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A CALL FOR COMPLIANCE AND CONTINUED EFFORTS TO INSURE THE "BEST INTEREST" OF INDIAN CHILDREN IN SOUTH DAKOTA

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By

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ABSTRACT

A Call for Compliance and Continued Efforts to Insure the "Best Interest" of Indian Children in South Dakota

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The *Indian Child Welfare Act* (ICWA) was implemented in 1978 to protect the best interest of American Indian children and families from the unwarranted removal of children from the homes and communities. 40 years post-ICWA, the state of South Dakota still struggles to insure proper and complete implementation of this law. This undergraduate thesis examines the history and current status of ICWA in South Dakota and the role of the South Dakota Department of Social Services in implementing ICWA and working with tribal nations. Finally, this thesis is a call for compliance by the state of South Dakota and continued effects of collaboration between the State and Tribal Nations in South Dakota to insure best interest of Indian children in the social system.

KEYWORDS: Indian Child Welfare Act, ICWA, South Dakota, Native American, American Indian, Children, Social Services, South Dakota Governor 2004 ICWA Commission Report

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CHAPTER ONE

Introduction

U.S. federal Indian policy has often been described as a pendulum swing, at times protecting and advancing tribal sovereignty and others violating or attacking tribal sovereignty. Federal Indian policy from contact to the present, reflects this pendulum swing. During the mid- to late- 20th century, the pendulum swings in favor of American Indian tribes and people, ultimately recognizing the sovereignty of tribal nations. Donald Fixico, in a review of *To Show Heart: Native American Self-Determination and Federal Indian Policy, 1960-1975* by George Pierre Castile states, in the years of the John F. Kennedy and Gerald Ford administrations, "lies the origin of the federal Indian policy of self-determination."[1] The self-determination era began with the "Indian Self-Determination and Education Assistance Act of 1975."[2] Soon thereafter, the *Indian Child Welfare Act* and the *American Indian Religious Freedom Act,* both passed by Congress in 1978.[3] Congress' enactment of *ICWA* and other federal Indian policies during this time was a result of their recognition that American Indian tribes should determine the destiny of their children and citizens in general, as recognized through the implementation of the

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[1] Donald L. Fixico, "Book Reviews." *The Journal of American History* 86 no.4 (March 2000): 1861-1862, accessed May 10, 2018 EBSCO*host.*

[2] Fixico, 2000, 1862.

[3] Suzanne Garner "The Indian Child Welfare Act: A Review," *Wicazo Sa Review* 9, no. 1 (Spring 1993): 47-51, accessed May 12, 2018, http://dx.doi.org/10.2307/1409255.

Indian Self-Determination and Education Assistance Act, American Indian Religious Freedom Act. Tribes have been given the power and financial resources to envision and build the future of tribal members and nation.[4] This is the reason that ICWA was an important piece of legislation, it empowers tribes and tribal courts. Tribal nations could now determine the fate of their child and to "preserve the rights of Indian children."[5]

[4] Another example includes the *Indian Self-Determination Act and the Education Assistance Act of 1975*, Office of Congressional Legislative Affairs, U.S. Department of the Interior, accessed May 10, 2018**,** https://www.doi.gov/ocl/hearings/110/TribalSelfGovernance_051308.

[5] State of South Dakota Office of the Governor, "Indian Child Welfare Act Commission Report." Vol. I: Narrative and Recommendations. December 30, 2004.

CHAPTER TWO

Theory

Genocide and the continued oppression of indigenous populations in North American has been result of European settlement throughout the history of the United States. Genocide, including cultural genocide, and dehumanization among many other things of American Indian people has been the result of European's efforts to colonize American Indian people.[6] *Teaching American Indian Studies to Reflect American Indian Ways of Knowing and to Interrupt Cycles of Genocide* defines cultural genocide as:

> … the destruction of the specific character of the targeted group(s) through destruction or expropriation of its means of economic perpetuation; prohibition or curtailment of its language; suppression of its religious, social or political practices; destruction or denial of access to its religious or other sites, shrines, or institutions; destruction or denial of use and access to objects of sacred or sociocultural significance; forced dislocation, expulsion or dispersal of its members; forced transfer or removal of its children, or any other means.[7]

Despite the countless efforts to "kill the Indian, save the man," American Indians continue to maintain and revive their language and culture that has been widely lost due to U.S. federal policies destroyed to destroy or eliminate Indigenous culture and people.[8]

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[6] Lawrence W. Gross. "Teaching American Indian Studies to Reflect American Indian Ways of Knowing and to Interrupt Cycles of Genocide." *Wicazo Sa Review* 20, no.2 (Autumn 2005): 121-145, accessed May 12, 2018, http://www.jstor.org/stable/4140290.

[7] Gross,124

[8] Julie Davis. "American Indian Boarding School Experiences: Recent Studies from Native Perspectives." *OAH Magazine of History* (Oxford University Press on behalf of Organization of American Historians) 15, no. 2 (Winter 2001): 20.

The United States government's efforts to assimilate via cultural and physical genocide of Indigenous peoples took many forms, this thesis focuses on the removal of American Indian children from their homes.[9]

Natives and non-Natives need to cooperate to protect American Indian children and ensure that history is not repeated. A suggested solution is for tribal social service organizations and state government organizations to find best practices to protect Native children. Paulo Freire's *Pedagogy of the Oppressed* and Albert Memmi's *The Colonizer and the Colonized* suggests certain ways in which Tribal Nations can work towards protecting their children and help us to examine the ways in which we can better understand the complexity of ICWA and find potential solutions that ensure the spirit of ICWA is being honored through its enforcement.

Albert Memmi's *The Colonizer and the Colonized* can be used to examine the unwarranted removal of American Indian children. The removal of children was yet another effort by the U.S. government to determine what it meant to be "American

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As Davis discusses, Adams discusses the cultural struggle that was faced in boarding schools. The author asserts that boarding schools, the teachers, policy makers, and all of those involved in the boarding school process, were waging "cultural, psychological, and intellectual warfare on Native students as part of a concerted effort to turn Indians into 'Americans.'"

[9] For additional information regarding boarding schools and colonization, please see the following:

Brenda J. Child, *Boarding School Seasons: American Indian Families* (Lincoln: University of Nebraska Press, 1998).

M. Annette Jaimes, *The State of Native America: Genocide, Colonization, and Resistance* (Boston: South End Press, 1995).

Indian." Memmi discusses the idea of assimilation by examining the tactics used by the colonizer to assimilate American Indian people, and continues discussing the inevitable consequence of assimilation, which explains the current state of colonization in Native communities and peoples. Memmi states, "In order for assimilation of the colonized to have both purpose and meaning, it would have to affect an entire people; i.e., that the whole colonial condition cannot be changed except by doing away with the colonial relationship."[10] Memmi's argument is that the colonizer envisions assimilation as a way for American Indians to find their place in American society, however, in order to achieve assimilation, Indigenous peoples must subscribe to the colonizer's goals of cultural genocide. To the colonizer, assimilation means that an individual rids oneself of their American Indian culture, language and identity. This is cultural genocide.[11] The federal government and the state of South Dakota, through the unwarranted removal of American Indian children from their homes and tribal communities, are not only denying basic human rights, but self-determination to American Indian tribes and people. Memmi further discusses that a state of assimilation that would work for all parties involved would include overthrowing the colonial relationship.[12] The current colonial state in our world today is almost impossible to overthrow, Memmi suggests, because "the colonizer would be asked to put an end to himself."[13] For the colonized to overthrow this colonial

[10] Albert Memmi, *The Colonizer and the Colonized* (Boston: Beacon Press, 1991), 126.

[11] Gross,124.

[12] Memmi, 126.

[13] Memmi, 127.

relationship, Memmi suggests that "he," or the colonized, needs to revolt.[14] *Oglala v. Van Hunnik* is a great example of tribal nation's revolting and making an effort to overthrow the colonial relationship that exists tribal nations and the state of South Dakota.

"Revival and revolt," as stated by Memmi, are the best ways for the colonized to offset the efforts of the colonizer and to overthrow the colonial relationship that currently exists between tribal nations and South Dakota/the United States.[15] Paulo Freire in *Pedagogy of the Oppressed* continues to discuss the relationship between the oppressor and the oppressed and the concept of "humanization and dehumanization."[16] Freire states, "Within history, in concrete, objective contexts, both humanization and dehumanization are possibilities for a person as an uncompleted being conscious of their incompletion."[17] Freire both discuss the concept of losing oneself, which Memmi discusses is caused by the colonizers efforts to assimilate the colonized, or Indigenous peoples. The result of this would be a realization by the colonized for losing oneself and his/her identity, and finding themselves in a new culture and environment. When the colonized realize their own deficiency of culture, language, among all other identifiers of being a American Indian, one feels as less "human," as Freire would define "dehumanized."[18] American

[14] Memmi, 127.

[15] Memmi, 127.

[16] Paulo Freire, *Pedagogy of the Oppressed* (New York: Bloomsbury Publishing Inc, 2000):,43-44.

[17] Freire.43.

[18] Freire, 43.

Indians realized the efforts of South Dakota to determine the fate of their children is and saw that it was going to continue to a cycle of emptiness and feeling lesser.

CHAPTER THREE

Timeline and History of Federal Indian Policy

The history of federal Indian policy in the United States is marked with failure. During the 1800's, federal policymakers often referred to American Indian people as "savages" and people who in order to survive among the American society, needed to be "rehabilitated and Christianized."[19] Teresa Evans Campbell stated in *Indian Boarding School Experience, Substance Use, and Mental Health among Urban Two-Spirit American Indian/Alaska Natives*, "Over successive generations, AIAN people have experienced community massacres, forced relocation, and prohibition of cultural practices."[20] Terry Cross, in *Child Abuse and Neglect in Indian Country: Policy Issues* asserts that in the mid 1800's, the attitudes of American expansion led to major removal of American Indian people through federal Indian policies, including the use of Indian Boarding Schools.[21] During the boarding school era, thousands of American Indian and

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[19] Richard Henry Pratt, "The Advantages of Mingling Indians and Whites," in *Americanizing the American Indians: Writings by the "Friends of the Indian" 1800-1900* (Cambridge: Harvard University Press, 1973), 260-271.

[20] Teresa Evans-Campbell et al., "Indian Boarding School Experience, Substance Use, and Mental Health among Urban Two-Spirit American Indian/Alaska Natives." *The American Journal of Drug and Alcohol Abuse* 38, no. 5 (August 2012): 421-427, accessed May 10, 2018 http://dx.doi.org/10.3109/00952990.2012.701358.

[21]Terry Cross, David Simmons, and Kathleen Earle, "Child Abuse and Neglect in Indian Country: Policy Issues," *Families in Society: The Journal of Contemporary Social*

Alaska Native children were taken out of their tribal communities and placed into schools run by religious organizations and/or the federal government.[22] During the late 1800's and early 1900's the policies of the United States government aimed to assimilate Indigenous people to this country into mainstream American society.

One policy that highlights the U.S. government's effort towards assimilation is the passage of the *Dawes Act* of 1887.[23] The *Dawes Act* divided the land on Indian reservations to individual head of households, including women who served as head households, and young, single men. Land was allotted in 160- or 90-acre allotments to be held in trust for 25 years. Those who received allotted land had to register with a federal agent, thereby ensuring that the federal government kept documentation of tribal citizenship and data regarding households. Those who chose to receive allotted land varied, some individuals that did not participate were wary of the federal government and chose not to "register." Others purchased their own land, free from federal supervision. In order to incentivize American Indian s, the *Dawes Act* not only promised individual title to land, but U.S. citizenship, and farming equipment, all markers and "…habits of civilized life."[24] The *Dawes Act* facilitated the move from communal, traditional ways of

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Services 81, no.1 (January 2000): 49-58, accessed May 10, 2018, http://dx.doi.org/10.1606/1044-3894.1092.

[22] Cross, et.al, 51.

[23] Yale Law School, "An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations, and to Extend the Protection of the Laws of the United States and the Territories over the Indians, and for Other Purposes," The Avalon Project, accessed April 10, 2018, http://avalon.law.yale.edu/19th_century/dawes.asp.

[24] "An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations, and to Extend the Protection of the Laws of the United States and the Territories over the Indians, and for Other Purposes," accessed April 2018.

living where no one owned the land to individual, land-owners. American Indian people were treated as children, they could not hold title to their own land for 25 years. It also created a hierarchal, gendered society. Most Indigenous societies were largely matrilineal, women farmed. The *Dawes Act* dramatically changed Indigenous communities and family structures.

The *Dawes Act* embodies federal Indian policy in the 19th and 20th century. Legislators used their influence to govern the lives that American Indian people, and if they did not acquiesce to U.S. federal policies, such as the *Dawes Act*, they would strip away American Indian rights: U.S. citizenship, denying of tribal membership, and government annuities/benefits promised through treaties like the Fort Laramie Treaty of 1868.[25]

The U.S. federal government sought to assimilate American Indian people in a variety of ways, including land allotments, boarding schools and removal of Indian children. Education was used as a tool to facilitate the removal of children from their homes and tribal communities. The Fort Laramie Treaty 1868 highlights how education was key to assimilation. In article 7 it states, "In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted…they [Sioux]…[must] pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school.[26] Article 7 further demonstrates not only compulsory education of children aged 6-16 years, but the role of education as a tool

[25] Yale Law School, **"**Fort Laramie Treaty 1868," http://avalon.law.yale.edu/19th_century/nt001.asp, accessed May 14, 2018, The Avalon Project: Documents in Law, History and Diplomacy.

[26] Ibid.

of assimilation. The removal of children was not always voluntary. American Indian children had been targeted for removal and it continued into the 20th century. It was not until the passage of the Indian Child Welfare Act of 1978 did Congress attempt to stop the large-scale removal of American Indian children from their homes and tribal communities. In the late 1800's was the beginning of an era by the federal government to "Kill the Indian, Save the Man," with the Carlisle Indian School, which continued with the unwarranted removal of children into non-Native homes who were able to teach them English and knew the "American" way of life.[27]

[27] Jennifer Bess,"'Kill the Indian and Save the Man!' Charles Eastman Surveys His Past." *Wicazo Sa Review* 15, no. 1 (Spring 2000): 7-28.

CHAPTER FOUR

Indian Child Welfare Act and South Dakota

Indian Child Welfare Act

The *Indian Child Welfare Act* of 1978 was created "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes."[28] Removal of American Indian children was just another tactic to assimilate American Indian children and people into white, American society, to rid the country of American Indian languages, cultures and traditions. Decades later, South Dakota continues to struggle with the implementation of ICWA. This thesis explores the history of ICWA in the state of South Dakota, the *State of South Dakota Office of the Governor's Indian Child Welfare Act Commission Report,* and continued issues with compliance of ICWA in South Dakota, calling for continued research and changes to be made regarding ICWA implementation in South Dakota, hoping that the state can finally "get it right."

American Indians in the United States reside under an interesting, and sometimes confusing, scope of law and jurisdiction. American Indian children specifically, "occupy

[28] "Indian Child Welfare Act of 1978." US Code 25 §§ 1901 et seq. November 8, 1978.

a unique status in the American and South Dakota legal system."[29] There are three different political entities under which the lives of these children are protected through law: the United States, State of South Dakota, and their respective tribe.[30] Due to the "political relationship" that tribes have with the federal government, American Indians, including children, are subject to federal laws and policies, including the *Indian Child Welfare Act.* [31] However, these children are also subject to programs and "protection" in the same manner in the state of South Dakota as are non-Native children in the state. These protections and programs include those that are "operated by state and county governments pursuant to federal mandates."[32]

Prior to the passage of the *Indian Child Welfare Act* there was a disproportionate number of American Indian children being removed from their communities and families.[33] In "The Indian Child Welfare Act: A Review," Suzanne Garner states, "In 1974, South Dakota had 16 times as many Indian children as non-Indian children in foster care. In Minnesota, the ratio of Indian to non-Indian children in placement was five to one." [34] Garner then states, "Indian children in North Dakota, South Dakota, and Nebraska were placed outside of their homes at more than twenty times the national

[29] State of South Dakota Office of the Governor 2004, 9.

[30] State of South Dakota Office of the Governor 2004, 9.

[31] State of South Dakota Office of the Governor 2004, 9.

[32] State of South Dakota Office of the Governor 2004, 9.

[33] Indian Child Welfare Act of 1978

[34] Garner, 47-48.

average."[35] When examining U.S. population statistics versus statistics of children being taken out of their homes, there is a dramatic gap between the two. In the 1960's, American Indians made up 0.3% of the population in the United States according to the Census Bureau and it is clear that these children were disproportionately taken out of their homes if the number of children removed was 20 times the national average. Furthermore, Garner asserts that, "In Arizona in 1975 Indian Children were separated from their families and placed in non-Indian care at a rate 27.3 times greater than non-Indian children." [36] This is significant, Garner's research reveals the insidious nature of the removal of American Indian children, the majority of time, they would be placed into non-native homes by state social workers. During this time, out of every 9 Indian children in the country, 2 were living in a non-Indian household.[37] Statistics like these were the catalyst for the proposal of the Indian Child Welfare Act by South Dakota Senator James Abourezk on April 1, 1977.[38] The Indian Child Welfare Act was signed into law on July 21, 1978.[39]

As defined in the *Indian Child Welfare Act*, the purpose of this law is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of

[35] Garner, 48.

[36] Garner, 48.

[37] Garner, 48.

[38] Garner, 48.

[39] Garner, 49.

Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs."[40] The Indian Child Welfare Act is to be used as a guide for "child custody proceedings" that involve Indian children their families and tribes.[41] *ICWA* requires that all children

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[40] Indian Child Welfare Act of 1978

[41] Indian Child Welfare Act of 1978

As stated in the *Indian Child Welfare Act,* " '**'child custody proceeding'** shall mean and include-- (i) **''foster care placement''** which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; (ii) **''termination of parental rights''** which shall mean any action resulting in the termination of the parent-child relationship; (iii) **''preadoptive placement''** which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and (iv) **''adoptive placement''** which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents" and, " **'Indian'** means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43; (4) **''Indian child''** means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe; (5) **''Indian child's tribe''** means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts; (6) **''Indian custodian''** means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child; (7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians; (8) **''Indian tribe''** means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43; (9) **''parent''** means any biological parent or parents of an Indian child or any Indian person

under the age of 18 who fall into or fit among any of these definitions, be protected by ICWA. These requirements include the notification of the child's removal to parents/guardians as well as the tribe in which the child is affiliated. If a child is believed to belong to a federally recognized tribe, states are required to contact that tribe and if this cannot be determined by the state, then the information is required to be passed to the United States Department of the Interior to locate the tribe. [42] Thereafter, the tribe is responsible for any case proceedings and jurisdiction of the child. Proceedings by the tribe in these cases entails the tribes determining where the child is going to be placed, whether that be a family member, tribal member, foster home, or back in their original home. There are special circumstances in which American Indian children are able to stay under the jurisdiction of the state if they can prove "good cause."[43] However, as Garner

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who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established; (10) "**reservation**" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation"

[42] According to the Bureau of Indian Affairs, "A **federally recognized tribe** is an American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian Affairs.

Furthermore, federally recognized tribes are recognized as possessing certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States. At present, there are 567 federally recognized American Indian and Alaska Native tribes and villages." U.S. Department of the Interior Indian Affairs n.d.

[43] Garner, 49.

discusses, "'good cause' is not delineated in the Act."[44] Judicial officials such as judges and lawyers, who play a major role in the placement of children, rely on the definition of "good cause" as provided in the Federal Register.[45] A tangible example of the variance in defining "good cause," was revealed in, *In re Adoption of B.G.J., 281 Kan, 552, 133 p.3d 1, 9 (2006).*[46] The case states that, "In B.G.J., the Kansas Supreme Court said, 'We think the use of the term 'good cause'… was designed to provide state courts with some flexibility in determining the proper placement of Indian Children…Because flexibility

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[44] Garner, 49.

[45] Garner, 49.

> "1. If the Indian child's tribe does not have a tribal court as defined in the Act to which the case can be transferred;
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> 2. The proceeding is at an advanced stage when the petition to transfer is received and the petitioner did not file the petition promptly after receiving notice;
>
> 3. The Indian child is over 12 and objects to the transfer;
>
> 4. The evidence necessary to decide the case could not be adequately presented in tribal court without undue hardship to parties or witnesses;
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> 5. The parents of a child over 5 years of age are not available and the child has had little or no contact with the child's tribe or members of the tribe;
>
> 6. Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in determining if good cause exists; and
>
> 7. The burden of establishing good cause to the contrary shall be on the party opposing the transfer."

[46] *The People of the State of South Dakota, ex rel. South Dakota Department of Social Services, In the Matter of D.W., Abused/Neglected Child.* 795 N.W.2d 39 (Supreme Court of South Dakota, March 2, 2011). https://www.narf.org/nill/documents/icwa/state/southdakota/case/sd_dept_social_services.html

implies discretion, we will employ an abuse of discretion standard of review.'"[47] This is why there is a lot of grey area and inconsistency with ICWA, it relies on state and court officials to interpret as they see fit. Because federal courts has not clearly defined the terms such as "good cause" and "best interest of the child," far too often the way in which these cases are inconsistently carried out and American Indian children who should be protected under ICWA are not nor are they treated the same in court

Despite the passage of ICWA in 1978, the social service system in the United States continues to fail children, families, and tribes. Some states seem to be getting a good grasp on what it takes to thoroughly implement ICWA and for it to work in the fashion in which it was intended. For example, in California, active efforts are being made and partnerships are being formed to ensure the "best interest of the child" in ICWA cases. *State/Tribal, Partnerships, and Services (S.T.E.P.S)* works for tribal communities and members in the State of California to develop programs and education materials for professionals and individuals involved in ICWA in any way.[48] However, some states continue to struggle, such as South Dakota.

Marge and Webster Two Hawk Story and Current Statistics

[47] (The People of the State of South Dakota, ex rel. South Dakota Department of Social Services, In the Matter of D.W., Abused/Neglected Child. 2011)

[48] Judicial Council of California, 2015. S.T.E.P.S. To Justice- Child Welfare, March 2015, accessed April 18, 2018. http://www.courts.ca.gov/documents/STEPS_Justice_childwelfare.pdf.

On October 6, 1998, Marge and Webster Two Hawk's six-year fight for their granddaughter began. On this day, their grandchild was "kidnapped" by the South Dakota Department of Social Services (SD DSS). The Two Hawk's knew nothing of her whereabouts or welfare, as is stated in the *Indian Child Welfare Act Commission Report." Vol. II* report by the South Dakota ICWA commission board.[49] [50] Six months later, Marge Two Hawk coincidentally heard of a meeting that was going to be held, attended, and it was here that she was notified of her granddaughter's whereabouts.[51] The following day Marge and Webster finally saw their granddaughter. After six years of dialogue with SD DSS officials and hearings, the Two Hawk family finally got custody of their own

[49]State of South Dakota Office of the Governor. "Indian Child Welfare Act Commission Report: Volume II." 2004. http://sdtribalrelations.com/docs/icwa04report.pdf

[50] As stated in section "§ 1912 Child Court Proceedings" in the Indian Child Welfare Act, "(a) Notice; time for commencement of proceedings; additional time for preparation In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding." Indian Child Welfare Act of 1978

[51] State of South Dakota Office of the Governor 2004

grandchild.[52] Why did they have to fight the Sate of South Dakota for custody of their grandchild until July 30, 2002?[53]

The Two Hawk's fight with SD DSS was not unique. Many American Indian parents and families in SD had similar experiences. Those experiences became the catalyst for the passage of the Indian Child Welfare Act (ICWA) in 1978. In statements made during congressional hearings for the Indian Child Welfare Act, the *Oneida Tribe of Indians of Wisconsin, Inc.* made the statement that there were 1,343,543 under 21-year-olds in the State of Wisconsin and 10,456 of those individuals were American Indian.[54] 771 of those children were adopted out into non-Native homes and 545 American Indian children were living in non-Native foster homes.[55] Including those children in boarding schools and those children in correctional facilities, there were a total of 2,225 or 21% American Indian children outside of their homes and communities and with non-Native caretakers.[56] In the NPR investigation in 2011, it was found that "nearly 90% of [American Indian] children sent to foster care in South Dakota [were] placed in non-Native homes or group care."[57]

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[52] State of South Dakota Office of the Governor 2004

[53] State of South Dakota Office of the Governor 2004

[54] *Hearing before the United States Senate Select Committee on Indian Affairs,* S 1214, Indian Child Welfare Act of 1977, 95th Cong., 1st sess., August 4, 1977. 285.

[55] *Hearing Before the United States Senate Select Committee on Indian Affairs* August 4, 1977, 286.

[56] *Hearing Before the United States Senate Select Committee on Indian Affairs* August 4, 1977, 286.

[57] Laura Sullivan and Amy Walters. *Incentives And Cultural Bias Fuel Foster System.* October 25, 2011, accessed May 14, 2018,

Reoccurring stories of child removal post-ICWA, such as the Two Hawk family, and statistics of American Indian children in the social welfare system make it apparent that the implementation of this law has not been thorough nor uniform, particularly in South Dakota. In *Oglala Sioux Tribe v. Van Hunnik*, a lawsuit regarding the lack of compliance of the Indian Child Welfare Act the judge ruled in favor of the Oglala and Rosebud Sioux Tribes on March 30, 2015.[58] *Van Hunnik* further demonstrates that the failure to implement ICWA uniformly, results in a failure of addressing the issues that were a catalyst for the passage of ICWA initially (i.e., state sponsored child removal and cultural genocide).[59] According to standards set forth in ICWA, Marge and Webster Two Hawk should have been notified within at least 15 days after their grandchild was removed by SD DSS.[60] Out of their own accord, they knew of their grandchild's whereabouts 6 months after she was removed. As Marge Two Hawk's mentions, had she not heard about and attended the meeting where they found their granddaughter, it is

https://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system

[58] *Oglala Sioux Tribe v. Van Hunnik.* No. CIV. 13–5020–JLV (United States District Court, D. South Dakota, Western Division, March 30, 2015).

[59] Indian Child Welfare Act of 1978

[60] In the Indian Child Welfare Act Commission Report from 2004, it states, "The act requires any parent to an involuntary child custody proceeding involving an Indian Child to give notice to the child's parents, Indian custodian (if one exists), and to the Indian child's tribe of the commencement of the proceedings."

"Notice" was noted as an issue of compliance in this report. State of South Dakota Office of the Governor 2004, pp. 19-20

unclear how long they would have gone without knowing her whereabouts."[61] SD DSS's lack of compliance to notification regulations of ICWA suggests either unwillingness to follow ICWA, deficits in knowledge on ICWA, or both. Understanding these histories and the presence of American Indian children at the center of what is essentially "trafficking," allows for a better understanding in "the importance of the law to Indian families and tribes and why the implementation is so crucial to the survival of Indian families and tribes."[62] Further, the misrepresentation of American Indian populations in South Dakota within various institutions and programs today is shocking. According to the South Dakota Department of Corrections, on March 31, 2018, the representation of American Indian people in the prison system was 33% (White-55.17%), while the representation of American Indian people in the state is 9% as reported on July 1, 2016.[63] However recent and modern this issue may seem, historical statistics proves that, there has been an over-representation of Native children in the South Dakota social service as far back as 1974 when there were 16 times as many American Indian children in foster homes as non-Native children.[64] As stated in the *2004 Indian Child Welfare Act Commission Report*, "Indian persons represent 8% of the population [in South Dakota],

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[61] State of South Dakota Office of the Governor 2004

[62] State of South Dakota Office of the Governor 2004, pp. 9

[63] South Dakota Department of Corrections, "Statistics," March 31, 2018, accessed April 18, 2018, 2018, https://doc.sd.gov/documents/InmatesbyRaceEthnicityMarch312018.pdf.

United States Census Bureau, "South Dakota," Quick Facts, July 1, 2017, accessed April 18, 2018. https://www.census.gov/quickfacts/SD.

[64] Garner, 47-48.

yet represent over 60% of the children in DSS custody."[65] Thirty-six years after the passage of ICWA, there are still staggering numbers of American Indian Children in the South Dakota State Social Services system. According to the *Kids Count Data Center* by the Annie E. Casey Foundation in 2015, 49% of the children in South Dakota in the foster care system were American Indian despite American Indian comprising only 9% of the state's population.[66]

ICWA Caselaw Update

B.J. Jones, Director of the Northern Plain Tribal Judicial Institute at the University of North Dakota wrote *Indian Child Welfare Act Caselaw Update* which outlines the case-law that has been published related to the Indian Child Welfare Act. As displayed in this short overview, South Dakota has published ICWA case law dealing with a variety of issues including but not limited to, the "Status of Tribe," "Status of Child," "Status of Proceedings," "Adoption Placement Issues."[67] Below is a non-

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[65] State of South Dakota Office of the Governor 2004, pp. 16

[66] Kids Count Data Center, "Children in foster care by race and Hispanic origin" February 2017, accessed April 18, 2018. https://datacenter.kidscount.org/data/tables/6246-children-in-foster-care-by-race-and-hispanic-origin?loc=1&loct=2&loc=1&loct=2#detailed/2/43/false/573,36/2638,2601,2600,2598,2603,2597,2602,1353/12992,12993.

[67] B.J. Jones. *Indian Child Welfare Act Caselaw Update*. University of North Dakota Law School. 2009

comprehensive timeline of some case-law findings involving ICWA in South Dakota over the past 40 years after the passage of ICWA.

1989- *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Circuit Court)[68]
Matter in which two parents were divorced. Therefter, they were in a custody battle for their three children. The father lived in California and the mother resided on the Pine Ridge Indian Reservation. After back and forth battles, it was determined that the Indian Child Welfare Act was not applicable in this case due to the parents being divorced, despite the children being American Indian.[69]

1990- *Matter of Adoption of Baade,* 462 N.W.2d 485[70]
In the matter of in infant being born to a 16 year-old mother and a 17 year-old father. The father left when the child was born due the mother's lack of warmth and encouragement, as well as her plans prior to the birth of the child to terminate the father's rights. After the birth of the child, the mother gave up her rights to the child to her family members. When the father heard of this, he made plans to adopt the child. However, the courts decided that he abandoned the child and that ICWA did not apply in this case because of his abandonment to the child.[71]

1994- *People in Interest of A.R.P.,* 519 N.W.2d 56[72]
In the matter of A.R.P. being placed into foster care due to abuse and neglect in the household. Parents of A.R.P. asked for parental rights back 24 months after the child was in foster care (usually they're only allowed to be in foster care for 18 months). The court denied their parental rights

[68] Henry F. DeMent, Jr., on behalf of himself and as custodian v. Oglala Sioux Tribal Court. 874 F.2d 510 (United States Court of Appeals, Eighth Circuit, May 3, 1989). https://openjurist.org/874/f2d/510/henry-f-dement-jr-v-oglala-sioux-tribal-court

[69] Ibid.

[70] In the Matter of the Adoption of John Michael Baade, a Minor Child. 462 N.W.2d 485 (Supreme Court of South Dakota, October 31, 1995). https://law.justia.com/cases/south-dakota/supreme-court/1990/16783-1.html

[71] Ibid.

[72] The PEOPLE of the State of South Dakota, in the Interest of A.R.P., Alleged Abused or Neglected Child, and Concerning D.R.P. and A.P., Jr. 519 N.W.2d 56 (Supreme Court of South Dakota, June 29, 1994). https://www.leagle.com/decision/1994575519nw2d561571

and terminated them for good because of the continued abuse and neglect in to household for the "best interest of the child." The jurisdiction of this case was never transferred to either of the parents' tribes and stayed under state jurisdiction.[73]

2004- *Senate Bill 211* establishing the *Governor's Commission on the Indian Child Welfare Act*[74]

This bill was examined by the state of South Dakota representatives and senators to examine the compliance of the Indian Child Welfare Act in the state. This bill established the *Governor's Commission on the Indian Child Welfare Act*.[75]

2005- *People in Interest of M.H.,* 691 N.W.2d 622[76]

In the matter of M.H. and the termination of parental rights of the child. This case outlined the lack of definitions provided in ICWA and the issues associated. As stated in the *Indian Child Welfare Act,* "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses,[2] that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[77] This case highlights the lack of definition in "qualified expert witness" in the Indian Child Welfare act and the variation of the definition.[78] It was decided that the testimony of the worker from the Cheyenne River Sioux Tribe was not qualified and therefore, the decision was reversed.[79]

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[73] Ibid.

[74] South Dakota Legislature. "An Act to establish a commission to study compliance with the federal Indian Child Welfare Act." Bill 211. SD: LRC, March 3, 2004.

[75] South Dakota Legislature 2004

[76] The People of the State of South Dakota in the Interest of M.H., L.U.H, W.H., JR., AND T.H., Minor Children Concerning T.R.T., W.H., SR., and M.M., Respondents. 691 N.W.2d 622 (South Dakota Supreme Court, January 5, 2005).

[77] Indian Child Welfare Act of 1978

[78] Interest of M.H.

[79] Interest of M.H.

2006- *People in Interest of T.I. and T.I.,* 707 N.W.2d 826[80]

In the interest of T.I. and T.I. who were living in a home with abuse and neglect. The case did not ever get transferred to the tribe's court and was not under tribal jurisdiction. It remained under the state of South Dakota's jurisdiction.[81]

2011- People, Ex Rel, South Dakota Department of Social Services in the Matter of D.W., N.W.2d[82]

In this case, the lack of definition of "good cause" in the *Indian Child Welfare* Act was noted and highlighted as an issue and flexibility of definitions, often times in favor state courts. In the interest of D.W., an Oglala Sioux Tribal member who was taken out of her mother and step-father's custody. There tribe made a motion to intervene and transfer jurisdiction but the motion to transfer the jurisdiction was denied. Thereafter, the child was to be adopted but there were no family members of the mother that expressed interest in adopting D.W. Thereafter, the child was said to be placed outside of tribe and adopted by a family in Michigan. The tribe insisted that the state court explore the father's family, which had not yet been done. Thereafter, the girlfriend of the child's father expressed interest in adoption of the child. However, the court deemed that the father had abandoned the child and was to proceed with the adoption of D.W. by the Michigan couple. The tribe appealed this decision because the court had ordered for a home-visit to the girlfriend and biological fathers home, which the Department of Social Services failed to conduct. The decision was affirmed and the child was adopted by the Michigan couple.

There is much more extensive list of court cases throughout the state, however, these cases listed display the sampling of cases involving ICWA in South Dakota courts since

[80] The People of the State of South Dakota in the Interest of T.I. and T.I., Minor Children, and C.I. and D.B., Respondents, and Sisseton-Wahpeton Sioux Tribe and Yankton Sioux Tribe, Intervenors. 707 N.W.2d 826 (Supreme Court of South Dakota, December 21, 2005).

[81] Interest of T.I.

[82] National Council of Juvenile and Family Court Judges. "Adoption Indian Child Welfare Act people, ex rel. South Dakota Department of Social Services, in the Matter of D.W. ---n.w.2d--- (s.d., 2011) South Dakota Supreme Court." *Juvenile and Family Law Digest* (2011): 7-10.

1978. The importance of these cases lies in the fact that since the passage of ICWA, South Dakota courts have attempted to undermine the law, undo the law, and interpret the law. This small sampling of court cases that involve various aspects of interpretation and enforcement of ICWA, demonstrate the extensive nature of litigation between various individuals, tribes, and state courts to not only weaken ICWA so that the removal of Indian children could continue.

Oglala v. Van Hunnik Lawsuit

The most notable, recent, discussions regarding the issues of the ICWA began in 2014 during the court case and lawsuit against SD DSS by the Oglala and Rosebud Sioux tribes and their counterparts. In 2014, as stated by the case, plaintiffs "Oglala Sioux Tribe and Rosebud Sioux Tribe, as *parens patriae*, to protect the rights of their tribal members; and Rochelle Walking Eagle, Madonna Pappan, and Lisa Young," filed a lawsuit against defendants, "Luann Van Hunnik; Mark Vargo; Jeff Davis; and Kim Malsam-Rysdon" for the lack of compliance to the *Indian Child Welfare Act*.[83] The court's decision stated, "The court finds that Judge Davis, States Attorney Vargo, Secretary Valenti and Ms. Van Hunnik developed and implemented policies and procedures for the removal of Indian children from their parents' custody in violation of the mandates of the Indian Child Welfare Act and in violation of the Due Process Clause of the Fourteenth Amendment to

[83]. *Oglala Sioux Tribe and Rosebud Sioux Tribe, et al. vs. LuAnn Van Hunnik et al.* CIV. 13-5020-JLV (United States District Court District of South Dakota Western Division, January 28, 2014).

the United States Constitution."[84] Therefore, the presiding judge ruled in favor of the tribes, and stated that the SD DSS and the judges and other officials listed as defendants, were liable for a lack of compliance with the ICWA.[85] After this 2015 ruling, it created tension between SD DSS officials, the judge and courts involved, and the tribes in the state. Further, a lack of trust among American Indian families, children, and communities was created due to the thought that the State was mistreating those that were in their system. Since the first ruling of this case in 2015, the state of South Dakota Department of Social Services and the other defendants in the case have tried multiple times to get the ruling overturned in favor of the state.

[84] "The Due Process Clause of the Fourteenth Amendment provides '[n]o State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'" United States Consitution n.d.

Oglala Sioux Tribe and Rosebud Sioux Tribe, et al. vs. LuAnn Van Hunnik et al. 2014

[85] *Oglala Sioux Tribe and Rosebud Sioux Tribe et al. vs. LuAnn Van Hunnik et al.* CIV. 13-5020-JLV (United States District Court District of South Dakota Western Division, March 30, 2015).

CHAPTER FIVE

Governor's Commission on the Indian Child Welfare Act and the 2004 Report

Overview of Senate Bill 211 and Commission Board Report

On February 24, 2004, the South Dakota Governor Mike Rounds, signed Senate Bill 211 entitled, "An Act to establish a commission to study compliance with the federal Indian Child Welfare Act." The main goals of this bill included: establishment of the *Governor's Commission on the Indian Child Welfare Act* to "study the requirements of the federal Indian Child Welfare Act… including the compliance with requirements" as stated in the ICWA, "appointment of an independent reviewer to complete and analysis of compliance with the act," a commission board consisted of up to 29 members.[86] There

[86]South Dakota Legislature 2004

As stated in *Senate Bill 211,* things studied for compliance were, "requirements for notice, placement, expert witness testimony, intervention, transfer of jurisdiction, and active efforts, and the means by which Indian tribes can assist in pursuing the policies of the Act," As stated in *Senate Bill 211,* compliance of the Act by "the Department of Social Services, the state's attorneys, the Unified Judicial System, and private agencies involved in foster care and adoption, and the means by which

Indian tribes can assist the state and private agencies in achieving compliance", As stated in *Senate Bill 211,* the commission board should consist of "a representative of each of the nine Indian tribes of South Dakota …, a representative from a court appointed special advocates program, two representatives of private child placement agencies, four representatives from the Department of Social Services, and two representatives from the Department of Corrections, one of whom is a member of the Council of Juvenile Services. The President of the Senate shall appoint two members, including one from each political party. The Speaker of the House shall appoint two members, including one from each political party. The Chief Justice of the Supreme Court of South Dakota shall

were four main areas in which the board was to study and report on back to Governor Rounds. [87] The overall goal of *Senate Bill 211* was to create a commission board to evaluate the compliance of the *Indian Child Welfare Act* in South Dakota, and thereafter, make recommendations to the organizations in the state and tribes in South Dakota, in how to better implement ICWA in South Dakota.

On December 30, 2004, the State of South Dakota Office of the Governor published the *Indian Child Welfare Act Commission Report: Volume I.*[88] *Senate Bill 211,* passed in 2004 as the catalyst for this report, outlined the information and statistics that

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appoint five members. The South Dakota State's Attorney Association shall appoint two members"

[87] As stated in *Senate Bill 211,* the four areas to be studied were:

"(1) Review the analysis of compliance completed by the independent reviewer and based

upon the results, identify and prioritize any issues or barriers preventing or hindering compliance;

(2) Review the efforts of the Department of Social Services to enter into agreements with Indian tribes regarding licensing of foster homes, access to federal funding, and contracting of child protection services;

(3) Explore and evaluate options to address and resolve identified issues and barriers preventing or hindering compliance; and

(4) Make recommendations to improve compliance with the federal Indian Child Welfare Act, (25 U.S.C. §§1901-1963), as amended to January 1, 2004, and identify additional resources needed to implement the recommendations."

[88] State of South Dakota Office of the Governor 2004

were to be included in this report regarding the implementation of *ICWA* in South Dakota. During the time between the passage of *Senate Bill 211* and the publishing of this report, the commission board met 5 times to "review numerous documents from the federal, state and tribal entities regarding the design and implementation of ICWA, listen to expert witnesses regarding ICWA, analyze and discuss testimonies from carious individuals and organizations, and deliberate on the concerns and successes of ICWA compliance."[89] The commission board issued 30 recommendations that came from these meetings and subsequent investigations.[90]

There were over 500 individuals that attended the 10 listening sessions, including a number of "written submissions."[91] Through the high attendance rates at the listening sessions, individual interest in the board, and the opportunities that came from the creation of this board, it is apparent that the compliance of ICWA in South Dakota is a "vitally important issue."[92] Due to the extensive evidence and interest in the compliance of ICWA that was revealed through the commission board's report, it was recommended that this report not be the conclusion to *Senate Bill 211.* Instead, the board wanted to

[89] State of South Dakota Office of the Governor, 2.

[90] The 30 recommendations made after conducting all research, as stated in the report can be found in the Index on page 52. Despite the list being 30, there were actually 64 recommendations that were condensed into the 30. The recommendation is that all 64 recommendations are carefully considered State of South Dakota Office of the Governor, 6

[91] State of South Dakota Office of the Governor, 6

[92] State of South Dakota Office of the Governor, 6

continue the investigations so their recommendations could be as thorough as possible.[93] The main recommendation that appears several times throughout the report is that "the tribe and state agencies will begin to collaborate in a new and effective way to better serve South Dakota's children," which seems to be a recommendation that continues to plague the state and tribes.[94], name, title, who works for SD DSS points to the agreement between the Sisseton Wahpeton Oyate (SWO) and SD DSS as an example of collaboration between the state and tribes. This agreement between Sisseton Wahpeton and the state of South Dakota has been in place since 1978.[95] The Sisseton Wahpeton Oyate has, "Since 1978, SWO has provided the full array of child protective service programs from intake to adoption and licensing of tribal foster homes. This includes the pass through of Title IV-E funds to Title IV-E eligible children for placement costs and Title IV-E administrative costs."[96] This quote is evidence that tribes have the capacity and capability to protect their children and to run their own agencies with little to no oversight from the state. However, though issues continue to arise, the cooperation between the State and other tribal national in South Dakota still needs a lot of improvement.

[93] State of South Dakota Office of the Governor, 6-7.

[94] State of South Dakota Office of the Governor, 7.

[95] South Dakota DSS. n.d. Indian Child Welfare Act (ICWA), accessed March 6, 2018. dss.sd.gov/childprotection/icwa/.

[96] Ibid.

Progress in South Dakota

Benefits and monetary assistance for children in foster care is a major issue between tribes and SD DSS. Financial assistance is provided to help cover "costs of father care maintenance for eligible children, administrative costs to manage the program, and training for staff, foster parents and private agency staff."[97] The passage of ICWA has allowed tribes to gain jurisdiction over their children and determine the fate of their children that have been removed from their homes, however there is very little in the law that provides funding or monetary support to tribes for these children or foster homes. In 2004, the commission report discussed that tribes had been able to "tap into alternative sources of funding to pay or foster care" however, they did not have direct access to Title IV-E funding, the primary funding sources for state foster care services for these children.[98] For children who are in a tribal system that fails to have a cooperative agreement with the state the Title IV-E funds are given to the state, they do not have the opportunity to get these funds to assist with placement and administrative costs.[99]

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[97] U.S. Department of Health and Human Services. n.d. Foster Care. Accessed April 18, 2018. https://www.benefits.gov/benefits/benefit-details/788.

[98] As stated in the report, "Those alternative resources include Title II of the Indian Child Welfare Act, 25 USC 1931-1932, which allows for funding Indian tribes for the operation of child welfare programs and the application of tribal codes; and the Title IV-B of the Social Security Act, 42 USC 628, which authorizes direct grants to Indian tribes for the delivery of child welfare services." State of South Dakota Office of the Governor, 22

State of South Dakota Office of the Governor, 22

[99] State of South Dakota Office of the Governor, 23

However, if tribes, like Sisseton Wahpeton Oyate, decide to join in a cooperative agreement with the state, they then have access to these funds because policies fail to recognize the government to government relationship between tribes and the U.S. government in this case, only the state can access these funds.[100] Notably, one of the priority recommendations in the report by the commission board is that more tribes worked to form this cooperative agreement with the state. The Department of Social Services and tribes in South Dakota have made efforts to cooperate with tribes in order to form these cooperative agreements to allow tribes to access funding. According to the SD DSS ICWA page on their website, there are only four tribes in the state that have cooperative agreements with the state that allows for the transfer of state Title IV-E funds to those children in the tribal foster systems. These tribes that have cooperative agreements include: *Flandreau Santee Sioux Tribe* (2000), *Oglala Sioux Tribe* (2008), *Sisseton Wahpeton Oyate* (1978), and *Standing Rock Sioux Tribe* (1993).[101]

Despite the efforts by the state and tribes, these cooperative agreements will no longer be necessary in the near future. *The Fostering Connection to Success and Increasing Adoptions Act* of 2008, "provides federally-recognized Indian Tribes, Indian Tribal Organizations and Consortia with the option to submit a plan to the Administration for Children and Families to operate a title IV-E program directly."[102] This has allowed

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[100] State of South Dakota Office of the Governor 2004. South Dakota DSS n.d.

[101] South Dakota DSS n.d.

[102] Administration on Children, Youth and Families; U.S. Department of Health and Human Services. "Considerations for Indian Tribes, Indian Tribal Organizations or Tribal Consortia Seeking to Operate a Tribal Title IV-E Program." Technical Assistance Document, 2009, 1.

tribes the option to submit plans to the federal government agency, *The Administration for Children and Families,* so that they are able to run their own Child and Family Services completely independent from the states. According to Virgena Wieseler and Joseph Ashley, some tribes in South Dakota, including the Rosebud Sioux Tribe and the Oglala Sioux Tribe, are working towards completing this plan and operating independently from the state.[103] Rosebud Sioux Tribe's, *Sicangu Child and Family Services* is the closest to completion.[104] Ashley states, "once a tribe gets their plan approved, then the state will step away and the tribes will be solely responsible for the cases.[105] There are many small pieces of the puzzle when it comes to this type of thing so the process often takes quite some time to get put together."[106] These efforts that tribes are making to become independent from the South Dakota Department of Social Services speak to the efforts being made by tribes defining their tribal sovereignty. Independence from the State allows tribes self-determination of the fates of their children and examples their right of exercising their sovereign rights. This eliminates the states position of control over American Indian children and speaks to the government to government relationship between the federal government and tribal nations.

Notably, since the establishment of the Governor's Commission on the Indian Child Welfare Act and the report was published, there have been numerous steps taken

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[103] Virgena Wieseler and Joseph Ashley, interview by Tamee Livermont. ICWA Efforts in South Dakota (March 15, 2018).

[104] Virgena Wieseler and Joseph Ashley in discussion with author, March 2018

[105] Ibid

[106] Ibid

by both the state and tribes to work cooperatively to ensure that the "best interest of Indian children" is met through these processes. When recommendations were prioritized, the report proposed to "create a position for a statewide ICWA coordinator to help enforce a statewide ICWA compliance plan."[107] This was the third recommendation made by the Commission Board to ensure ICWA compliance by SD DSS. This position was subsequently created and still exists within the South Dakota Department of Social Services. Joseph Ashley currently serves in this position. Efforts to interview with Ashley and ask questions regarding the obligations and responsibilities of his position as well as the state of ICWA in South Dakota fell short.

Another one of the high priority recommendations made in the report was, "DSS should offer each tribe in South Dakota the opportunity to enter into a contract to enable the tribe to provide fill child welfare services to its children domiciled on its reservation, including foster care licensing, Title IV-E payments, and administrative capacity."[108] Virgena Wieseler, Division of Child Protection Services, Division Director for the SD DSS, gave insight on what the state has been doing in recent years to address ICWA related issues and to promote a better relationship with the tribes.[109] Wieseler discussed efforts by the state regarding finding American Indian foster families, the state's technical assistance to tribes that are operating their own child and family services

[107] State of South Dakota Office of the Governor, 115

[108] State of South Dakota Office of the Governor, 115

[109] Virgena Wieseler and Joseph Ashley in discussion with author, March 2018

programs, among many different efforts that are being made to promote a better relationship between the state and tribes in South Dakota. [110]

[110] Virgena Wieseler and Joseph Ashley in discussion with author, March 2018

CHAPTER SIX

Methodology

Things seem to be progressing towards equality in the South Dakota social system and regarding state and tribal relations. However, it is clear, through the Oglala Sioux Tribe v. Van Hunnik in 2015, that tension still exists somewhere in this system and is a result of unwarranted removal of children and wrongful treatment of American Indian families. The state of South Dakota has been making efforts to better their relationships with the tribes and American Indian families but this is not something that happens overnight. The recommendations in the 2004 report were put into consideration by the state of South Dakota, however, there needs to be more done. Minimal effort to meet these recommendations is not enough. Reexamining the current compliance of ICWA in the state of South Dakota would be the first step in seeing how this relationship is developing and what else the different parties need to do in order to ensure compliance. Clearly, following these recommendations was not enough to guarantee the "best interest of the child," especially after the lawsuit in 2015.

Despite a favorable court ruling, the state has continued to try and get this ruling overturned. It is hard to understand why the state cannot accept their wrongdoings, try to fix the issue, and move forward for the betterment of everyone involved. The argument of this decision and what is going on, tends to inhibit the relationship and respect for the

state by tribes and tribal members because they will not except their faults and change for the better.

The initial interest with this research was to compare the understanding of ICWA in both South Dakota Department of Social Services and tribal social services agencies. To evaluate the education, understanding, and the implementation of the ICWA in the state of South Dakota, I planned to do face-to-face interviews with both Family Service Specialists employed by the State and with social workers who directly worked with children and families protected by the ICWA.

For the interviews, I drafted questions with both state and tribal officials that would get the best answers to evaluate the understanding and implementation of ICWA in their organization. The following questions are a few of those that were to be used to evaluate the criteria.

(1) The following questions will ask you about the Indian Child Welfare Act.
    a. On a scale from 1-10, how familiar are you with the Indian Child Welfare Act and the processed related to it?
    b. Was the Indian Child Welfare Act included as part of your social degree program?
    c. Did you receive any formal training on the Indian Child Welfare Act and if so where?
    d. Did you learn about the Indian Child Welfare Act as part of any continuing education?

(2) The following questions pertain to their education and exposure in working with Native populations and Tribes.
    e. Have you had any education/exposure to working with tribes?
    f. Have you had education/exposure working with American Indian children?
    g. Have you had education/exposure working with American Indian communities?

(3) In your opinion, what role do caseworkers play when it comes to children who are protected under the Indian Child Welfare Act?

(4) In your opinion, does the work that a caseworker does, affect the way a judge handles a case?

** Full list of interview questions can be found in the Index pg. 37

The purpose of these interviews was to examine current knowledge, education, and understanding of ICWA and how to implement ICWA at the social service level. I was then going to compare the answers with hopes of revealing a gap in the practices between the state and tribe. Thereafter, I planned to make suggestions for best practices and next steps for the tribe and state, for ways in which they could better work together to ensure compliance of ICWA in South Dakota.

In Margaret Kovach's *Indigenous Methodologies,* she suggests that the best way to proceed when doing research with Indigenous populations is to collaborate with those in tribal communities and tribal members.[111] To do research on tribal reservations or with tribal employees, tribal IRB approval is necessary. I am a member of the Oglala Sioux Tribe (OST), the main defendant in *Oglala v. Van Hunnik* court case. Due to their participation and leadership throughout the lawsuit, I made the choice to work with the Oglala Sioux Tribe Social Service office for interviews. Upon going through the Oglala Sioux Tribe's Research Review Board process, I was informed that all the work that I was planning on doing was relevant and something that would benefit OST. However, before I could get full approval from OST Research Review Board, I had to get a Memorandum of Understanding or a Memorandum of Agreement from the OST Social Services. The MOA and MOU were for agreement in sharing names and contact numbers of their employees as well as approval of the interviews. For multiple months in the fall of 2017, I repeatedly contacted the OST Social Service office, tribal board members, as well as the chairman and vice chair of the tribe. After months of being forwarded to

[111] Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009).

different individuals, I was never able to find the right person that was willing or able to sign an MOU or MOA with me regarding this research project. During this time, the tribe was going through a transition period of directors in their social service system, so I now know that this was the reason that I was not able to get in contact with the appropriate individual.

In the meantime, I was also in contact with Virgena Wieseler, Division of Child Protection Services, Division Director, SD DSS, regarding the participation from state employees in my interviews. After conversation with Ms. Wieseler and sharing all interview questions with her, I was told that she would be choosing which state employees would be participating in the interviews. Also, I would not be able to do face to face interviews with SD DSS employees instead they would only be done by telephone. Wieseler also made it clear that the state would have nothing to do with any interviews if it had anything to do with the lawsuit. The *Van Hunnik* decision continues to be challenged by the state. Applying the knowledge and research training that I have had throughout my postsecondary education, I concluded that doing interviews with the State on these terms would not reveal the information that I was looking for, but compromised my thesis research because it did not provide an accurate evaluation of current ICWA knowledge and education by DSS employees. The information gathered regarding SD Family Service Specialists education, understanding, and application of ICWA would be biased.

Recommendations

The goal with doing my interviews was solely to examine what the State and tribes were doing, and to make suggestions to both parties in order to create a better channel of communication between the two entities in order to ensure the "best interest" of American Indian children in the state of South Dakota. From the beginning, working with the State, there always seemed to be a barrier or something that was restricting the state from me conducting the interviews. My last intention was to point fingers and say that either entity was in the wrong, rather, I wanted to use my thesis as a way to examine the current state of ICWA in South Dakota and how to better serve Native children in the foster and adoption system. Through my efforts of trying to conduct interviews, and essentially making no progress with either entity, the issue in South Dakota is clear. Based on my research and research experiences, the state of South Dakota lets their history interfere with making strides to better the outcomes of life in the social service system for American Indian children. Overcoming these insecurities that are a result of the history in our state is an absolute necessity in order for Native children to be treated in a just manner. Instead of being in a state of defense at all times and making decisions based on the reputation of the state, it is only through the removal of these barriers can social workers on both sides effectively work with one another. Sitting Bull, a Hunkapapa Lakota, famously stated, "Let us put our minds together to see what we can build for our children." Everyone must work together to build a future for Native children in South Dakota.

CHAPTER SEVEN

Conclusion

Large strides have been made to grant sovereignty to American Indian tribes, to reclaim cultures and languages, and to decolonize American Indian people from the western culture and society. A great deal of work needs to be done. Understanding the issues that caused the passing of ICWA in 1978, and those that have continued to conversation and lack of compliance in South Dakota is the catalyst to working towards compliance and ensuring that "the best interest of the child" is always the priority. South Dakota Department of Social Services and the tribes and American Indian population in South Dakota need to work together for the well-being of all parties involved. I suggest collaboration and the implementation of straight forward procedures when it comes to implementing and abiding by ICWA to fulfill the legislation's goals. Also implementing a cohort of professionals to sit on a board that research and tracks the compliance of the law, like the *Indian Child Welfare Act Commission Report* created in 2005, would be a crucial step. This would ensure the compliance of the law because all parties involved would be evaluated often and those who made decisions not in the best interest of the child would be held accountable. Validating the humanity and respect for American Indian cultures and livelihoods, that have too long been discredited and degraded, is a priority. Establishing requirements of accountability and compliance with ICWA in South Dakota would example significant progress to these validations.

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Interview Questions

1. What is the name and location of your current employer?
2. How long have you worked for this employer?
3. How long have you been employed in the field of social work?
4. Do you travel to visit clients? Home visits?
5. Do you have tribal affiliation and if so, what is it?
6. When and Where did you earn your social work degree(s), or please list your degrees, the schools and the year earned.
7. The following questions will ask you about the Indian Child Welfare Act.
    a. On a scale from 1-10, how familiar are you with the Indian Child Welfare Act and the processed related to it?
    b. Was the Indian Child Welfare Act included as part of your social degree program?"
    c. Did you receive any formal training on the Indian Child Welfare Act and if so where?
    d. Did you learn about the Indian Child Welfare Act as part of any continuing education?
8. The following questions pertain to their education and exposure in working with Native populations and Tribes.
    a. Have you had any education/exposure to working with tribes?
    b. Have you had education/exposure working with American Indian children?

    c. Have you had education/exposure working with American Indian communities?

9. In your opinion, what role do caseworkers play when it comes to children who are protected under the Indian Child Welfare Act?
10. In your opinion, does the work that a caseworker does, affect the way a judge handles a case?

Senate Bill 211

AN ACT

ENTITLED, An Act to establish a commission to study compliance with the federal Indian Child Welfare Act, to afford due regard to the Act, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. There is hereby established the Governor's Commission on the Indian Child Welfare Act. The commission shall study the requirements of the federal Indian Child Welfare Act, (25 U.S.C. §§ 1901-1963), as amended to January 1, 2004, including compliance with the requirements for notice, placement, expert witness testimony, intervention, transfer of jurisdiction, and active efforts, and the means by which Indian tribes can assist in pursuing the policies of the Act.

Section 2. The Governor shall appoint an independent reviewer to complete an analysis of compliance with the Act by the Department of Social Services, the states attorneys, the Unified Judicial System, and private agencies involved in foster care and adoption, and the means by which Indian tribes can assist the state and private agencies in achieving compliance. Upon completion, the independent reviewer shall submit the analysis of compliance to the commission.

Section 3. The commission may not exceed twenty-nine members. The Governor shall appoint up to eighteen members including a representative of each of the nine Indian tribes of South Dakota upon the written recommendation of the tribal chairman or the appointed representative of the tribal chairman, a representative from a court appointed special advocates program, two representatives of private child placement agencies, four representatives from the Department of Social Services, and two representatives from the Department of Corrections, one of whom is a member of the Council of Juvenile Services. The President of the Senate shall appoint two members, including one from each political party. The Speaker of the House shall appoint two members, including one from each political party. The Chief Justice of the Supreme

Court of South Dakota shall appoint five members. The South Dakota State's Attorney Association shall appoint two members.

Section 4. The commission is administered by the Office of the Governor. The commission shall hold not less than four meetings and shall dissolve and cease to exist on December 31, 2004. The study by the commission shall include the following areas:

(1) Review the analysis of compliance completed by the independent reviewer and based upon the results, identify and prioritize any issues or barriers preventing or hindering compliance;

(2) Review the efforts of the Department of Social Services to enter into agreements with Indian tribes regarding licensing of foster homes, access to federal funding, and contracting of child protection services;

(3) Explore and evaluate options to address and resolve identified issues and barriers preventing or hindering compliance; and

(4) Make recommendations to improve compliance with the federal Indian Child Welfare Act, (25 U.S.C. §§ 901-1963), as amended to January 1, 2004, and identify additional resources needed to implement the recommendations.

Section 5. The commission shall provide a final report to the Eightieth Session of the Legislative Assembly which shall include the findings of the commission and any recommendations to improve compliance with the federal Indian Child Welfare Act, (25 U.S.C. §§ 1901-1963), as amended to January 1, 2004.

Section 6. Notwithstanding §§ 26-7A-28, 26-7A-37 and 26-8A-13, the records and files of the Department of Social Services and its licensees, and the records of court proceedings pursuant to chapter 26-7A and chapter 26-8A involving an apparent, alleged or adjudicated

abused or neglected child, including transcripts contained in such records, are open to inspection by the independent reviewer to complete the analysis of compliance described in section 2 of this Act. Any information received by the independent reviewer and its agents or employees which identifies a parent, guardian, custodian, or child shall be held confidential as required by § 26-8A-13.

Section 7. That § 25-5A-35 be amended to read as follows:

25-5A-35. Sixty days after the emergency medical services provider or licensed child placement agency takes possession of the child a hearing shall be held in circuit court to terminate parental rights.

Section 8. That chapter 25-5A be amended by adding thereto a NEW SECTION to read as follows:

Due regard shall be afforded to the Indian Child Welfare Act (25 U.S.C. §§ 1901-1963), as amended to January 1, 2004, if that Act is applicable.

Section 9. That chapter 25-6 be amended by adding thereto a NEW SECTION to read as follows:

Due regard shall be afforded to the Indian Child Welfare Act (25 U.S.C. §§ 1901-1963), as amended to January 1, 2004, if that Act is applicable.

Section 10. That chapter 26-8A be amended by adding thereto a NEW SECTION to read as follows:

Due regard shall be afforded to the Indian Child Welfare Act (25 U.S.C. §§ 1901-1963), as amended to January 1, 2004, if that Act is applicable.

Section 11. Whereas, this Act is necessary for the immediate preservation of the public peace, health, or safety, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.

Recommendations by the Commission Board

The independent Review Team, as part of its assessment, completed forty-two hour focus groups with state stakeholders, held focus group meetings on each of the nine reservations, reviewed 94 separate case files from every judicial circuit, consisting of the actual court file and the DSS files, administered a web-based survey of state and tribal stakeholders, and performed an intensive file review of four cases, including interviews with professionals and others involved in the actual cases. The reviewers presented 34 recommendations to the commission.

During the seven months preceding this report, the commission convened five (5) meetings and communicated consistently using e-mail and regular mail. The commissioners were able to review numerous documents from the federal, state and tribal entities regarding the design and implementation of ICWA, listen to expert witnesses regarding ICWA, analyze and discuss testimonies from various individuals and organizations, and deliberate on the concerns and successes of ICWA compliance. From these discussions the commissioners prioritized all the recommendations made by them and by the reviewers. The commission believes that many of the recommendations made herein can be implemented through the enactment of a state ICWA bill following consultation with all invested stakeholders including the tribes and state agencies. The top 30 recommendations are:

1. Extend the service of the ICWA Commission for one year in order to provide guidance and assist in the implementation of its recommendations. [a]

2. DSS should consider hiring “child placement investigators” to identify, locate, and investigate relative and kinship placements. This would be the sole responsibility of this position.
3. Create a position for a statewide ICWA Coordinator within DSS to help enforce a statewide ICWA compliance plan (In the Interests of D.M., R.M., Ill and T.B.C., 2004 WL 1689673 (SD), 2004 SD 90).
4. The Governor of the South Dakota and Department of Social Services through its Secretary should offer to each tribe in South Dakota the opportunity to enter into a contract to enable the tribe to provide full child welfare services to its children domiciled on its reservation, including foster care licensing, Title IV-E payments, and administrative capacity.
5. Encourage the Department of Social Services to work with each tribe to identify qualified expert witnesses whose testimony will be relied upon by state courts and not just utilize those experts who will conform their opinions to the requested actions of DSS. Department of Social Services shall contact tribal community colleges to identify persons who could serve as qualified expert witnesses.
6. Whenever possible, DSS and State’s Attorneys shall provide tribes with notice of 48 hour hearings and the opportunity to participate, by telephone or in person. When the tribe indicates a desire to participate, the Circuit Court shall considers the input of the tribe in determining whether and emergency situation exists; whether a continued out-of-home placement is necessary; and whether extended family members are available to provide care for the child. DSS and State’s Attorneys shall attempt to introduce qualified expert witness testimony at the 48 hour hearing.

7. Create family placement specialist teams with representatives from the Department of Social Services and each tribe to search for relatives.
8. Proactively recruit American Indian foster homes throughout the state.
9. DSS and State's Attorneys should adopt a statewide and uniform notification process for notifying the tribes, the ICWA worker, and the Bureau of Indian Affairs (BIA). This should include uniform language and format including the right of the parties to review the court files and inclusion of the mother's maiden name. The same notice should be given to parents and Indian custodians.
10. Revise the format of the PRIDE classes to include culturally appropriate parenting practices. Consider contracting with a tribal community college or colleges to train American Indian foster care providers to expand the pool of providers and make PRDE classes more culturally appropriate.
11. Enter into agreements with each tribe and provide appropriate training so that the tribes may license their own foster homes both on and off the reservations. The Departments of Social Services shall honor tribal licenses pursuant to 24 U.S.C. Section 1931(b) and children in homes shall be eligible for all state and federal benefits.
12. All of the state agencies involved in CHINS cases must develop a realistic and consistent protocol for the application of ICWA in CHINS cases. At a minimum, (1) State's Attorneys should include an ICWA statement in the petition and motive the tribes, and (2) judges should make active inquiry and a record (at each stage of the proceeding) whether ICWA is applicable. This information should also be included in the court order. The tribes should develop a consensus regarding how they are to respond to CHINS.
13. Create a statewide ICWA office within state government

14. Provide tribes before every hearing, if necessary by fax, copies of all DSS reports generated by workers. This includes 48 hours emergency hearings if DSS has determined the tribal affiliation of the child prior to the hearing.
15. The tribes should fully staff and fund ICWA offices, as a top priority, to include paralegals and attorneys. Additionally, the tribes should fully staff and fund the juvenile and family courts on each reservation.
16. DSS should expand family group conferencing to each reservation.
17. Create a brochure to be distributed to families in court explaining the Indian Child Welfare Act and their rights under the Act.
18. Develop a protocol for transfer of cases from state to tribal court including those cases where DSS maintains the child in foster care placement and provides services. DSS shall work with each Indian tribe to apprise them of the options available to DSS and the tribes for paid placements under the Interstate Compact Act for Indian Children transferred from out of state.
19. Increase the resources necessary to quickly and thoroughly complete home studies. Delays hold up kinship placements and jeopardize placement options.
20. The tribes should keep DSS, the South Dakota Attorney General, State's Attorneys and the Circuit Courts regularly apprised of any change in tribal law regarding child protection issues including any tribal resolution or amendments to tribal law changing the order of preference for foster care and adoptive placements for the children of that tribe.
21. All state and private adoption agencies should designate specific local, regional and state-level ICWA employee resources within their organizations. For DSS and UJS, this may

include specifically designated individual(s) within the private agency "network". This information should be widely disseminated throughout each organization.

22. All of the state agencies, in consultation with the tribes, must work to develop a network of ICWA experts. This may include DSS social workers and supervisors (in the circuits where DSS testimony is accepted) if the DSS worker meets established minimum criteria (i.e., three completed ICWA cases, advanced training in ICWA, and the knowledge of services available to Indian children and families and Indian culture). Additionally, at a minimum, DSS workers should not be in a position to testify as an expert on their own cases.
23. UJS should also fund a statewide ICWA coordinator to work with the DSS counterpart to serve as a liaison between courts, DSS, and the tribes. Furthermore, this coordinator should work to implement the many recommendations contained in this report.
24. Request the Supreme Court to update the South Dakota Guidelines for Judicial Process for Child Abuse and Neglect Cases (SD Guidelines—"The Green Book").
25. All judicial circuits should require that an ICWA affidavit or court report be filed in every case involving an Indian child. The IVWA affidavit or court report should be updated at each step of the proceedings in terms of the ongoing need for the child's placement consistent with ICWA placement preferences.
26. When actions venued in state court, involving children domiciled off the reservation, are transferred to tribal court, DSS, if so ordered by the tribal court, will maintain legal custody, similar to placements by tribal courts with DSS for reservation domiciled children, and the tribal courts shall commit to conducting court proceedings in a manner that accommodates the families of off-reservation children and witnesses. DSS and the

tribes that take advantage of this opportunity shall develop procedures for such cases addressing issues such as the applicability of ASFA to such children and other matters.

27. Tribes should respond to DSS contact either by telephone or in writing to assure regular communications with DSS workers to prevent perception by DSS or state court that the tribe is not desirous of participating in a pending state court proceeding.
28. Certificates of Mailing should clearly indicate which documents were included in the mailing.
29. At each stage of the proceeding, judges should make an active inquiry about the applicability of ICWA and the status of the determination that the child is an Indian Child. This information should be included for the record of the case and the court order. Moreover, the UJS should consider adopting the standards and practices set out by the National Council of Juvenile and Family Court Judges—Indian Child Welfare Act Checklists for Juvenile and Family Court Judges (June 2003). These checklists articulate best practice standards for state courts processing of ICWA cases.
30. The provision of active efforts can be strengthened by case workers becoming more hands on or directly involved in helping clients achieve the goals outlined in the family service and treatment plans. For example, rather than simply giving a mother the telephone number of a program that provides parenting classes and expecting her to set up classes, the caseworker and mother could together visit with a program representative to discuss how the class will meet the needs of the mother and then discuss any barriers, such as transportation, childcare, or work schedule, that might make it difficult for the mother to attend classes.