d 1486 (9th Cir. 1985), cert denied 475 U.S. 1121 (1986).