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# THE INDIAN CHILD WELFARE ACT

Improving Compliance through State-Tribal Coordination

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| Justine van Straaten<br>Director, Child Welfare Programs<br>Center for Court Innovation<br><br>Paul G. Buchbinder<br>Intern, Center for Court Innovation<br>J.D., Albany Law School | 2011 | This report was supported by Grant No. 2008-DD-BX-0274 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.<br><br>A version of this article was accepted for publication in the *Children's Legal Rights Journal,* School of Law, Loyola University, Chicago. |

# THE INDIAN CHILD WELFARE ACT: IMPROVING COMPLIANCE THROUGH STATE-TRIBAL COORDINATION

## INTRODUCTION

The Indian Child Welfare Act of 1978[1] (ICWA) remains the most comprehensive piece of federal legislation protecting the rights of Native American children and their families. When it was passed, it was seen as a substantial victory for Native Americans and an important step in the preservation of Native American culture. More than 30 years later, though, many are still confused about ICWA. As a result, compliance is inconsistent and the protections afforded to Native Americans by the federal government remain threatened.

There is general agreement among child welfare experts that continuing attention must be paid to this important law. This paper reviews some of the current challenges associated with following the mandates set forth in ICWA and offers suggestions for how state and tribal jurisdictions can work collaboratively to improve compliance. For all its laudable goals, ICWA depends entirely on the willingness of states and tribes to work together to understand the law and incorporate its directives into everyday practice. Common obstacles to routine ICWA compliance include lack of knowledge regarding the requirements of the Act, confusion regarding the impact of subsequent federal legislation, and difficulty identifying those children eligible for ICWA protection.

It is important to note that this discussion about ICWA is part of a larger conversation about state-tribal court collaboration that has gained considerable momentum in recent years. In 2008, the Center for Court Innovation launched a new initiative called the Tribal Justice Exchange to promote improved communication between state and tribal courts and to share ideas, innovations, and best practices among jurisdictions. This paper is an examination of one area of the law where state-tribal court collaboration is critical, but there are countless additional instances in which these two systems could build bridges of communication and cooperation to ensure the protection and preservation of cultural and individual rights.

## BACKGROUND

ICWA was passed in 1978 as a result of congressional recognition that there is value in preserving Native American heritage, culture, and communities. The law was an attempt to reverse decades of federal policy that

disrupted the cultural and familial ties of Native American children. In the 19th century, the federal government passed a series of laws designed to promote the assimilation of Native Americans into the larger American culture.[2] The commissioner of Indian Affairs in 1879 argued that because Indians "...cling tenaciously to old customs and hate all changes...the government should force them to scatter...break up their tribal organizations... and give them cattle in exchange, and compel them to labor or to accept the alternative of starvation."[3] As part of this policy, Native children were commonly sent to boarding schools to become indoctrinated in mainstream American culture and Christian religious practices, as well as forbidden to speak their Native languages or have contact with their families.[4] This practice continued until the 1930s, diluting cultural and familial ties among Indian tribes across the United States.[5]

To appreciate fully the need for ICWA, it is important to comprehend the long-standing over-representation of Native American children in the state child welfare systems. In the 1950s and 1960s, the cultural practices of Native American families were often seen as justification for removal. Child-rearing practices that were widely accepted in Native communities, such as leaving children in the care of other tribal members, sometimes led to allegations of neglect. Moreover, state authorities cited Native families' lack of financial resources and general state of poverty as reasons for removing Native children. Such state interventions routinely compromised children's connections to their tribes, reservations, and extended families. The increasing popularization of adoption in the United States, and the rising demand for babies to adopt, further accelerated this trend. Native American babies were freed for adoption with increased frequency, while few protections were in place to preserve families.[6] As a result of these dubious child welfare practices, an average of 25 to 30 percent of all Native American children during this period were placed in foster or adoptive homes with non-Native families.[7]

In 1978, Congress—acknowledging that past policies irreparably damaged generations of Native American families—took an extraordinary step by passing the Indian Child Welfare Act,[8] which expanded the jurisdiction of tribal courts to include child welfare matters beyond the reservation,[9] allowed greater input from tribes into decisions affecting the future of their youngest members,[10] and kept many children in Native American communities who would otherwise have been sent to non-Native homes.[11] ICWA sets minimum federal standards and specifies the procedures that apply in "child custody proceedings," which are defined in the Act as foster care placements, voluntary or involuntary termination of parental rights, pre-adoptive placements, adoptive placements, and status offenses/Persons in Need of Supervision (PINS) cases[12] involving a child that is either enrolled or eligible for enrollment in one of the more than 560 federally recognized Native American tribes in the United States.

ICWA aims to protect the best interests of Native American children and their families by preserving the tribal ties that are vital both to the individual child's development and to the strength of tribal communities. Crucially, ICWA covers Native Americans residing on or off tribal reservations.[13] ICWA's recognition of the cultural heritage rights of all Native Americans, regardless of their domicile, represented a dramatic shift in federal policy.[14] By granting tribal jurisdiction in matters involving all Native American children, irrespective of physical location, ICWA was an important step toward preserving Native American communities throughout the vast

expanse of the United States. It also meant that state courts were responsible for learning the implications of a complicated and far-reaching new law that affected a small percentage of the population.

Because state courts are entitled to concurrent jurisdiction in many child custody proceedings involving Native American children,[15] ICWA includes protections to guard against undue separation of Indian families in cases where exclusive jurisdiction by tribal courts is not available. These protections include: higher burdens of proof for terminating parental rights and for removing Native American children from their homes involuntarily;[16] strict notification requirements to ensure that tribes are aware of proceedings involving tribal members and are offered the opportunity to intervene;[17] active efforts (an enhanced version of the "reasonable efforts" standard applied in state court proceedings) on the part of departments of social services to keep the Indian family intact prior to substitute placement;[18] and qualified expert witness testimony before making out-of-home placements or terminating parental rights.[19] In addition, ICWA pays specific attention to placement preferences, favoring caregivers who will preserve Native American heritage, as well as ties to tribal communities, when the removal of Indian children becomes necessary.[20] The intent of these protections is clear, and the protections represent a significant step forward in federal policy. Nonetheless, these protections are only as powerful as the degree of compliance with them.

Although ICWA sought to reverse generations of government-sponsored disruption of Native communities, the fragmentation of tribal culture continues to this day and the representation of Native American children in foster care remains disproportionate to the number in the general population. The most recent available data reveals that Native American children make up 2 percent of the total number of children in foster care nationally even though Native Americans comprise only 1 percent of the child population in the United States.[21] Regional figures are even more stark. In Alaska, Native Americans make up 20 percent of the general population and 50.9 percent of the foster care population.[22] In South Dakota, Native Americans comprise 15 percent of the general population and 52.2 percent of the foster care population.[23] It has been estimated that Indian children are placed in substitute care at a rate as high as 3.5 times greater than that of non-Native children,[24] and Native American families are twice as likely to be investigated by child welfare authorities compared to the general population.[25] These rates of child protective investigations and foster care placement are higher than for any other racial or ethnic group nationwide.

## OBSTACLES TO ICWA COMPLIANCE

The consequences of failing to comply with ICWA are serious. They include the invalidation of state court proceedings through appeal by either the child or the parent, the possible disruption of a long-standing foster care placement, the voiding of a final adoption order, malpractice actions, and federal sanctions. As serious as the legal ramifications might be, the potential consequences to Indian families and culture are even greater; inadequate compliance with ICWA means the continued disruption of a group of people long mistreated by the United States. Nonetheless, compliance with ICWA has never been routine. Many of ICWA's potential sanctions are rarely, if ever, enforced. This may be attributable to the fact that there is no reliable mechanism for detecting

a state's failure to follow ICWA's mandates in any individual case, a general recognition that state and tribal entities lack the requisite knowledge and resources to ensure compliance, or the fact that those protected by the ICWA are often not aware of the law or how to seek the remedies available. In addition, a lack of communication and information-sharing between state and tribal governments contributes to the fact that there are insufficient policies in place to alert authorities when ICWA mandates are not being followed. As a result of these systemic challenges, failure to comply with ICWA is rarely penalized. ICWA is not the only area where state and tribal court systems fail to communicate or cooperate effectively—problems related to communication arise in numerous areas where tribal and state court jurisdictions share some authority. But ICWA is arguably one of the areas in most urgent need of a fix because the stakes—the well-being of children and their families—are so high. While the identity and authority of tribal and state jurisdictions ought to remain distinct, communication strategies and channels should be in place to minimize the miscarriage of justice.

### Lack of Education and Training

The failure of many state courts and child welfare agencies to follow the mandates of ICWA is often due to simple lack of knowledge. In many states, ICWA and laws regarding state-tribal court interaction are seen as issues for tribal specialists. Moreover, ICWA is not studied in graduate schools or in practice with nearly the same intensity as the Adoption and Safe Families Act (ASFA), Fostering Connections, or other federal statutes governing the child law area.[26] Similarly, federal court interpretation of ICWA is largely overlooked. For example, the case of *Mississippi Band of Choctaw Indians* v. *Holyfield*,[27] the only instance in which the U.S. Supreme Court ruled upon ICWA, is taught with far less frequency than other landmark cases in the child law canon, such as *Pierce* v. *Society of Sisters,*[28] *Santosky* v. *Kramer,*[29] *Prince* v. *Massachusetts,*[30] or *Parham* v. *J.R.*[31] Moreover, professional training for front-line child welfare staff does little to reinforce the significance of ICWA. In most U.S. jurisdictions, Native Americans constitute a relatively small percentage of the child welfare caseload and, as such, greater time is spent covering more general child welfare regulations and mandates. In short, too many graduate schools and child welfare systems do not incorporate ICWA into general education or training curricula.[32]

### Relocation of Native Americans to Urban Areas

ICWA compliance has also been complicated by the relocation of thousands of Native Americans to urban centers. In the 1950s and 1960s (often referred to as the "Termination Era"), the federal government stripped approximately 60 tribes of federal recognition. This resulted in the elimination of the terminated tribes' federal funding and the forced division and sale of the tribes' land base to private landowners (both tribal members and non-members).[33] This wholesale termination of tribal communities led to a dramatic influx of Native Americans into urban areas.[34] As a result, approximately two-thirds of the 2.4 million Native Americans in the United States today live outside of reservation areas, which makes identifying children eligible for ICWA protections in state systems much harder.[35] According to the 2000 U.S. Census, New York City has the largest Native American pop-

ulation of any American city at 87,241.[36] Los Angeles, at 53,092, has the second largest urban Native American population.[37]

In urban areas, it is especially difficult for state child welfare authorities to identify children who are covered by ICWA for the obvious reason that these children do not live on clearly delineated reservations but within the broader multi-ethnic population of the city. Without prompt identification, notification of tribes cannot happen in a timely fashion. New York City is an important example of this phenomenon. There are nine tribal Nations located within the borders of New York State (eight of these Nations are federally recognized as of June 2010; one is recognized by New York State only). However, New York City has no mechanism in place to identify prospective foster children as Native American, as defined by ICWA. Even in cities like Tucson, Arizona, where reservation land borders or is close to city limits, many Native Americans opt to live off the reservation.[38] In the urban setting, child welfare authorities can confirm a child's eligibility for ICWA protections only by inquiring directly about the child's heritage. This information, however, can be difficult to obtain. Many Native Americans are understandably wary of state child welfare authorities who, in the middle of the last century, commonly filed abuse and neglect petitions against Native American parents for actions as benign as leaving a child with an extended relative for long periods of time.[39] In addition, direct inquiry often does not occur because child welfare authorities do not know to ask, do not ask the question routinely, or make assumptions about heritage based on physical attributes.

### ICWA and the Adoption and Safe Families Act

Since ICWA's passage, Congress has enacted additional legislation designed to improve the manner in which states approach children in foster care. Perhaps the most significant of these laws is the Adoption and Safe Families Act of 1997 (ASFA).[40] ASFA was enacted to minimize the problem of "foster care drift": children spending their entire childhoods drifting from one temporary placement to another. ASFA ushered in a new era in child welfare legislation by turning the focus away from family reunification and toward finding swift permanent living situations for children removed from their homes. In doing so, ASFA represented a fundamental shift in congressional priorities—the child's best interest would now take precedence over parental rights.[41]

While ASFA has led to much-needed improvements in the child welfare system, it has also created a great deal of confusion among child welfare practitioners about how it impacts ICWA. Native American children continue to be protected by ICWA, which was specifically designed with their special circumstances and needs in mind. However, ASFA contains several keys provisions that seem to conflict with ICWA or, at a minimum, raise questions about how the two laws fit together.

The overall purpose of ASFA did not appear, initially, to conflict with the directives of ICWA. ICWA garnered little, if any, attention during ASFA deliberations.[42] In fact, ASFA fails to address Indian tribes at all,[43] even though tribes are responsible for administering services to about half of all Indian children who have been removed from their parents. Nonetheless, the two laws were enacted for very different purposes and their differing goals have led to potential conflicts. ICWA was enacted to keep Native American families intact and help to

rectify earlier, discriminatory practices that eroded Indian families and cultures. ASFA, on the other hand, was drafted to address the lack of permanency for children in the foster care system, regardless of race or ethnicity, by facilitating adoptions and minimizing the time children spend in substitute care.[44] In many ways, ASFA moves away from the ICWA ideal of reunifying children with their parents unless all other options are exhausted. Two of ASFA's provisions, in particular, represent a marked break with the reunification ideal and therefore raise the possibility of conflict with ICWA's guarantees: 1) a section waiving, under certain circumstances, the traditional requirement that departments of social services make "reasonable efforts" to reunify a family;[45] and 2) a requirement that termination of parental rights petitions be filed in most instances when a child has been in substitute care for 15 of the most recent 22 months.[46]

ASFA allows for the waiver of the "reasonable efforts" requirement in certain prescribed circumstances. ICWA, however, requires departments of social services to use "active efforts" to prevent the separation of the Indian family, a more demanding standard than the "reasonable efforts" required in most child welfare proceedings. This key difference between the two statutes raises an important question: should a state be able to waive ICWA's "active efforts" requirement in cases involving Native American children under the same circumstances that it is permitted to waive the "reasonable efforts" requirement in non-ICWA cases? In fact, the question is even more complex. ASFA merely permits, but does not require, the waiver of "reasonable efforts." Does this suggest that the statutory intent of ICWA—to require active efforts to reunify families in all circumstances—should be applied in all ICWA cases without the possibility of waiver? So far, courts have not provided answers to these important questions, leaving child welfare practitioners with little guidance in addressing these complex issues.

Complicating the issue of "reasonable efforts" further is the fact that one of the situations in which ASFA permits waiver of the "reasonable efforts" requirement is when a child has been subjected to "aggravated circumstances," as defined by state law.[47] State and tribal law may have differing interpretations of what constitutes "aggravated circumstances," and ASFA does not offer any guidance in resolving potential disagreements. As an example, state law commonly considers abandonment to be an aggravated circumstance. However, the concept of abandonment has historically created friction between tribal court and state court systems, as they may have different definitions of what constitutes abandonment.[48]

Another potential area of conflict is ASFA's requirement that, absent specifically enumerated circumstances, a state must file a petition for the termination of parental rights on behalf of a child that has been in care for 15 of the most recent 22 months. ASFA provides several exceptions to this general rule: 1) the child is being cared for by a relative;[49] 2) the state has not provided the family of the child with services needed to facilitate the safe return of the child (in any case where reasonable efforts are required);[50] and 3) a state agency has a compelling reason for determining that filing the petition would not be in the best interests of the child.[51] These exceptions raise several questions.

In the first exception, the term "relative" is open to differing interpretations. This term is considered more broadly in ICWA when discussing members of tribes. Can this extended definition of "relative" be applied to

waive the requirement of filing for a termination of parental rights in cases where a child is being cared for by a member of the child's tribe who is not a blood relative?

The second exception revisits the "reasonable efforts" versus "active efforts" debate discussed above. It seems that if ICWA heightened the standard of "reasonable efforts" to reunify families to "active efforts" (which includes the testimony of a qualified expert witness and enhanced efforts to preserve families), it would stand to reason that any mention of "reasonable efforts" to reunify families in subsequent federal legislation absent language to the contrary should be construed as indicating "active efforts" as it relates to ICWA cases. If that is the interpretation favored, the court would have to determine that "active efforts," rather than "reasonable efforts," were lacking in a case involving a child governed by ICWA in order to stall ASFA's accelerated requirement for termination of parental rights.

The third exception enumerated in ASFA runs slightly in conflict with ICWA, as it focuses solely on the best interests of the child in determining whether or not to file a termination of parental rights petition. ICWA suggests a broader "best interests" standard—that of the child, the parents, and the tribe; according to ICWA the best interests of the entire family and tribe should be taken into consideration. The termination of parental rights, overall, is an area specifically limited by ICWA to decrease the disruption of Native American families. This is evident in the standards applied in ICWA and other child welfare cases for the termination of parental rights. In order to terminate parental rights in ICWA cases, the evidence must be proven "beyond a reasonable doubt," the highest evidentiary standard available, whereas the lower "clear and convincing" standard is usually applied in non-ICWA termination proceedings.

A final section of ASFA worth mentioning provides that "States may not deny or delay placement of a child for adoption when an approved family is available outside of the jurisdiction with responsibility for handling the case." It is easy to imagine a scenario in which adhering to ICWA's requirements for comprehensive notice and placement preferences would lead to a violation of this ASFA provision. State courts are required by ICWA to notify the relevant tribe or tribes in a child protective proceeding to determine whether the tribal court would like to intervene or have the case transferred to the tribal court. This process and the process for finding foster care and adoptive placements in accordance with ICWA preferences can often cause delays. It is worth noting that funding for foster care and adoptions is partially withheld from states that deny or delay placements of children with approved families outside the state.[52]

Given these potential areas for conflict between ICWA and ASFA, many analysts have asked which statute prevails in the instance of a conflict. The short answer is that ICWA prevails. Several rationales justify this conclusion. First, ASFA fails to mention ICWA despite being enacted 19 years later. Nowhere does it indicate that ASFA is meant to curtail ICWA's provisions.[53] Second, ICWA addresses the very specific situation of Indian children being removed from their parents, whereas ASFA applies to all children at risk of foster care; a longstanding rule of statutory interpretation is that when two statutes potentially conflict, the more specific statute controls.[54] In addition, in this circumstance, the specific language in ICWA relates to a specifically protected group, which is a stronger argument for why the dictates of ICWA should prevail. Statutes enacted for the benefit of a

specially protected group, as ICWA is, are to be construed in the light most favorable to the protected group. As Native Americans are a specially protected class,[55] the unique protections of ICWA should override conflicting language in ASFA or any other federal legislation.

To date, case law has provided limited guidance regarding conflicts between ICWA and ASFA. A few courts have expressly limited ASFA in cases involving children covered by ICWA. Two courts have ruled specifically that ASFA's waiver of the customary "reasonable efforts" requirement in cases involving aggravated circumstances did not waive ICWA's requirement that active efforts at reunification be made.[56] A third court reasoned in dicta that permanency, a cornerstone of ASFA, is irrelevant in deciding whether to terminate a parent's rights when ICWA applies.[57] The Alaska Supreme Court, however, disagreed with these courts, finding that the congressional intent behind ASFA modified ICWA. In *J.S.* v. *State*,[58] a subsequently criticized decision,[59] the Court ruled that the active efforts requirements of ICWA could be waived because ASFA indicated a shift in congressional mindset, even though ASFA did not actually apply to the issue of the case.[60]

## STRATEGIES FOR IMPROVING STATE-TRIBAL COORDINATION

While the Indian Child Welfare Act has been in effect for more than three decades, state and tribal court communication is less than cohesive. There is certainly no national consistency with respect to ICWA compliance. As previously discussed, the mandates of ICWA are frequently unknown or misunderstood by state jurisdictions. While ICWA training for courts and child welfare agencies is conducted from time to time, the nuances are often lost among the vast amount of information communicated to child welfare professionals and front-line staff charged with the responsibility of identifying children and families that may be eligible for ICWA protection.

Identification of Native American heritage is no small detail. It cannot be presumed and can only be made through direct inquiry. A child's appearance, name, or domicile do not necessarily indicate Native American heritage. Moreover, the determination of eligibility for membership in a tribe, a criterion that triggers ICWA applicability, can only be made by the tribe itself. There is a widespread, erroneous belief that a strict blood quantum requirement exists for ICWA application. However, the question whether blood quantum, contact with the tribe, or other criteria are necessary for eligibility for tribal membership is solely within the discretion of the individual tribe.

Child protection investigators are often the individuals who interact with families at the earliest point in a child welfare case—the point at which the question regarding Native American heritage must be asked. In rare instances, a child or family member will offer information about the family's Native American heritage, but child welfare practitioners can only be certain in every case if a question regarding Native American heritage is asked routinely and consistently. Because identification of Native American heritage is the trigger for ICWA applicability, jurisdictions across the country, at minimum, should increase awareness of ICWA through training and create specific points in the child welfare and family court processes where inquiry regarding Native American heritage is routinely made and responsibility for asking is shared across agencies.

### Alaska

Alaska is an extreme example of the disproportionate representation of Native Americans in the child welfare system. Of all the children in foster care in Alaska in November 2009, 62 percent were Native American,[61] despite the fact that Native Americans represent only 16 percent of the overall child population in Alaska.[62] As Alaska and jurisdictions throughout the country increase efforts to reduce the disproportionate representation of minorities in the child welfare system, greater attention to the proper identification and handling of ICWA cases could serve as a powerful additional strategy.[63]

The Alaska Office of Children's Services (OCS) has made exemplary efforts to collaborate with tribal communities. OCS requires that all case workers inquire about tribal membership, making identification of ICWA eligibility a routine procedure in Alaska.[64] This requirement is clearly expressed in frequent trainings and within practice and policy guides at all OCS staff levels, as are other elements of ICWA. OCS leaves no room for confusion or ambiguity about ICWA's requirements and includes written guidance and training for practitioners to help them understand how to notify tribes, find placement preferences, and comply with other elements of ICWA. OCS clarifies its policies further in two important ways. First, it specifically defines "active efforts" and other terms likely to cause debate, providing guidance for case workers regarding the specific actions and types of services that are required by ICWA.[65] Second, OCS incorporates additional steps beyond the statutory mandates, such as holding internal reviews every 30 days until preferred placements are found for ICWA-eligible children[66] and having an ICWA specialist on hand to ensure that smooth transfers occur when jurisdiction has been transferred to a tribal court.[67]

Alaska has several other important initiatives in place. OCS operates an Indian Child Welfare Help Desk,[68] which functions as a comprehensive information resource for case workers searching for available Native American placements for Indian children. It is, in effect, a place to seek guidance on ICWA notification and compliance requirements.[69] OCS has developed grant partnerships with local tribes, a Tribal/State Collaboration Group that meets three times per year to address issues faced by Alaska Native children,[70] a Native Rural Recruitment Team for Foster Care, and a Reducing Disproportionality Partnership with the Casey Foundation.[71] In addition, OCS has identified at least one ICWA expert/specialist in each OCS region to serve as a consultant on policies and as a liaison to tribes.[72]

Alaska also sets and publishes written Indian Child Welfare goals.[73] These goals include maintaining a statewide ICWA compliance plan that meets all current federal and state mandates, ensuring implementation of the ICWA compliance plan in all OCS offices, developing and implementing a database to monitor Alaska's ICWA compliance, creating a statewide ICWA training program, and broadening tribal/state collaboration.[74] Memorializing and publicizing agreed-upon ICWA compliance goals holds stakeholders accountable and keeps the issue at the forefront of practitioners' minds.

### Arizona

In Tucson, Arizona, ICWA is taken into account in daily child welfare and family court practice. The Pima County Juvenile Court integrates tribal social workers from the Tohono O'odham Nation and the Pascua Yaqui Tribe, the two largest tribal communities in southern Arizona, into the juvenile court intake process and subsequent court hearings. Tribal social workers participate regularly in hearings and given the same access to the Pima County Juvenile Court as other child welfare stakeholders. They also serve as liaisons to their respective tribes and address any notification and communication issues that may arise.[75] It may not be feasible for all jurisdictions to include tribal social workers in court in anticipation of ICWA proceedings, but the Pima County model is an exemplary practice that other jurisdictions should consider replicating. At the very least, tribal courts and associated tribal social service systems should have substantial access to state court proceedings involving children eligible for ICWA protection.

Pima County also uses written materials that contain specific language reminding stakeholders, such as case workers and attorneys representing children and parents, to inquire about ICWA eligibility and follow enumerated steps when ICWA protocols are triggered. In addition, Pima County provides an orientation handbook for all parents and family members involved in dependency court,[76] as well as a guide to dependency court for children and youth in foster care.[77] "Indian Heritage" for purposes of identifying ICWA eligibility is part of the pre-hearing conference script protocol.[78] The first question on the Foster Care Review Board's questionnaire reads: "Is this an ICWA case?"[79] These simple steps—including ICWA-related prompts in all relevant court documents and informing children and parents that they have special rights under ICWA—are strategies that all jurisdictions can follow to increase compliance with ICWA.

### New York

New York State has already undertaken significant efforts to increase ICWA compliance. In 2002, Judith S. Kaye, then the state's chief judge, created the New York Tribal Courts Committee to promote collaborations across federal, state, and tribal jurisdictions. Over the past several years, the membership of the Committee has met every six months and created a platform for collaboration and communication through committee visits to reservations and meetings with the leadership of participating tribal Nations. In 2006, the Committee organized a New York Listening Conference that brought together tribal, state, and federal judicial officers to learn about each other's systems of justice. In 2007, the Committee held a forum designed to educate tribal representatives, attorneys for children, and other stakeholders in the state and tribal court systems about ICWA's mandates. While New York State has considerable room for improvement as far as ICWA compliance is concerned, consistent training and the cultivation of relationships between state, federal, and tribal courts increases awareness of the issue and reminds practitioners that following ICWA mandates is necessary.

The New York initiative underscores an important point: education on the subject of ICWA must be continuous to make a difference. Legislation governing child welfare is constantly evolving. The enactment of new statutes inevitably calls into question the effect of older statutes, such as ICWA. In order to be effective, ICWA

education must be incorporated into more general trainings on subjects such as ASFA, Fostering Connections, and the Multi-Ethnic Placement Act. In addition, trainings should cover any specific protections included in state and local regulations. In New York, for example, state regulations expand the maximum age for ICWA protection from 18 years to 21 years and also extend ICWA to cover members of state-recognized tribes, even though those tribes are not recognized by the federal government. It is critically important that practitioners be trained on these kinds of state-specific variations in the law.

### Tribal Jurisdictions

Tribes may also be able to lessen confusion surrounding ICWA by defining and explaining some of the key terms used in ASFA and other federal and state regulations in their tribal codes. Specifically, tribes may want to define "termination of parental rights," describe who may be considered a "relative" for purposes of ASFA, outline the circumstances necessary to conclude that an infant is "abandoned," and explain what constitutes an "approved family" for adoption.[80] ASFA is silent on the meaning of many of these terms, and its failure to define these terms clearly could lead to real-world disputes in ICWA cases. By addressing these issues in their codes, tribes can reduce confusion about the application of these important terms and establish a legal basis to support their definitions should a dispute arise.

ICWA authorizes concurrent state/tribal jurisdiction in cases involving Indian children who live off reservation land as well as those who live on reservation land in Public Law 280 states.[81] For these reasons, many ICWA cases will continue to be heard in state courts. Nonetheless, tribal laws and cultural practices remain relevant and extremely important. Tribal laws and customs can play a central role when a "qualified expert witness" testifies about whether a termination of parental rights is appropriate. Tribes may wish to define "termination of parental rights" differently than many state court jurisdictions do and provide for legal authority, as some state jurisdictions have done, to reinstate parental rights subsequent to an involuntary termination.

To limit unnecessary terminations of parental rights further, tribes may want to define the meaning of "relatives" expansively, as they are permitted to do under ICWA, thereby increasing the number of cases in which the state can choose not to press for termination. This becomes important when considering "abandonment" as grounds for the termination of parental rights. While some state courts may be persuaded to view a parent's decision to leave her child with a non-relative member of the tribe as abandonment, a qualified expert could demonstrate that a tribe's expansive cultural and legal definition of "relative" to include all members of a given tribe would support the notion that the parent's actions did not constitute abandonment. In all of these ways, tribes can use legal definitions to help pursue the goals of the ICWA.

A final step that tribal court systems may want to consider is delineating their visions of

"approved families" for adoption in a clear, written manner. Although ASFA bars a delay in adoptions to approved families in other jurisdictions, a change in who is approved would allow tribes more control over the process without technically violating ASFA, even if adoptions were delayed as a result of the changes in tribal law.

## CONCLUSION

As valuable as it is to bring greater clarity to some of the language used by ICWA, the goals of this law will not be achieved without a commitment to system-wide training that reaches the front-line staff at child welfare agencies, the attorneys representing children and parents, individual judges, and tribal leadership. The onus of inquiry regarding whether ICWA applies in each individual case should not fall squarely on the shoulders of child protective services, but should be a shared responsibility across the system. Each stakeholder in the process, whether part of a state or tribal system, should be accountable for whether the mandates of ICWA are followed. Unfortunately, these two groups are not generally brought together for training.

Along with training, there is a need for additional resources both on the state and national level. Many child welfare professionals do not know where to turn once a child is identified as a Native American child for purposes of ICWA application. Having a resource center with experts on call—either in person or via the Internet—to explain the complex notice requirements, the different levels of proof required at various stages of a child protection case, and the circumstances in which exclusive jurisdiction would require a transfer of the case to the relevant tribal court would be enormously helpful.

At the end of the day, compliance with the ICWA must be established as a shared priority for the child welfare system, family courts, and tribal courts in each state. Greater collaboration between tribal and state courts can accelerate notification, minimize delays in transferring cases from state to tribal courts, and assist in locating resources to preserve Native American families and protect the best interests of Native American children.

## ENDNOTES

[1] Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. 1901-63 (2006)).
[2] *See* Edward H. Spicer, The American Indians 183 (1980).
[3] Joe R. Feagin & Clairece Booher Feagin, Racial and Ethnic Relations 226 (5th Ed. 1996).
[4] *See id.*
[5] *See id.*; *see also* B.J. Jones, The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children 2 (2d. ed. 2008); Spicer, *supra* note 2, at 188.
[6] B.J. Jones, The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children 4 (2d. ed. 2008).
[7] *Id.* at 2; *see also* Practice Notes for North Carolina's Child Welfare Social Workers, http://www.practicenotes.org/v14n3/AI.htm (last visited Nov. 9, 2010).
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[13] 25 U.S.C. §1911 (2006).
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[15] 25 U.S.C § 1911(b) (2006).
[16] *See id.* § 1912(e–f).
[17] *See id.* § 1912(a).

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[42] David Simmons & Jack Trope, P.L. 105-89 Adoption and Safe Families Act of 1997: Issues for Tribes and States Servince Indian Children 5 (1999), *available at* http://www.nicwa.org/law/asfa/asfa-issues.pdf.
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[44] H.R. Rep. No. 105-77, at 7–8 (1997).
[45] 42 U.S.C. § 671(a)(15) (2006) (authorizing waiver of "reasonable efforts" if: (1) a child has been subjected to aggravated circumstances, as defined by state law; (2) the parent has previously had his or her parental rights to a sibling of the subject child terminated involuntarily; (3) the parent committed or aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or (4) the parent committed a felony assault resulting in serious bodily injury to the child or another child of the parent).
[46] 42 U.S.C. § 675(5)(E) (2006).
[47] *Id.* at § 671(a)(15)(D)(i).
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[51] *Id.* at § 675(5)(E)(ii) (2006).
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[54] *See* Morton v. Mancari, 417 U.S. 535, 550–51 (1976); Greene v. U.S., 79 F.3d 1348, 1355 (2d Cir. 1996); *J.S.B., Jr.,* 691 N.W.2d at 619.

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[58] 50 P.3d 388 (Alaska 2002).
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