**Indian Child Welfare Act (ICWA)**

In the mid-1970s Congress established the American Indian Policy Review Commission. [James Abourezk](http://lakotapeopleslawproject.org/about/our-advisors/), the United States Senator from South Dakota at the time, led the Commission in its charge of investigating conditions in Indian Country and making recommendations as to what steps were necessary to improve those conditions.

During the course of their work the members of the Commission were presented with indisputable evidence that when Indian children are involuntarily removed from their families or tribes and placed in non-Indian foster care institutions or homes, the vast majority of them later end up homeless, in prison, or dead. In response to this shocking revelation, Senator Abourezk personally authored—and Congress ultimately enacted—the Indian Child Welfare Act of 1978 (ICWA).

Section 1915 of ICWA mandates that State Departments of Social Services (DSS) undertake all possible “active efforts” to keep Indian children with their parents before removing them from their homes. If those efforts fail, the state is obligated to provide for the “preferential placement” of children with their Indian relatives or tribe. Indeed, all such possible active efforts must be undertaken by DSS officials *before* any Indian child can lawfully be placed in a non-Indian child-care institution or with a non-Indian foster parent. Section 1916 of ICWA mandates that every State Department of Social Services and every State Court in our nation comply with these preferential placement provisions. Together, these two sections were intended by Congress to be central, remedial provisions of the Act.

Over 30 years later, however, the situation has not improved. According to the Child Welfare League of America’s latest official report, between 2001–2007, Native American children constituted between 61% and 68% of the children who were involuntarily seized and placed in out-of-home care each year by the State of South Dakota’s Department of Social Services…this is despite the fact that Native Americans constitute only 13% of the state’s total population.

The problem persists due to a serious flaw in the language of ICWA. During the law’s final drafting, Sections 1915 & 1916 were inserted into the Act after Section 1914 had already been written. And Section 1914, the “enforceability” provision, identifies those Sections of the Act that Congress intended to make judicially enforceable in any court of competent jurisdiction (in this case, Federal District Courts). Ultimately, Congress failed to edit Section 1914 to expressly include Sections 1915 and 1916 and thus make it indisputably clear that those sections were enforceable in Federal Court, just like the other mandatory provisions of the Act.

Due to this oversight, several States’ Courts and Departments of Social Services consistently and flagrantly defy ICWA’s requirements for the preferential placement of fostered Indian children with their Indian relatives or tribe. Furthermore, a number of Federal District Courts in the States of South Dakota, California and Washington State, have recently ruled that they are presently helpless to stop or remedy these violations unless this oversight is redressed.1 The now officially-declared state of powerlessness on the part of the federal courts to intervene has resulted in a virtual epidemic of trauma inflicted upon thousands of Native American children—the very trauma Congress intended to prevent.

Indeed, during the administration of George W. Bush alone, over 6, 000 Native American children were seized and removed from their Indian parents.2 Approximately 2,544 still remain in non-Indian foster care settings or in one of the “other state institutions” to which they have been involuntarily moved. And, despite this shocking statistic, according to the most-recent Resource Report of the South Dakota DSS, only 9% of the foster care homes that have been officially-licensed by the State over the past ten years are Native American homes. Furthermore, these Native American foster care homes presently house less than 12% of the Indian children being held by the DSS. These statistics are unacceptable.

While this crisis may be at its most extreme in South Dakota, the serious problem of defying Sections 1915 & 1916 of ICWA is manifest in several other States as well. The Lakota People’s Law Project conducted a nationwide survey of over 40 tribal ICWA offices during 2008 and 2009, and more than 50% of these offices identified “placement preference violations” as one of the “three most serious problems” faced in their state. Indeed, 28% of all ICWA staff surveyed identify this “placement issue” as “the single-most serious area of non-compliance with ICWA” on the part of their States’ Courts and Departments of Social Services.

Unfortunately, these Indian children and their families have no effective remedy in federal court, and will continue to have no such recourse unless, and until, Congress fixes the law by amending ICWA and correcting its flawed language. If Congress does not act, Indian relatives of Native American children will continue to be unlawfully denied the federally-mandated “preferential placement” of their Indian child relatives. And the on-going policy and practice of defiance will continue to undermine not only the security and integrity of every such child’s tribe for generations to come….it will undermine the very integrity and authority of Congress as well.

That is why the Lakota People’s Law Project has launched its [Initiative to Amend the Indian Child Welfare Act.](http://lakotapeopleslawproject.org/lakota-child-rescue-project/icwa-amendment-initiative/) You can read more about this important initiative on the following page.

**Notes**

1. See *Navajo Nation v. Superior Court of Washington for Yakima County,* 47 F. Supp 2d 1223 (E.D. Wash. 1999), affirmed 331 F. 3d 1041 (9th Cir. 2000); *Doe v. Mann,* 285 F. Supp 2d 1229 (N.D. Cal. 2003); *Collins v. Bern,* Civ. 04-4182 KES (U.S. District Court, Southern Division of South Dakota, 08/30/ 06). Also see the earlier case of *B.R.T. v. Exec. Dir. Social Services Bd. of North Dakota,* 391 N.W. 2d 594 (1986).
2. 833 in 2001; 819 in 2002; 773 in 2003; 725 in 2004; 752 in 2005; 719 in 2006, and, we have calculated, in similar numbers during both the years of 2007 and 2008 (though the numbers of Indian children taken by the State of South Dakota have still not been released by the State DSS