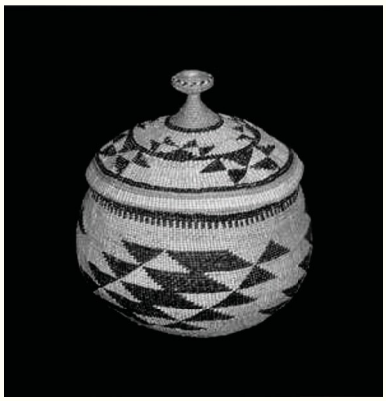
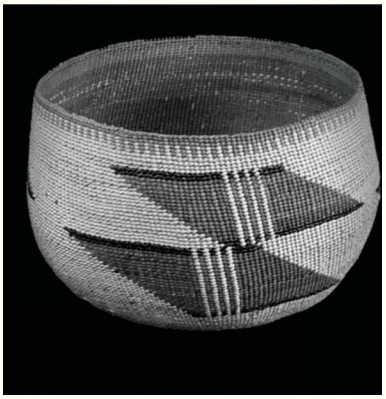
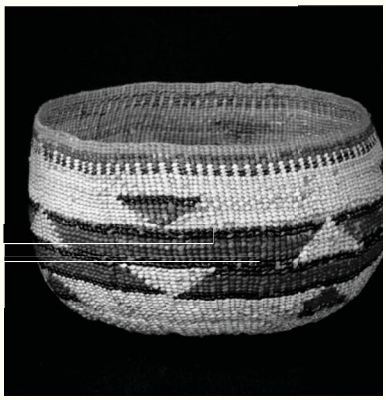
INDIAN CHILD WELFARE ACT DESK REFERENCE







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CALIFORNIA DEPARTMENT OF SOCIAL SERVICES

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DEPARTMENT OF
SOCIAL SERVICES

A Framework and Quick Reference Resource for the Practitioner

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INDIAN CHILD WELFARE ACT DESK REFERENCE:

SECTION I.
SCOPE AND USE OF THE GUIDE

DESK REFERENCE APPROACH

DESK REFERENCE ORGANIZATION

I. Scope and Use of Desk Reference

This Desk Reference provides a resource for social workers handling juvenile cases that are subject to the requirements of the federal Indian Child Welfare Act, 25 U.S.C. §1901 *et seq.* (the ICWA). It is also intended as a resource to support child welfare policy development and training.

Under its definition of "child custody proceeding," the ICWA specifies the types of custody cases to which it applies and the types of custody cases to which it does not apply. The focus is not on what a proceeding is called, or whether it is a private action or an action brought by a public agency, but on whether the proceeding meets the definition set forth in the ICWA.[1]

- The ICWA covers both voluntary and involuntary placements.

- Involuntary placements are *any* temporary placement where the Indian child need not be returned upon demand. They include all placements in a foster home or institution or the home of a guardian or conservator, unless expressly excluded by the Act. By its terms, the ICWA does NOT apply to custody disputes *between parents* in *divorce* (dissolution) proceedings, and placements based on what would be a criminal act if committed by an adult.

- The ICWA also covers *any* proceeding resulting in adoption or termination of parental rights.

- Child custody proceedings subject to the ICWA may occur in juvenile, family and probate court actions.

Desk Reference Approach:

The ICWA has been law for over forty years. In that time, many resources and guides have been produced. While many remain useful, significant changes to the ICWA requirements occurred in late 2016 with the finalization of federal regulations that were then incorporated into California law in 2019. These changes were designed to promote uniformity in implementation of the ICWA and, most significantly, they moved applicability of the ICWA forward in the child welfare process and they greatly increased emphasis on tribal engagement. This Desk Reference does not seek to replace existing useful resources. *Learning Opportunities* are identified throughout the Desk Reference to direct users to some of these resources for more detailed discussions of the subjects addressed.

- The focus of the ICWA Desk Reference is to:

    - Provide a framework for equipping social workers to work effectively with

[1] 25 U.S.C. §1903 (1) sets out the definition of "child custody proceeding".

tribes in achieving compliance with the ICWA, as well as an introduction to basic information essential to implementing the ICWA, including information on:

    - Indians and tribes; and
    - the ICWA as a multi-faceted statute

  - Provide a handy compilation of controlling authority. Too often mistaken assumption lead to conflict. Appropriately addressing an issue is often aided by going back to the actual text of legal authority, conveniently included in the appendices to the Desk Reference.

  - Provide tools, in the form of job aids and other guidance, to support and enhance implementation of the ICWA.

- While ICWA requirements apply to many types of cases the focus of this Desk Reference is juvenile dependency cases, although it does include some resources that address family or probate court cases.

- To enhance the accessibility of the information:

  - Citations to legal authority are minimized to strike a balance between readability and the ability to locate controlling authority as needed depending on the circumstance. The Judicial Council of California maintains on its California Courts website[2] a host of job aids developed pursuant to a contract with the California Department of Social Services (CDSS). These documents contain extensive citation to legal authority and are recommended as a complement to this Desk Reference.

  - To provide options for accessing information in the way that best meets the individual user's needs, the same information is at times presented in multiple formats in the various sections of the Desk Reference.

  - The Desk Reference focuses on the dependency process and Division 31 of the Child Welfare Manual of Policies and Procedures. Issues such as Tribal Customary Adoptions, ICWA data and Tribal Title IV-E programs are not a focus of the Desk Reference but may be addressed to some extent, as in the Frequently Asked Questions, which aspire to answer questions that are in fact frequently asked.

  - The initial edition of the Desk Reference endeavors to present law and policy current as of June 2020. To accommodate anticipated updates, each section of the Desk Reference that is updated will contain at the

[2]California Courts ICWA page is located here: https://www.courts.ca.gov/3067.htm

beginning of that section, a notation identifying the date of the most recent update.

Desk Reference Organization:

The Desk Reference is divided into the following sections:

I. Scope and Use of Desk Reference

II. Overview of the Indian Child Welfare Act

This section offers an orientation to the unique status of Indians and tribes in the United States, and introduces key concepts impacting effective engagement with Indian tribes. It also provides an orientation to the ICWA as a multi-faceted statute containing intertwining provisions that impact all of the following areas:

- Tribal rights and opportunities
- Minimum Federal Standards for State Courts
- Cultural considerations

III. Operational Indian Child Welfare Act Information for Social Workers

This section provides summary of social worker practice responsibilities in implementing the ICWA. This section is based primarily on CDSS regulations and guidance, supplemented for convenience by select provisions of federal and state law.

IV. Frequently Asked Questions

This section contains questions and answers organized in the context of the various facets of the ICWA, applying various concepts introduced in the Desk Reference to issues and questions as they arise in child welfare practice.

V. The Indian Child Welfare Act Glossary

Compliance with the ICWA and effective engagement with tribes requires concepts and terminology that relate to the varied capacities in which Indians, tribes, and tribal representatives or employees interact with child welfare systems – as cultural groups, as governments, or as service providers – and applies that terminology in the appropriate circumstances. The Glossary sets forth definitions of terms applicable to implementation of the ICWA, including sometimes multiple statutory definitions that apply to a single term, depending on context.

Included in the Appendices are:

- Indian Child Welfare Act Job Aids developed by the CDSS Office of Tribal Affairs, or by the Judicial Council of California pursuant to a contract with CDSS.

- Authority relating to the 2016 federal Indian Child Welfare Act regulations. These regulations were amended to clarify the ICWA requirements by adopting best practices from throughout the nation to support uniform implementation of the ICWA. They have resulted in conforming amendment to state law, regulations and guidance. This section of the appendices includes the Indian Child Welfare Act, federal ICWA regulations, Bureau of Indian Affairs Guidelines for State Courts, an Index of California law implementing the ICWA, and the ICWA related California Rules of Court.

INDIAN CHILD WELFARE ACT DESK REFERENCE:

SECTION II. OVERVIEW OF THE INDIAN CHILD WELFARE ACT

BASIC PRINCIPLES OF FEDERAL INDIAN LAW: THE FOUNDATION SUPPORTING THE ICWA

FACTUAL ORIENTATION TO INDIANS AND TRIBES IN CALIFORNIA

ICWA POLICY AND LEGISLATIVE HISTORY

GENERAL OVERVIEW OF THE ICWA — A MULTIFACETED STATUTE

II. Overview of the Indian Child Welfare Act

The Indian Child Welfare Act of 1978 (ICWA) governs "child custody proceedings" (adoption, termination of parental rights, foster care, and pre-adoptive placements) involving an Indian child and sets national standards and procedures which must be followed by state courts.

> ***Practice Tip:*** *The ICWA contains unique definitions that do not necessarily have the same meanings as they usually do in child welfare, family law or guardianship cases, including for example, the definitions of foster care and Indian child. See, Section V, ICWA Glossary.*

The ICWA also contains powerful provisions relating to tribal authority. This includes jurisdictional provisions that support tribal authority over Indian child custody proceedings. When a case is heard in state court, the ICWA permits a child's tribe to be involved in the state proceedings, both as a party to the proceeding and through provisions accommodating tribal law and cultural standards.

While the ICWA has been law for over four decades, state implementation has been challenging at best. Understanding why begins with the fact that the minimum federal standards for state courts established by the ICWA involve the interplay of multiple sovereigns – the federal government, 50 states and over 570 federally recognized tribes. In California juvenile proceedings, this is further complicated by the fact that 58 counties administer the state's child welfare system. This provides opportunity for complexity, variation, and confusion.

In June 2016, to facilitate consistency in implementation of ICWA requirements, the Department of the Interior (DOI) amended federal ICWA regulations. A new subpart, based on best practices from throughout the nation, was added addressing requirements for state courts in ensuring the proper implementation of the ICWA in Indian child-custody proceedings.[1]

Additionally, in December 2016, DOI issued updated *Guidelines for Implementing the ICWA* to complement the regulations. While not imposing binding requirements, the guidelines provide a reference and resource for all parties involved in child custody proceedings involving Indian children. Courts in California have consistently held that the federal guidelines are entitled to "great weight." The guidelines explain the statute and regulations and provide examples of best practices for the implementation of the statute, with the goal of encouraging greater uniformity in the application of ICWA. These guidelines replace the 1979 and 2015 versions of DOI's guidelines.[2]

The 2016 regulations and guidelines provide detailed and applied instruction on ICWA

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[1] Indian Child Welfare Act, 81 Fed. Reg. 38,778 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

[2] See Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. 96,476 (Dec. 30, 2016).

implementation and are contained in the appendices of this Desk Reference. Even with these resources, to effectively engage with issues involving multiple governments and systems, it is important to begin with a basic orientation to the unique legal status of Indians and tribes and to the body of law commonly referred to as federal Indian law. This information runs in the background and is essential for effective ICWA implementation. It provides a context for understanding and appropriately implementing the ICWA.

1. Basic Principles of Federal Indian Law

Indian tribes have a unique legal relationship with the U.S. government unlike that of any other group of Americans. This relationship is based, in large part, on the recognition in the U.S. Constitution of tribes as sovereign nations. This relationship is further cemented by historic treaties (agreements between sovereign nations) that the federal government signed with Indian tribes, which acknowledged and recognized the tribes' inherent sovereignty as nations predating formation of the United States. Therefore, the relationship between the federal government and Indian tribes is a political one, based on this historic and evolving relationship between sovereign governments, and not on the race or ethnicity of American Indians.

This political relationship has taken shape in the arena of the U.S. legal system. While a detailed discussion of the body of law commonly known as federal Indian law is beyond the scope of this Desk Reference, the legal environment tribes operate within is subject to the processes and complexities of the United States legal system. Consequently, answers to questions about why a tribe does or does not take a particular action may not be simply a matter of a tribe's prerogative but may be impacted by an entire body of federal law.

Federal Law Shapes the Unique Status of Indians and Tribes

Example - Paragraph with Legal Citations

To illustrate how deeply steeped in federal law the unique status of Indian tribes is, below is a paragraph describing that status with citation to controlling legal authority:

Described by the U.S. Supreme Court as "domestic, dependent nations," tribes have a unique status in the federal system. Indian tribes are sovereign entities predating the U.S. Constitution. *Cherokee Nation v. Georgia* (1831) 30 U.S. (5 Pet.) 1. Through the U.S. Constitution, Congress has the exclusive authority to regulate "commerce with Indian tribes." U.S. Const., Art. I, Sec. 8, Cl. 3. In general, tribal sovereignty is limited by overriding federal authority (known as "plenary power") only to the extent expressly authorized by Congress, or where inconsistent with the tribe's legal status. *New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324; *United States v. Wheeler* (1978) 435 U.S. 313; *Montana v. United States* (1981) 450 U.S. 544. Consequently, states are preempted from exercising any authority over Indian tribes if doing so would clash with federal authority or policy. *Worcester v. Georgia* (1832) 31 U.S. (6 Pet.) 515; *Williams v. Lee* (1959) 358 U.S. 217; *New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324.

One of the most significant legal concerns for Indian tribes is the safeguarding of tribal sovereignty, that is, the authority to self-govern. Tribal sovereignty is recognized as being inherent, meaning that the traditional authority of tribal leaders to govern their people and lands existed long before their relationship with the U.S. government. Indian treaties were based on the sovereign power of Indian tribes to enter into agreements on a government-to-government basis with the United States. Because it is inherent, tribal sovereignty is something Indian tribes have retained, not something granted to them by the federal government.

Tribal sovereignty was reaffirmed in the landmark cases of *Johnson v. McIntosh (1823)*, *Cherokee Nation v. Georgia (1831)*, and *Worchester v. Georgia* (1832), wherein the Supreme Court, in opinions penned by Chief Justice John Marshall, held that tribes retained a nationhood status and inherent powers of self-governance. These cases, referred to as the Marshall Trilogy, formed a large part of the foundation of present-day federal Indian law.

Tribal sovereignty includes the inherent right of Indian tribes to exercise self-determination and self-governance. It is the basis of a tribe's jurisdiction (governmental authority) over people and activities on tribal lands. As part of the sovereign status of Indian tribes, tribal governments generally have the authority to do the following:

- Select their own form of government
- Define their tribal membership criteria and determine membership
- Enact and enforce civil, criminal, and regulatory legislation, including regulating domestic relations
- Provide specific areas of law enforcement and establish a court system.
- Assert jurisdiction over their people and lands
- Regulate trade within their borders
- Impose and collect taxes, including taxing non-Indians engaged in economic activity on tribal lands

These rights are in effect unless waived by a tribe, or modified by treaty, statute, or federal Court decision.

Another vital aspect of the unique relationship between the federal government and Indian tribes is the federal trust responsibility. This trust responsibility requires the federal government to uphold rights reserved by, or granted to, Indian tribes and Indian individuals by treaties, federal statutes, and executive orders, which are sometimes further interpreted through court decisions and federal regulations.

The famous 1831 Supreme Court decision *Cherokee Nation v. Georgia* introduced the concept that while Indian tribes could not be considered to have the same status as foreign nations because they were located within the boundaries of the United States, they still retained their status as nations. Because tribes had ceded lands in exchange for certain promises of provisions and protection by the United States, Chief Justice John Marshall coined the term "domestic dependent nations" to refer to the status of the tribes.

Fundamental Principles of Tribal Powers

Felix Cohen, great scholar of Indian law, summarized the meaning of tribal sovereignty as follows:

> *The whole course of judicial decisions on the nature of Indian tribal powers is marked by adherence to three fundamental principles:*
>
> 1. *Indian tribes possess, in the first instance, all powers of any sovereign state.*
> 2. *Conquest renders tribes subject to the legislative power of the U.S. and terminates the external powers of sovereignty of the tribe, but does not, by itself, affect the internal sovereignty of the tribe.*
> 3. *These powers are subject to qualification by treaties and by express legislation by Congress, but, except as expressly qualified, full powers of internal sovereignty are vested in the tribes and their duly constituted governments.*

While the basic framework of the relationship between the United States and Indian tribes has remained constant, the fundamental principles are grounded in the federal legal system. This has provided opportunity for great variation and complexity in the law as it applies to Indians and tribes. Why?

The unique legal posture of the tribes in relation to the federal government is deeply rooted in American history. Knowledge of historical context is perhaps more important to the understanding of Indian Law than any other legal subject. Indian Law has always been heavily intertwined with federal Indian policy. Over the years the law has *shifted back and forth* with the flow of popular and governmental attitudes towards Indians. For this reason, many laws have “expressly qualified” tribal powers, at times generally and at other times with respect to only some tribes in some states. An entire multi-volume title of the federal statutes, Title 25 of the U.S. Code, is titled “Indians” and focuses exclusively on laws impacting Indians and tribes.

Introduction to Jurisdictional Issues

Jurisdiction is the power of a government to exercise authority over persons and things in a specified territory. When a government has jurisdictional authority, its laws or

regulations will apply, and its courts may be the forum in which disputes are heard and where cases involving violations of the law are adjudicated.

There are three types of domestic sovereign governments recognized by the laws of the United States: federal, tribal, and state. In Indian Country, sometimes the jurisdictions overlap. “Indian Country" is a legal term of art that is defined in 18 United States Code § 1151 as follows:

a. All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

b. All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and,

c. All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Courts have interpreted §1151 to include lands held in trust by the United States for a tribe or an individual Indian. There can be different names for tribal trust lands in different parts of the country. In California, lands might be referred to as “rancherias.” In other areas, they might be called pueblos. The name does not matter. It is the legal status of the land as being held in trust by the United States for a tribe or Indian that is important. Although the Indian Country definition is found in the federal criminal statutes, it is also used in civil cases.

Within Indian Country, the apportionment of authority among governments may result in a range of tribal jurisdictional possibilities including the following:

- **Exclusive Tribal Jurisdiction:** an area in which only the tribe may legislate and act

- **Concurrent Jurisdiction:** an area in which a tribe shares legislative, judicial and other authority with another government

- **Referral Jurisdiction**: established by ICWA, jurisdiction is concurrent, but presumptively tribal

- **Partial Jurisdiction**: an area where federal action is required to complete tribal action

- **Proprietary Interest**: Property ownership

Civil Jurisdiction

In a governmental context, the term “jurisdiction” refers to a government’s power to both make and enforce laws. "Legislative Jurisdiction" (the power to make laws) can be subdivided into Criminal and Civil.

- In the **criminal** realm, legislative jurisdiction means a government's power to define a crime and provide a penalty.
- In the **civil** realm, it refers to the power to create, define, and regulate a citizen's rights (in regard to both the government and other citizens) and to provide remedies.

Child welfare laws, the focus of this discussion, are civil laws.

Tribes have inherent civil jurisdiction over their own tribal members living within Indian Country, which includes land within the boundaries of a reservation and tribal trust land. Many tribal Constitutions assert jurisdiction over tribal members “wherever located.” In some circumstances, for example, when tribal hunting and fishing rights exist, jurisdiction may extend outside a tribe's territory. In some cases, civil jurisdiction will also be affected by acts of Congress. For example, the Clean Water Act allows qualifying tribes to assume certain responsibilities, such as enforcement of provisions of the Act.

Tribal authority over non-Indians on fee lands within reservations is controlled by the case of *Montana v. United States*, 450 U.S. 544 (1981), in which the Supreme Court stated that tribes retained their inherent power to "exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands" but only when:

1. Non-Indians enter consensual relationships with the tribe or its members; or
2. A non-Indian's conduct threatens or has a direct effect on the political integrity, economic security, or health or welfare of the tribe.

This analysis, called the "Montana Test," is applied by courts when determining whether Indian tribes have inherent authority to regulate non-Indian activities on fee lands within reservation boundaries.

Tribal and State Relations

Relations between tribes and states are often complex, and made even more so by a federal law commonly known as Public Law 280 (P.L. 280)[3]. P.L. 280 was enacted in the 1950’s “termination era,” when federal policy sought to extinguish government-to-

[3] 28 U.S.C. §1360; 18 U.S.C. §1162

government relations with many tribes, thus stripping many tribes and their members of their unique political status.

Generally, states have no authority over tribal governments, or over the conduct of Indians in Indian Country unless expressly authorized by Congress. In five states, including California, P.L. 280 mandated that the states assume criminal and some civil jurisdiction in Indian Country. Jurisdiction over civil causes of action involving Indians, and state civil laws of general application to private persons or private property, were made applicable within Indian Country.

Over the years, courts have clarified that Public Law 280 only authorizes state civil laws of general application to apply in Indian Country, not local laws such as zoning ordinances. People may not always be aware that some laws are enacted by the state and some by local governments like counties and cities, and thus may not be aware that some apply to tribes and others do not. Federally recognized tribes possess both the right and the authority to regulate activities on their lands (territory) or otherwise within their **jurisdiction** independent from state government control. Further, as to both criminal and civil jurisdiction, P.L. 280 did not extinguish tribal jurisdiction, thus creating a situation where the state and tribe may both have *concurrent* jurisdiction in some circumstances. Congress and the federal courts have not fully addressed many key questions about tribal and state jurisdictional authority.

As a result of differing legal views about their respective jurisdictional authority, tribes and states at times compete aggressively for such authority; however, there are often many points of agreement, and cooperative partnerships between tribes and states are commonplace. P.L. 280 does not make local laws (of cities and counties) applicable to Indian Country. Often counties do not understand the limitations of their own authority with respect to tribes and will mistakenly try to assert authority over tribes and tribal lands. To protect their sovereignty, tribes will resist wrongful assertions of authority and control. This does not mean that tribes are unwilling to work with counties but does mean that it may be better to negotiate an agreement rather than trying to enforce laws that do not apply and ending up in protracted litigation.

Interests, Authority, and Capacity

Tribes are discrete sovereigns but are impacted by federal and state laws. Across sometimes large tribal operations, tribes may also engage with federal and state processes in various ways: as governments, as agents, as service providers, as clients, etc. Likewise, individual Indians may be both citizens of a tribe and of the state, entitled to many of the privileges and responsibilities of each. Intergovernmental collaboration may be appropriate to effectively address the needs of joint constituencies.

Tribal interests are not monolithic; there is great diversity among tribes. Respectful engagement necessitates clear understandings of the capacity in which a tribal representative is interacting with the state and the scope and limits of the authority they are exercising. This should not be assumed, but clearly established. Just as there is a difference between the authority of a state service provider, a social worker, a California

Department of Social Services (CDSS) official, and the governor, the same is true of tribal representatives. In some cases, corresponding tribal roles are filled by a host of tribal staff members and officials. In others, a single individual may fill several or all of these roles. Communication and clarity regarding capacity and authority is an important step in both effective engagement and ICWA compliance. Similarly, tribes each have their own "bureaucracy" or system of governmental and organizational approval and decision making. In the child welfare context, this means that the tribal social worker or ICWA advocate may have to seek approval from another authority in the tribe, often the tribal chairperson or tribal council, before they can make a decision on a case.

Like states, tribes have diverse interests and processes for the proper exercise of authority. Why and how something is done may be of great significance. For example, state courts have ruled that, pursuant to ICWA, a tribal resolution or other *legislative* act that generally alters the ICWA order of placement preferences is binding on state courts. However, a designation of a preferred placement in a particular case is not. ICWA establishes as the first order of preference extended family, Indian or non-Indian, and even reaching to second cousins. Placement with a non-Indian second cousin falls within the first order of preference and complies with ICWA, even if the child's tribe has specified the Indian grandparent as the desired placement. However, a tribe that legislates a different order of preference might identify as the first preference an Indian grandparent. In this instance, ICWA would require placement with the grandparent absent a showing of good cause.

Additional information on Indians and tribes may be found in accessible presentation in the resources identified in the Learning Resource on the following page.

Learning Resource

To learn more about the unique status of Indians and tribes, visit the material course titled *Working Effectively with Tribal Governments.* This training curriculum was developed to provide federal employees with skills and knowledge they can use to work more effectively with tribal governments. While it was designed in 2009, the basic principles addressed remain current and accessible in that it is paced and designed to develop an understanding and awareness of tribal issues and concerns. Much of the information in this section is based on this course. It presents further information on how the unique status of Indian tribes and their historical relationship with the federal government affects government programs, responsibilities, and initiatives.

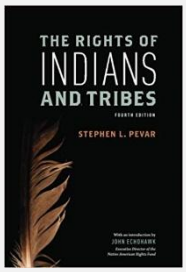
Modules of particular interest include:

- *Introduction to Tribal Concepts* which introduces key terms and concepts that provide a foundation for working with Indians and tribes. These include: American Indian, Alaska Native, Native American; Federal Recognition; Treaties; Tribal Sovereignty; Tribal Governments; The Government-to-Government Relationship; Tribal Consultation; The Federal Trust Responsibility; and Indian Country.

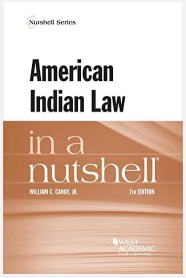
- *Federal Indian Law and Policy* which presents both a historical and a present-day perspective of policies and issues regarding American Indians and the federal government, and an overview of federal Indian law. The module presents an introduction to the history of federal policy with American Indians, federal Indian law regarding jurisdictional issues and a discussion of tribal and state relations.

- The curriculum in PDF format may be accessed for free at https://www.michigan.gov/documents/mdch/Working-Effectively-with-Tribal-Governments_384010_7.pdf.

For more detailed discussions of federal Indian law, there are useful resources including:



● *The Rights of Indians and Tribes* by Stephen Pevar – Incorporating a user-friendly question-and-answer format, the book addresses the significant legal issues facing Indians and Indian tribes today.



● *American Indian Law in a Nutshell* by William Canby Jr. - provides a reliable resource on American Indian law. Its authoritative text covers the essentials of this complex body of law, with attention to the governmental policies underlying it. The work emphasizes both the historical development of Federal Indian Law and recent matters such as the evolution of Indian gaming and issues arising under the Indian Child Welfare Act.

2. Factual Orientation

a. American Indians in California

There are more than 570 federally recognized tribes in the United States, including 227 village groups in Alaska. The Bureau of Indian Affairs (BIA) recognizes 109 California Tribes, 104 based in California and another 5 with territory extending into California. Some of these tribes are among the most sophisticated tribes in the United States. However, of the federally recognized tribes, a significant number are formerly terminated tribes that have been restored (that is, "unterminated") in recent years via litigation or legislation. Termination is the process by which Congress abolishes a tribe's government, and with it, the tribe's unique sovereign status, distributes tribal assets, and ends (terminates) the federal government's trust relationship with the tribe and its members. Between 1954 and 1966, Congress terminated over one hundred tribes, most of them in Oregon and California.[4] A shift in federal policy ended the termination era and ushered in a period of critical examination of the termination process. This resulted in a number of lawsuits. One example of an untermination lawsuit that has impacted a number of California Tribes is the class action lawsuit *Tillie Hardwick v. United States of America*, U.S. District Court for the Northern District of California, No. C-79-1710-SW. This litigation, settled in the 1980's, resulted in the untermination of 17 California Tribes that had been terminated. The litigation reestablished tribal status and confirmed reservation boundaries. However, since in this case and others the tribal existence of an unterminated tribe may have been interrupted for decades - formerly terminated but now recognized tribes may be in greatly varied stages of organization. Today, nearly 100 separate Indian reservations dot the California landscape. Membership rolls range from fewer than 25 members for smaller tribes to the more than 4,500 members of the Yurok Tribe.

Although the Bureau of Indian Affairs (BIA) recognizes 109 California Tribes, there are additional tribes in the state: California is also home to non-federally recognized tribes. Under recent regulatory changes, the BIA now identifies as a non-federally recognized tribe only the number of tribes that have completed petitions for federal recognition pending with the BIA. In 2020 that number was three. However, the number of tribes that have *initiated* the process of petitioning for federal recognition is much higher, with some reports placing the number as high as 78.

With a total population of more than 720,000 American Indian/Alaska Native persons (alone or in combination), California has the highest Indian population in the nation, 2% of the total California population. Due to past federal initiatives such as the BIA Relocation Program, designed to assimilate Indians by moving them to urban areas, the majority of the Indian population in California is affiliated with tribes located in other states. The tribes with the largest populations are Cherokee (18%), Apache (6%), Navajo (5%), and Choctaw (5%).

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[4] American Indian Policy Review Commission, *Final Report* p. 447-53 (Washington D.C.: Government Printing Office, 1977).

Among counties in the United States, Los Angeles has the highest Indian population. As of 2005, only 3% of the Indian population lived on a reservation in California.

b. Indian Programs and Services

Because P.L. 280 extends state laws of general application to reservation Indians in California, Indians throughout the state are eligible for state programs and services. In addition, tribes and the federal government share the responsibility of delivering social services to Indians in California. Primary federal agencies involved with delivery of social services include: the U.S. Department of the Interior, Bureau of Indian Affairs; ("BIA"); and, the U.S. Department of Health and Human Services, Indian Health Service ("IHS"). Additionally, many federal agencies have Indian program components.

In California, tribes and non-profit groups operate many IHS funded programs, directly providing medical and mental health services, including drug and alcohol rehabilitation. Both the BIA and a number of tribes also run a range of programs, including job, housing, disaster and educational support programs. Indian programs and services are not centralized or uniformly delivered, so the social worker must investigate all potential sources of assistance for each client. A useful approach is to contact the tribe, the BIA, and IHS in this order of preference. The BIA Pacific Region Office and the IHS maintain websites where information is available, including contact information for tribes and a current list of tribal health care and mental health care providers.

A detailed discussion of contemporary Indian and tribal programs and services is beyond the scope of this Desk Reference. However, many resources exist to provide additional information about agencies, organizations, and programs that occupy the contemporary tribal landscape. Awareness, if not familiarity with, this landscape is important to effective engagement with tribes.

Set forth on the following page are links to some of these resources.

Links to Web Resources:

Some Federal Agencies in the Tribal Landscape

- US. Department of the Interior – Bureau of Indian Affairs (BIA) https://www.bia.gov/
  - BIA Tribal Leaders Directory https://www.bia.gov/bia/ois/tribal-leaders-directory/
  - BIA ICWA Designated Agents Listing https://www.bia.gov/bia/ois/dhs/icwa
  - BIA Pacific Region (CA) https://www.bia.gov/regional-offices/pacific
  - BIA - Division of Tribal Government Services https://www.bia.gov/bia/ois/tgs
- Administration for Children and Families
  - Administration for Native Americans https://www.acf.hhs.gov/ana
  - Children's Bureau – Focus Area – Tribes https://www.acf.hhs.gov/cb/focus-areas/tribes
  - Office of Family Assistance https://www.acf.hhs.gov/ofa/programs/tribal
  - Tribal Head Start https://eclkc.ohs.acf.hhs.gov/center-locator?latitude=36.778&longitude=-119.418&state=CA&type=5,6
- Indian Health Services https://www.ihs.gov/
  - California Area Indian Health Services https://www.ihs.gov/california/
- Environmental Protection Agency https://www.epa.gov/tribal
- US Department of Education-The Office of Indian Education (OIE) https://www2.ed.gov/about/offices/list/oese/oie/index.html

Some State Agencies in the Tribal Landscape

- California Native American Heritage Commission http://nahc.ca.gov/
- California Department of Social Services- Office of Tribal Affairs http://www.cdss.ca.gov/inforesources/Tribal-Affairs
- Tribal TANF http://www.cdss.ca.gov/inforesources/Tribal-TANF/Programs
- American Indian Education Department https://www.cde.ca.gov/sp/ai/re/aidirectory.asp
- California Judicial Council ("CA Courts") Tribal/State Programs http://www.courts.ca.gov/programs-tribal.htm
- California Governor's Tribal Advisor https://tribalaffairs.ca.gov/

Some Tribal Organizations in the Tribal Landscape

- Native American Rights Fund https://www.narf.org/
- National Indian Child Welfare Association https://www.nicwa.org/
- National Congress of American Indian http://www.ncai.org/
- National Indian Health Board http://www.nihb.org/
- National Indian Justice Center https://www.nijc.org/
- Association on American Indian Affairs / ICWA https://www.indian-affairs.org/indian-child-welfare-act.html
- California Indian Legal Services http://www.calindian.org/
- Council for Tribal Employment Rights http://www.councilfortribalemploymentrights.org/
- Substance Abuse and Mental Health Services Administration/Tribal Affairs https://www.samhsa.gov/tribal-affairs
- Tribal Law and Policy Institute https://www.home.tlpi.org/
  - Tribal Court Clearinghouse http://www.tribal-institute.org/index.htm

The "Special Case of California"

The Bureau of Indian Affairs identifies 104 federally recognized tribes as based in California with another five possessing territory extending into California. Federal law imposes various requirements on the states to consult with tribes in their state. For tribal consultation purposes all 109 tribes are considered to be "California Tribes." "Federally recognized" means that these tribes and groups have a special, legal relationship with the U.S. government. This relationship is referred to as a government-to-government relationship. (See 25 C.F.R. §83.2.) Today, Indians must generally be members, i.e., "citizens" of a tribal government, in order to be subject to many of the special laws governing Indians and tribes, including a number of the protections of the Indian Child Welfare Act. The concept of recognition as "eligible for services provided to Indians because of their unique status as Indians" appears in the definition of Indian tribe that is set forth in the ICWA. This same definition has appeared in statutes since the early part of 20th century, long before the existence of federal recognition regulations or published lists of federally recognized tribes. Under many of these statutes, as descendants of original sovereign nations, Indians in California received services, with their Indian status and eligibility regularly certified by the Bureau of Indian Affairs based on official records of past dealings dating back to unratified treaties signed in the 1800's.

In the early 1980's the BIA first adopted regulations that required publication of a list of federally recognized tribes in the Federal Register. The list must now be published annually, with the most current list, as well as a Tribal Leader Directory available on the BIA website.

The regulations also establish a procedure for non-federally recognized tribes to petition for recognition. 25 C.F.R. Part 83. A tribe can gain recognition (have their status as a tribe acknowledged or restored) by successfully petitioning under the regulations, through litigation, or through legislation.

Federally recognized tribes qualify to participate in virtually all federal programs. Federal recognition confirms a contemporary political tribal identity. This political identity may or may not correspond to the tribe's historical/cultural identity, something the BIA refers to as "ancestral tribal affiliation." This is the result of the interplay of fluctuating federal law and policy together with unique historical interactions between the federal government and Indians. Federally recognized tribes in California often do not correspond to historic/ancestral tribal groups.

First, it should be noted that "Indians of California" have been recognized by the federal government for many purposes via a course of dealings between the government and California Indians and resulting special statutes.[5] Unique to California, a federal agency

[5] See, e.g., 25 U.S.C.§651 *et seq*.(Indians of California); 25 U.S.C. §1679(b) (Indian Health Care Improvement Act, special California Indian eligibility definition).

service delivery system has developed that allows certification of the Indian status of California Indians and their eligibility for Indian services.[6]

Second, many California Indians and Tribes are not listed on the 25 C.F.R. Part 83 published list of federally recognized tribes. This is because of the approach the BIA took to implementing the Indian Reorganization Act of 1934 (25 U.S.C. §461 et seq.), a federal law that allowed a tribe or tribes occupying a reservation to organize as a tribe.

In California, under the California Rancheria Act, small parcels of land throughout the state were obtained by the BIA in trust status for landless/homeless California Indians. Subsequently, as the BIA implemented the Indian Reorganization Act, the BIA treated these small parcels as reservations and allowed the occupants of each of these small parcels to organize as tribes. Hence, many California Tribes later selected for inclusion on the list of federally recognized tribes corresponded to groups of individual Indians occupying these rancheria areas at the time the BIA implemented the Indian Reorganization Act. Thus, for example, while there may have been several rancherias located within the aboriginal territory of a historical tribe, only the residents of each rancheria, comprising only a fraction of the larger historic tribe, ended up recognized as distinct sovereign nations. No Indians or historic tribal groups not occupying these rancheria/reservation lands were listed.

In the 1980's, when the BIA first started publishing the Part 83 list, it included as tribes Indians occupying the reservations and rancherias located in the state. An anomaly developed in California where one family or a small group of Indians residing on each of several parcels of rancheria trust land within a historic tribe's aboriginal territory was deemed a federally recognized, quasi-sovereign tribal nation. For this reason, there is not, for example, a single Miwok Tribe but rather several small tribes identified by the BIA as possessing an affiliation with the historic or ancestral Miwok Tribe. The larger historical tribal group no longer fits into this approach, and under the prevailing policy of tribal self-governance, significant numbers of Indians and some historic tribes in California are now largely deemed "non-federally recognized." This is the case even though these "non-federally recognized" Indians in California can receive Certificates of

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[6]A short explanation is required detailing the reasons why there appear to be a large number of non-federally-recognized tribes in California as well as a large number of aboriginal California Indians unaffiliated with a federally recognized tribe. Tribal existence and identity have never depended on federal recognition or acknowledgment; tribal existence predates the United States. During the Indian treaty-making period of the 1880's the United States treated all tribes as sovereigns and all tribes were "recognized" through course of dealings and treaties with the federal government. Advisory Council on California Indian Policy, *Final Reports and Recommendations to the Congress of the United States* pursuant to P.L. 102-416. (1997) Recognition report at 8. Once the treaty-making era ended Congress continued to pass laws applying to tribes "recognized by the political department of the government." *United States v. 43 Gallons of Whiskey* (1876) 93 U.S. 188, 195. These tribes included California Indian tribes. However, the government did not have one definition for recognized tribes until 1978, when the Department of the Interior created the Branch of Acknowledgment and Research to process tribal petitions for official recognition. (1979) 44 F.R. 7235. Thus, a number of tribes, including California tribes, found themselves excluded in the new approach to identifying Indian and tribes and are still in the process of applying for official (Part 83) recognition.

Degree of Indian Blood documents from the BIA confirming their Indian status, may continue to qualify for some federal Indian services, and in some cases continue to hold interests in lands held in trust by the United States for their benefit as Indians.

Response to the unique circumstance of California Indians and tribes is evolving, with special legislation and litigation addressing the problem. Nevertheless, as a consequence of this unique history, many California Indians may not be affiliated with a tribe listed in the federal register, but may still be entitled to treatment as Indians for some purposes.[7] The circumstances of Indians in California renders Indian status determinations one of the most controversial and complex areas of ICWA implementation.

c. Non-federally Recognized Tribes and the Spirit of ICWA

California Senate Bill 678 was passed in 2006 and codified in the Family, Probate, and Welfare and Institutions codes. It included section 306.6 of the Welfare and Institutions Code, which is commonly referred to as implementing "the Spirit of ICWA."

California Welfare and Institutions Code § 306.6

(a) In a dependency proceeding involving a child who would otherwise be an Indian child, based on the definition contained in paragraph (4) of Section 1903 of the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), but is not an Indian child based on status of the child's tribe, as defined in paragraph (8) of Section 1903 of the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), the court may permit the tribe from which the child is descended to participate in the proceeding upon request of the tribe.

(b) If the court permits a tribe to participate in a proceeding, the tribe may do all of the following, upon consent of the court:
(1) Be present at the hearing; (2) Address the court; (3) Request and receive notice of hearings; (4) Request to examine court documents relating to the proceeding; (5) Present information to the court that is relevant to the proceeding; 6) Submit written reports and recommendations to the court; and, (7) Perform other duties and responsibilities as requested or approved by the court.

(c) If more than one tribe requests to participate in a proceeding under subdivision (a), the court may limit participation to the tribe with which the child has the most significant contacts . . .

(d) This section is intended to assist the court in making decisions that are in the best interest of the child by permitting a tribe in the circumstances set out in subdivision (a) to inform the court and parties to the proceeding about placement options for the child within the child's extended family or the tribal community, services and programs available to the child and the child's parents as Indians, and other unique interests the child or the child's

[7] See, e.g., Indian Health Care Improvement Act, 25 U.S.C. 1679(b), special California Indian eligibility definition.

WIC § 306.6 (continued)

parents may have as Indians. This section shall not be construed to make the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), or any state law implementing the Indian Child Welfare Act, applicable to the proceedings, or to limit the court's discretion to permit other interested persons to participate in these or any other proceedings.

(e) The court shall, on a case-by-case basis, make a determination if this section is applicable and may request information from the tribe, or the entity claiming to be a tribe, from which the child is descended for the purposes of making this determination, if the child would otherwise be an Indian child pursuant to subdivision (a).

Section 306.6 responds to the special case of California just discussed. It allows non-federally recognized tribes, on request and at the discretion of the judge in the dependency matter, to participate in the case. Because juvenile cases are confidential, without Section 306.6 a non-federally recognized tribe is precluded from participating, even though that participation could expand both the availability of relevant information to the court and options for culturally appropriate services to children from non-federally recognized tribes.

A number of child welfare policies encourage or require respect for a child's ethnic identity and provision of culturally appropriate services. These requirements apply to all children, including children with Indian ancestry, regardless of membership or citizenship in a federally recognized tribe. However, for children of Indian ancestry, the effect of this heritage may be different due to the impact of federal law.

As an example, the definition of Indian child remains one of the most difficult and least understood concepts within the ICWA. This, in significant part, is because the singular definition set forth in 1903(4) is not the only definition in the Act. Two other definitions of Indian exist within the ICWA, each broader in scope than the section 1903(4) definition. Tribes also have an opportunity to impact the definition of Indian child via their particular and varying rules governing "membership."
The ICWA definitions include all of the following:

1. The definition section of the ICWA defines Indian child as **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. 25 U.S.C. §1903(4).**

2. The second definition of Indian is alluded to but not explicitly set forth in 25 U.S.C. §1912(a). The section states that where **the court "knows or has reason to know" that an Indian child is involved in the proceedings**, the notice requirements of the Act are triggered. Federal regulations effective in 2016 further clarify that the child is to be treated as an Indian child unless and until it is determined on the record that the child does not meet the definition of "Indian child" set forth previously.

3. The third definition applies only to Title II of the Act, governing grants and funding for off-reservation services. 25 U.S.C. §1934 specifies that for the purposes of off-reservation programs, the term "Indian" is defined in 25 U.S.C. §1603(c). Section 1603(c) sets forth the broader Indian Health Care Improvement Act definition of "Indian." It defines an Indian as any person who is a member of an Indian tribe, except that for health related services, the term means **any individual who (1) irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the state in which they reside, or who is a descendant, in the first or second degree, of any such member; or (2) is an Eskimo or Aleut or other Alaska Native; or (3) is considered by the Secretary of the Interior to be an Indian for any purpose; or (4) is determined to be an Indian under regulations promulgated by the Secretary. (25 U.S.C. § 1603(c).[8])** An Indian need not be a member of a tribe and an Indian tribe need not be recognized in order for its members to receive services from the United States under this definition. Thus, for purposes of funding services to Indian children, the definition of "Indian" is both broad and complex.

[8] The issue of defining Indians in California is even more complex. 25 U.S.C. §1679(b) modifies the §1603(c) definition. The Indian Health Care Improvement Act contains a special eligibility definition for California Indians which includes 1) Any member of a federally recognized Indian tribe; 2) Any descendant of an Indian who was residing in California on June 1, 1852, but only if such descendant (A) is living in California, (B) is a member of the Indian community served by a local program of the Service, and (C) is regarded as an Indian by the community in which such descendant lives; 3) Any Indian in California who holds trust interests in public domain, national forest, or Indian reservation allotments in California; and 4) Any Indian in California who is listed on the plans for distribution of the assets of California rancherias and reservations under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian.

Practice Tip: *The ICWA requires the application of special laws to Indian children as defined in §1903 of the Act. The ability to do this is, in significant part, based on the unique political status of the child as a member/citizen of a federally recognized tribe. Applying different laws based on race or ethnicity would be unconstitutional under federal law. However, given the complex system of federal Indian law, and because of the broad definition applicable to Indian child and family programs funded under the ICWA, a tribal program may provide services to Indians and Indian children who are* ***not*** *members of their tribe, nor in some cases affiliated with tribes that are federally recognized. Two things to keep in mind about this:*

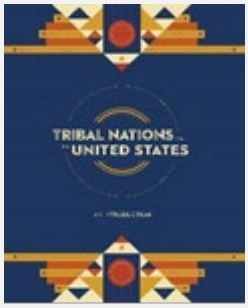
1. *An Indian or tribal representative may participate in a child custody case as a service provider, versus as a representative of an Indian child's tribe. Hence, the status of tribal or Indian program representatives should not simply be assumed. Clarify the capacity and authority of all participants in a proceeding. See, California Rules of Court, rule 5.534(e).*

2. *While a child affiliated with a non-federally recognized tribe may qualify for treatment as an Indian in some instances, this is not a matter of racial or cultural self-identification, but pursuant to federal law and historic interactions that provide standards and a documentary basis for determining eligibility.*

All of these definitions are potentially complicated by the rules and processes of the child's Tribe. Some tribes have sophisticated systems with specific membership criteria and evidentiary presumption, as well as computerized enrollment data. Others can have less formal enrollment processes and make membership determinations based on other approaches. Of course, the determination of whether a child is Indian is not a racial one, but rather a question of political status, and a tribe's determination that a child is an Indian child under ICWA is conclusive. (25 C.F.R. §23.108.) The role of tribes in membership determinations requires that tribes be consulted and the final answer in an Indian status determination may vary depending upon the law of the particular tribe.

Additional information on Indians and tribes may be found in the Learning Resource on the following page.

Learning Resource



Tribal Nations and the United States: An Introduction

National Congress of American Indians

(Additional information providing a more in-depth orientation to Indians and Tribes in the United States).

This desk reference provides:

- A basic overview of the history and underlying principles of tribal governance
- Introductory information about tribal governments and American Indian and Alaska Native people today

Table of Contents includes subjects discussed in this section and provides an orientation to tribal operations with subjects such as:

- Tribal Governance
- Systems of Governing
- Federal Funding
- Health Care
- Education

LOCATE GUIDE HERE: http://www.ncai.org/about-tribes

3. ICWA Policy and Legislative History

The ICWA implements the federal government's trust responsibility to tribes and Indian people by protecting and preserving the bond between Indian children and their tribe and culture. Congress passed the ICWA to address the misuse of state child protection power to remove Indian children and place them with non-Indian families. By maintaining the connection between Indian children and their tribes, the ICWA protects the best interests of Indian children and promotes the stability and security of Indian tribes and families. Numerous courts have ruled that the ICWA is constitutional. The state of California has endorsed the ICWA and enacted complementary state laws.

California Welfare and Institutions Code, Section 224

(a) The Legislature finds and declares the following:

(1) There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members or citizens of, or are eligible for membership or citizenship in, an Indian tribe. The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.) and other applicable state and federal law, designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.

(2) It is in the interest of an Indian child that the child's membership or citizenship in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of an Indian child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled.

(b) In all Indian child custody proceedings, as defined in the federal Indian Child Welfare Act the court shall consider all of the findings contained in subdivision (a), strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act of 1978 and other applicable federal law, and seek to protect the best interest of the child…

a. The Problem Leading to Passage of the ICWA

Congressional hearings in the mid-1970's revealed a pattern of wholesale public and private removal of Indian children from their homes, undermining Indian families, and threatening tribal survival and Indian culture.[9] At the national level:

- Indian children were placed in foster care or for adoption at **three times the rate of non-Indian children.**
- Approximately **25-35 percent of all Indian children were removed** from their homes and placed in foster homes, adoptive homes, or institutions.[10]

[9] Indian Child Welfare Program, Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. 3 (1974) (statement of William Byler).
[10] H.R. Report No. 1386, 95th Cong., 2d Sess. (1978).

In California:

- public agencies placed over **eight times as many Indian children** than non-Indian children in adoptive homes.
- **Over 90 percent** of California Indian children subject to adoption were placed in non-Indian homes.
- **One of every 124 Indian children** in California was in a foster home, compared to a rate of one in 337 for non-Indian children.

Congress determined that Indian children who had been placed for adoption into non-Indian homes **frequently suffered serious adjustment problems during adolescence.**[11] Indian children had to cope with the overwhelming problems of adjusting to a social and cultural environment much different than their own. They were not accepted in non-Indian communities, and they were torn away from their Indian families and tribes.

In 1978, Congress concluded "that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical for our society as a whole."[12] **This resulted from states failing to recognize the essential tribal relations of Indian people and the different cultural standards regarding extended family which prevail in Indian communities.**[13] Congress passed the ICWA to remedy these "abusive child welfare practices."[14]

b. The "Best Interest" Test

The ICWA revolutionized the "best interest" test in the context of Indian children. Although, the ICWA leaves in place the best interests of the child standard for child custody proceedings, the Act shifts the focus of the standard where an Indian child is involved. Under the federal standard, the best interests of Indian children are served by protecting "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."[15] Federal policy protects the best interests of Indian children by preserving Indian families and the connection between tribes and their children.

Most states use the "best interests of the child" standard in child custody proceedings. Generally, the best interests of a child is deemed to be a stable placement with an adult who becomes the psychological parent.[16] In passing the ICWA, Congress was

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[11] Indian Child Welfare Program, Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. 75-83 (1974).
[12] H.R. Report No. 1386, 95th Cong., 2d Sess. (1978).
[13] 25 U.S.C. §1901(5); H.R. Report No. 1386, 95th Cong., 2d Sess. 10-12 (1978).
[14] *Mississippi Choctaw v. Holyfield* (1989) 490 U.S. 30, 32.
[15] H.R. Report No. 1386, 95th Cong., 2d Sess. 23 (1978).
[16] *See, e.g.,* J. Goldstein, et al., Beyond the Best Interests of the Child (1979) p. 53.

concerned that states were applying the best interest standard to the detriment of Indian children and found the vagueness of the standard especially problematic. Using the best interest standard, state officials made subjective value decisions about Indian families without taking into account cultural differences in child rearing or the essential tribal relations of Indian people.[17] To rectify this situation, Congress included in the ICWA a federal statutory best interest standard for Indian children.

In the ICWA, Congress declared that it is the official policy of the federal government "to protect the best interests of Indian children." 25 U.S.C. §1902. This policy is carried out by following four important objectives of the Act:

- Jurisdictional provisions and intervention rights designed to enhance tribal control and involvement in Indian child custody cases;
- The adoption of minimum federal standards for the removal of Indian children from their families;
- The placement of Indian children in Indian homes; and
- The support of tribal child and family service programs.

Congress concluded that proper implementation of the ICWA, achieves the best interests of the American Indian child.[18]

Congressional findings set forth in the ICWA include that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the *essential tribal relations* of Indian people and the *cultural and social standards* prevailing in Indian communities and families." (emphasis added).[19] This finding sets forth two important but distinct considerations that underlie the provisions of the Act.

Cultural considerations, and concern for tribal heritage are relevant to a proper application of the Indian Child Welfare Act. Assessment, treatment and placement standards require adherence to cultural dictates. However, the Act acknowledges a *special relationship* between tribes and the federal government and seeks to protect *essential tribal relations*. Indians as members of tribes are not simply separate racial or cultural groups, but also separate **political** groups.[20] The Act is very much concerned with these legal/political relationships. Indian tribes stand in a government to government relationship with the United States.[21] An Indian child is a "citizen" of a tribe and entitled to the incidents of that status as determined both by the laws of the federal government and the tribe. The Indian child has an interest in his or her tribe that

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[17] H.R. Report No. 1386, 95th Cong., 2d Sess.19 (1978).
[18] H.R. Report No. 1386, 95th Cong., 2d Sess. 19 (1978).
[19] 25 U.S.C. §1901 (5).
[20] *See*, *Morton v. Mancari* (1974) 417 U.S. 535.
[21] *See*, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe* (1991) 111 S.Ct. 905.

Congress has sought to protect by the imposition of minimum federal standards, in order to assure that cultural bias and misunderstanding does not adversely impact an Indian child's relationship with his or her Indian family and tribe. A state may not justify the destruction of Indian families and tribes by casting its actions in undefined terms of "best interest." What the Act attempts to do is to eliminate biased subjectivity by imposing minimum standards for state court proceedings. As a matter of federal law as well as conforming California law, if these standards are met, the best interests of Indian children will be advanced. If they are not, then the action is not in the best interest of the Indian child regardless of the belief of state officials to the contrary. ***ICWA compliance = best interest of an Indian child.***

c. Constitutionality

The ICWA has survived numerous constitutional challenges by parties claiming that the Act constitutes disparate treatment based on race.[22] The Constitution of the United States establishes principles that require equality under the law. However, Indians are subject to many laws that apply only to Indian people. The courts have allowed this primarily on the basis that federally recognized tribes and citizens of those tribes are treated differently on the basis of their unique "political" status and not on the basis of race. The principle case confirming the permissibility of this situation was a case involving laws allowing Indian employment preferences.

Indian employment preference means discrimination in favor of Indians. Why is this permitted? A group of non-Indian BIA employees asked this question in 1974. Their case *Morton v. Mancari*, was presented to the U.S. Supreme Court. *Morton v. Mancari* (1974) 417 U.S. 535. There, the judges unanimously agreed that Indian Employment Preference is acceptable because of the unique nature of Indians and tribes.

> (Indian employment preference) does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government. . . The preference, as applied, is granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.

What makes tribes so special are *political* facts, not racial or cultural facts. A tribe is an ethnic group - - a cultural entity - - but also has the political right to self-government. Statutes passed for Indians may have incidental benefits of advancing Indian religion, culture, race, etc. but because they are based on the unique relationship between tribes (as political entities) and the federal government, they do not illegally discriminate.

The general approach to ICWA applicability focuses on members/citizens of federally recognized tribal nations. The child's tribal nation, by virtue of this political relationship, is entitled to exercise governmental authority with respect to their member/citizen children. However, a few provisions are broader in scope, such as the adoptive

[22] *Morton v. Mancari* (1974) 417 U.S. 535, 555.

placement preferences. These preferences include both "other members of the Indian child's tribe" and "other Indian families." But even here, the criteria is not racial, because the ICWA defines *Indian* as a member of a federally recognized tribe. Thus, both the child and the other Indian family both enjoy a unique political status that the provision is rationally based on. The U.S. Supreme Court, considering cases like this, has held such provisions permissible as an outgrowth of the entire legal structure dealing with Indians.[23]

4. General Overview of the ICWA — A Multifaceted Statute

In 1978, Congress passed ICWA (25 U.S.C. 1901, et seq.) to protect the best interests of Indian children and promote the stability and security of Indian tribes and families. The Indian Child Welfare Act is a multi-faceted and powerful statute that includes provisions addressing all of the following:

- Tribal Rights and Opportunities
- Indian Social and Cultural Considerations
- Minimum Federal Standards for State Court Proceedings

A. Tribal Rights and Opportunities (25 U.S.C. §§1903, 1911, 1918, 1919)

- JURISDICTIONAL PROVISIONS. ICWA provides for exclusive tribal control over Indian child custody cases in some circumstances and for transfers of cases from a state court to the tribe in others.[24]

- FULL FAITH AND CREDIT. The United States, every State, and every Indian tribe must give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent as that given to any other entity.[25]

- REASSUMPTION. Tribes that may not have previously operated judicial systems are provided an opportunity to **reassume** jurisdiction, including exclusive jurisdiction.[26] This process is optional and is *not* required before a tribe may exercise concurrent jurisdiction over Indian child custody cases and transfer an Indian child custody case to its tribal system.

- INTERVENTION IN STATE COURT. Tribes are authorized to intervene as

[23] United State v. Antelope (1977) 430 U.S. 641.
[24] 25 U.S.C. §1911 (a) and §1911(b)
[25] 25 U.S.C. §1911 (d)
[26] 25 U.S.C. §1918

parties in state custody cases, at any point in a state court Indian child custody proceeding. This includes confidential juvenile proceedings.[27]

- MINIMUM FEDERAL STANDARDS. The ICWA sets forth minimum federal requirements for Indian child custody proceedings *in state courts*. These are federal requirements that must be followed whenever a state court decides child custody cases covered by the ICWA. These standards must be followed whether or not a tribe becomes involved in a state court Indian child custody case.[28] Various provisions of the ICWA provide that tribes may alter provisions, including various definitions and placement preferences, that must then be applied by the state court.

- AGREEMENTS. The ICWA authorizes agreements between states and tribes.[29]

- TRIBAL HOME APPROVAL. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State. [30]

B. Social/Cultural Components (§§1903, 1912, 1915)

Programs. The primary social/cultural component of the Act, Title II, authorizes grants for establishment and operation of Indian Child and family service programs.[31]

- The objective of authorized programs is to prevent the breakup of Indian families, with removal a last resort. Activities identified as appropriate for this objective are very broad ranging from home improvement programs to licensing or regulating Indian foster and adoptive homes.

- This section specifies that for purposes of qualifying for assistance under a federally assisted program (such as Title IV-E Foster Care), "licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State."

- Grants are authorized for both tribes on or near their reservations as well as for off-reservation programs. Tribal services are not limited only to tribal members. And a special definition of "Indian" is set out for eligibility for off-reservation programs. This definition is the one that applies to Indian Health Programs and it is not limited to only members of federally recognized tribes.

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[27] 25 U.S.C. §1911 (c)
[28] 25 U.S.C. §1912, 1913, 1915, 1916, 1917, 1920, 1921, and 1922
[29] 25 U.S.C. §1919
[30] 25 U.S.C. §1931 (B)
[31] 25 U.S.C. §1931, §1932

Tribal Law and Culture Acknowledged in Federal Standards. The minimum federal standards for state court proceedings require that states defer to Indian social and cultural standards in several instances.

- Placement and treatment/services assessments must consider Indian social and cultural standards.[32]

- Tribes have opportunities to influence or alter the standards that must be applied by state courts. For example, the definition section of the ICWA, defines a number of terms "as defined by tribal law or custom," and only in the absence thereof, as set forth in the Act.[33]

C. Minimum Federal Standards for State Court Child Custody Proceedings. (§§1911 – 123)

The ICWA imposes minimum federal standards for state court Indian child custody proceedings.

- They apply to state court proceedings and do not apply to tribal proceedings unless the tribe chooses to enact them.

- They apply in a state case whether or not a tribe intervenes or otherwise appears in court or is involved with the case.

- All the minimum federal standards apply when two basic requirements are met: 1) the case involves a child that is an Indian child as defined in the Act or a child that there is reason to know is an Indian child, and 2) the proceeding is one covered by the Act.

- In general, the ICWA covers both voluntary and involuntary proceedings regarding foster care placement, termination of parental rights, and adoption of an Indian child. Custody decisions between parent's incident to divorce and most juvenile delinquency proceedings are not generally covered by the Act.

One of the more complex pieces of federal legislation ever passed, the ICWA significantly impacts child custody litigation and procedures involving Indian children. Under the ICWA, Indian tribes and parents are guaranteed procedural and substantive safeguards in custody proceedings involving Indian children that include all of the protections discussed below.[34]

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[32] 25 U.S.C. §1912; §1915.

[33] 25 U.S.C. §1903, §1912, §1915

[34] The summary of ICWA protections summarized her reflects the Judicial Council of California Job Aid *Indian Child Welfare Act (ICWA) Requirements* available in the appendices to this Desk Reference and online here: https://www.courts.ca.gov/documents/ICWARequirements.pdf

Applicability.[35] ICWA applies to any state court case involving an Indian child that may result in:

- A voluntary or involuntary foster care placement;
- Guardianship placement;
- Custody placement under Family Code section 3041;
- Declaration freeing a child from the custody and control of one or both parents;
- Termination of parental rights; or
- Voluntary or involuntary adoptive placement

This includes all proceedings under WIC sections 300 et seq. as well as under WIC 601 and 602 et seq. when the child is in foster care or at risk of entering foster care and one of the following applies: 1) the proceedings are based on conduct that would not be a crime if committed by an adult, 2) the court is setting a hearing to terminate parental rights, or 3) the court finds that the foster care placement is based entirely on conditions within the child's home and not even in part upon the child's criminal conduct.

Emergency Proceedings.[36] Without complying with the minimum federal standards, the state may make an emergency removal of an Indian child only when such removal is necessary to prevent imminent physical damage or harm to the child. If the child resides on or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, the placement must be terminated as soon as the imminent physical damage to the child no longer exists. Alternatively, if a child is not returned, a proceeding must be initiated in compliance with requirements of the ICWA.

California law designates the Detention hearing as an emergency removal under ICWA, provides for an ex parte request for return of the child when the emergency has ended, and requires the agency to make active efforts to comply with placement preferences upon detention when there is reason to believe the child is an Indian child. The agency must demonstrate due diligence in efforts to work with tribes to confirm the child's Indian status and comply with ICWA requirements.

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[35] 25 U.S.C. §§1901-1923, 1903(i); 25 C.F.R. §§23.2, 23.103, 23.107; Guidelines B.1 & B.2; W.I.C. §§224.1, 224.3; Fam. Code §170; Prob. Code, §§1459.5(a), 1516.5(d); Rule 5.480

[36] 25 U.S.C. §1922; Detention: W.I.C. §309(a)(3); §315 [hearing under 319 considered an emergency removal]; §319(b), (d), (e) & (i); §319.4 [ex parte request for return when emergency has ended]; §11462.022 [agency must make active efforts to comply with placement preferences upon detention when there is reason to believe child is an Indian child] Due diligence to work with tribes: §224.2 (g) §224.2 (i)(2). Emergency proceeding: §224.1 (l); §305.5 (g); §306 (c); §315; §319 (b), (d), (e) & (i); §319.4 [Ex parte request for return when emergency has ended]; §361.31(b)

Indian Child.[37] An Indian child is an unmarried person under the age of 18 who is (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is a biological child of a member of an Indian tribe. Under California law the term Indian child may also include a person over 18, but under 21, years who is a dependent of the court unless that person elects not to have ICWA apply.

- A determination by a tribe or the Bureau of Indian Affairs (BIA), absent a determination by the tribe to the contrary, that a child is or is not a member or eligible for membership is conclusive.

- The child is NOT required to be affiliated with the same tribe the parent is a member of. (25 U.S.C. §1903(4)).

- Enrollment is NOT required to establish membership unless the tribe confirms that enrollment is required. (WIC, §224.2(h))

Indian Custodian.[38] An Indian Custodian is any person who has legal custody of an Indian child under tribal law or custom or state law or to whom temporary physical care, custody, and control has been transferred by the parent. There does not have to be any paperwork or formal documents establishing an Indian custodianship.

Intervention/Invalidation.[39] An Indian custodian, and Indian child's tribe have the right to intervene at any point in the proceeding. If ICWA applies, the Indian child, parent, Indian custodian, or the child's tribe may petition any court of competent jurisdiction to invalidate the proceedings for not complying with the requirements of sections 1911 (jurisdiction; transfer; intervention; full faith and credit to public acts, records, and judicial proceedings of Indian tribes), 1912 (notice, appointment of counsel, examination of reports or other documents, active efforts, qualified expert witness testimony) or 1913 (consent requirements) of ICWA.

Inquiry.[40] In all child custody proceedings, the court and the petitioner, including a social worker, a probation officer, a licensed adoption agency or adoption service provider, or an investigator must ask the child, the parents or legal guardians, Indian custodian and extended family members as soon as possible whether there is information indicating the child is or may be an Indian child and must affirm on the petition that inquiry has been made. If that initial inquiry gives *reason to believe* the child is an Indian child, further inquiry regarding the possible Indian status of the child must be done as soon as practical. This further inquiry must include at a minimum interviewing the parents, Indian custodian and extended family members to gather

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[37] 25 U.S.C. §1903(4); 25 C.F.R. §23.2; Guideline B.1; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a) & (b)

[38] 25 U.S.C. §1903(6); 25 C.F.R. §23.2; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a)

[39] 25 U.S.C. §§1911(c), 1914; Fam. Code, §§175(e), 177(a); Prob. Code, §§1459(e), 1459.5(b); WIC, §§224(e), 224.4; Rules 5.482(d) & 5.487

[40] 25 C.F.R. §23.107(a); Fam. Code, §177(a); Prob. Code, §§1459.5(b), 1513(h); WIC, §224.2; Rules 5.481(a) & (b); 5.482(c) & 5.668(c)

ancestry information, contacting the CDSS and the BIA for assistance in identifying tribes and tribal contact information, contacting others that may reasonably be expected to have information about the child's status, and contacting tribe(s) by telephone, facsimile or email and sharing with the tribe(s) any information the tribe(s) require to make a determination about the child's status. In all child custody cases, at their first court appearance, the parent or guardian must be ordered to complete Parental Notification of Indian Status (form ICWA-020), and the court must ask all participants whether they have information indicating the child is or may be an Indian child and instruct them to inform the court if they subsequently receive such information.

Reason to Know the Child Is an Indian Child.[41] The following circumstances give "*reason to know*" the child is an Indian child:

1. A person having an interest in the child provides information suggesting that the child is an Indian child;

2. The residence or domicile of the child, the child's parents, or an Indian custodian is on a reservation or other tribal lands or in an Alaska Native village;

3. The child is or was a ward of a tribal court; or

4. Either parent or the child possesses an I.D. card indicating membership in an Indian tribe.

If there is "reason to know," the court must require the petitioner to provide evidence that the petitioner has used due diligence to identify and work with all tribes the child may be affiliated with to verify the child's status; require formal ICWA notice by registered or certified mail return receipt requested as discussed below; and must *treat the child as an Indian child unless and until the court can confirm that the child is not an Indian child* in accordance with WIC § 224.2(i)).

Notice.[42]

- When: For any hearing that may culminate in an order for foster care placement, including a guardianship placement, termination of parental rights or declaration freeing the child from the custody and control of one or both parents, pre-adoptive placement or adoptive placement*, when it is known or there is "reason to know"* the child is an Indian child.

- How: Party seeking foster care placement, guardianship, termination of parental rights, or order declaring the child free from the custody and control of one or both parents, must notify the parent(s), Indian custodian, and the tribe(s) that there is reason to know the child is a member of or eligible for membership in, of

[41] 25 C.F.R. §23.107(c); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.2(d); Rule 5.481(b)

[42] 25 U.S.C. §1912(a); 25 C.F.R. §§23.11 & 23.111; Guidelines D.1-D.7; Fam. Code, §180; Prob. Code, §1460.2; WIC, §§224.3, 727.4(a)(2); Rule5.481(c)

the pending proceedings by registered or certified mail, return receipt requested as specified in Fam. Code, §180, Prob. Code, §1460.2, or WIC, §224.3. Notice of Involuntary Child Custody Proceedings for an Indian Child (form ICWA-030) is required to be completed and sent for all cases except excluded delinquency proceedings, for every hearing that may culminate in one of the outcomes listed above. In addition to the information included on form ICWA-030, the party must also include:

1. Information regarding the Indian child's Indian custodian including: all known names, including maiden, married, former, and aliases; current and former addresses; birthdates; places of birth and death; tribal enrollment numbers; and any other identifying information, if known.

2. A copy of the child's birth certificate if available.

3. A copy of the petition by which the proceeding was initiated.

4. The location, mailing address, and telephone number of the court and all parties notified.

5. When a child's Indian tribe is identified, the tribe is entitled to notice of all other hearings and service of all documents in the same manner as all other parties.

Active Efforts.[43] The party seeking an involuntary foster care placement, guardianship, order freeing the child from the custody and control of one or both parents, or termination of parental rights must provide evidence to the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts were unsuccessful.

- What constitutes active efforts is assessed on a case-by-case basis and may vary depending on the facts and stage of a case. Examples of active efforts are set out in the federal ICWA regulations.

- Active efforts must be affirmative, active, thorough, and timely.

- If an agency is involved, active efforts must begin at first contact with the family when there is reason to know the child may be an Indian child.

- If an agency is involved, active efforts must include assisting the parents through

  the steps of a case plan and accessing or developing the resources necessary to satisfy the case plan.

[43] 25 U.S.C. §1912(d); 25 C.F.R. §§23.2 & 23.120; Guidelines E.1-E.6; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§ 224.1(f), 361.7; Rule5.485(c)

- Active efforts must consider the prevailing social and cultural values and way of life of the Indian child's tribe.

- Active efforts must include the available resources of extended family members, the tribe, Indian social service agencies, and individual Indian caregivers.

- Active efforts must be documented in detail in the record.

Qualified Expert Witness (QEW) Testimony.[44]

Many issues may arise in an Indian child custody proceeding where the testimony of an expert may be appropriate. Because the Act involves tribal law and Indian standards, not subjects within the common experience of most state court judges, any issue involving such matters may benefit from expert testimony. However, there are mandatory findings that must be made where expert testimony is particularly appropriate or required. These include the services requirements of section 1912 (d) of the Act (active efforts to provide services to prevent break-up of the Indian family), and the expert witness requirement of section 1912 (e) and (f) that support placement or termination of parental rights. To involuntarily order foster care or adoptive placement, guardianship or terminate parental rights, when the child is an Indian child or there is reason to know the child is an Indian child, the court must require testimony of a QEW regarding whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical damage. The QEW cannot be an employee of the person or agency seeking the foster care placement or termination of parental rights. For a more detailed discussion of QEW requirements, see ACIN No. I-40-10, *Requirement of the Use of an Expert Witness by the Indian Child Welfare Act*.

Amendments to California law that took effect in 2019 have further clarified qualifications for a QEW and for how the QEW's qualifications can be confirmed. (W.I.C. §224.6.)

Persons most likely to meet the requirements for a QEW are:

1. A person designated by the tribe as being qualified to testify to the prevailing social and cultural standards of the tribe

2. A member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices;

3. An expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and

[44] 25 U.S.C. §1912(e); 25 C.F.R. §§23.121 & 23.122; Guidelines G.1 & G.2; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§224.6, 361.7(c); Rule 5.485(a)

cultural standards and child-rearing practices of the Indian child's tribe.

The court may accept a declaration or affidavit from a QEW in lieu of testimony only if the parties stipulate in writing and the court is satisfied that the stipulation is made knowingly, intelligently, and voluntarily.

Placement Preferences.[45] The following placement preferences and standards must be followed whenever there is reason to know the child is an Indian child and the child is removed from the physical custody of his or her parents or Indian custodian. The court must analyze the availability of placements within the preferences in descending order without skipping.

Foster Care, Guardianships, and Custody to Non-parent:

- The court must order the least restrictive setting that most approximates a family situation within reasonable proximity to the child's home and meets the child's special needs, if any.

- Preference must be given in the following order:

  1. A member of the child's extended family as defined in 25 U.S.C. §1903(2);

  2. A foster home licensed, approved, or specified by the Indian child's tribe;

  3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority;

  4. An institution approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

Adoptive Placements:

- Preference must be given in the following order:

  1. A member of the Indian child's extended family as defined in 25 U.S.C. §1903(2);

  2. Other members of the Indian child's tribe;

  3. Another Indian family. For both foster care and adoptive placements, the tribe may establish a different preference order by resolution. This order of preference must be followed if it provides for the least restrictive setting.

[45] 25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §361.31; Rule5.485(b)

Placement Standards and Records.[46]

- The preferences of the child (if old enough) and the parent(s) must be considered.

- Placement standards must be the prevailing social and cultural standards of the child's tribe or the Indian community in which the parent or extended family member resides, or extended family member maintains social and cultural ties.

- A determination of the applicable prevailing social and cultural standards may be confirmed by the Indian child's tribe or QEW testimony.

- CDSS must maintain a record of each placement of an Indian child.

- CDSS must also maintain evidence of efforts to comply with the placement preferences whenever the placement deviates from the preferences.

Good Cause to Deviate from the Placement Preferences.[47] The court may deviate from the placement preferences listed above only upon a finding of good cause.

- If a party asserts there is good cause to deviate from the placement preferences those reasons must be contained in the record either orally or in writing. The party requesting a different order has the burden of establishing good cause.

- The court may base a decision to deviate from the placement preferences on:

  1. The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

  2. The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

  3. The presence of a sibling attachment that can be maintained only through a particular placement;

  4. The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

  5. The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located.

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[46] 25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; Fam. Code, §§177(a), 3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361(c)(6), 361.31, 361.7(c), 366.26(c)(2)(B); Rule5.484(b)(1)

[47] 25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; WIC, §361.31(h); Rule5.484(b)(2) & (3)

- The standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

- A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement. A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Burden of Proof and Qualified Expert Witness.[48] The burden of proof to place a child in foster care, appoint a guardian, and award custody to a non-parent is clear and convincing evidence, including testimony of a qualified expert witness establishing that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The burden of proof to terminate parental rights is beyond a reasonable doubt, including testimony of a qualified expert witness establishing that continued custody of the child by the child's custodian is likely to result in serious emotional or physical damage to the child.

Adoption.[49] The court must provide the Secretary of the Interior a copy of the adoption order and other information needed to show: 1. the name and tribal affiliation of the Indian child; 2. the names and addresses of the biological parents; 3. the names and addresses of the adoptive parents; 4. the identity of any agency having files or information relating to such adoptive placement; 5. any confidential parent affidavits; and 6. any information relating to tribal membership or eligibility for tribal membership of the adopted child. At the request of an adopted Indian child over the age of 18, the court must provide information about the individual's tribal affiliation, biological parents, and other information as may be necessary to protect any rights flowing from the individual's relationship to the tribe.

Jurisdiction and Transfer.[50] Exclusive Jurisdiction: If an Indian child is a ward of the tribal court or resides or is domiciled on a reservation of a tribe that exercises exclusive jurisdiction, notice must be sent to the tribe by the next working day following removal. If the tribe determines that the child is under the exclusive jurisdiction of the tribe, the state court must dismiss the case and ensure that the tribal court is sent all information regarding the Indian child-custody proceeding, including the pleadings and any court record. Transfer to Tribal Jurisdiction: If the above exclusive jurisdiction does not apply, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribal jurisdiction. The court must transfer the proceedings unless there is good

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[48] 25 U.S.C. §1912(e), (f); 25 C.F.R. §23.121; Guideline G.1; Fam. Code, §§3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361.7(c), 366.26(c)(2)(B); Rule5.484(a)

[49]25 U.S.C. §§1917, 1951; 25 C.F.R. §23.140; Guideline J.2; Fam. Code, §9208; Rule 5.487

[50] 25 U.S.C. §1911(a), (b); 25 C.F.R. §23.110; Guidelines F.1-F.6; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §305.5 Rule 5.483

cause not to do so. Either parent may object to the transfer, or the tribe may decline the transfer of the proceedings.

Right to Counsel.[51] The parent, Indian custodian, or Indian guardian, if indigent, has the right to court-appointed counsel.

Examination of Reports and Documents.[52] The parent, Indian child, Indian custodian, tribe, and their attorneys have the right to examine all court documents related to the Indian child-custody case.

Full Faith and Credit.[53] Full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe is required.

Right to Additional Time.[54] With the exception of an emergency proceeding as defined in 25 C.F.R. §23.113 the court cannot go ahead with a hearing that meets the definition of "child custody proceeding" under ICWA until 10 days after receipt of notice by tribe(s) and BIA and must grant 20 extra days for preparation if requested.

[51] 25 U.S.C. §1912(b); Fam. Code, §180(b)(5)(G)(v); Prob. Code, §1474; WIC, §317(a)(2)
[52] 25 U.S.C. §1912(c); Fam. Code, §177(a); Prob. Code, §1459.5(b)
[53] 25 U.S.C. §1911(d); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.5
[54] 25 U.S.C. §1912 (a); 25 C.F.R. §23.112; Fam Code §180(e); Prob. Code §1460.2(e); WIC §224.2(d); Rule5.482(a)

Learning Resource

San Francisco Human Services Agency
INDIAN CHILD WELFARE ACT
Social Worker Manual

The 2020 San Francisco Human Services Agency the ICWA Social Worker Manual was created from the adaptation of the 2016 Fresno County the ICWA Social Worker Manual. It is an applied 146-page manual that addresses subjects identified as important for social workers to understand and presented specifically for the social worker audience. This includes information relating to historic trauma and cultural issues.

The Manual table of contents includes all of the following:

I. Background

II. History of San Francisco and California Indians

III. Tribal Sovereignty and Cultural Awareness

IV. Rights of Tribes

V. Overview of the Indian Child Welfare Act (ICWA)

VI. Inquiry and Identification of Indian Children

VII. Notice

VIII. Active Efforts

IX. Placement Preferences

X. Qualified Expert Witness

XI. Court

XII. Department's Ongoing Duties Under the ICWA

XIII. San Francisco Specific Resources and Services

XIV. The ICWA Checklist

XV. Forms and Information Sheets

LOCATE THE MANUAL ON THE CALIFORNIA COURTS WEBSITE HERE:
https://www.courts.ca.gov/documents/sf_ICWA_social_worker_manual.pdf

INDIAN CHILD WELFARE ACT DESK REFERENCE:

SECTION III. OPERATIONAL ICWA INFORMATION FOR SOCIAL WORKERS

CHAPTER 31-200 ASSESSMENT AND CASE PLAN

CHAPTER 31-300 SERVICE DELIVERY

CHAPTER 31-000 GENERAL REQUIREMENTS

CHAPTER 31-400 PLACEMENT

CHAPTER 31-100 INTAKE

CHAPTER 31-500 SPECIAL REQUIREMENTS

III. Operational ICWA Information for Social Workers

The ICWA has been law for more than 40 years. Historically, MPP Division 31, the Child Welfare Services regulations, addressed the ICWA briefly in the Special Provisions section contained at the end of the MPP. In 2016, provisions addressing ICWA were expanded and integrated throughout.

Thereafter the department began work on again amending the MPP to incorporate significant practice changes stemming from new 2016 federal ICWA regulations and the conforming California legislation which took effect in January 2019. This section of the Guide compiles the ICWA-specific guidance integrated throughout the MPP. To facilitate use of this guide, section citations are included to assist in directing users to appropriate sections of the MPP Division 31 regulations, which may be consulted for further information.

Learning Resource

The California Department of Social Services' (CDSS) regulations are divided into two groups:

- The Manual of Policies and Procedures (MPP), which include all the social service programs regulations, and
- The California Code of Regulations (CCR), Title 22, Divisions 2, 6, and 12, which include the Adoptions Program Regulations and the Community Care Licensing Regulations.

The MPP is issued as an operational tool. It contains CDSS regulations governing the counties that administer CDSS programs, the department's agents, licensees, and/or beneficiaries; regulations adopted by other State Departments affecting CDSS programs; statutes from appropriate codes which govern CDSS programs; court decisions; and operational standards by which CDSS staff will evaluate performance within CDSS programs.

The MPP is published in-house and the CCR is published by Barclays, the state's official publisher of the California Code of Regulations. The MPP regulations manuals and the manual letters are available electronically on the CDSS website for public use. This website also includes the Department's version of its CCR, Title 22 regulations manuals. https://cdss.ca.gov/inforesources/cdss-regulations-home-page

Consult the MPP for the full text of general child welfare practice requirements. These requirements apply to Indian children unless modified by the ICWA provisions integrated throughout relevant sections of the regulations and compiled here. Note, however, that the CDSS regulations as set forth in this section III are in the process of being finalized and moved in their entirety from the MPP to the California Code of Regulations.

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CHAPTER 31-000 GENERAL REQUIREMENTS[1]

31-001 GENERAL

The requirements specified in the Child Services Manual/regulations:

- Must be met by the county in the administration of child welfare services.
- Must be met by county probation departments when placing children in out-of-home care.
    - The requirements for *inquiry* into whether a child is an Indian child as defined by the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) apply to all children placed in out-of-home care by county probation departments.
    - *Notice and substantive requirements* of the ICWA apply to placement by probation departments only in the following circumstances:

        a) Where the child placed in out-of-home care is alleged to be or has been adjudicated a ward of the court due to the commission of an offense that would not be criminal if committed by an adult; or

        b) Where the juvenile justice court contemplates placing the child into out-of-home care and announces on the record that the decision is based on the harmful condition in the child's home rather than the child's criminal conduct and/or need for rehabilitation; or

        c) Where the child is subject to the jurisdiction of both the juvenile dependency and the juvenile justice courts and is placed in out of home care based on harmful conditions in the home rather than the child's criminal conduct and/or need for rehabilitation; or

        d) The court contemplates terminating the parental rights of the child.

Note: While not an ICWA requirement per se, WIC §16501 mandates Child and Family Teams (CFTs) for all children in foster care, including all children placed by probation departments., The child's tribe is a mandatory CFT member. CFTs are convened to provide input on case plans, including both services and placement. Thus, as a matter of state law, Indian tribes have a right to be involved with these issues with respect to Indian children placed in foster care by probation.

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[1] Information extracted from the MPP and CDSS letter guidance is set out in regular text. Supplemental references to and presentation of other state and federal authority is set out in distinct italicized text. Helpful tips and explanations are contained in text boxes.

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- The following special provisions also apply:
    - Provision of services to an Indian child are subject to the additional requirements integrated throughout Division 31.
    - When considering the "best interest of the child," social workers must adhere to Welfare and Institutions Code section 224(a)(2), which specifies that it is in the best interest of an Indian child that the connection to their tribe and tribal community is encouraged and protected regardless of whether the child is in the physical custody of the Indian parent or Indian custodian(s) at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled. In assessing whether there is a sufficient basis to ask the court to make a finding of good cause as later used in this Division, a social worker shall consider that the Indian Child Welfare Act (ICWA) 25 USC 1902, seeks to protect not only the rights of the Indian child but the rights of Indian communities and tribes in retaining their Indian children.

31-002 DEFINITIONS

The ICWA, federal regulations and state law create many definitions that it is important to be familiar with in order to properly implement the Indian Child Welfare Act. These include the following:

"Active efforts" in the case of an Indian child, means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.

- Active efforts must involve assisting the parent(s) or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.
- To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and the Indian child's parent(s), extended family members, Indian custodian(s) and tribe.
- Active efforts include but are not limited to the following:

    A. Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal.

    B. Identifying appropriate services and helping the parents overcome barriers, including actively assisting the parents in obtaining those services.

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C. Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues.

D. Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents.

E. Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's tribe.

F. Taking steps to keep siblings together whenever possible.

G. Supporting regular visits with parents or Indian custodians in the most natural setting possible, as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child.

H. Identifying community resources, including housing, financial assistance, transportation, mental health and substance abuse services, and peer support services, and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources.

I. Monitoring progress and participation in services.

J. Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available.

K. Providing post-reunification services and monitoring.

- Active efforts are to be tailored to the facts and circumstances of the case and may change depending upon the stage of government intervention and/or the court proceeding.

"Case record" means an electronic and/or written record for each child receiving child welfare services including, but not limited to, the Emergency Response Protocol. The Case Record contains all of the documentation requirements specified by the Division 31 regulations and includes court documents maintained by the child welfare services agency, as defined in Rule 5.552 of the California Rules of Court.

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Practice Tip: *Case record is not an ICWA specific definition but is included here because Division 31 mandates documentation of compliance with ICWA requirements "in the case record" as it is defined by this definition. As well, a child's tribe is entitled to access information contained in the case record. See, ACL 18-140, TRIBAL ACCESS TO CHILD WELFARE CASE RECORDS.*

"Continued custody" in the case of an Indian child, means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of an Indian child has had custody of an Indian child.

"Custody" in the case of an Indian child, means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.

"Domicile" in the case of an Indian child, means:

(A) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

(B) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

"Emergency proceeding" in the case of an Indian child, is a hearing pursuant to Welfare and Institutions Code Section 319. (The Detention hearing.)

"Emergency removal" in the case of an Indian child, means the immediate physical removal of the child from the parent(s) or Indian custodian(s) that is necessary to prevent imminent physical damage or harm to the child.

"Exclusive jurisdiction" in the case of an Indian child, means an Indian tribe shall have jurisdiction to the exclusion of any state court over a child custody proceeding involving an Indian child who resides, or is domiciled, within the reservation of such tribe. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

"Indian" means a person who is a member of an Indian tribe, or who is an Alaskan Native and a member of a Regional Corporation as defined in 43 USC 1606.

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"Indian child" means:

(A) An unmarried person who is under age 18 and is either a member or citizen of an Indian tribe or eligible for membership or citizenship in an Indian tribe and is the biological child of a member/citizen of an Indian tribe; or

(B) A nonminor dependent who was previously determined to be an Indian child under subparagraph A, unless the nonminor dependent, personally or through their attorney, elects to no longer be considered an Indian child. All proceedings involving a nonminor dependent who meets this definition of Indian child shall be conducted in a manner that respects the person's status as a legal adult.

The Welfare and Institutions Code section 224.1(b) states "As used in connection with an Indian child's dependency proceeding, the term "Indian child" also means an unmarried person who is 18 years of age or over, but under 21 years of age, who is a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, and who is under the jurisdiction of the dependency court, unless that person or his or her attorney elects not to be considered an Indian child for purposes of the Indian child custody proceeding."

"Indian child custody proceeding" in the case of an Indian child, means any hearing during the course of a juvenile court case, other than the Detention hearing, that may result in one of the following outcomes:

(A) *Foster care placement*, which includes the removal of an Indian child from his or her 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;

(B) *Termination of parental rights*, which is any action resulting in the termination of the parent-child relationship;

(C) *Preadoptive placement*, which is 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; or

(D) *Adoptive placement*, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

When involving wards of juvenile probation, "Indian child custody proceeding" does not include any of the above-referenced placements if they are made based

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upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a family law proceeding, of custody to one of the Indian child's parents.

Practice Tip: *Dependency and wardship proceedings involve multiple hearings in California. Each hearing that may result in one of these four outcomes is considered a separate Indian child custody proceeding under the federal law and regulations. There may be several Indian child custody proceedings involved in any given dependency or wardship proceeding. The determining factor is the possible outcome of the hearing, not whether a new or additional petition has been filed.*

"Indian child's extended family" means "extended family" as defined by the law or custom of the Indian child's tribe; or, in the absence of such a law or custom, a person 18 years of age or over who is the Indian child's grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, first or second cousin, or stepparent.

"Indian child's parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. The term does not include the unwed father where paternity has not been acknowledged or established.

"Indian child's tribe" means:

(A) The Indian tribe of which an Indian child is a member or is eligible for membership. A tribe has exclusive authority to determine if a child is a member of or eligible for membership in the tribe;

(B) The designated Indian tribe as mutually agreed upon by tribes, when the Indian child is a member of or is eligible for membership in more than one tribe; or

(C) If tribes are unable to reach an agreement, the Indian tribe with which the Indian child has more significant contact, as designated by the state court.

"Indian Child Welfare Act (ICWA)" means the Indian Child Welfare Act, codified in 25 U.S.C. Chapter 21, 1901, et seq. which sets forth the federal law that establishes minimum federal standards that must be applied in state child custody proceedings involving an Indian child.

"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(s) of such Indian child.

"Indian organization" means a group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.

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"Indian tribe" means an Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska native village as defined in 43 USC 1602c.

"Indian foster home" means a foster home or resource family home where one or more of the licensed or approved foster parents is an "Indian" as defined in 25 U.S.C. 1903(3).

"Involuntary proceeding" means an Indian child custody proceeding in which the parent does not consent of his or her free will to the foster care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster care, preadoptive, or adoptive placement under threat of removal of the Indian child by a state court or agency and where the parent cannot regain custody of the Indian child upon demand.

"Non-federally recognized tribe(s)" means an Indian tribe, band, nation, or other organized group or community of Indians that is not recognized by the Secretary of the Interior as eligible for the federal services provided to Indians.

"Qualified expert witness" means a person required to testify in an Indian child custody proceeding on whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. A qualified expert witness shall have knowledge of the prevailing social and cultural standards of the Indian child's tribe and may be a person designated by the child's tribe as having such knowledge. A qualified expert witness should have one of the characteristics described in Section 31-135.

MPP, Division 31 Section 31-135.421 sets out requirements applicable to a qualified expert witness as follows:

- ***Qualified Expert Witness***. *A qualified expert witness must have sufficient expertise to testify as to the likelihood of serious emotional or physical damage if the Indian child remains in the custody of his or her parent(s), guardian(s) or Indian custodian and as to the prevailing social and cultural standards of the Indian child's tribe. Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness:*

  (a) A person designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.

  (b) A member or citizen of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.

  (c) An expert witness having substantial experience in the delivery of child and family

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services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe.

- *A qualified expert witness cannot be an employee of the person or agency recommending a foster care placement or termination of parental rights.*
- *The social worker may request the assistance of the Indian child's tribe or the BIA agency serving the Indian child's tribe in locating persons qualified to serve as an expert witness.*

"Relative" means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "step," "great," "great-great," or "grand," or the spouse of any of these persons even if the marriage was terminated by death or dissolution. For the purposes of preferential consideration for placement of a child, "relative" means an adult who is a grandparent, aunt, uncle, or sibling of the child.

For the purposes of federal Kin-GAP only, "relative" also means any of the adults specified in Welfare and Institutions Code sections 11391(c) and (c)(2) through (c)(4).

This includes an adult who is either a member of the Indian child's tribe, or an Indian custodian, as defined in Section 1903(6) of Title 25 of the United States Code. It also includes an adult who is the current foster parent of a child under the juvenile court's jurisdiction, who has established a significant and family-like relationship with the child, and the child and the county child welfare agency, probation department, Indian tribe, consortium of tribes, or tribal organization that has entered into an agreement pursuant to Section 10553.1 identify this adult as the child's permanent connection.

"Reservation" means, in an Indian child custody proceeding, Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is 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.

"Tribal agency," for purposes of Welfare and Institutions Code section 10553.12 background check certifications, means an entity designated by a federally recognized tribe as authorized to approve a home consistent with the ICWA, for the purpose of placement of an Indian child into foster or adoptive care, including the authority to conduct a criminal or child abuse background check of, and grant exemptions to, an individual who is a prospective foster parent or adoptive parent, an adult who resides or is employed in the home of an applicant for approval, any person who has a familial or intimate relationship with any person living in the home of an applicant, or an employee of a Tribal Agency who may have contact with a child.

"Tribal court" means a court with jurisdiction over child custody proceedings including a Court of Indian Offenses; a court established and operated under the code or custom

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of an Indian tribe; or any other administrative body of a tribe which is vested with authority over child custody proceedings.

"Tribal customary adoption" means an adoption of an Indian child who is a dependent of a county court and that, pursuant to Welfare and Institutions Code section 366.24, is finalized by and through the customs, laws, or traditions of the child's tribe. Termination of parental rights is not required to effectuate the adoption.

"Tribal Temporary Assistance to Needy Families (Tribal TANF)" refers to TANF program(s) operated by a federally recognized American Indian tribe or association of tribes which have entered into an agreement with the federal government to conduct a Tribal TANF program and are authorized to provide TANF services to Indian people in the service area specified in the agreement.

"Tribal title IV-E agency" means a tribe, consortium of tribes, or tribal organization that has entered into an agreement with either the state or the federal government to have oversight of its own foster care program and draw down Title IV-E funding for the cases of Indian children in its care.

"Tribally approved home" means a home that has been licensed or approved by an Indian tribe for foster care or adoptive placements of an Indian child using standards established by the tribe pursuant to ICWA (at 25 U.S.C. 1915); is not required to be licensed by the state or county; and is equivalent to a state or county-licensed home. Background check requirements for foster or adoptive placement as required by Health and Safety Code sections 1522 and 1522.1 apply to a Tribally Approved Home.

"Tribally specified home" means a home that a tribe designates as its preferred placement option for an Indian child who is in the custody of the county. This may include, but is not limited to, any of the placement options outlined in Section 31-002(f)(8).

"Upon demand" in the case of an Indian child, means that a parent or Indian custodian can regain physical custody during a voluntary proceeding simply upon verbal request, without any delay, formalities, or contingencies.

"Voluntary proceeding" means an Indian child custody proceeding that is not an involuntary proceeding, such as a proceeding for foster care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of their own free will and without a threat of removal by a state agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights. The parent or Indian custodian's consent must be executed in writing and certified by a judge as described in Section 31-430.

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CHAPTER 31-100 INTAKE

31-101 GENERAL

Referrals. The county must respond to all referrals for service which allege that a child is endangered by abuse, neglect, or exploitation.

Inquiry in Every Case Beginning at Initial Contact. On all referrals, the county shall inquire of the reporting party whether he or she has any information that the child may be an Indian child. When the referral results in contact with the child and/or the child's family, legal guardian, or Indian custodian, the county shall also inquire of the child, if the child is old enough, and the child's parent(s), legal guardian(s), Indian custodian, and extended family members, whether the child is or may be an Indian child [WIC 224.2 (a)] and if the child, a parent or Indian custodian resides or is domiciled on a reservation. The county shall identify and document each response in the case record.

- If the inquiry provides reason to know the child is a member or eligible for membership in a federally recognized Indian tribe and the child of a member, then the case shall be treated as an Indian child custody proceeding until and unless the court makes a finding that following further investigation there is no reason to know the child is an Indian and ICWA does not apply.

- Where there is information that supports a *reason to believe* the child may be an Indian child, but the information is insufficient to establish reason to know the child is an Indian child, the child welfare services agency shall conduct further inquiry into whether the child is a member of a tribe or, if the child is not a member, one or both biological parents are members and the child is eligible for membership in a tribe. Depending on the information already gathered, further inquiry shall include but not be limited to the following questions:

  (1) Is the child a member or citizen of one or more federally recognized Indian tribes or Alaska Native villages? If yes, then which tribe or tribes may the child be a member/citizen of?

  (2) Is either biological parent of the child a member of one or more federally recognized tribes? If yes, then which tribe or tribes?

  (3) Is the domicile or residence of the child, the child's parent, or the child's Indian custodian on a reservation or in an Alaska Native village.

  (4) Does the child's biological family identify as having ancestry or heritage with one or more federally recognized Indian tribes or Alaska Native villages?

  (5) Does the child, or any of the child's relatives, receive services or benefits from a tribe or tribes? If yes, which tribe or tribes?

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(6) Does the child or any of the child's relatives receive services or benefits available to Indians from the federal government?

(7) Is there any family member or close friend who may have information about the child's status as an Indian child? If so, to the extent possible, get the names and contact information for that person or persons and interview them as well.

Welfare and Institutions Code Section 224.2(a), in part, affirms, "the duty to inquire begins with the initial contact, including, but not limited to, asking the party reporting child abuse or neglect whether he or she has any information that the child may be an Indian child." If the inquiry provides reason to know the child is a member or eligible for membership in a federally recognized Indian tribe, then the case shall be treated as an Indian child custody proceeding unless and until the court makes the finding that the child does not meet the definition of an Indian child.

Volume 81 of the Federal Register (81 FR 38802) provides the following clarification regarding timely inquiry and verification:

> *The applicability of ICWA to child welfare services (i.e. "child custody proceedings") turns on the threshold question of whether the child in the case is an Indian child. It is, therefore, critically important that there be an inquiry into that threshold issue as soon as possible. If this inquiry is not timely, a child custody proceeding may not comply with ICWA and thus may deny ICWA protections to Indian children and their families. The failure to timely determine if ICWA applies also can generate unnecessary delays, as the court and the parties may need to redo certain processes or findings under the correct standard. This is inefficient for courts and parties and can create delays and instability in placements for the Indian child.*

Social Worker Requirements. Within 30 calendar days of the initial removal of the child or the required in-person investigation, or by the date of the dispositional hearing, whichever comes first, the social worker shall determine whether child welfare services beyond the investigation are necessary.

(A) If child welfare services beyond the investigation are necessary, complete a case plan and begin implementation of the case plan in accordance with the time frames and schedules specified in the regulations. The social worker shall complete the written case plan within 60 calendar days of the initial removal of the child or the required in-person investigation, or by the date of the dispositional hearing, whichever comes first.

(B) If child welfare services beyond the investigation are necessary, and inquiry has resulted in any indication that the child is an Indian child based upon their or their parent's political affiliation with a tribe or tribes, the social worker shall prepare and implement the case plan in collaboration with the Indian child, the Indian child's parent(s), Indian custodian(s), legal guardian(s), extended family, tribe,

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tribal and other Indian social service agencies, and individual Indian caregiver service providers in accordance with the time frames and schedules specified in the regulations.

(C) If child welfare services are unnecessary, the social worker shall close the referral and document the decision and rationale in the case record.

State law was amended effective January 2019 to require the dispositional hearing for an Indian child be completed no longer than 30 days from the emergency removal absent a court finding of exceptional circumstances. Social Workers should therefore prioritize development of the case plan for Indian children who have been detained.

W.I.C. §352(b) Notwithstanding any other law, if a minor has been removed from the parents' or guardians' custody, a continuance shall not be granted that would result in the dispositional hearing, held pursuant to Section 361, being completed longer than 60 days, or 30 days in the case of an Indian child, after the hearing at which the minor was ordered removed or detained, unless the court finds that there are exceptional circumstances requiring a continuance. If the court knows or has reason to know that the child is an Indian child, the absence of the opinion of a qualified expert witness shall not, in and of itself, support a finding that exceptional circumstances exist. The facts supporting a continuance shall be entered upon the minutes of the court. The court shall not grant continuances that would cause the hearing pursuant to Section 361 to be completed more than six months after the hearing pursuant to Section 319.

Continuing Duty of Inquiry. The social worker shall conduct further inquiry regarding the alleged victims' political affiliation with a tribe, their or their parents' or Indian custodian's tribal membership, or their or their parents' or Indian custodian's eligibility for tribal membership.

When there is any indication that the child is an Indian child based upon their or their parent's political affiliation with a tribe or tribes, the social worker shall contact the designated agent for tribes named as potential political affiliations for the purpose of determining if the child is a member, eligible for membership, or recognized as a member.

Practice Tip: *To meet legal requirements social workers must demonstrate due diligence. Attempts to contact the tribe(s) must include several attempts by telephone, email, fax, and mail contacts. All attempts should be documented.*

Active Efforts Prior to Removal. Active efforts must be made prior to removal of an Indian child from the custody of his or her parents or Indian custodian, except in the case of emergency removal of an Indian child. Where it is known, or there is reason to know as described in Section 31.131, that an Indian child is involved, investigations and any subsequent case planning must involve the child's tribe and other Indian service providers in the event that removal is required at a later date. If the child's tribe has not

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yet been identified, active efforts will require the social worker to make all necessary contacts to identify and, once identified, engage the child's tribe.

31-105 EMERGENCY RESPONSE PROTOCOL

The social worker shall immediately initiate and complete the Emergency Response Protocol to determine whether an in-person investigation is required.

Documentation. The social worker shall document in the case record:

- All general information specified in the MPP.
- Information regarding each adult in the household, including tribal affiliation and their domicile and residence.
- Information regarding each minor child in the family, including tribal affiliation, and the domicile and residence of the child and/or the adult(s) with whom the child normally resides.
- A description of the alleged incident, including consideration of the general risk factors specified in the MPP, together with family factors, including tribal affiliations.
- Information regarding the collateral contacts, including contacts with tribe(s), extended family, Indian organizations, other Indian service providers, and a summary of all the information obtained.

Decision Options. The decision [based on the evaluation criteria set forth in the MPP] whether an in-person investigation is required must be documented, including the following outcome options:

(a) Accept for in-person investigation.

(b) Evaluate out, with no referral to another community agency;

(c) Evaluate out, with a referral to an appropriate community agency. When the social worker determines that an in-person investigation is unnecessary, and there is any indication that a child is an Indian child, evaluate out with a referral to the Indian child's tribe (if known), an Indian organization or other Indian service provider, if available.

To "evaluate out" is to conclude there is not enough information on which to follow up on a reported suspicion of child abuse and neglect or if the situation reported does not meet the State's legal definition of abuse or neglect. In these instances, the worker may refer the person reporting the incident to other community services or law enforcement for additional help.

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ICWA requires active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family prior to removal of an Indian child from the custody of his or her parent(s) or Indian custodian(s), unless emergency removal of an Indian child is necessary. It is therefore essential for the social worker to identify culturally relevant community services that can help support the Indian family if a call regarding an Indian child is being evaluated out with a referral to another community agency. Referrals may include known Indian service providers such as local tribes, tribal ICWA programs, Indian Health programs or Tribal TANF programs. Additionally, the BIA may be able to help identify the child's tribe and therefore help access relevant services. Documentation of referrals to culturally appropriate services may be referenced as evidence of active efforts if the child is subsequently removed from parental custody and enters the state court system.

Documenting Evaluate-out Decision. When the decision is to evaluate out, either with or without a referral to another community agency, the rationale for the decision must be documented in the case record. If the child is an Indian child, document referrals made to the child's tribe (if known) or Indian service providers and why these efforts proved unsuccessful, or if not utilized, why not, and why these efforts proved unsuccessful.

31-110 IN-PERSON INVESTIGATION

Referral Rather than In-person Investigation. If the social worker determines from the Emergency Response Protocol that an in-person investigation is not necessary but that the services of another community agency are appropriate, the social worker shall refer the reporter or child and family to that agency. In the case of an Indian child the social worker shall also identify and refer the family to culturally appropriate services such as those available through the child's tribe, an Indian organization or other Indian service providers if available.

In-person Investigation. If the social worker determines, from the Emergency Response Protocol, that an in-person investigation is necessary, the social worker shall make the in-person investigation immediately or within 10 calendar days, as appropriate.

Inquiry. During the course of the in-person investigation the social worker shall inquire with (1) the child, if old enough, and (2) the child's parent(s), (3) the legal guardian(s), (4) the Indian custodian(s), and (5) extended family members, whether the child is or may be an Indian child. The social worker must document each response in the case record.

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The applicability of ICWA to child welfare services, i.e., Indian child custody proceedings, turns on the threshold question of whether the child in the referral or case is an Indian child. Thus, it is critical that inquiry into that threshold issue is conducted as soon as possible by the social worker completing the Emergency Response Protocol (81 FR 38802). Information received during inquiry is vital to providing a social worker with any indicators that suggest a child is an Indian child and allows a social worker to comply with 25 CFR Section 23.107 if the social worker determines child welfare services are necessary.

25 CFR Section 23.107 requires the social worker to inform a state court if there is information that provides "reason to know" a child is an Indian child. Once a state court acknowledges it has reason to know a child is an Indian child, ICWA's notice provisions are triggered and the proceeding must move forward in compliance with the ICWA unless and until the court determines pursuant to Welfare and Institutions Code Section 224.2(h)(i)(l) that the child does not meet the definition of an Indian child.

Therefore, inquiry with the child, the child's family, and any other relatives or close friends should include questions that may provide any indication that a child is an Indian child, and thus, potentially providing the social worker with reason to know a child is an Indian child. Examples of such questions to assist with inquiry include, but are not limited to, the following:

(1) Is the child a member or citizen of one or more federally recognized Indian tribes or Alaska Native villages? If yes, then which tribe or tribes may the child be a member/citizen of?

(2) Is either biological parent of the child a member of one or more federally recognized tribes? If yes, then which tribe or tribes?

(3) Is the domicile or residence of the child, the child's parent, or the child's Indian custodian on a reservation or in an Alaska Native village?

(4) Does the child's biological family identify as having ancestry or heritage with one or more federally recognized Indian tribes or Alaska Native villages?

(5) Does the child, or any of the child's relatives, receive services or benefits from a tribe or tribes? If yes, which tribe or tribes?

(6) Does the child, or any of the child's relatives, receive services or benefits available to Indians from the federal government?

(7) *Is there any family member or close friend who may have information about the child's status as an Indian child?*

Indian Child Involved. If a social worker receives or discovers information indicating that an Indian child is involved, the social worker shall adhere to investigation

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requirements provided in Sections 31-110 and 31-125 prior to removal, unless emergency removal of an Indian child is necessary.

If a social worker receives or discovers information indicating that a referral involves an Indian child, the social worker shall engage in active efforts to provide remedial services and rehabilitative programs designed to maintain an Indian child with his or her family.

If emergency removal of an Indian child is necessary, the social worker shall adhere to emergency proceeding requirements and investigation requirements in Sections 31-110 and 31-125.

Jurisdictional Screening. If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters (that is, Indian child custody proceedings) or is believed to be a current ward of a tribal court, the social worker shall document all efforts that have been made and are being made to contact the tribe to confirm exclusive or existing tribal jurisdiction over the Indian child and transfer the child to the tribe's custody and jurisdiction.

Practice Tip: *The ICWA is a federal law that applies in all fifty states. The terms used in the Act may not match the meaning assigned by a state. While ICWA uses the phrase ward of a tribal court, the phrase is not limited to a "ward" in the delinquency sense, but rather refers more broadly to a child that is currently under the jurisdiction of a tribal court.*

Contact with Tribe. To contact a tribe to obtain information or verification of a child's relationship to the tribe, or to provide notice as described in Section 31-131, the social worker shall direct the inquiry or notice as follows:

- To the Indian tribe's designated agent for receipt of ICWA notices;
- For an Indian tribe without a designated agent for receipt of ICWA notice, contact the tribe to be directed to the appropriate office or individual; and
- If the contact information for a tribe is inaccurate, or the tribe contacted fails to reply to written inquiries, seek assistance in contacting the Indian tribe from the BIA's local agency offices, the Pacific Regional Office in the Sacramento area, or Central Office in Washington, DC (see www.bia.gov).

Practice Tip: *The ICWA requires social workers to demonstrate due diligence in their efforts to identify an Indian child and to work with the Indian child's tribe to provide active efforts to prevent the breakup of the Indian family. Attempts to contact the child's tribe(s) should be made by phone, fax, and email in addition to writing. A single effort, such as leaving a phone message or an unanswered email or letter is not sufficient. Several attempts by telephone, email, fax, and mail should be made. All attempts should be documented.*

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31-115 IN-PERSON IMMEDIATE INVESTIGATION

Immediate Investigation. The social worker shall conduct an in-person immediate investigation when (1) the Emergency Response Protocol indicates the existence of a situation in which imminent danger to a child, such as physical pain, injury, disability, severe emotional harm or death, is likely; or (2) the law enforcement agency making the referral states that the child is at immediate risk of abuse, neglect, or exploitation; or (3) the social worker determines that the child is at immediate risk of abuse, neglect, or exploitation.

Continuing Duty of Inquiry. The social worker shall inquire with the child, if the child is old enough, and the child's parent(s), legal guardian(s), Indian custodian(s), and extended family members, on an ongoing basis as new individuals are contacted or become available whether the child is or may be an Indian child, including questions to determine the residence and domicile of the child and the child's parents or Indian custodian, and document each response in the case record.

- If a social worker receives or discovers information indicating that the referral involves an Indian child, the social worker shall engage in active efforts and adhere to investigation requirements in Sections 31-110, and 31-125 prior to removal, unless emergency removal of an Indian child is necessary.

- If emergency removal is necessary, the social worker shall adhere to the requirements regarding emergency proceedings, as well as to the investigation requirements as soon as possible.

Jurisdictional Screening. If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters (i.e., Indian child custody proceedings), or is believed to be under the jurisdiction of a tribal court, the social worker shall document all efforts that have been made and are being made to contact the tribe, confirm exclusive or existing tribal jurisdiction, and transfer the child to the tribe's custody and jurisdiction as described in Sections 31-135 and 31-136. Additional instruction for how to contact a tribe is provided in Section 31-110.

Practice Tip: *When a social worker is considering removal and making a foster care placement of an Indian child, the ICWA requires that they engage in active efforts to provide remedial, rehabilitative services to prevent the breakup of the Indian family prior to removal, unless removal is necessary on an emergency basis to prevent imminent physical damage or harm to the child.*

When an emergency removal occurs, active efforts should immediately begin to be provided. Active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe, and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and tribe.

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Emergency Removal of an Indian Child. If an emergency removal of an Indian child is necessary, the county shall adhere to the following provisions:

- Use due diligence to identify and contact the child's tribe as soon as possible after removal, as described in Section 31-125. Additional instruction for how to contact a tribe is provided in Section 31-110.

- In the case of a child that is or there is reason to know may be an Indian child, any application for a petition to declare a child a dependent of the juvenile court and/or the petition's supporting declarations, reports and other documents shall describe the imminent physical damage or harm to the Indian child and why emergency removal and placement are necessary to prevent such imminent physical damage or harm to the child. The application for warrant, the petition and/or the supporting documents shall also contain the following information:

    - The Indian child's name; age; current and last known addresses, if any; residence and domicile;

    - The name and address of the Indian child's parent(s), guardian and/or Indian custodian(s), if any. If there is no parent, guardian, or Indian custodian living in the state, or if their residence is unknown, the name and residence address of any adult relative living in the county or nearest to the location of the juvenile court, if that information is known, shall be included in the application, petition, or supporting documentation.

    - The steps taken to provide notice as described in Section 31-131 to the child's parent(s), Indian custodian(s), and tribe about the removal and the initial petition/detention hearing. If the child's parent(s) and/or Indian custodian(s) are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the regional BIA office;

    - If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with that reservation or village;

    - The tribal affiliation of the child and of the parent(s) or Indian custodian(s);

    - A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;

    - If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, "Indian child custody proceedings," or is believed to be under the jurisdiction of a tribal court, complete a statement of the efforts that have been made and

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are being made to contact the tribe and transfer the child to the tribe's custody and jurisdiction; and

- A statement of the efforts that have been taken to prevent the need for removal of the Indian child from the custody of the parents, guardian, or Indian custodian, if any were made prior to the circumstances creating imminent physical damage or harm, and what efforts have been taken since removal to assist the parents, guardian, or Indian custodian so the Indian child may safely be returned to their custody.

31-120 IN-PERSON INVESTIGATION WITHIN 10 DAYS

10-day Investigation. The social worker shall conduct an in-person investigation of the allegation of abuse, neglect, or exploitation within 10 calendar days after receipt of a referral when:

1. The Emergency Response Protocol or other information indicates that an in-person investigation is appropriate, and the social worker has determined that an in-person immediate investigation is not appropriate.

2. The law enforcement agency making the referral states that the child is not at immediate risk of abuse, neglect, or exploitation and the social worker determines that an in-person immediate investigation is not appropriate.

Active Efforts. If it is known, or there is reason to know, that the referral involves an Indian child, the social worker shall contact the designated representative of the child's tribe, so that active efforts to prevent the breakup of the Indian family can be commenced and coordinated with the tribe. If a social worker receives or discovers information indicating that the referral involves an Indian child and ultimately determines that child welfare services are necessary beyond the period of investigation, the social worker shall engage in active efforts and adhere to investigation requirements in Sections 31-110 and 31.125 prior to removal, unless removal is necessary to prevent imminent physical damage or harm to the child.

- If emergency removal of an Indian child is necessary, the social worker shall adhere to requirements regarding emergency proceedings and the inquiry requirements in Sections 31-110 and 31-125 as soon as possible thereafter.

- If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, i.e. "Indian child custody proceedings," or is believed to be under the jurisdiction of a tribal court, the social worker shall make efforts to contact the tribe, confirm exclusive or existing tribal jurisdiction, and transfer the child to the tribe's custody and jurisdiction as described in Sections 31-135 through 31-136, and to document the

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efforts that have been and are being made in the case record. Additional instruction for how to contact a tribe is provided in Section 31-110.

31-125 INVESTIGATION REQUIREMENTS

The social worker initially investigating a referral shall determine the potential for or the existence of any conditions(s) which places the child, or any other child in the family or household, at risk and in need of services and which would cause the child to be a person described by Welfare and Institutions Code Sections 300(a) through (j).

In-person Contact. The social worker investigating the referral shall have in-person contact with all of the children alleged to be abused, neglected, or exploited, and at least one adult who has information regarding the allegations.

Continued Contacts. If as a result of the investigation the social worker does not find the referral to be unfounded, the social worker shall continue to conduct the in-person investigation with all persons specified in the regulations, including Indian custodians (if any) and shall make necessary collateral contacts with each person having knowledge of the condition of each child who is the subject of an allegation, including tribes, Indian organizations, or other Indian service providers when the child is or may be an Indian child. All contacts shall be documented in the case record.

Continuing Duty of Inquiry in ALL Cases. In all investigations the social worker shall inquire with the child, if the child is old enough, and the child's parent(s), legal guardian(s), Indian custodian, and extended family members, whether the child is or may be an Indian child, including questions to determine the residence and domicile of the child and the child's parents or Indian custodian, and document each response in the case record.

Circumstances that require further inquiry into whether the child is an Indian child and/or verification from a tribe that the child is an Indian child include, but are not limited to, the following:

(1) Information is provided by the child, parent, legal guardian, Indian custodian, an officer of the court, a tribe, an Indian organization, a public or private agency, or an extended family member suggesting the child is an Indian child;

(2) Any agency involved in child protective or family support services has discovered information suggesting that the child is an Indian child.

(3) Information is provided or discovered that one or more of the child's biological parent(s), grandparent(s), or great grandparent(s) are or were a member or citizen of a tribe;

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(4) The child or the child's family has received services or benefits available to Indians from a tribe or from the federal government, such as Indian Health Services.

(5) Information or documentation is provided or discovered during the investigation suggesting the child's, the child's parents' or any other biological relatives' membership or citizenship, or eligibility for membership or citizenship, in a federally recognized Indian tribe.

Membership or citizenship papers issued by a tribe are evidence the person identified in the papers is a member of that tribe and should be treated as such until evidence exists otherwise. However, a situation in which families have recollection of an application, but do not know the outcome, is an example in which further inquiry is necessary. In these latter situations, the social worker must exercise due diligence to determine membership or eligibility for membership, including but not limited to, whether an application was received by the tribe and the outcome of the application, document those efforts, and report to the court the efforts to determine membership, eligibility for membership, and the responses, if any, from the tribe.

Investigation Leading to Active Efforts. If a social worker receives or discovers information indicating that the referral involves an Indian child and ultimately determines child welfare services are necessary, the social worker shall engage in active efforts and adhere to investigation requirements provided in Sections 31-110 and 31-125 prior to removal, unless the child is at risk of imminent physical damage or harm and immediate removal is required.

Investigation Leading to Emergency Removal. If emergency removal of an Indian child is necessary, the social worker shall adhere to the requirements in Section 31-115 regarding emergency removal and the investigation requirements provided in Sections 31-110 and 31-125 as soon as possible thereafter.

Investigation Leading to Services. If as a result of the investigation involving an Indian child the social worker determines services are necessary, the social worker shall do as follows:

- If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, i.e., "Indian child custody proceedings," or is believed to be a ward of a tribal court, the social worker shall document all efforts that have been made and are being made to contact the tribe, confirm exclusive or existing tribal jurisdiction, and transfer the child to the tribe's custody and jurisdiction in accordance with Sections 31-135 and 31-136. Additional instruction on contacting a tribe is provided in Section 31-110.

- If the social worker receives or discovers information that indicates the child is an

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Indian child, the social worker shall use due diligence to identify and contact the tribe(s) of which the child may be a member/citizen or eligible for membership/citizenship to seek verification of whether the child is in fact a member/citizen (or a biological parent is a member/citizen and the child is eligible). Instruction on how to seek verification is provided in Section 31-110.

- The social worker shall invite the child's tribe to collaborate in providing support and services to the Indian child and family. Contact shall be made prior to removal of an Indian child, unless the child is at risk of imminent physical damage or harm and immediate removal is required.

- If emergency removal of an Indian child is necessary, the social worker shall adhere to the requirements in Section 31-115 regarding emergency removal and the investigation requirements provided in Sections 31-110 and 31-125 as soon as possible thereafter.

- If the identity and/or location of the child's tribe is unknown, contact the Bureau of Indian Affairs (BIA) regional office in the Sacramento area and the CDSS for assistance in identifying the name and contact information of the tribe(s) of which the child may be a member/citizen (or eligible for member/citizenship).

- If the tribe has not replied, or the contact information is inaccurate, seek assistance in contacting the tribe from the BIA's local agency offices, the regional office in the Sacramento area or the Central Office in Washington, DC (see www.bia.gov)

The December 2016 BIA Guidelines for Implementing the Indian Child Welfare Act, specify the following:

> *Sometimes, the child or parent may not be certain of their citizenship status in an Indian Tribe but may indicate they are somehow affiliated with a Tribe or group of Tribes. In these circumstances, State agencies and courts should ask the parent and extended family what Tribe or Tribal ancestral group the parent may be affiliated with.*
>
> *If a specific Tribe is identified, determine if that Tribe is listed as a federally recognized Indian Tribe on the BIA's annual list, viewable at www.bia.gov. Some Tribes are recognized by States but not recognized by the Federal Government. The Federal ICWA applies only if the Tribe is a federally recognized Indian Tribe and therefore listed on the BIA list.*
>
> *If only the Tribal ancestral group (e.g., Cherokee) is identified, the social worker should contact each of the Tribes in that ancestral group to identify whether the parent or child is a member of any such Tribe.*

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The Bureau of Indian Affairs maintains on its website a tribal leaders directory with contact information for federally recognized tribes, as well as a list of Indian Child Welfare Act; Designated Tribal Agents for Service of Notice.

Federally recognized tribes may not correspond to historic (ancestral) tribal groups. Because Indians commonly identify to their historic tribal or ancestral group, the Bureau of Indian Affairs maintains a List of Designated Tribal Agents By Tribal Affiliation which may be viewed on the BIA website at the following link: https://www.bia.gov/bia/ois/dhs *(Scroll down to the Indian Child Welfare Act Section.)*

When the child's federally recognized tribe is not known or readily identified, inquiry should include questions about the child's affiliation with any historic or Tribal ancestral groups. The Bureau of Indian Affairs may then assist with locating the identity of and contact information for federally recognized tribes the child may be a member or eligible for membership in based on an identified ancestral tribal affiliation. For example, if the ancestral group of "Cherokee" is identified, the Tribal Affiliation list identifies to that historic Cherokee affiliation three separate federally recognized tribes. Similarly, if the ancestral group of "Paiute" is identified, the Tribal Affiliation list identifies to that historic Paiute affiliation 26 federally recognized tribes.

If a petition to declare an Indian child a dependent of the juvenile court is filed, the social worker shall:

- Complete Judicial Council's form ICWA-010(A), *Indian Child Inquiry Attachment* with information obtained through inquiry and file the ICWA-010(A) with the state court; and

- At the first appearance in the dependency case, provide and explain Judicial Council's form ICWA-020, *Parental Notification of Indian Status* to the parents, Indian custodian or legal guardian. Inform the person(s) to complete and file the ICWA-020 form with the state court. If the person(s) do not appear in a dependency case, the social worker shall use reasonable diligence to find and inform the person(s) of this requirement.

California Rules of Court rules 5.481(a)(1) and 5.481(a)(2) require completion of Judicial Council's forms ICWA-010(A), Indian Child Inquiry Attachment; and ICWA-020, Parental Notification of Indian Status. Pursuant to this rule, the state court must also order the county to use reasonable diligence to locate and inform a parent, Indian custodian, or guardian that the state court has ordered the parent, Indian custodian, or guardian to complete the ICWA-020. ICWA forms are available on the Judicial Council's website at http://www.courts.ca.gov.

Completing the forms with accurate information is critical to completing the Judicial Council form ICWA-030, Notice of Child Custody Proceeding for Indian Child. The

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information contained on the ICWA-030 is essential in allowing a tribe to determine whether or not the child is a member or citizen (or eligible) of the tribe.

The information regarding historic/ancestral tribal groups in the preceding handbook section applies here as well.

31-127 SAFETY ASSESSMENT AND PLANNING

Safety Assessment. During the initial in-person visit, social workers must timely and accurately conduct a safety assessment and determine whether the child can be safely maintained in their home.

- When conducting a safety assessment of the home of an Indian child, the social worker shall confer, whenever possible, with representatives of the child's tribe who have knowledge of the prevailing social and cultural conditions and way of life of the Indian child's tribe.

Safety Plan. If it is determined that the caregiver, with the support of a safety network, has the protective capacity to mitigate immediate safety threats, the social worker shall create a safety plan.

- The social worker shall assess whether it is known or there is reason to know if a child is an Indian child under the Indian Child Welfare Act (ICWA) prior to creating a safety plan. When it is known or there is reason to know the child is an Indian child, the social worker shall engage in active efforts, including developing the plan in consultation with the tribe and with consideration given to the prevailing social and cultural conditions and way of life of an Indian child's tribe. The social worker shall consider the use of tribal resources, Indian community service agencies, and/or ICWA program resources to assist the family in addressing the identified safety threats.

- When it is known a child is an Indian child, or there is reason to know the child is an Indian child the actions identified in the safety plan shall include referrals to, and active efforts to secure the delivery of, culturally appropriate services for the Indian child and the child's parents or Indian custodian. The social worker shall confer with the child's tribe and members of the child's Indian community, if known, to determine what, if any, culturally appropriate services are available.

- The safety plan must identify all the individuals involved with completion of the safety plan, including at least one adult who is not the alleged perpetrator. Individuals involved may include but are not limited to: social workers, caregiver(s), members of the child's Tribe, safety networks (which may consist of: family, friends, neighbors, etc.), and the child (when appropriate).

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31-131 REASON TO KNOW AND ICWA NOTICE

Initial Petition/Detention Notice. If the social worker is informed of or discovers information that indicates the child is an Indian child, and a dependency petition is filed, notice of the initial petition/detention hearing shall be provided to the child's parent, guardian, or Indian custodian, if any, and the tribe or tribes with whom the child may be a member/citizen or eligible for membership/citizenship. Notice shall be in accordance with Welfare and Institutions Code Section 290.1. The social worker must seek verification of a child's membership/citizenship or eligibility for membership/citizenship from a tribe as early as possible as described in Sections 31-110 and 31-125.

Notice for ICWA Proceedings. After the initial petition/detention hearing, if it is known or there is reason to know the child is an Indian child, notice of any hearing that may result in an order for foster care placement, preadoptive placement, termination of parental rights or adoptive placement must be sent in accordance with the ICWA.

Reason to Know. There is reason to know a child is an Indian child under any of the following circumstances:

- A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family informs the child welfare services agency or the juvenile court that the child is an Indian child.

- The residence or domicile of the child, the child's parents, or Indian custodian is on a reservation or in an Alaska Native village.

- Any participant in the dependency proceeding, officer of the court, Indian tribe, Indian organization, or agency informs the child welfare services agency or the juvenile court that it has discovered information indicating that the child is an Indian child.

- The child who is the subject of the proceeding gives the child welfare services agency or the juvenile court reason to know he or she is an Indian child.

- The child welfare services agency or the juvenile court is informed that the child is or has been a ward of a tribal court.

- The child welfare services agency or the juvenile court is informed that either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe.

- Any state court has made a finding that there is reason to know the child is an Indian child.

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When All Provisions of ICWA Apply. Whenever it is known or there is reason to know the child is an Indian, the child welfare services agency shall treat the child as an Indian child and apply all provisions of the ICWA until the juvenile court determines that the child does not meet the definition of an Indian child as contained in Section 224.1 of the Welfare and Institutions Code and the ICWA. In order for the juvenile court to make a determination regarding whether a child is an Indian child, the child welfare agency shall present to the court the following information:

- All information received from all sources that reflects that the child is an Indian child or that there is reason to know the child is an Indian child, including but not limited to any information provided by the tribe or tribes.

- All efforts made to establish and verify the child's status as an Indian child including contacts made with parents, Indian custodians, extended family, tribal officials or representatives or other tribal members, and the BIA, and why information may be missing from the notices sent to the tribe(s).

- All ongoing contact with the tribe and the BIA, and documentation of those contacts.

ICWA Notice Requirements. Notice shall be sent by registered or certified mail with return receipt requested to all of the following:

- All tribes of which the child is a member or citizen or there is reason to know the child is a member or citizen, or in which the child is eligible for membership or citizenship unless:

    - The tribe has determined that the child is not a member or citizen or eligible for membership or citizenship and the details of the determination are documented in the CWS case record; or

    - The juvenile court has determined which of more than one tribe is the Indian child's tribe, in which case notice need only be provided to that tribe.

- The child's parents;

- The child's Indian custodian; and

- When the identity or location of the child's parent(s) or Indian custodian and the tribe cannot be determined, notice shall be sent to the Secretary of the Interior's designated agent.

Sending follow-up notice to the tribe(s) by first-class mail is recommended to facilitate active efforts and engagement of the tribe(s).

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Tribal Agent for Notice. Notice to a tribe shall be sent to a tribe's designated agent as reflected on the "Indian Child Welfare Act; Designated Tribal Agents for Service of Notice" list published annually in the Federal Register by the BIA. It is available on the BIA website at https://www.bia.gov/bia/ois/dhs (Scroll down to the Indian Child Welfare Act Section). If the tribe does not have a designated agent, the social worker shall contact the tribe to be directed to the appropriate office or individual on whom notice would be served.

Practice Tip: The current federal register list of agent's for service of ICWA Notice is posted on the California Courts Tribal/State Programs landing page, currently under "What's New" at https://www.courts.ca.gov/programs-tribal.htm.

Notice to BIA. Notice to the Secretary of the Interior shall also be sent to the regional office of the BIA in the Sacramento area. As of January 1, 2019, the address for the regional BIA office is 2800 Cottage Way in Sacramento, CA 95825. Always check for the most current regional office address available on the BIA's website.

Form of Notice. Notice shall be sent using the Judicial Council form ICWA-030, Notice of Child Custody Proceeding for Indian Child. The notice must be sent by registered or certified mail and the notice must be sent far enough in advance that it will be received at least 10 days before the hearing date. The notice must include information specified by Welfare and Institutions Code Section 224.3.

Welfare and Institutions Code Section 224.3 requires notice to include the following information:

"(A) The name, birth date, and birthplace of the Indian child, if known.

(B) The name of the Indian tribe in which the child is a member, or may be eligible for membership, if known.

(C) All names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married, and former names or aliases, as well as their current and former addresses, birth dates, places of birth and death, tribal enrollment information of other direct lineal ancestors of the child, and any other identifying information, if known.

(D) A copy of the petition by which the proceeding was initiated.

(E) A copy of the child's birth certificate, if available.

(F) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

(G) The information regarding the time, date, and any location of any scheduled hearings.

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(H) A statement of all of the following:

(i) The name of the petitioner and the name and address of the petitioner's attorney.

(ii) The absolute right of the child's parents, Indian custodians, and tribe to intervene in the proceeding.

(iii) The right of the child's parents, Indian custodians, and tribe to petition the court to transfer the proceeding to the tribal court of the Indian child's tribe, absent objection by either parent and subject to declination by the tribal court.

(iv) The right of the child's parents, Indian custodians, and tribe to, upon request, be granted up to an additional 20 days from the receipt of the notice to prepare for the proceeding.

(v) The potential legal consequences of the proceedings on the future custodial and parental rights of the child's parents or Indian custodians.

(vi) That if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent the parents or Indian custodians pursuant to Section 1912 of the federal Indian Child Welfare Act of 1978.

(vii) In accordance with Section 827, the information contained in the notice, petition, pleading, and other court documents is confidential. Any person or entity notified shall maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal that information to anyone who does not need the information in order to exercise the tribe's rights under the federal Indian Child Welfare Act of 1978.

Notice for Each ICWA Proceeding. Notice shall continue to be sent regarding each child custody proceeding, that is, each hearing which may result in an order for foster care, preadoptive placement, termination of parental rights, and adoptive placement to each tribe for which it is known or there is reason to know a child is a member or citizen or eligible for membership or citizenship, unless it is determined by the juvenile court that the ICWA does not apply to the case. If there are multiple tribes in which it is known or there is reason to know a child is a member, notice need only be sent to the tribe determined by the juvenile court to be the Indian child's tribe after all evidence regarding membership is presented to the court. After a tribe acknowledges the child is a member or citizen or eligible for membership or citizenship or after the Indian child's tribe intervenes, notice need be sent only to the child's tribe and no longer needs to include the ancestral information, a copy of the petition, a copy of the child's birth certificate or the statement of rights.

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Proof of Service. Proof of service of notice consisting of copies of each notice sent and the original return receipts and tribal responses, shall be filed with the court as well as maintained in the case record. All parties to the proceeding shall be served with copies of the proof of service.

Non-Federally Recognized Tribes. If the county determines that child welfare services are necessary and receives or discovers information indicating a child is a member or citizen of an Indian tribe that is not a federally recognized tribe, and the child has been taken into the temporary custody of the child welfare agency and a petition to declare the child a dependent of the juvenile court has been filed, the social worker is authorized to inform the non-federally recognized tribe that the tribe may seek permission to participate in the child's dependency case at the discretion of the court, pursuant to Section 306.6 of the Welfare and Institutions Code.

Welfare and Institutions Code section 306.6(b) provides, as it pertains to non-federally recognized tribes:

> *"(b) If the court permits a tribe to participate in a proceeding, the tribe may do all of the following, upon consent of the court:*
>
> *(1) Be present at the hearing.*
>
> *(2) Address the court.*
>
> *(3) Request and receive notice of hearings.*
>
> *(4) Request to examine court documents relating to the proceeding.*
>
> *(5) Present information to the court that is relevant to the proceeding.*
>
> *(6) Submit written reports and recommendations to the court.*
>
> *(7) Perform other duties and responsibilities as requested or approved by the court."*

31-135 AUTHORITY FOR REMOVAL OF CHILD

Authority Required for Removal. When the social worker determines that the child cannot be safely maintained in his/her own home, the social worker shall ensure that authority to remove the child exists prior to removal.

- If removal is voluntary, such authority shall be the written consent of the parent/guardian/Indian custodian; and in the case of an Indian child the social worker shall comply with the consent requirements that are more fully set forth in Section 31-430.

- In the situation where the placement of an Indian child may no longer be

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voluntary, in that the parent no longer consents of their free will and/or the agency has determined that the child would not be returned to the parent/guardian/Indian custodian upon demand, the social worker must comply with the requirements of ICWA including the duty to engage in active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to comply with the ICWA placement preferences.

In December 2016, the BIA issued regulations that clarified what voluntary placement is for Indian children. In order for a placement to be voluntary, the parent(s) or Indian custodian(s) must have the right to regain physical custody "upon demand" by verbal request to the social worker, without formalities or contingencies. If the parent(s) or Indian custodian(s) cannot have the child returned upon demand, the placement is not voluntary, and the social worker must file a dependency petition. Furthermore, it is not considered a voluntary placement if the parent(s) or legal guardian(s) of an Indian child are told that a voluntary placement is the means by which "formal court involvement" will be avoided; this implies threat of removal and is thus considered involuntary for Indian children.

In response to the BIA regulations, in 2018 California amended its definitions via AB 3176. Effective January 1, 2019, Welfare and Institutions Code Section 224.1 includes definitions designed to implement the ICWA requirements for voluntary placement or adoption of an Indian child. "Upon demand" means "the parent or Indian custodian may regain physical custody during a voluntary proceeding simply upon verbal request, without any delay, formalities, or contingencies." (WIC, Section 224.1, subd. (p).) "Voluntary proceeding" is "an Indian child custody proceeding that is not an involuntary proceeding, including, but not limited to, a proceeding for foster care, preadoptive or adoptive placement that either parent, both parents, or the Indian custodian has, of their free will, without a threat of removal by a state agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights." (WIC, Section 224.1, subd. (q).) The requirements for voluntary placement of an Indian child are set forth in Section 31-430, infra.

Involuntary Removal Authority. If removal is involuntary, authority for the removal shall be temporary custody as specified in Welfare and Institutions Code Sections 305 and 306, or a court order.

- If a determination has been made in accordance with Welfare and Institutions Code Section 308 that the minor or his/her foster family would be endangered or his/her custody would be disturbed by the disclosure to the parent(s)/guardian(s)/Indian custodian of the minor's exact whereabouts, the social worker shall notify immediately the parent(s)/guardian(s)/Indian custodian either in-person or by telephone of his/her right to apply for judicial review of that determination within 24 hours.

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- If the social worker fails to notify the parent(s)/guardian(s)/Indian custodian(s) as specified in Section 31-131, the social worker shall document in the case record the reason(s) for failure to do so.

- If the social worker knows or has reason to know that the child is an Indian child, involuntary removal must be supported by clear and convincing evidence that the continued custody of the child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the child. The determination on emotional or physical damage to the child must be supported in court by the testimony of a qualified expert witness. Characteristics of a person who may be qualified to serve as a qualified expert witness is provided in Section 31-135.

Pre-Placement Preventive Efforts. The social worker shall document in the case record all pre-placement preventive efforts made or services provided.

- **Active Efforts**. When it is known or there is reason to know the child is an Indian child, pre-placement preventive efforts shall include active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family prior to the removal of a child from the family.

  - Active efforts shall include but not be limited to examples provided in Welfare and Institutions Code Section 224.1(f) and in the Bureau of Indian Affairs ICWA rules at 25 Code of Federal Regulations Section 23.2.

- **Due Diligence.** If the social worker receives or discovers information that the child may be an Indian child, the social worker shall use due diligence to identify and contact the tribe(s) of which the child may be a member/citizen, or eligible for membership/citizenship, to seek verification of whether the child is in fact a member/citizen or a biological parent is a member/citizen and the child is eligible in order to facilitate active efforts. Attempts to verify should occur as soon as possible after facts become known requiring the provision of child welfare services to the family regardless of whether the child is removed from the custody of his or her parents or Indian custodian. Instruction on how to seek verification is provided in Section 31-110.

- **Documenting Unsuccessful Active Efforts**. If the determination is made to remove the child, the social worker must document that the active efforts proved unsuccessful and the reasons why and include this information in court reports.

- **Jurisdictional Screening**. When the social worker determines that an Indian child who has been removed from the custody of his or her parent(s), guardians, or Indian custodian(s), may be subject to the exclusive jurisdiction of a tribe, or may be a ward of a tribal court, the social worker shall notify the tribal court (if any) and the tribe of the removal, seek confirmation of exclusive or existing tribal jurisdiction from the tribe, and within 24 hours of receiving confirmation from the tribe, transfer the child to the tribe's custody and jurisdiction.

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- If the child welfare services agency is able to transfer custody of the Indian child to the tribe before the time expires for filing a dependency petition in the juvenile court, the social worker shall transmit to the tribe all records of the child welfare referral and investigation, document the tribal jurisdiction and transfer of custody of the child, and close out the case.

- If the child welfare services agency does not receive confirmation from the tribe and/or is unable to transfer the Indian child to the tribe's custody and jurisdiction before the time expires for filing a dependency petition in the juvenile court, the child welfare services agency shall file a petition to declare the child a dependent of the juvenile court. The petition and/or the documents supporting detention of the child shall reflect that the child may be subject to the tribe's exclusive jurisdiction or already may be a ward of the tribal court and shall detail the efforts made to confirm exclusive or existing tribal jurisdiction, including submitting a copy of the notification sent to the tribe pursuant to Section 31-135.

Practice Tip: *The ICWA is a federal law that applies in all fifty states. The terms used in the Act may not match the meaning assigned by a state. While ICWA uses the phrase ward of a tribal court, the phrase is not limited to a "ward" in the delinquency sense, but rather refers more broadly to a child that is currently under the jurisdiction of a tribal court.*

- **Notification to Tribe for Jurisdictional Screen**. The notification to the child's tribe shall be in writing and shall advise the tribe that the child has been taken into protective custody, a petition has been filed, and that the county is seeking confirmation that the child is a ward of the tribe's court or subject to the tribe's exclusive jurisdiction. The notification shall include the following:

  - The child's name, date of birth, name of parent(s), guardian(s) or Indian custodian(s), and the date of removal.

  - Request that the tribe confirm if the child is a ward of its tribal court or under its exclusive jurisdiction.

  - Inform the tribe that upon receiving confirmation that the child is already a ward of tribal court or that child custody proceedings are subject to the tribe's exclusive jurisdiction, the social worker will inform the state court of the tribe's determination.

  - Inform the tribe that additional information regarding the identity of the child or circumstances that created the reason for the removal of the child may be requested by the tribe, along with any other information necessary to confirm the child's status with the tribe.

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- The notification shall be provided to the tribal court (if any) and the tribe. Notification of the tribe shall follow the procedures outlined in 31-131 and sent via facsimile or secure email. If communication by secure email or facsimile is not available, then notification shall be sent via overnight delivery. In addition, contact with the tribe shall be made by telephone to inform the tribe of the removal of the child.

- **Action When Exclusive Tribal Jurisdiction Exists**. If the child welfare services agency receives confirmation of exclusive or existing tribal jurisdiction over an Indian child after a petition to declare the child a dependent of the juvenile court was filed, the child welfare agency shall immediately notify the state court and all parties to the dependency proceeding of the tribal determination and shall seek dismissal of the dependency proceeding.

- **Transfer of Child Upon Case Dismissal**. When the juvenile court dismisses a child custody proceeding as a result of the child being subject to the exclusive jurisdiction of a tribe or already a ward of a tribal court, the social worker shall within 24 hours initiate the safe physical transfer of the child and provide the child's entire case record as defined in Section 31-002 to the child's tribe.

- **Documentation and Record Retention**. The social worker shall document each communication with the tribe regarding the notification of the removal, as well as the final outcome, and shall retain a copy of the entire case record upon transfer of the child.

Welfare and Institutions Code Sections 305.5 and 381 address, among other things, transfer of jurisdiction from state courts to tribal courts. Where a tribal court has exclusive jurisdiction over child custody proceedings, a state court cannot retain jurisdiction and therefore must dismiss the case. This principal is reflected in 25 CFR Section 23.110, which provides:

"Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and Section 23.113 (emergency proceedings), the following limitations on a state court's jurisdiction apply:

(a) The court in any voluntary or involuntary child custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the state court must expeditiously notify the tribal court of the pending dismissal based on the tribe's exclusive jurisdiction, dismiss the state court child custody proceeding, and ensure that the tribal court is sent all information regarding the Indian child custody proceeding, including, but not limited to, the pleadings and any court record.

(b) If the child is a ward of a tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the state court child custody

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proceeding, and ensure that the tribal court is sent all information regarding the Indian child custody proceeding, including, but not limited to, the pleadings and any court record."

If the child is in temporary custody following an involuntary removal, and the social worker determines that continued detention is necessary for the child's protection, the social worker shall proceed as set forth below if it is known or there is reason to know the child is an Indian child.

Standard of Proof for Detention of Indian Child. If it is known or there is reason to know the child is an Indian child, foster care placement and termination of parental rights must be supported by clear and convincing evidence and proof beyond a reasonable doubt, respectively, that the continued custody of the child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the child. The determination of emotional or physical damage to the child must be supported in court by the testimony of a qualified expert witness.

- **Qualified Expert Witness**. A qualified expert witness must have sufficient expertise to testify as to the likelihood of serious emotional or physical damage if the Indian child remains in the custody of his or her parent(s), guardian(s), or Indian custodian and as to the prevailing social and cultural standards of the Indian child's tribe. Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness:

  (d) A person designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.

  (e) A member or citizen of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices.

  (f) An expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe.

- A qualified expert witness cannot be an employee of the person or agency recommending a foster care placement or termination of parental rights.

- The social worker may request the assistance of the Indian child's tribe or the BIA

  regional office serving the Indian child's tribe in locating persons qualified to serve as an expert witness.

The state court may accept the opinion of a qualified expert witness in writing in lieu of live testimony only when the parties to a child custody proceeding have stipulated so in

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writing. If the state court is to accept the opinion in this manner, the written opinion must be in the form of an affidavit or declaration under penalty of perjury and the court must make a finding on the record that the stipulation was made knowingly, intelligently and voluntarily.

The BIA is organized into regions with offices within each region. The regional offices serve the tribes located within the region. The BIA's website is found at: https://www.bia.gov/, and may be used to help identify the correct region for purposes of seeking help in identifying a qualified expert witness.

Indian Social and Cultural Standards. The determination of emotional or physical damage to the child must consider the prevailing social and cultural standards and way of life of the Indian child's tribe, including that tribe's family organization and child rearing practices.

31-136 TRANSFER OF AN INDIAN CHILD

Transfer of an Indian Child to a Tribe. In the case of an Indian child under state court jurisdiction and where the exclusive jurisdiction of a tribe does not apply, the Indian child's parent(s), guardian(s), Indian custodian(s) or tribe may petition for the state court to transfer the child custody proceeding to the tribe's jurisdiction.

- When a petition for transfer has been filed, any party to the child custody proceeding shall have the opportunity to assert to the state court, either orally or in writing, whether good cause to deny a transfer exists and the reason(s) for that belief.

- When evaluating whether to assert a good cause opposition to transfer of jurisdiction, the child welfare services agency must recognize that the juvenile court may not consider any of the following circumstances when making its determination whether to deny a motion to transfer to tribal court:

  (a) Whether the foster care or termination of parental rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or tribe did not receive notice of the child custody proceeding until an advanced state;

  (b) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;

  (c) Whether transfer could affect the placement of the child;

  (d) The Indian child's cultural connections with the tribe or its reservation; or

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(e) The socioeconomic conditions or any negative perception of tribal or BIA social services or judicial systems.

Action Upon Transfer. In all cases where a state court grants a petition for transfer, the social worker shall retain a copy of the child's entire case record and follow the final order issued on Judicial Council's form ICWA-060, Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction, as follows:

- Provide the child's entire case record to the tribe having jurisdiction, including any court records and orders related to the case;
- Collaborate with the tribe to ensure the physical transfer of the child to the designated representative of the child's tribe. The physical transfer must be made consistent with local child welfare protocols that are mutually agreed upon between a county and a tribe, where such protocols exist.

Transfer to Tribal Title IV-E Agency. Pursuant to 45 CFR 1356.67, in order to preserve the child's eligibility for federal Title IV-E AFDC-FC benefits, the following shall apply when an Indian child is being transferred from county jurisdiction to a Tribal Title IV-E Agency:

- The social worker shall transfer the child in a manner that does not affect the child's eligibility for or payment of Title IV-E or other federal benefits, including medical assistance under Title XIX (Medicaid, or Medi-Cal as it is known in California).
- Prior to transfer of the child, the child's Title IV-E eligibility determination must be completed, and all documentation related to that determination shall be provided to the Tribal Title IV-E Agency.
- The entire case record for the child's current foster care episode shall be provided to the Tribal Title IV-E Agency. The child welfare agency shall retain a copy of the documents provided upon transfer.

Document Transfer to Tribal Title IV-E Agency. Essential documents that must be provided upon transfer are the following:

- All judicial determinations that continuation in the home from which the child was removed would be contrary to the welfare of the child and that reasonable efforts have been made to prevent or eliminate the need for removal of the child.
- Documentation that relates to the child's Title IV–E eligibility, including the following, as applicable:

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(a) Foster Care Form 3 (FC3) "Determination of Federal Aid to Families with Dependent Children (AFDC) Foster Care Eligibility".

(b) Adoption Assistance Form 4 "Eligibility Certification Adoption Assistance Program" (AAP4).

(c) Kinship Guardianship "Statement of Facts Supporting Eligibility for Kinship Guardianship Assistance payment (KinGAP)" (KG2).

- Documentation pertaining to the child's eligibility for other federal benefits including Medicaid programs under Title XIX, Social Security Disability, or other federal benefits.

- The most recent provider's license or approval including background check documentation verifying clearances for all adults in the caregiver's household and complaint information.

Ward of a Tribal Court or Exclusive Jurisdiction of a Tribe. Where the social worker receives or discovers information indicating that a child who has been taken into temporary custody is an Indian child subject to the exclusive jurisdiction of a tribe or is already a ward of a tribal court the social worker shall, no later than the next working day, seek confirmation of exclusive or existing tribal jurisdiction from the tribe by providing notification as specified in Section 31-135.

According to 25 Code of Federal Regulations Section 23.110, if an Indian child is ward of a tribal court or subject to the exclusive jurisdiction of a tribe, the state court must expeditiously notify the tribe of the pending child custody dismissal and dismiss the proceeding upon receiving evidence from the tribe that the child is a ward of a tribal court or subject to the tribe's exclusive jurisdiction.

As of January 1, 2019, the Washoe Tribe of Nevada and California is the only tribe located in the State of California which exercises exclusive jurisdiction over child custody proceedings involving an Indian child on their reservation. However, there are tribes who exercise jurisdiction over their member children such that a child may be a ward (dependent) of a tribal court. As well, there are many tribes throughout the country that also exercise exclusive jurisdiction to which the child may be subject. Therefore, child welfare agencies should confer with the tribes as to the nature of their jurisdiction.

Action Upon Confirmation of Exclusive Tribal Jurisdiction.

- Upon receiving confirmation from the tribe that the Indian child is subject to the exclusive jurisdiction of the tribe or already a ward of the tribal court, the social worker shall expeditiously inform the juvenile court, provide any written confirmation from the tribe to the court, and move to dismiss the dependency proceeding.

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- When the state court dismisses the child custody proceeding, the social worker shall retain a copy of the child's entire case record and, within 24 hours, initiate the following:
- Provide the child's entire case record to the tribe having jurisdiction, including any court records and orders related to the case;
- Collaborate with the tribe to ensure the physical transfer of the child to the designated representative of the child's tribe. The physical transfer must be made consistent with local child welfare protocols that are mutually agreed upon between a county and a tribe, where such protocols exist.

CHAPTER 31-200 ASSESSMENT AND CASE PLAN

31-201 ASSESSMENT AND CASE PLANNING PROCESS

When it has been determined that child welfare services are to be provided, the social worker shall:

Complete an Assessment.

- An assessment must be completed for each child for whom child welfare services are to be provided. Performing an assessment includes gathering and evaluating information relevant to the case situation and appraising case services needs.
- In the case of an Indian child, the assessment shall include Active Efforts as specified in Sections 31-135 and 31-420. The assessment shall include information received from the child's tribe, the child's extended family and Indian service providers regarding the resources available to the child and the family. Additionally, in appraising the case service needs, the social worker shall consider the child's tribe's placement and permanency preferences when removal is necessary.

Determine the Case Plan Goal.

When determining the case plan goal, the social worker shall consider the following order of priority for services:

1. **Family Maintenance Services** - Provided to maintain the child in his/her own home when the protective needs of the child can be met. In the case of an

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Indian child, family maintenance services shall include Active Efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family as described in Section 31-135.

2. **Family Reunification Services** – Provided if the family potentially can be successfully reunified within the time limits specified in Welfare and Institutions Code Sections 16507 and 16507.3. In the case of an Indian child, family reunification services shall include Active Efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family as described in Section 31-135. If the child is placed out of home and is receiving family reunification services, the case plan shall have two tracks:

   (1) The family reunification track, which consists of services described in Welfare and Institutions Code Section 16501(h).

   (2) The concurrent services track, which identifies the child's permanency alternative and the services necessary to achieve legal permanence should family reunification fail.

3. **Permanent Placement Services** – Pursued only when there are no feasible means of maintaining or reuniting the child with his/her parent(s)/guardian(s).

   When recommending a permanent placement services, the social worker shall adhere to the following order of priority for permanent placement:

   (A) **Adoption** - Before the social worker recommends to the court that family reunification services be terminated, foster care and adoption staff shall jointly complete a case review to determine potential for adoption.

      1. If the case review is to address a potential relative adoption, it shall address whether a kinship adoption is in the child's best interest.

      2. If the case review is to address a potential adoption of an Indian child, the following shall also apply when evaluating the child's permanency alternatives:

         a. In any pre-adoptive or adoptive placement of an Indian child, preference shall be given, in the absence of good cause to the contrary, in descending priority order to placement with:

            (i) A member of the Indian child's extended family which shall be defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or

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sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(ii) Other members of the child's tribe;

(iii) Another Indian family;

(iv) If a different order has been established by the tribe, the order preferred by the tribe so long as the placement is in the least restrictive setting appropriate for the child;

(v) When no preferred placement is available, Active Efforts shall be made to place the child with a family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe.

3. If the permanent placement may lead to the termination of parental rights of the Indian child's parent, the social worker must consider that no termination may be ordered in such a proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt and including the testimony of qualified expert witnesses, 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. Evidence must also be presented that Active Efforts designed to prevent the breakup of the Indian family have been made and that the efforts proved unsuccessful.

4. Before the social worker recommends termination of parental rights, the review shall evaluate whether the termination of parental rights would substantially interfere with the child's connection to his or her tribal community or tribal membership.

5. The review shall evaluate whether there is another planned permanent living arrangement for the child that does not require termination of parental rights but that nonetheless provides the child with permanency.

6. The review shall evaluate, after soliciting input and consulting with the

   child's tribe, whether a Tribal Customary Adoption is a potential option for the child pursuant to Welfare and Institutions Code Section 366.24.

7. If the tribe elects to consider Tribal Customary Adoption for the child, the social worker shall collaborate with the tribe in meeting the requirements set forth in Welfare and Institutions Code Section 366.24.

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The Indian child's tribe is the only entity that can elect Tribal Customary Adoption as the permanency option for the child. The tribe may express a preference for a different option. [Welfare and Institutions Code section 366.26(c)(1)(B)(vi)(II)]. No tribe is required to elect Tribal Customary Adoption.

8. When a case is referred for adoption planning, it shall remain under county supervision for purposes of providing child welfare services until dismissal of the dependency and issuance of a final decree of adoption.

(B) **Guardianship** - If kinship adoption or adoption is not possible, the case shall be reviewed for guardianship. Preference shall be given to guardianships by relatives.

(C) **Long Term Foster Care** - Only if adoption or guardianship is not possible shall a recommendation for long-term foster care placement be made. Exercise of this option requires continued efforts to obtain adoption, guardianship, or preparation for independence of the child.

Develop the Case Plan which shall identify the following factors and document the plan as specified in Section 31-205:

- Objectives to be achieved,
- Specific services to be provided, and
- Case management activities to be performed.

Parent(s)/guardian(s) shall be asked to participate in the development of the case plan. In the case of an Indian child, the child's extended family, tribe, or tribal advocate or Indian custodian, if the child has one, shall also be requested to participate in the development of the case plan.

31-205 ASSESSMENT DOCUMENTATION

The social worker shall document assessment information, including:

- The relevant social, cultural, and physical factors relating to the following:
  - The child.
    - In the case of an Indian child, the social worker shall include information about the prevailing social and cultural standards and way of life of the Indian child's tribe, including family organization and child-rearing practices.

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- The child's parent(s)/guardian(s), Indian custodian(s) or person(s) serving in that role.

- The apparent problems, and possible causes of those problems, which require intervention, and the family strengths which could aid in problem resolution.
  - Whether the child may safely remain at home if Pre-Placement preventive services are provided, and, if so, the specific services to be provided.
    - In the case of an Indian child, the social worker shall document the Pre-Placement preventive services that have been or will be provided to constitute the Active Efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family as described in Section 31-135..

- Any known social services previously offered and/or delivered to the child or family and the result of those services.
  - In the case of an Indian child, documentation shall additionally include information about all known social services previously offered and/or delivered to the child or family including those provided as Active Efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, as required by Section 31-135.23, and the results of those efforts.

- If family reunification services are recommended, relatives or others who could provide or assist with legal permanency - adoption, guardianship, or preparation for independence - should family reunification fail.
  - In the case of an Indian child, documentation shall additionally include information about relatives and extended family members, tribal representatives, other Indian social service agencies and individual Indian caregivers who can provide or assist with legal permanency should family reunification fail.

31-206 CASE PLAN DOCUMENTATION

The social worker shall document in the case plan the case plan goal which the social worker has determined to be appropriate for each child.

Documentation Requirements. The social worker shall document in the case plan information regarding case plan objectives for each person named in the case plan, including:

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- Measurable, time-limited objectives based on the problems and family strengths identified in the assessment.
    - In the case of an Indian child, the case plan shall include the concurrent option of Tribal Customary Adoption.
    - Discussion of advisement to the parent(s) that at any time during the child's dependency he/she/they may request adoption counseling and services.
- The specific services to be provided and the case management activities to be performed in order to meet the case plan objectives and goal.
    - The social worker shall include specific descriptions of the responsibilities of the social worker, other county staff, other individuals, and community agencies in the provision of services and the performance of case management activities.
    - In the case of an Indian child, the social worker shall include a description of the specific services available and being provided to the child by the tribe, the Indian caregiver, and/or other Indian service agencies or Indian organizations.
    - For children in out-of-home care, the social worker shall document the two services tracks identified for children receiving family reunification services.

        (a) The services to be provided to assist the parent(s), guardian, or Indian custodian in reunifying with the child as identified in the family reunification services track. In the case of an Indian child, the social worker shall also document Active Efforts to prevent the breakup of the Indian family as required by Section 31-135.

        (b) The services to be provided and steps to be taken to implement the permanency alternative identified in the case plan if family reunification fails.

            (1) In the case of an Indian child, the social worker shall document the services to be provided and the steps to be taken to implement the permanency alternative, including, in the case of an Indian child, Tribal Customary Adoption, identified in the case plan, if family reunification fails. Permanent placement may only occur if there is evidence beyond a reasonable doubt that is supported by the testimony of a qualified expert witness

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as required by Section 31-135 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. The social worker shall also document compliance with the standards required by ICWA as detailed in Section 31-201.

Welfare and Institutions Code Section 366.24 states:

(b) Whenever an assessment is ordered pursuant to Section 361.5, 366.21, 366.22, 366.25, or 366.26 for Indian children, the assessment shall address the option of tribal customary adoption.

- The projected date for completion of case plan objectives and the date child welfare services are to be terminated.

- The schedule of planned social worker contacts and visits with the child and the family in accordance with Sections 31-320 and 31-325.

Additional Documentation for Children in Out-of-Home Care. For children receiving out-of-home care, the social worker shall also document in the case plan, the following:

- An assessment of the child's placement needs and a determination and description of the type of home or institution which will best meet those needs.

    - In the case of an Indian child, the assessment shall include a description of the social worker's Active Efforts made to comply with the ICWA placement preference standards as further specified in Section 31-420 and if this did not occur document reasons why this did not occur.

        - The assessment shall include all efforts made, or to be made, to find a placement within the order of preference required by ICWA, the position of the Indian child's tribe on the placement, and what facts, if any, provide good cause to deviate from the ICWA placement preferences. Deviation for the ICWA placement preference order may occur only with good cause as determined by the court.

CHAPTER 31-300 SERVICE DELIVERY

31-301 GENERAL REQUIREMENTS FOR SERVICE DELIVERY

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Case Plans and Services. The individual child's case plan shall be the guiding principle in the provision of child welfare services. The social worker shall ensure that the provision of all services is consistent with the case plan goals specified in the child's case plan.

31-310 SOCIAL WORKER RESPONSIBILITIES FOR SERVICE DELIVERY

In-Home Services. In providing or arranging for the provision of services identified in the case plan when a child's family is being provided services in order to maintain the child in the home, the social worker shall take action as necessary to ensure that the child's protective needs continue to be met.

- In the case of an Indian child, the services to maintain the child in the home must be provided in accordance with the requirement to engage in Active Efforts to provide remedial and rehabilitative services to prevent the breakup of the Indian family as further specified in Section 31-135. This standard requires additional efforts on the part of the social worker to work with the child's family and tribe to identify and utilize tribally based resources that may be available to the family, such as tribal and other Indian social service agencies and organizations.

Voluntary Services. In providing or arranging for the provision of services identified in the case plan when the parent(s)/guardian(s) of a child is voluntarily receiving services, the social worker shall provide both verbal and written information regarding the possibility that legal action may be taken which could result in removal of the child from the home if parenting problems are not solved and the child remains at risk of abuse, neglect, or exploitation.

Practice Tip: *The requirement that the social worker provide the information set forth in this section would render this an involuntary proceeding. For an Indian child, Section 31-002 defines "voluntary proceeding" to mean an Indian child custody proceeding that is not an involuntary proceeding, such as a proceeding for foster care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights. The parent or Indian custodian's consent must be executed in writing and certified by a judge as described in Section 31-430.*

31-315 SERVICE-FUNDED ACTIVITIES

Service-Funded Activities Identified in Case Plan. Service-funded activities shall be available to children and their families in all phases of the Child Welfare Services program as specifically identified in the child's case plan.

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- "Service funded activity" means activities which are provided as determined by each county based upon the individual child and family needs as identified in the case plan and includes, but is not limited to, those activities specified in Welfare and Institutions Code Section 16501(a)(1). (MPP 310-002 (s)(5).)

Culturally Appropriate Services. In the case of an Indian child, social workers shall seek and make available to Indian children and their families service-funded activities that reflect the unique values of the Indian culture and promote the stability and security of Indian children, Indian families and Indian communities. Sources of such services may be found in the Indian child's tribe, Tribal TANF programs, and other Indian organizations. ICWA requires documentation when Active Efforts to provide these services prove unsuccessful.

Exhaustion of Other Public and Private Sources. If service-funded activities are available through other public and private sources, the county shall exhaust those sources prior to authorizing the expenditure of state funds appropriated for the purpose of funding child welfare services.

Range of Service-Funded Activities. The range of service-funded activities shall include, but not be limited to, the following:

(a) Case management

(b) Counseling

(c) Emergency shelter care, as specified in Section 31-415

(d) Emergency/Temporary in-home caretakers

(e) Therapeutic day services

(f) Teaching and demonstrating home-making skills

(g) Parenting training
(h) Substance abuse testing

(i) Transportation

(j) Respite care

Welfare and Institutions Code Section 16501 provides as follows:

(a)(1) As used in this chapter, "child welfare services" means public social services that are directed toward the accomplishment of any or all of the following purposes:

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(A) Protecting and promoting the welfare of all children, including disabled, homeless, dependent, or neglected children.

(B) Preventing or remedying, or assisting in the solution of problems that may result in, the neglect, abuse, exploitation, or delinquency of children.

(C) Preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible.

(D) Restoring to their families children who have been removed, by the provision of services to the child and the families.

(E) Identifying children to be placed in suitable adoptive homes, in cases where restoration to the biological family is not possible or appropriate.

(F) Ensuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption.

(2) "Child welfare services" also means services provided on behalf of children alleged to be the victims of child abuse, neglect, or exploitation. The child welfare services provided on behalf of each child represent a continuum of services, including emergency response services, family preservation services, family maintenance services, family reunification services, and permanent placement services, including supportive transition services. The individual child's case plan is the guiding principle in the provision of these services. The case plan shall be developed within a maximum of 60 days of the initial removal of the child or of the in-person response required under subdivision (f) if the child has not been removed from his or her home, or by the date of the dispositional hearing pursuant to Section 358 , whichever comes first.

(3) "Child welfare services" are best provided in a framework that integrates service planning and delivery among multiple service systems, including the mental health system, using a team-based approach, such as a child and family team. A child and family team brings together individuals that engage with the child or youth and family in assessing, planning, and delivering services consistent with paragraph (1) of subdivision (d) of Section 16501.1 . Use of a team approach increases efficiency, and thus reduces cost, by increasing coordination of formal services and integrating the natural and informal supports available to the child or youth and family.

(4) "Child and family team" means a group of individuals who are convened by the placing agency and who are engaged through a variety of team-based processes to identify the strengths

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and needs of the child or youth and his or her family, and to help achieve positive outcomes for safety, permanency, and well-being.

*(A) The **activities of the team** shall include, but not be limited to, both of the following:*

(i) Providing input into the development of a child and family plan that is strengths-based, needs-driven, and culturally relevant.

*(ii) Providing **input into the placement decision** made by the placing agency and the **services to be provided** in order to support the child or youth.*

*(B)(i) The child and family team process shall engage the child or youth, the child's family, and other people important to the family or to the child or youth in meeting the objectives set forth in subparagraph (A). **The child and family team shall also include** representatives who provide formal supports to the child or youth and family when appropriate, including, but not limited to, all of the following:*

(I) The caregiver.
(II) The placing agency caseworker.
(III) A representative from a foster family agency or short-term residential therapeutic program with which a child or youth is placed.
(IV) A county mental health representative.
(V) A representative from the regional center if the child is eligible for regional center services.
(VI) The child or youth's Court-Appointed Special Advocate, if one has been appointed, unless the child or youth objects.
***(VII) A representative of the child or youth's tribe or Indian custodian**, as applicable.*

(ii) As appropriate, the child and family team also may include other formal supports, such as substance use disorder treatment professionals and educational professionals, providing services to the child or youth and family. For purposes of this definition, the child and family team also may include extended family and informal support persons, such as friends, coaches, faith-based connections, and tribes as identified by the child or youth and family. If placement into a short-term residential therapeutic program or a foster family agency that provides treatment services has occurred or is being considered, the mental health representative is required to be a licensed mental health professional. Any party to the child's case who is represented by an attorney may consult with his or her attorney regarding this process. The child or youth and his or her family may request specific persons to be included on the child and family team.

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Nothing shall preclude another agency serving the child or youth from convening a team in collaboration with the placing agency.

31-320 SOCIAL WORKER/PROBATION OFFICER CONTACTS WITH THE CHILD

Generally, subject to exceptions as set out in the MPP, the social worker shall visit the child at least three times in the first 30 calendar days, including the initial in-person response. As well, the social worker/probation officer shall visit each child with an approved case plan who remains in the home at least once each calendar month.

Purpose of the Visits. The purpose of social worker contact with the child is to assess the safety and wellbeing of the child and to achieve the following objectives:

- Verify the location of the child
- Monitor the child's physical, emotional, social, and educational development
- To the extent possible, engage, and involve the child and the caregiver in the development of the case plan
- Gather information about the child to identify needed services to be included in the case plan and monitor the effectiveness of those services provided to meet the child's needs
- Ensure the child is able to maintain a relationship with siblings, relatives, and adults who are important to the child
- Assist the child in preserving and maintaining religious and ethnic identity
- Evaluate and assess the child's educational needs and progress and the potential need for special educational services such as an Individual Education Plan

Practice Tip: *Indian children experience disproportional educational challenges, despite the availability of specialized Indian educational programs and services that often may not be provided to them. (See, From Boarding Schools to Suspension Boards: Suspensions and Expulsions of Native American Students in California Public Schools. https://cceal.org/wp-content/uploads/2019/09/Suspension-Boards-Final.pdf)*

Local Education Agencies are required to have a foster youth liaison who should be contacted to provide assistance with connecting Indian children with available Indian education programs and services.

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The California Department of Education maintains:

- *Contact information for Assembly Bill 490 educational liaisons at the county offices of education and school districts.* *https://www.cde.ca.gov/ls/pf/fy/ab490contacts.asp*

- *Information on programs and resources that focus on American Indian educational and cultural information; including a directory of California Indian Education Centers.* *https://www.cde.ca.gov/sp/ai/*

31-335 SOCIAL WORKER CONTACTS WITH OTHER SERVICE PROVIDERS

Required Contacts. The social worker shall have contact with other professionals working with the child, parents/guardians/Indian custodians, and the out-of-home care provider.

- In the case of an Indian child, social workers must establish and maintain contact with representatives from the child's tribe, other Indian social service agencies, Indian agencies, Indian organizations, or individual Indian service providers that assist Indian children and families.

The purpose of social worker contact with other professionals is to achieve the following objectives:

1. *Confer and collaborate toward the most effective, efficient identification and meeting of the child's or the parent's needs.*
2. *Monitor safety of the child (e.g., daycare center, public health nurse, etc.) and obtain their perception of the child's well-being.*
3. *Determine whether parent is following through with commitments.*
4. *Document reasonable efforts.*
5. *Document "Active Efforts" in cases involving Indian child(ren).*

Documentation for Case Record. The social worker shall request written reports from the professionals when their services are being provided to a child, parent/guardian/ Indian custodian, or the out-of-home care provider as part of a case plan.

- The social worker shall ensure that such reports are received and documented in the case record.

- If the social worker is unable to obtain a written report, a verbal report shall be obtained and documented in the case record.

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- In addition, in the case of an Indian child, social workers shall document in the case record all reports, written or verbal, obtained from tribal representatives or service providers. It is critical to maintain a clear record of all Active Efforts being provided to the Indian child and his/her family as part of the case plan.

Examples of other service providers that often work with an Indian child and family include: a tribal ICWA advocate, a tribal designated representative, a tribal spiritual leader, a Tribal TANF program, Indian Health Services, an Indian education program, or a non-tribal community agency.

31-340 PARENT/GUARDIAN CONTACTS WITH THE CHILD

Parent/Child Visits. The social worker shall arrange for visits between child and the parent(s)/guardian(s) named in the case plan no less frequently than once each calendar month for children receiving family reunification services, subject to exceptions set out in the MPP.

Grandparent/Child Visits. The social worker shall arrange for visits between the child and grandparents, as determined in the child's case plan, for children receiving court-ordered family reunification services.

CHAPTER 31-400 PLACEMENT

31-401 GENERAL REQUIREMENTS FOR PLACEMENT

Placement in Licensed or Approved Facility. For a child placed in-state or out-of-state, the placement shall be in an appropriately licensed or approved facility which accords the child the same personal rights afforded children in California as specified in California Code of Regulations, Title 22, Division 6, Chapter 9.5, Article 3, Section 89372.

Federally recognized tribes are sovereign governments, possessing authority similar to states. The ICWA recognizes this status and confirms that licensing or approval of foster or adoptive homes or institutions by a federally recognized Indian tribe is equivalent to licensing or approval by a State. (25 U.S.C. §1931 (b).) California law defines "Tribally approved home" (TAH) as a home that has been licensed or approved by an Indian child's tribe, or a tribe or tribal organization designated by the Indian child's tribe, for foster care or adoptive placement of an Indian child using standards established by the child's tribe. A tribally approved home is not

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required to be licensed or approved by the state or county and is equivalent to a state-licensed or county-licensed or approved home, including an approved resource family home. TAH placements are subject to criminal background check requirements. (W.I.C. § 224.1.)

Caution - for the ICWA tribal rights and for the minimum federal standards for state courts to apply, the case must involve an "Indian child" as the term is specifically defined in ICWA. That definition is based on the child's unique political status as a member/citizen of a federally recognized tribe. These provisions do not apply to children who possess native heritage or whose families identify historically and culturally as "Indian", but do not have this political connection to a federally recognized tribe.

Each tribe establishes its own TAH approval standards and processes. The agency or state court may place an Indian child in a TAH approved by or at the direction of the Indian child's tribe and pay foster or adoptive assistance to that placement. However, when the Indian child is in the state court system, it is the state that makes the final placement decision. For more information on TAHs, see ACL 19-71 Tribally Approved Homes (TAHs).

31-405 SOCIAL WORKER RESPONSIBILITIES FOR PLACEMENT

When arranging for a child's placement the social worker shall:

Active Efforts to Comply with ICWA Placement Preferences. In the case of an Indian child, Active Efforts shall be made to comply with the ICWA placement preferences and standards as required by Section 31-420. The first preference shall be placement with a member of the child's extended family, as defined in Section 1903(2), of 25 U.S.C.

As required by Welfare and Institutions Code Section 361.3, a finding that the relative is not willing to adopt or seek guardianship for the child cannot be used as the sole basis for denying placement with a relative.

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*The ICWA Section 1903(2) provides that an Indian child's "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent." Note, this does **not** include non-related extended family unless it is part of an Indian child's tribe's definition.*

In the case of an Indian child, Active Efforts shall be made to comply with the ICWA placement preferences and standards as required by Section 31-420 for foster care placement and shall:

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- Consider the placement preferences of the child's tribe.

- Consider the Tribally Specified Home when designated as the preference of the Indian child's tribe.

- If adoption of the child is being considered, the social worker shall take into account the ICWA preferences for adoptive placement which, absent good cause to the contrary as determined by the court, are a placement with:

  (1) A member of the child's extended family,

  (2) Other members of the Indian Tribe, or

  (3) Other Indian families.

Requirements for Placement in a Tribally Approved Home. When considering the placement of an Indian child in a Tribally Approved Home, the following requirements shall apply:

- The social worker must conduct the caregiver background checks on all adults (over age 18) living in the home or persons that may have significant contact with the child unless the tribe has an authorized Tribal Agency that conducts the caregiver background checks pursuant to Welfare and Institutions Code section 10553.12.

- If the tribe has a Tribal Agency that is approved to receive criminal and child abuse registry information from the California Department of Justice pursuant to Welfare and Institutions Code section 10553.12 the social worker shall secure documentation of the following:

  (a) The Tribal Agency's certification that it has completed caregiver background checks, pursuant to the standards set forth in Sections 1522 and 1522.1 of the Health and Safety Code, with respect to any prospective foster parent, adoptive parent, or any adult who resides or is employed in the Tribally Approved Home.

    (1) The certification must provide the address of the home, the names of the individuals in the household that have been cleared, the date of the completion of the clearance for each individual, and if any exemptions were granted.

    (2) Documentation that the Tribal Agency has agreed to report, within 24 hours, to the county social worker responsible for the child placed in the Tribally Approved Home, any notification to the Tribal Agency by the Department of Justice of a subsequent state or federal arrest or

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disposition notification involving an individual associated with the Tribally Approved Home.

- Should the social worker have any concerns about the safety of the home, the social worker must consult and collaborate with the tribe to address any concerns.

- The social worker must follow the ICWA placement preferences, which include the Tribally Approved or Tribally Specified Home designated by the child's tribe. Deviation from the preference order may occur only with good cause, as determined by the court. The social worker must provide the court with facts and supporting evidence that justify a request to deviate from the placement preferences and must ask the court for a finding that there is good cause to deviate from the ICWA placement preferences.

Documenting Reasons Child Transfers to Another Placement. In the case of an Indian child, in addition to documenting the reasons for the child's transfer to another placement location, the social worker must also document the Active Efforts taken to make the transfer within the order of ICWA placement preferences as required by Section 31-420, which shall include making contact with the child's tribe to solicit assistance and support in identifying an appropriate placement for the child.

31-410 TEMPORARY PLACEMENT

Temporary placement services shall consist of emergency shelter care and out-of-home respite care. Temporary placement services shall be provided when the social worker has considered and/or used in home services and has determined that the provision or continued provision of these services will not safely maintain the child in his/her own home.

Temporary Placement Services Involving an Indian Child. For temporary placement services involving an Indian child, the social worker shall, to the extent possible, collaborate with the child's tribe in an attempt to prevent the removal of the child and to solicit tribal assistance and support in the placement of the child. When selecting a temporary placement for an Indian child, the social worker shall engage in Active Efforts to place the child in compliance with the ICWA placement preference order required in Section 31-420.

Assessment for Temporary Placement. The county welfare department or probation department shall begin an assessment for a relative or nonrelative extended family member, as defined in Welfare and Institutions Code Section 319, who either has requested placement of a child pending the detention hearing or whom the social worker/probation officer has identified as willing to provide care for the child pending the detention hearing.

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The assessment shall include, but is not limited to, all of the following:

- An in-home inspection to assess the safety of the home as required in Welfare and Institutions Code Section 309(d), except in the case of an Indian child whose tribe has recommended a home they have approved according to their tribal standards, pursuant to 25 U.S.C. 1915(b).
- Where an Indian child is being placed in a Tribally Approved Home, the tribe's home assessment is considered as equivalent to state licensing standards applicable to foster family homes and shall be consistent with Section 31-405.
- As assessment of the relative's ability to provide temporary care for the child.
- The results of a criminal records check conducted through the California Law Enforcement Telecommunications System (CLETS) on all persons 18 years of age or older residing in the home, pending the receipt of DOJ fingerprint clearance.

The ICWA specifies in pertinent part:

- *Section 1911 (d). The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity*
- *Section 1931 (b). For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.*

Penal Code Section 16504.5 specifies in pertinent part:

(a) Notwithstanding any other provision of law, pursuant to subdivision (b) of Section 11105 of the Penal Code, a child welfare agency may secure from an appropriate governmental agency the state summary criminal history information, as defined in subdivision (a) of Section 11105 of the Penal Code, through the California Law Enforcement Telecommunications System for the following purposes: ...

(f) Nothing in this section shall preclude a relative or other person living in a relative's home from refuting any of the information obtained by law enforcement if the individual believes the criminal records check revealed erroneous information.

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- The results of a Child Abuse Central Index (CACI) check conducted on all persons 18 years of age and older residing in the home.

Effect of CACI Listing. A CACI listing does not necessarily preclude placement with a relative or non-related extended family member. Instead, the relative or non-related extended family member may still be entitled to placement upon consideration of all relevant factors. These factors include but are not limited to the following:

(a) The nature of the substantiated or inconclusive child abuse/neglect report that led to the CACI listing,

(b) The period of time that has elapsed since the substantiated or inconclusive child abuse/neglect was committed and the number of offenses,

(c) The circumstances surrounding the commission of the substantiated or inconclusive child abuse/neglect that would demonstrate the likelihood of repetition, and

(d) Character references.

Active Efforts Required for Temporary Placement. The temporary placement of an Indian child shall require Active Efforts to comply with the ICWA placement preference requirements as specified in Section 31-420 and shall also be based on the following:

- The least restrictive setting which most approximates a family-like environment and in which the child's special needs, if any, can be met.

- The reasonable proximity to the child's home, taking into account any special needs of the child.

- The prevailing social and cultural standards of the Indian child's tribe and community in which the parent or extended family members reside or maintain social and cultural ties.

31-420 FOSTER CARE PLACEMENT

The foster care placement shall be based on the following needs of the child including, but not limited to:

- The least restrictive, most family-like environment.

- The child's age, sex, and cultural background, including racial or ethnic and religious identification.

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- In the case of an Indian child, the child's tribal affiliation and the cultural and traditional practices of the tribe shall be considered.

- Planned parent/guardian-child contacts during the separation, and the specific actions to be taken by the parent(s)/guardian(s) which will facilitate reunification.

- Capability, willingness and ability of the caregiver to meet specific needs of the child, to facilitate family reunification, and provide the child's permanency alternative, if necessary.

- Appropriateness of attempting to maintain the child in his/her current school.

- The child's health and emotional factors.

- Anticipated special needs of the child, including but not limited to transportation, diet, medical and/or psychological care, clothing, recreation, and special education.

Placement Priorities. When selecting a foster care placement for the child, the social worker shall adhere to the following priority order:

- The home of a relative, including the non-custodial parent, in which the child can be safely placed as assessed according, but not limited to, the requirements specified in Welfare and Institutions Code Section 361.3.

- Preferential consideration for placement of the child shall be given to a non-custodial parent, then an adult who is a grandparent, aunt, uncle, or sibling of the child, except that if the child is an Indian child and the noncustodial parent is not available or appropriate for placement of the child, then the placement requirements of Section 31-420 shall apply.

    - As required by Welfare and Institutions Code Section 361.3, a finding that the relative cannot provide legal permanence for the child shall not be used as the sole basis for denying placement with a relative.

Article VI of the U.S. Constitution declares the constitution, laws, and treaties of the federal government to be the supreme law of the land to which every state is bound regardless of state law to the contrary.

The ICWA is a federal law whose standards must be implemented by states, except in one narrow set of circumstances: when state law provides a higher standard of protection to the rights of the parent or Indian custodian (not the child) than that given them under the federal ICWA. 25 CFR 23.106(b). This includes compliance with placement preferences, even if a social worker believes that it would be inconsistent with state law or otherwise in the child's best interests to apply non-ICWA preferences such as placing the child in a certain location to maintain enrollment at the child's school of origin.

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Active Efforts to Adhere to Foster Care Placement Preferences. When selecting a foster care placement for an Indian child the social worker shall engage in Active Efforts to adhere to the following ICWA placement preference requirements:

- The prevailing social and cultural standards of the Indian community in which the parent or extended family members reside or maintain social and cultural ties, or the prevailing social and cultural standards of the Indian child's tribe shall be applied.

- A determination of the applicable prevailing social and cultural standards may be confirmed by the Indian child's tribe or by the testimony or other documented support of a qualified expert witness who is knowledgeable regarding the social and cultural standards of the Indian child's tribe.

- The services of the Indian child's tribe shall be used, when available, in seeking to secure a placement that meets their placement preference order.

- The social worker shall select the least restrictive placement that most approximates a family-like environment and in which the child's special needs, if any, may be met. The placement shall be within reasonable proximity to the child's home, taking into account any special needs of the child.

Foster Care Placement Preferences. Preference shall be given to the child's placement with one of the following, in descending order:

1. A member of the Indian child's extended family, which shall be defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, bother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

2. A Tribally Approved Home or a Tribally Specified Home, as defined in section 31-002, as so designated by the Indian child's tribe.

3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority (a state licensed home; a home certified by a licensed foster family agency).

4. An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Different Preference Order Established by Tribe. A tribe may establish a different preference order, which must be followed so long as the placement is in the least restrictive setting appropriate to the particular needs of the child.

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Good Cause Required for Deviation. Deviation from the preference order may occur only with good cause, as determined by the court, which may include but is not necessarily be limited to the following:

(a) The request of the parent or Indian custodian,

(b) The request of the Indian child, when of sufficient age,

(c) The extraordinary physical or emotional needs of the Indian child as established by a qualified expert witness, or

(d) The unavailability of suitable families based on documented Active Efforts to identify families meeting the preference criteria.

The social worker must provide the court with facts and supporting evidence that justify the request to deviate from the placement preferences and must ask the court for a finding that there is good cause to deviate from the ICWA placement preferences.

Placement When No Preferred Placement Available. When no preferred placement is available, Active Efforts shall be made and documented to place the child with a family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe.

Placement Records. A record of each placement shall be maintained in perpetuity, including the Active Efforts made to comply with the placement preference order, and the placement history shall be available to the Secretary of the Interior and/or the child's Indian tribe, upon request to the county.

Welfare and Institutions Code Section 361.31 (m) provides as follows:

> *(m) A record of each foster care placement or adoptive placement of an Indian child shall be maintained in perpetuity by the State Department of Social Services. The record shall document the active efforts to comply with the applicable order of preference specified in this section and shall be made available within 14 days of a request by the child's tribe.*

31-425 PERMANENT PLACEMENT

Placement Considerations. The permanent placement shall be based on the needs of the child, including but not limited to:

- The degree of permanency of the available alternatives,

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- The child's age, sex, tribal affiliation, and cultural background, including racial or ethnic and religious identification,

- Capability of a relative, Indian custodian, the out-of-home care provider(s), adoptive parent(s), or guardian(s) to meet specific needs of the child.

    - If the child is not placed with a permanency planning family or if the permanency alternative identified in the case plan fails, preferential consideration for placement of the child shall be given the non-custodial parent, then to an adult who is a grandparent, aunt, uncle, or sibling of the child, as required in Welfare and Institutions Code Section 361.3.

    - In the case of an Indian child, capacity to encourage and protect the child's retention of connections to its tribe.

- Appropriateness of attempting to maintain the child in his/her current school,

- The child's health and emotional factors,

- Anticipated special needs of the child, including but not limited to transportation, diet, medical and/or psychological care, clothing, recreation, and special education.

Discrimination Prohibited. An agency or entity that receives state financial assistance to place a child in foster care shall not:

(a) Deny to any person the opportunity to become a foster parent on the basis of race, color, national origin, or culture of the foster parent or the child involved.

(b) Deny or delay the placement of a child into foster care or adoption on the basis of race, color, national origin or culture of the foster parents or the child involved.

Practice Tip: *The Constitution of the United States establishes principles that require equality under the law. However, Indians are subject to many laws that apply only to Indian people. Why? Federal case law has confirmed that what makes Indians and tribes so special are unique political factors, not racial or cultural ones. A tribe is an ethnic group - - a cultural entity - - but also an original sovereign of this nation with the political right to self-government over its members/citizens. Statutes passed for Indians may have incidental benefits of advancing Indian religion, culture, race, etc. However, they survive challenge because they are not based on these impermissible criteria, but on the unique political relationship between the federal government and tribes (as political entities).*

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ICWA Placement Preferences. When selecting a permanent placement for the Indian child, the social worker shall adhere to the priority order specified in Sections 31-201.

- When selecting a permanent placement for an Indian child that may involve the adoption of the child or termination of parental rights, the social worker shall adhere to the adoptive placement preference standards specified in Sections 31-201.

- When the permanent placement of an Indian child may involve a foster care or guardianship placement the social worker shall adhere to the placement preference standards specified in Section 31-420.

Consulting with Tribe on Placement. When selecting a permanent placement of the Indian child, the social worker shall consider and consult with the child's tribe regarding Tribal Customary Adoption.

A Tribal Customary Adoption is an adoption of an Indian child who is a dependent of a county court and that, pursuant to Welfare and Institutions Code section 366.24, is finalized by and through the customs, laws, or traditions of the child's tribe. Termination of parental rights is not required to effectuate the adoption.

The Indian child's tribe is the only entity that can elect Tribal Customary Adoption as the permanency option for the child. The tribe may express a preference for a different option. (WIC section 366.26(c)(1)(B)(VI)). No tribe is required to elect Tribal Customary Adoption.

31-430 ADDITIONAL REQUIREMENTS FOR VOLUNTARY PLACEMENTS

In addition to the general requirements specified in other Division 31 regulations, the provisions specified below shall apply to voluntary placements.

Voluntary Placement Agreement. Voluntary placement of a nondependent child shall occur only when there is a written voluntary placement agreement between the county and the parent(s)/guardians(s)/Indian custodian(s) pursuant to the provisions of Sections 16507.2, 16507.3, and 16507.4(b) of the Welfare and Institutions Code.

Voluntary Placement of an Indian Child. If the voluntary placement is of an Indian child, the consent to the placement shall be the written consent of a parent or Indian custodian and comply with the following:

1. The consent must be recorded no fewer than 10 days after the birth of the child, in the presence of the judge of the Superior Court on SOC Form 155C;

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2. The judge must certify that the terms and consequences of the consent were fully explained in detail and that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language the person understood; and

3. The parent or Indian custodian is informed that consent may be withdrawn for any reason at which time the child must be returned to the parent or Indian custodian.

Notice Required. If the child is or may be an Indian child, ICWA notice shall be conducted as set forth in Section 31-125.

Placement No Longer Voluntary. In the situation where the placement may no longer be voluntary, in that there is a determination the child will not be returned to the parent(s)/guardian(s)/Indian custodian(s), the social worker must comply with the requirement to engage in Active Efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to comply with the ICWA placement preferences.

Social Worker Requirements. The social worker shall:

- Complete the Voluntary Placement Agreement-Parent/Agency.

- Provide a written statement informing the parent(s)/guardian(s)/Indian custodian(s) that he/she may be responsible for a share of the family reunification services costs.

- Assist the parent(s)/guardian(s)/Indian custodian(s) of a voluntarily placed child to understand that he/she still retains legal custody of the child even though he/she voluntarily places the child with the agency; and that he/she may limit, by written agreement, the scope of the foster parent's authority to give parental consent.

- Ensure that the computation of the share of costs is completed pursuant to Welfare and Institutions Code Section 16507.4(a).

31-435 OUT-OF-COUNTY AND OUT-OF-STATE PLACEMENT REQUIREMENTS and 31-445 REQUIREMENTS FOR APPROVAL OF RELATIVE AND NONRELATIVE EXTENDED FAMILY MEMBER FOSTER FAMILY HOMES

[Note: These sections are largely outdated as the state transitions to the Continuum of Care Reform (see https://cdss.ca.gov/inforesources/continuum-of-care-reform), which is altering congregate care options and the home approval process via Resource Family Approval Written Directives, available on the CDSS website at https://cdss.ca.gov/inforesources/resource-family-approval-program.]

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CHAPTER 31-500 SPECIAL REQUIREMENTS

31-510 INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC)

The Interstate Compact on the Placement of Children (ICPC) is an agreement among member states that provides procedures for placements by one-member state (the sending agency) that wishes to place a child of whom it holds legal custody or has placement responsibility for, in another member state.

Because tribes are not parties to the ICPC, the MPP specifies that the ICPC shall not be applicable to any placement (sending or receiving) of an Indian child if the placement is made:

- Between an Indian tribe and another Indian tribe, or
- Between a county compact member and a tribal court that is assuming jurisdiction of the Indian child's case.

31-525 INDEPENDENT LIVING PROGRAM (ILP)

The purpose of the Independent Living Program (ILP) is to provide program services and activities as described in the Transitional Independent Living Plan (TILP) to assist eligible youth to live independently.

All County Letter 16-19 addresses Independent Living Program (ILP) Services for Tribal Youth and is located here: https://www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2016/16-19.pdf

California Department of Social Services Letters and Notices

In addition to regulations set forth in the CDSS MPP, CDSS provides policy guidance and operational instructions for social workers through in All County Letters (ACLs)and All County Information Notices (ACINs). ACLs and ACINs may be accessed on the CDSS website at: https://cdss.ca.gov/inforesources/letters-and-notices. The website identifies that ACLs transmit mandated changes in policy and procedures and statewide requirements. ACINs transmit non-mandatory, general or instructional information. ACLs and ACINs addressing Tribal/ICWA issues are set forth below.

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Table of CDSS Tribal/ICWA All County Letters

ACL, Issue Dates	Subject	Link
ACL 20-38 (April 18, 2020)	CHILDREN AND FAMILY SERVICES DIVISION: IMPLEMENTATION OF ASSEMBLY BILL 3176 REGARDING INDIAN CHILDREN (CHAPTER 833, STATUTES OF 2018)	https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2020/20-38.pdf
ACL 19-84 (September 4, 2019)	UPDATED INFORMATION REGARDING FUNDING FOR EMERGENCY CAREGIVERS WITH PLACEMENT OF CHILDREN AND/OR NONMINOR DEPENDENTS (NMDS) PRIOR TO RESOURCE FAMILY APPROVAL (RFA) OR AS A TRIBALLY APPROVED HOME (TAH)	https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2019/19-84_ES.pdf
ACL 19-71 (July 29, 2019)	TRIBALLY APPROVED HOMES	https://www.cdss.ca.gov/Portals/9/ACL/2019/19-71.pdf?ver=2019-07-31-123518-930
ACL 18-140 (January 16, 2019)	TRIBAL ACCESS TO CHILD WELFARE CASE RECORDS	https://www.cdss.ca.gov/Portals/9/ACL/2018/18-140.pdf?ver=2019-02-15-135825-110
ACL 17-107 (February 6, 2018)	ASSESSING CHILD SAFETY AND APPROPRIATE MONITORING OF SAFETY PLANS	https://www.cdss.ca.gov/Portals/9/ACL/2017/17-107.pdf?ver=2019-06-26-152901-400
ACL 17-62 (July 27, 2017)	NEW AUTHORITIES FOR TRIBAL BACKGROUND CHECKS	http://www.cdss.ca.gov/Portals/9/lettersnotices/ACL/2017/17-62.pdf?ver=2017-07-28-090816-000
ACL 17-45 (June 21, 2017)	AMENDED CALIFORNIA RULES OF COURT, RULE 5.640 AND PSYCHOTROPIC MEDICATION FORMS	https://www.cdss.ca.gov/Portals/9/ACL/2017/17-45.pdf?ver=2019-06-25-140547-413
ACL 17-17 (March 7, 2017)	IMPLEMENTATION OF STATEWIDE COMMON CORE 3.0 CURRICULUM	https://www.cdss.ca.gov/Portals/9/ACL/2017/17-17.pdf?ver=2019-06-25-135033-123
ACL 17-14 (February 3, 2017)	OPTIONAL COUNTY REVIEW OF PROVIDER PROGRAM STATEMENTS AND LETTER OF RECOMMENDATION	https://www.cdss.ca.gov/Portals/9/ACL/2017/17-14.pdf?ver=2019-06-25-134909-693
ACL 16-19 (April 28, 2016)	INDEPENDENT LIVING PROGRAM (ILP) SERVICES FOR TRIBAL YOUTH	https://www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2016/16-19.pdf
ACL 14-15 (February 14, 2014)	FEDERAL REQUIREMENTS FOR THE TRANSFER OF INDIAN CHILDREN TO A TRIBAL TITLE IV–E AGENCY OR AN INDIAN TRIBE WITH A TITLE IV–E AGREEMENT	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2014/14-15.pdf

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ACL 14-10 (January 31, 2014)	INSTRUCTIONS FOR COMPLETION OF THE RELATIVE ASSESSMENT/APPROVAL SOC FORMS FOR A TRIBALLY APPROVED HOME	http://www.cdss.ca.gov/Portals/9/lettersnotices/ACL/2014/14-10.pdf?ver=2014-03-20-131746-000
ACL 13-91 (November 1, 2013)	AFTER 18 PROGRAM (AB 12 EXTENDED FOSTER CARE) AND INDIAN NON-MINOR DEPENDENTS (NMDs) COVERED BY THE INDIAN CHILD WELFARE ACT (ICWA)	https://www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2013/13-91.pdf
ACL 11-77 (November 18, 2011)	EXTENSION OF FOSTER CARE BEYOND AGE 18: PART TWO (PLACEMENT)	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2011/11-77.pdf
ACL 11-69 (October 13, 2011)	EXTENSION OF FOSTER CARE BEYOND AGE 18: PART ONE	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2011/11-69.pdf
ACL 11-24 (April 14, 2011)	DUTIES AND RESPONSIBILITIES OF ADOPTION SERVICE PROVIDERS	http://www.cdss.ca.gov/Portals/9/lettersnotices/ACL/2011/11-24.pdf?ver=2011-04-27-145740-000
ACL 10-47 (October 27, 2010)	IMPLEMENTATION OF TRIBAL CUSTOMARY ADOPTION - ASSEMBLY BILL 1325 (CHAPTER 287, STATUTES OF 2009)	http://www.cdss.ca.gov/Portals/9/lettersnotices/ACL/2010/10-47.pdf?ver=2010-11-03-151830-000
ACL 10-17 (March 24, 2010)	TRIBAL CUSTOMARY ADOPTION	http://www.cdss.ca.gov/Portals/9/lettersnotices/ACL/2010/10-17.pdf?ver=2010-04-01-155450-000
ACL 09-35 (July 28, 2009)	WAIVER OF RIGHT TO FURTHER NOTICE OF ADOPTION PLANNING AND WAIVER OF RIGHT TO REVOKE CONSENT	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2009/09-35.pdf
ACL 09-28 (June 4, 2009)	INDIAN CHILD WELFARE ACT AND ADOPTONS—FORMS, PROCESSES, AND STANDARDS	http://www.cdss.ca.gov/Portals/9/lettersnotices/ACL/2009/09-28.pdf?ver=2018-06-13-090726-000
ACL 05-13E (February 15, 2006)	CORRECTION TO ALL COUNTY LETTER (ACL) NO. 05-13	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl05/pdf/05-13E.pdf
ACL 05-13 (June 16, 2005)	RELATIVE AND NONRELATIVE EXTENDED FAMILY MEMBER (NREFM) APPROVALS – FREQUENTLY ASKED QUESTIONS AND ANSWERS; CHILD WELFARE SERVICES/CASE MANAGEMENT SYSTEM (CWS/CMS) 5.4 RELEASE FUNCTIONALITY *(Contains errors—Read in conjunction with ACL 05-13E, above)*	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl05/pdf/05-13.pdf

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ACL 05-06 (June 15, 2005)	LEARNING OBJECTIVES FOR THE TRAINING OF RESOURCE FAMILIES IN CALIFORNIA	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl05/pdf/05-06.pdf
ACL 04-05 (February 3, 2004)	IMPLEMENTATION OF CHILD WELFARE SERVICES OUTCOME AND ACCOUNTABILITY SYSTEM	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl04/pdf/04-05.pdf
ACL 00-09 (January 10, 2000)	KINSHIP GUARDIANSHIP ASSISTANCE PAYMENT (Kin-GAP) PROGRAM	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl00/pdf/00-09.PDF
ACL 95-06 (February 8, 1995)	EMERGENCY ASSISTANCE (EA) FOR COUNTY WELFARE DEPARTMENTS EMERGENCY RESPONSE (ER) ACTIVITIES AND CRISIS RESOLUTION SERVICES	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl95/95-06.PDF

Table of CDSS Tribal/ICWA All County Information Notices

All County Information Notices	Subject	Link
ACIN I-40-10	REQUIREMENT OF THE USE OF AN EXPERT WITNESS BY THE INDIAN CHILD WELFARE ACT (ICWA)	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin/2010/I-40_10.pdf
ACIN I-06-09	ADMINISTRATIVE OFFICE OF THE COURTS INDIAN CHILD WELFARE ACT (ICWA) INITIATIVE	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin/2009/I-06_09.pdf
ACIN I-94-06	TRIBAL/STATE INTERGOVERNMENTAL AGREEMENTS	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin06/pdf/I-94_06.pdf
ACIN I-43-04	THE INDIAN CHILD WELFARE ACT/FREQUENTLY ASKED QUESTIONS	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin04/pdf/I-43_04.pdf
ACIN I-97-81	IDENTIFICATION OF INDIAN CHILDREN SUBJECT TO PROVISIONS OF THE INDIAN CHILD WELFARE ACT- UNBORN CHILD	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin81/I-97-81.pdf
ACIN I-122-00	INDIAN CHILD WELFARE ACT AND "EXISTING FAMILY DOCTRINE"	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin00/pdf/I-122_00.pdf
ACIN I-57-83	ACKNOWLEDGEMENT AND ESTABLISHMENT OF PATERNITY BY ALLEGED NATURAL FATHERS OF INDIAN DESCENT	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin83/I-57-83.pdf
ACIN I-111-83	INDIAN CHILD WELFARE ACT AND ALLEGED NATURAL FATHERS	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin83/I-111-83.pdf
ACIN I-95-82	SOC 319 AND THE INDIAN CHILD WELFARE ACT	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin82/I-95-82.pdf

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ACIN I-131-81	INDIAN RESOURCE AGENCIES RECEIVING GRANTS UNDER THE INDIAN CHILD WELFARE ACT OF 1978 (ICWA)	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin81/I-131-81.pdf
ACIN I-40-87	DESIGNATED TRIBAL AGENTS	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin87/I-40-87.pdf
ACIN I-46-98	THE IMPACT ON THE INDIAN CHILD WELFARE ACT OF: ASSEMBLY BILL 1544; THE ADOPTION AND SAFE FAMILIES ACT OF 1997; AND THE SMALL BUSINESS JOB PROTECTION ACT OF 1996, SECTION 1808 "REMOVAL OF BARRIERS TO INTERETHNIC ADOPTION"	https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acin98/I-46-98.pdf
ACIN I-29-16	ANTICIPATED RELEASE OF REVISED CALIFORNIA MANUAL OF POLICIES AND PROCEDURES, DIVISION 31 REGULATIONS	https://www.cdss.ca.gov/Portals/9/ACIN/2016/I-29_16.pdf?ver=2019-06-24-135445-693

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INDIAN CHILD WELFARE ACT DESK REFERENCE:

SECTION IV. FREQUENTLY ASKED QUESTIONS

QUESTIONS ABOUT THE ICWA

QUESTIONS ABOUT AN INDIAN CHILD'S BEST INTERESTS

QUESTIONS ABOUT CONFIRMING A CHILD'S INDIAN STATUS

GENERAL QUESTIONS ABOUT TERMINOLOGY

QUESTIONS ABOUT THE MINIMUM FEDERAL STANDARDS FOR STATE COURTS

QUESTIONS ABOUT FEDERALLY RECOGNIZED TRIBES

QUESTIONS ABOUT TRIBAL COURTS AND JURISDICTION

IV. Frequently Asked Questions

A. General Questions About Terminology

1. What terms should I know when working with Indians and tribes?

To achieve ICWA compliance, it is important that terms be clearly defined and carefully, consistently applied. Indians and tribes occupy a unique place in the history of the United States and in the legal and political system. With hundreds of years of history and an entire body of specialized law, commonly known as federal Indian law, one size does not fit all. Tribes are sovereign nations and they and their representatives may engage with the federal government and the state in multiple roles or capacities:

- Contemporary ***Indian tribes*** *descend from historic tribal nations* and ***are distinct ethnic/cultural groups***.

- Federally recognized **Indian tribes are** sovereign ***governments*** who enjoy a government-to-government relationship with each other, the federal government and the 50 states.

- In the exercise of their internal sovereign powers of self-government, federally recognized ***Indian tribes*** *may* regulate domestic relations and ***are service providers*** if they choose to operate child welfare programs pursuant to tribal and federal law.

ICWA compliance requires concepts and terminology that relate to the varied capacities in which Indians, tribes and tribal representatives or employees interact with child welfare systems – as cultural groups, as governments, or as service providers – and applies that terminology in the appropriate circumstances.

2. What are some important terms for me to be aware of and how do I know which term(s) to use?

Federal Indian law involves over a century of legislation and case law responding to the unique history, status and changing circumstances of Indians and tribes in the United States. Federal law contains express definitions, many specific to a particular context and many applicable only to federally recognized tribes. For this reason, when interacting with Indian people and tribes It is important to be familiar with the following terms: *sovereignty, historic/aboriginal/ancestral tribes, federally recognized tribe, and non-federally recognized tribe.*

Common terms to be familiar with when speaking of the original inhabitants of what is now the United States include: *Native American, Indigenous/Aboriginal; and American Indian/Indian.*

It is not uncommon to find people taking issue with being referred to as “Indian” and

expressing a preference for another term. Being respectful of how an individual self-identifies is always appropriate. However, it is also important to have an understanding of what terminology is appropriate to the subject at hand (for example, when a law uses a particular term), and to be intentional about the particular term used for the subject being addressed.

The body of federal law that frames the contemporary legal and sovereign status of federally recognized tribes is called federal Indian law, with title 25 of the United States Code titled "*Indians*." The 570+ federally recognized tribes in the U.S. are generally very protective of the legal principles, laws and terminology that support their unique legal status and contemporary tribal operations. Although there is not a single definition, the term Indian often has legal significance, which can differ depending on the context. For this reason, other terms that often have ethnic or cultural meanings should not be loosely substituted for the term “Indian” which has a specific legal meaning particularly in the context of the ICWA.

Because of the variations in definition, these and other terms relevant to Indian child welfare are defined in **Section V, The ICWA Glossary**.

3. Why is it so hard to know if someone is an “Indian” for ICWA purposes?

As discussed above, there is no single definition to use in determining if an individual is an Indian. For certain purposes and programs, a person’s self-identification as an Indian or indigenous person may be sufficient. In other contexts, the legal definition may be more restrictive. People are not always familiar with the legal definitions and restrictions. Generally, to be an Indian:

- A person must have some Indian blood (i.e., biological ancestry) and must be considered an Indian by his/her community.

- No single federal criterion establishes a person’s status as an “Indian.” Various federal laws define the term differently. This results in differing criteria for who a law may apply to and who may qualify as an Indian eligible to participate in any program authorized by that law.

- Membership/citizenship in a federally recognized tribe establish the individual’s Indian status for virtually all purposes.

- Tribes have varying eligibility criteria for membership/citizenship.

To determine what the criteria might be for agencies or tribes, to avoid an inappropriate assumption, you must contact them directly.

Indian status determinations **can be complex** undertakings, with **outcomes differing, depending on the particular circumstances** surrounding an inquiry. As an example, ICWA, a single federal statute contains multiple definitions of Indian:

- Section 1903 (3) defines Indian as a member of an Indian tribe. Section 1903(4) defines Indian child as a member or eligible for membership and the biological child of a member of an Indian tribe.

- Section 1934 contains a special (and broader) definition of Indian for purposes of eligibility for Child and Family Services funded under Title II of the Act.

- Section 1912 provides a functional definition by requiring that notice be provided as required under the ICWA "*whenever the court knows or has reason to know the child may be an Indian*." [Caution - Note that nowhere does the ICWA talk about "enrollment". Enrollment is an administrative process that many tribes use to prove or establish membership or citizenship, but it should not be confused with membership or citizenship itself!]

B. Questions About Federally Recognized Tribes

1. How does a tribe gain recognition, and why is recognition important?

There are currently over 570 federally recognized tribes in the United States, including 229 village groups in Alaska. There are 109 federally recognized tribes in California, 104 based in California and 5 with territory extending into California. "Federally recognized" means that these tribes and groups have a special, legal relationship with the United States government and as a result a unique legal status within the U.S. Constitution and in relation to the states. Grounded in the history of this nation and the Constitution of the United States, this relationship is referred to as a *government-to-government relationship*. Indians must be members, i.e., "citizens" of a federally recognized Indian tribe in order to be subject to and benefit from most but not all of the many special laws governing Indians and tribes.

There was not always a published list of federally recognized tribes. In the early 1980's the Bureau of Indian Affairs (BIA) adopted regulations which require annual publication of a list of federally recognized tribes in the Federal Register. The initial list was put together by the BIA without any consultation with Indian people and resulted in the unilateral exclusion of many groups in California who descend from California Indian nations and who had always been treated by the government as "Indians" before. (See, Section II, the Special Case of California). The Complete List of Federally Recognized Tribes and a tribal leaders directory is generally available on the BIA website at https://www.bia.gov/. The regulations also establish a procedure for non-federally recognized tribes to petition for recognition. 25 C.F.R. Part 83. In recent years, "federally recognized" has commonly come to mean that a tribe is included on the Part 83 list.

A tribe can gain recognition (have their status as a tribe acknowledged or restored) by successfully petitioning under the regulations, or in some cases by securing status clarification from the BIA through other means, or through litigation or legislation.

2. Who governs an Indian tribe and how does a tribe take formal action?

Agencies and Courts often struggle with issues that have at their core, this question. The question may arise in a variety of contexts, such as: How do we determine if a non-attorney is a valid representative of a tribe; if someone is considered an expert by a tribe; if a tribe approves a placement?

Most tribal governments are organized democratically, that is, with an elected leadership. The governing body is generally referred to as a "council". It is comprised of persons elected by vote of the eligible adult tribal members, and the presiding official, who is often vested with authority to represent the tribe, is the "chairman, chair or chairperson," although some tribes use other titles. An elected tribal council, generally operating pursuant to a tribal constitution and recognized as such by the Secretary of the Interior, has authority to speak and act for the tribe and to represent it in negotiations with federal, state and local governments. Most formal tribal council action is reflected in council meeting minutes and corresponding resolutions and ordinances. **Resolutions** will commonly confirm a tribal action or designate an official with authority to represent the tribe for designated purposes. Generally, the presiding official has authority to communicate on behalf of the tribe.

The form of tribal governmental organization and the procedures and processes followed by tribes may vary. However, tribes are governments. Upon inquiry, and if there is reason to question the authority of a specific individual, the tribe can clarify what the processes of its government are and can confirm the authority of an individual acting on behalf of the tribe. This confirmation may be a writing from the tribe and if not, the terms and method of the confirmation should be documented in the case record.

Practice Tip: *Collaboration with tribes and tribal service providers is both beneficial and required in many instances. There is a balance to be struck between the need to confirm the authority of an individual involved with an Indian child's case, and the formality required to do so. Proof of tribal authority should not be used to delay, undermine, or discredit a tribal representative. For instance, it can be assumed that a tribe's in-house counsel or designated agent for proof of ICWA notice has authority to represent the tribe in child welfare matters.*

3. May a tribe participate in a case if it is not federally recognized and does the ICWA apply?

A provision of state law often referred to as the *spirit of the ICWA* acknowledges the complicated history of Indians and tribes, the changing nature of the tribal recognition process, and that there are Indian people who may not be members of federally recognized tribes. W.I.C. §306.6 provides that in a case involving a child who is a member of a non-federally recognized tribe *the court may permit* the tribe from which the child is descended to participate in the proceeding upon request of the tribe.

- If the court permits a non-federally recognized tribe to participate in a proceeding, the tribe may do all of the things state law allows a CASA volunteer to do:

  (1) Be present at the hearing;

  (2) Address the court;

  (3) Request and receive notice of hearings;

  (4) Request to examine court documents relating to the proceeding;

  (5) Present information to the court that is relevant to the proceeding;

  (6) Submit written reports and recommendations to the court;

  (7) Perform other duties and responsibilities as requested or approved by the court.

- The law is intended to assist the court in making decisions that are in the best interest of the child by permitting the non-federally recognized tribe to provide information about placement options for the child within the child's extended family or the tribal community, services and programs available to the child and the child's parents as Indians, and other unique interests the child or the child's parents may have as Indians.

- The law clarifies that it does *not* make ICWA, or any state law implementing ICWA, applicable to the proceedings.

4. Federal laws, including the ICWA, treat Indians differently than everyone else. Why is this not a violation of equal protection?

The Constitution of the United States establishes principles that require equality under the law. However, Indians are subject to many laws that apply only to Indian people. The courts have allowed this primarily on the basis that federally recognized tribes and citizens of those tribes are treated differently on the basis of their unique "political" status and not on the basis of race. The principle case confirming the permissibility of this situation was a case involving laws allowing Indian employment preferences.

Indian employment preference means discrimination in favor of Indians. Why is this permitted? A group of non-Indian BIA employees asked this question in 1974. Their case *Morton v. Mancari*, was presented to the U.S. Supreme Court. *Morton v. Mancari* (1974) 417 U.S. 535. There, the judges unanimously agreed that Indian Employment Preference is acceptable because of the unique nature of Indians and tribes.

> (Indian employment preference) does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government. . . The

preference, as applied, is granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.

What makes tribes so special are *political* facts, not racial or cultural facts. A tribe is an ethnic group - - a cultural entity - - but also has the political right to self-government. Statutes passed for Indians may have incidental benefits of advancing Indian religion, culture, race, etc. but because they are based on the unique relationship between tribes (as political entities) and the federal government, they do not illegally discriminate.

5. What authority does a federally recognized tribe have over child welfare issues?

a. The ICWA Tribal Rights and Opportunities

The Indian Child Welfare Act is a multi-faceted and powerful statute that includes all of the following provisions setting out rights and opportunities for federally recognized tribes to impact Indian child custody proceedings:

- Jurisdictional provisions favoring the ability of tribes to exercise their own authority over Indian child custody cases in tribal systems rather than in state systems.

- Full Faith and Credit provisions confirming that the public acts, records and judicial proceedings of any Indian tribe are entitled to be recognized and enforced the same as another state or the United States.

- Provisions authorizing tribes to intervene as parties in state Indian child custody cases.

- Provisions setting forth minimum federal requirements for Indian child custody proceedings *in state courts*. Tribes are authorized to make changes to definitions and placement preferences which must then be applied by the state court.

- Provisions authorizing agreements between states and tribes and providing that for purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe is equivalent to licensing or approval by a State.

See Section II for additional discussion of tribal authority, and question F-3 for additional discussion of tribal rights and opportunities in a state court proceeding.

b. Tribal Access to Confidential Information

A government-to-government exchange of information necessary for the government agencies' performance of duties is authorized by law. Tribes are often treated like federal agencies for the purposes of exchange of confidential information in performance of governmental duties.[1] This includes, for example, providing to all tribes that may be a child's tribe the petition in a dependency case because it is necessary to provide sufficient information to allow the parents, Indian custodian, and tribes to effectively participate in the hearing. For additional information, see ACL 18-140, Tribal Access to Child Welfare Case Records.

c. Tribal Authority Impacting Placement of an Indian Child

i. Tribally Approved Home (TAH)

Federally recognized tribes are sovereign governments, possessing authority similar to states. The ICWA recognizes this status and confirms that licensing or approval of foster or adoptive homes or institutions by a federally recognized Indian tribe is equivalent to licensing or approval by a State. (25 U.S.C. §1931 (b).) California law defines Tribally Approved Home (TAH) as a home that has been licensed or approved by an Indian child's tribe, or a tribe or tribal organization designated by the Indian child's tribe, for foster care or adoptive placement of an Indian child using standards established by the child's tribe. A TAH is not required to be licensed or approved by the state or county and is equivalent to a state-licensed or county-licensed or approved home, including an approved resource family home. TAH placements are subject to criminal background check requirements. (W.I.C. § 224.1.)

Caution - for the ICWA tribal rights and for the minimum federal standards for state courts to apply, the case must involve an "*Indian child" as the term is specifically defined in the ICWA.* That definition is based on the child's unique political status as a member/citizen of a federally recognized tribe. These provisions do not apply to children who possess native heritage or whose families identify historically and culturally as "Indian", but do not have this political connection to a federally recognized tribe.

Each tribe establishes its own TAH approval standards and processes. The agency or state court may place an Indian child in a TAH approved by or at the direction of the Indian child's tribe and pay foster or adoptive assistance to that placement. However, when the Indian child is in the state court system, it is the state that makes the final placement decision. For more information on TAHs, see ACL 19-71 Tribally Approved Homes (TAHs).

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[1] See, e.g., Indian Child Protection and Family Violence Prevention Act, 25 USC 3205 (2012); Family Educational and Privacy Rights Act, 20 USC 1232(g) (2012).

ii. Placement Preferences

Separate from the governmental authority to license or approve a TAH for placement, the ICWA imposes placement preferences on state agencies and courts for both foster and adoptive placements. The first order of preference for both foster and adoptive placement is *extended family*. Note, that like many terms, the term "extended family" has a unique meaning in the ICWA context. The second preference for foster placement is *a foster home licensed, approved, or specified by the Indian child's tribe*. The list of preferences continues in descending order [meaning that the county must make active efforts to find a placement higher in the placement preferences before it can look to make a placement that is lower in the placement preferences] and the county must show "good cause" to depart from the highest available preference(s). Additionally, the ICWA provides that if the child's tribe establishes a different order of preference by resolution, that order must be followed if it is the least restrictive setting appropriate for the child. (25 U.S.C. §1915.) Hence, while it is the state court that makes the placement decision, approval of a TAH (other than the child's extended family), or tribal specification of a home for placement of the child, places it second in the order of preference. It should be noted, tribally approved or specified homes are not limited to homes of tribal members or Indians. If no extended family placement is available, the court must place in the TAH or tribally specified home unless there is good cause not to. If a tribe changes the order of preference by resolution, for example makes a TAH the first order of preference, the court must comply with the tribe's resolution if it is the least restrictive setting appropriate for the child.

Resource families should be informed that there are different preferences that apply to foster and adoptive placements. Hence, unlike with most RFA foster care placements that are approved to become the adoptive placement, if parental rights to an Indian child are terminated, selection of the adoptive placement is subject to the ICWA adoptive placement preferences which include (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. So unless the RFA home complies with the ICWA adoptive placement preferences, foster care placement of an Indian child in an RFA home does not necessarily mean that the RFA home would have priority for adoption of the Indian child.

d. What is Tribal Customary Adoption?

Tribal Customary Adoption is a permanency option for Indian children who are dependents of the State of California that became effective in July of 2010. Dependent Indian children who are unable to reunify with their parents may now, at the option of their tribe, be eligible for adoption by and through the laws, traditions and customs of the child's tribe without requiring termination of the parental rights of the child's biological parents.

W.I.C. §366.24 places certain requirements on social workers and judicial officers in all dependency cases involving an Indian Child who is in foster care. The social worker is required to discuss TCA as a potential permanency option with the Indian child's tribe

early in the case. This is particularly important if the child's tribe is located outside of California and may not be familiar with the way the TCA process works in California. Specifically, W.I.C. §358.1 (j) requires every social study or evaluation for an Indian child under section 358 include a discussion of whether tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful. In considering this issue, the social worker must consult with the child's tribe. Initially, it is the child's tribe who elects whether to pursue tribal customary adoption. An essential element of tribal customary adoption is a valid tribal customary adoption order issued by a federally recognized tribe which can be given full faith and credit by the state court. This means that tribal customary adoption is only available with the consent and participation of the child's tribe.

These requirements and how to proceed if a child's tribe selects Tribal Customary Adoption as the child's permanent plan are addressed in detail in All County Letter 10-47 issued by the California Department of Social Services. This ACL also discusses specific reporting requirements in the Child Welfare Services Case Management System (CWS/CMS) concerning Tribal Customary Adoption.

Additional information can be found at the California Courts website here: https://www.courts.ca.gov/12569.htm

Finally, the California Department of Social Services is working to finalize Tribal Customary Adoption Regulations that will be located in the California Code of Regulations at Title 22, §§ 35410, et seq.

C. Questions About the ICWA

1. What Is the ICWA, and why does it matter to you?

The Indian Child Welfare Act (ICWA) is a federal law created to keep American Indian/Alaska Native (AI/AN) children connected to their cultures and communities. After learning that many AI/AN children were being needlessly removed from their homes by public and private agencies, Congress passed the ICWA in 1978 to protect the best interests of Indian children and "to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902). The Act contains powerful jurisdictional provisions that support the authority of federally recognized tribes in Indian child custody proceedings involving their children, including transferring a case from a state to the tribe. A federally recognized tribe is a tribe recognized by the federal government as possessing a current government-to-government relationship with the federal government. This status brings with it a unique legal position in relation to state and local governments.

When an Indian child custody proceeding is heard in state court, the ICWA imposes minimum federal standards that must be followed by state agencies and courts in each case, whether or not the child's tribe participates in the case. These standards provide for a child's tribe, if it so chooses, to be involved both as a party to the case and through

provisions of the ICWA that require the state court to apply designated provisions of tribal law and tribal cultural standards.

California law echoes federal law and in W.I.C. §224 declares:

- It is in the interest of an Indian child that the child's membership or citizenship in the child's Indian tribe and connection to the tribal community be encouraged and protected; and

- The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the federal Indian Child Welfare Act.

Proper implementation of the ICWA requires familiarity with the unique status of Indian children and with the requirements of the ICWA law. As well, successful outcomes for Indian children in placement are enhanced when all parties understand the importance of the child's tribal connection, the role of the tribe, placement preferences, and the unique services that may be required for and available to Indian children. Just as there are different facets to the tribe's role in an ICWA case, there are different facets to the child's Indian identity. The child's Indian status is important because of its legal implications for the case, but also because of the importance of the child's Indian identity and culture which impact the approach to providing the most effective programs and services to the child and the child's family.

Effective in 2016, the federal Bureau of Indian Affairs published regulations providing applied instruction on the ICWA in a question and answer format. The regulations are available here: https://www.ecfr.gov/cgi-bin/text-idx?SID=95a3f26d8675afccce17e5712fa079aa&mc=true&node=pt25.1.23&rgn=div5

2. To which cases and when does the ICWA apply?

The ICWA is a powerful multi-faceted law that contains provisions relating to: Tribal rights and opportunities; Indian social and cultural standards; and, minimum federal standards for state courts.

For the ICWA tribal rights and for the minimum federal standards for state courts, the ICWA sets out a definition of *Indian child* that is based on the child's unique political status as a member/citizen of a federally recognized tribe. The child must be under 18 and unmarried; or an AB 12 nonminor dependent; and a member of a tribe; or eligible for membership and a biological child of a member of a federally recognized tribe. [Note - the ICWA does not say anything about "enrollment". Enrollment is an administrative practice commonly used by tribes to prove and establish membership or citizenship, but it is NOT the same thing nor is it always required for membership or citizenship] (25 U.S.C. §1903.) The tribal rights and the ICWA minimum federal standards for state courts apply only when the child meets this definition or there is reason to know the child meets this definition. While heritage and culture matter for all children, the United

States Constitution does not allow different laws to be applied to a group based on race or ethnicity. The ICWA standards are based on the membership or citizenship of an Indian child in a federally recognized tribal nation that occupies a unique status in the federal Constitutional framework.

Among the minimum federal standards for state courts are the following:

- Inquiry in *all* cases about whether the child is an Indian child. This is a continuing duty that begins at initial contact and continues throughout the case. [Caution - ICWA inquiry is part of every single dependency case.]

- Notice to the child's tribe, the child's parents, and any Indian custodian of the child custody proceeding, and working actively to involve the child's tribe, the child's parents, and any Indian custodian in the proceedings, as well as less formal ongoing tribal contacts.

- Active efforts to prevent the break-up of the Indian family. "Active efforts" mean the active and engaging, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. They must also address the unique culture of the Indian child and family and extended family (25 C.F.R. § 23.2).

- Finding a placement that fits under the ICWA preferences, which seek to support the child's connection to their tribe.

- Different options and standards for permanency.

- Higher evidentiary standards and expert testimony that takes into consideration Indian social and cultural standards.

The unique history of tribes, cultural considerations, and concern for tribal heritage are highly relevant to a proper application of the ICWA. The minimum federal standards for state agencies and courts integrate these into placement and services requirements. Additionally, the ICWA contains a grant program that uses an eligibility definition of *Indian* that is more inclusive than membership/citizenship in a federally recognized tribe. That definition is from the Indian Health Care Improvement Act, which is the federal law that funds most Indian Health Programs in California. This allows for services to be provided to some Indian children and families who are not members of federally recognized tribes. As well, honoring the *spirit of ICWA*, California law (W.I.C. §306.6) allows the court to permit a tribal group that is not federally recognized to participate in a case involving one of their children, similar to how CASA volunteers participate.

The California Courts website hosts information on its website developed under a contract with the California Department of Social Services. You can find additional information on the ICWA here: https://www.courts.ca.gov/8103.htm

D. Questions About an Indian Child's Best Interests

1. The Act requires the best Interests of Indian children be protected. Is the best interest standard established by the Act the same as for non-Indian children?

No. The two purposes of the Indian Child Welfare Act - to promote the "best interests of Indian children" and the ... "stability and security of Indian tribes and families" - are intertwined with the underlying premise being that *it is in the best interest of an Indian child that the role of the tribal community in the child's life be encouraged and protected.* See 25 U.S.C. §1902 and WIC §224. The Indian child has an interest in his or her tribe that Congress has sought to protect by, among other things, the imposition of minimum federal standards, in order to assure that cultural bias and misunderstanding does not adversely impact an Indian child's relationship with the child's Indian family and tribe. What the Act attempts to do is to eliminate biased subjectivity and imposition of the dominant cultural standards onto Indian families and tribes by imposing minimum standards for state court proceedings. As a matter of federal law, if these standards are met, the best interests of Indian children will be advanced. If they are not, then the action is not in the best interest of the Indian child regardless of the belief of the state court judge to the contrary.

2. May the court consider state requirements, such as keeping siblings together or keeping a child in their school of origin, over the requirements of the ICWA?

No. Federal law takes precedence over state law. Article VI of the U.S. Constitution declares the constitution, laws, and treaties of the federal government to be the supreme law of the land to which every state is bound regardless of state law to the contrary. The ICWA is a federal law whose standards must be implemented by states, except in one narrow set of circumstances: when state law provides a higher standard of protection to the rights of the *parent or Indian custodian* (not the child) than that given them under the federal ICWA. 25 U.S.C. 1921; 25 CFR 23.106(b). This includes compliance with placement preferences, even if a social worker believes that it would be inconsistent with state law or otherwise in the child's best interests to apply non-ICWA preferences such as placing the child in a certain location to maintain enrollment at the child's school of origin.

A tribe, however, can establish its own placement preferences by passing a tribal resolution setting forth the tribe's preferred order of placement. In that case, the agency or state court that is hearing the case is to follow the tribe's placement preferences rather than the federal ICWA preferences.

In any foster care or pre-adoptive placement of an Indian child under tribal resolution or state law, the child must be placed in the least-restrictive setting that most closely approximates a family, including sibling attachment; allows the Indian child's special needs to be met, if applicable; and is in reasonable proximity to the child's home, extended family, or siblings.

Exceptions may be made on a case-by-case basis if the court finds, based on the evidence, that good cause exists to deviate from the order of placement preferences. The proper scope of the "good cause" analysis under the ICWA is limited by and set out in federal regulations and state law implementing the ICWA. Parents can request an exception if they have reviewed the placement options and can produce evidence that those options provide good cause, and Indian children who are old enough and understand the proceedings can do the same. The presence of a sibling attachment that can only be maintained through a particular placement is another consideration by which the court may find that good cause exists to deviate. Another such consideration is if the Indian child has extraordinary physical, mental, or emotional needs that cannot be met through the preferred order of placements. The list of considerations is not exhaustive because these provisions are designed to reserve to the state courts the discretion to consider the unique needs of any particular Indian child in making a good cause determination.

There are two factors that may *not* be used to find that good cause exists to deviate from the governing placement preferences: (1) socioeconomic status of any potential placement versus that of another (that is, the child may not be placed with a non-preferred wealthier family simply due to that relative's wealth), and (2) ordinary bonding that flowed from time spent in a non-preferred placement that was made in violation of the ICWA.

The party claiming that there is good cause to deviate from the placement preferences must set out the reasons and underlying evidence for that claim on the record and the other parties must be given an opportunity to respond to that evidence. The party claiming good cause to deviate from the placement preferences has the burden of proof by "clear and convincing evidence" which is a high standard. If the court decides that there is good cause to deviate from the placement preferences, that finding and the reasons and evidence supporting that finding must be made on the record. [WIC 361.31(h) through (j)]

3. Why apply the Act if the child has always lived with a non-Indian parent and had little or no contact with their Indian heritage or tribe?

As United States citizenship is important, so too is a child's membership/citizenship in their Indian tribe. Acknowledging this, the California legislature has made the following declarations of state policy that explains the importance of applying the Act:

- "It is in the interest of an Indian child that the child's membership or citizenship in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of an Indian child custody

  proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled."

- "There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members or citizens of, or are eligible for membership or citizenship in, an Indian tribe. The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the federal Indian Child Welfare Act . . ." (W.I.C. §224 (a))

4. Do Indian children have other special rights social workers should be aware of?

Yes. All children and nonminor dependents placed in foster care whether in the dependency or the delinquency system have rights as specified in California law, commonly known as the Foster Youth Bill of Rights. (W.I.C. §16001.9) **All children of native heritage, regardless of membership in a federally recognized tribe enjoy the following rights:**

- To receive adequate clothing and grooming and hygiene products that respect the child's culture and ethnicity.

- To be placed with a relative or nonrelative extended family member if an appropriate and willing individual is available. (This is also the first order of placement in the ICWA placement preferences).

- To participate in extracurricular, cultural, racial, ethnic, personal enrichment, and social activities.

- To attend religious services, activities, and ceremonies of the child's choice, including, but not limited to, engaging in traditional Native American religious practices.

In the spirit of the ICWA, any Indian child or child with native heritage that identifies as Indian should be connected to his or her identified tribe or Indian community through tribal events, classes, participation in ceremonies, and local intertribal events at tribal agencies or centers whether or not the ICWA applies to the case.

However, beyond that, the tribal rights and the minimum federal standards for state courts apply only when it is known or there is reason to know the child is an Indian child, that is, a member or eligible for membership in a federally recognized tribe and the child of a member of a federally recognized tribe. **Special rights applying to Indian children include the following**:

- To live in a home that upholds the prevailing social and cultural standards of the child's Indian community, including, but not limited to, family, social, and political ties.

- To be provided the names and contact information for representatives designated by the child's Indian tribe to participate in the juvenile court proceeding, and to communicate with these individuals privately.

- To have the right to have contact with tribal members and members of their Indian community consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe.

- To have child welfare and probation personnel and legal counsel who have received instruction on the federal Indian Child Welfare Act and on cultural competency and sensitivity relating to, and best practices for, providing adequate care to Indian children in out-of-home care.

- To have recognition of the child's political affiliation with an Indian tribe or Alaskan village, including a determination of the child's membership or citizenship in an Indian tribe or Alaskan village; to receive assistance in becoming a member of an Indian tribe or Alaskan village in which the child is eligible for membership or citizenship; to receive all benefits and privileges that flow from membership or citizenship in an Indian tribe or Alaskan village; and to be free from discrimination based on the child's political affiliation with an Indian tribe or Alaskan village.

- To have a representative designated by the child's Indian tribe be in attendance during hearings.

- To have a case plan that includes protecting the essential tribal relations and best interests of the Indian child by assisting the child in establishing, developing, and maintaining political, cultural, and social relationships with the child's Indian tribe and Indian community.

- To be provided with contact information for the tribal authority approving a tribally approved home at the time of each placement, and to contact this office immediately upon request regarding violations of rights, to speak to representatives of the tribe confidentially, and to be free from threats or punishment for making complaints.

Note that these rights of an Indian child protected by the Foster Care Bill of Rights apply equally to all Indian children in foster care whether they enter foster care through the dependency or delinquency system. Social workers and probation officers can play a key role in securing an Indian child's rights by:

- Asking relatives if the child is or may be an Indian child and documenting relevant information.

- Assisting the child in pursuing tribal enrollment for the child and informing the

Bureau of Indian Affairs that the child is in foster care in the event the child has an Individual Indian Money or other Account.

- Incorporating into the case plan activities that support and encourage the child's connection to their tribe, and tribal services or services created for American Indian families (if available in the area).

    - Resources for American Indian families in California, some of which may not require membership in a federally recognized tribe include health centers; substance abuse programs; title VII education programs (available in many public schools); foster family agencies; college recruiting programs; tribal TANF (Temporary Assistance for Needy Families) services.

    - Because of placement preferences it is not uncommon for Indian children to be placed outside the county with jurisdiction over their case. This can create challenges in accessing needed services. Indian health centers located throughout the state often have medical, mental health and dental services that are culturally appropriate for Indian children and not limited by county boundaries. A Statewide Directory of Services for Native American Families that lists many of the available services available to Indian children can be found on the California Courts website here: https://www.courts.ca.gov/5807.htm

    - There are over 570 federally recognized tribes. There are 109 federally recognized tribes located in California and the largest Indian population in the nation, most affiliated with tribes located outside the state. To accommodate this and make resources accessible to TAHs that might otherwise not be, CDSS sometimes serves as the gateway to useful services. An example is access to the on-line *Foster Parent College* which presents training modules on behavioral and other issues commonly encountered with foster children. To learn more or to obtain a required log-in code (otherwise provided to foster homes through Foster Family Agencies), contact the CDSS Office of Tribal Affairs at TribalAffairs@ dss.ca.gov.

E. Questions About Confirming a Child's Indian Status

1. What is the agency's responsibility regarding identifying Indian children and confirming the identity of the child's tribe?

Inquiring whether a child is an Indian child is required in ***all*** state child custody cases. The duty begins at initial agency contact, in that it applies to actions that may lead to an Indian child custody proceeding. The duty is not "once and done" but continuing. Nor can the social worker just sit back and expect the parents or family to raise the issue of whether they have Indian heritage. The law says that the agency has an affirmative and

continuing duty of inquiry. The goal of inquiry is to determine Indian status -- i.e., membership/citizenship in a federally recognized tribe or political connection as eligible for membership and the child of a member of a federally recognized tribe. Inquiry results in one of the following categories (that may be subject to change based upon additional information):

Category/Class	What it is	What it requires
Non-Indian	After asking parents, child and others, no indication that the child is Indian (member or eligible for membership and the child of a member)	There is a continuing duty to inquire about whether the child is or may be an Indian child throughout the life of all state child custody cases. Unless that inquiry produces information that gives reason to believe or reason to know (discussed below), the ICWA does not otherwise apply.
Reason to Believe (Heritage cases)	While at times a child's Indian status and identity of their tribe can be readily confirmed, often needed information is not readily available. Rather, inquiry may produce vague statements of possible native heritage and possible affiliation with an historic/ancestral tribal group rather than with a specific federally recognized tribe. Just because the family does not know their membership status does not mean that the ICWA does not apply. Membership/citizenship issues can be factually and legally complicated and requirements differ from tribe to tribe. Tribes are the ultimate experts on their own membership/citizenship rules and are the only ones equipped to make membership/citizenship determinations. W.I.C. §224.2 (e) refers to these statements about Indian ancestry or possible tribal affiliation as *reason to believe the child may be an Indian child.*	*Reason to believe* requires further inquiry/investigation to confirm Indian status and identification of a child's federally recognized tribe(s), all of which must be documented. Due diligence in the further investigation is required, including contacting and providing information to the tribe(s) a family may be affiliated with. Unless that further inquiry gives the social worker "reason to know" the child is an Indian child (discussed below),the ICWA does not otherwise apply.

Reason to Know	Federal ICWA regulations and state law list factors that provide reason to know the child is Indian (i.e., a member or eligible for membership and the child of a member of a federally recognized tribe). (W.I.C. §224.2 (d))	*Reason to know* requires further inquiry AND importantly, it also requires application of the ICWA minimum federal standards to the case (e.g., notification, active efforts, expert testimony, placement preferences, etc.)
Indian Child	Children whose Indian status can be confirmed (i.e., children who are a member or eligible for membership and the child of a member of a federally recognized tribe)	Indian status requires application of the ICWA minimum federal standards to the case (e.g., formal ICWA notification, active efforts, expert testimony, placement preferences, etc.). Further, the child's tribe may exercise rights and opportunities provided by the ICWA to the child's tribe.
Non-federally Recognized Indian Child	Non-federally recognized tribes are groups that may be self-identified, petitioning for federal recognition, or state recognized. They do not enjoy the rights and privileges of federally recognized tribes.	WIC §366.6 permits a court to allow a child's non-federally recognized tribe to participate in a juvenile case, similar to a CASA volunteer. The ICWA does not otherwise apply.

For further discussion of identification of Indian children, see the OTA Job Aid – ICWA Inquiry, in appendices.

2. How does the agency and court find out the address of the tribe and if a child is a member?

To assist in identifying and contacting the child's tribe, the Bureau of Indian Affairs makes available on its website the most current list of *Indian Child Welfare Act; Designated Tribal Agents for Service of Notice* at https://www.bia.gov/bia/ois/dhs/. The designated agent list is intended to identify the contact information for tribal contacts for Indian child welfare purposes for all of the federally recognized tribes. However, at times, the information on the list can be in error or out of date. If the social worker is not successful at making contact with a tribe using the contact information on this list, the social worker must make efforts to confirm and obtain the correct contact information through such means as internet searches, contacts with the Bureau of Indian Affairs and the CDSS. All of these efforts to identify and contact tribe(s) should be well documented and submitted to the court.

Unfortunately, due to complicated law and history, identification of Indian status often begins from a racial designation or inquiry about Indian heritage. Respondents may not answer by identifying to a federally recognized tribe (something they may not know) but rather to an historic or ancestral tribal affiliation(s).

- State and federal law calls on the Bureau of Indian Affairs and the CDSS to assist in identifying the federally recognized tribes a child may be a member of or eligible for membership in. When the child's federally recognized tribe is not known or readily identified, inquiry should include questions about the child's affiliation with an historic or ancestral tribal group.

- The Bureau of Indian Affairs and the CDSS may then assist with locating the identity of and contact information for federally recognized tribes affiliated with the identified ancestral group.

    - For example, if the ancestral group of "Cherokee" is identified, the Tribal Affiliation list maintained by the Bureau of Indian Affairs identifies to that historic/ancestral Cherokee affiliation 4 separate federally recognized tribes. Similarly, if the ancestral group of "Paiute" is identified, the Tribal Affiliation list identifies to that historic Paiute affiliation 26 federally recognized tribes.

Because federally recognized tribes may not correspond to historic (ancestral) tribal groups and Indians commonly identify to their historic tribal or ancestral group, the Bureau of Indian Affairs published in the Federal Register a *List of Designated Tribal Agents By (Historic) Tribal Affiliation*. (77 Fed. Reg. 45816, 45837 (August 1, 2012). The *List of Designated Tribal Agents By Tribal Affiliation* may be accessed at https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/webteam/docx/idc1-033200.docx. The BIA launched a new search feature in May of 2020 that identifies tribal agents for service of the ICWA notice by entry of the name of a federally recognized tribe or an historical affiliation. This tool can be located on the BIA website here: https://www.bia.gov/bia/ois/dhs/icwa.[2]

[2] The BIA tool provides the following description of the search feature: "Indian Affairs annually publishes in the Federal Register a list of Tribally designated agents for service of notice of Indian Child Welfare Act (ICWA) proceedings. To provide the most accurate contact information possible, the Bureau of Indian Affairs (BIA) has developed this electronic interactive directory of ICWA designated agents. This directory's information is the most currently available at the time of its most recent update of designated agents to assist the public in between the BIA's annual Federal Register publication. BIA will update the directory information quarterly (every 3 months). To submit an update for the ICWA designated agents' electronic interactive directory, please contact the BIA Regional Social Worker in your area. To learn more about the Directory contact the BIA Division of Human Services at (202) 513-7622. To access the most recent Federal Register Notice, visit: **https://www.bia.gov/bia/ois**. The BIA cannot track all changes to the Tribal designated agent list in real time nor guarantees the accuracy of the directory's designated agent contact information.

The JCC hosts a link to the current federal register list of agent's for service of ICWA Notice is posted on the California Courts Tribal/State Programs landing page, currently under "What's New" https://www.courts.ca.gov/programs-tribal.htm.

F. Questions about the Minimum Federal Standards for State Courts

1. Does the Act apply to juvenile justice cases if the child is in foster placement?

A juvenile probation department has a duty to inquire about the child's Indian status whenever the department makes contact with a child that could result in the child's foster care placement (Welf. & Inst. Code § 224.2(a).) and whenever a child is placed in the temporary custody of the probation department pursuant to Welfare and Institutions Code § 307 (Welf. & Inst. Code § 224.2(b).) This includes the duty of initial inquiry as well as the duty of further inquiry and due diligence to verify the child's Indian status discussed above.

If the child is an Indian child, that is, a member or eligible for membership in a tribe, tribal members must be looked to for placement when seeking a foster care placement for an Indian child (ie a child who is a member or eligible for membership in a tribe) regardless of whether the ICWA applies to the case. (Welf. & Inst. Code §§ 727.1 (a); 16501.1 (c))

Indian children who are placed into foster care are entitled to all the same rights as other foster children under WIC 16001.9 and also have unique protections for their cultural and political identity as Indian children. These are discussed in more detail in question D 4 above.

All of the remaining ICWA requirements such as notice, active efforts, qualified expert witness testimony and heightened evidentiary standards apply only when a child is either in foster care or at risk of entering foster care and one of the three additional factors apply:

1. The petition under Welfare and Institutions Code section 601 or 602 alleges only status offenses and no conduct which would be criminal if the child were over age 18;

2. The court has set a hearing to terminate parental rights; or

3. The court has placed the child in foster care, or in an adoptive or pre-adoptive placement, due to abuse or neglect in the child's home and made a specific finding that placement outside the home of the parent or legal guardian is based entirely on harmful conditions within the child's home.

For further discussion, see the job aid in Appendices, Delinquency, Native American Identification and the ICWA.

2. **What if no petition has been filed or a petition is filed, but neither detention nor removal is recommended? Does the ICWA apply and must the tribe be noticed?**

Federal ICWA regulations clarify that the ICWA applies to any action that may culminate in removal of an Indian child for foster or adoptive placement. The ICWA applies to Indian children from initial contact. For this reason, *there is a continuing duty of inquiry about Indian status in all cases*. (W.I.C. § 224.2 (a).)

On **all** referrals, the county must inquire whether the child is or may be an Indian child. If the inquiry provides reason to believe the child is an Indian child, the agency must conduct further inquiry including contacting and providing information to the child's potential tribe(s) by phone, fax, email and other means. If after initial or further inquiry there is reason to know the child is a member or eligible for membership in a federally recognized Indian tribe and the child of a member, then the case must be treated as an Indian child custody proceeding until and unless the court makes a finding that following further investigation there is no reason to know the child is an Indian and the ICWA does not apply.

Active efforts must be made prior to removal when it is known or there is reason to know the child is an Indian child from the custody of his or her parents or Indian custodian, except in the case of emergency removal. The Guidelines for Implementing the Indian Child Welfare Act recommend that "[state agencies work with Tribes, parents, and other parties as soon as possible, even in an emergency situation, to begin providing active efforts to reunite the family." (Guidelines, § C.8, Active efforts in emergency situations, p. 29.) and this is consistent with implementing California law and mandates. Where it is known, or there is reason to know an Indian child is involved, investigations and any subsequent case planning must involve the child's tribe and other Indian service providers in the event removal is required at a later date. If the child's tribe has not yet been identified, active efforts will require the social worker to make all necessary contacts to identify and engage the child's tribe once the tribe is identified.

While formal ICWA notice involving certified mail and mandated Judicial Council forms is only required for hearings that may result in foster or adoptive placement or termination of parental rights, the federal ICWA regulations and state law require notification of tribes by less formal means including by phone, fax, and email. If child welfare services beyond the investigation are necessary, and inquiry has resulted in any indication that the child is an Indian child based upon their or their parent's political affiliation with a tribe or tribes, the social worker must prepare and implement the case plan in collaboration with the Indian child, the Indian child's parent(s), Indian custodian(s), legal guardian(s), extended family, tribe, tribal and other Indian social service agencies.

For further information, See, Desk Reference Section III, 31-101.

3. What is the tribe's role in a state court proceeding, and who can appear in court on behalf of a tribe?

If it is known or there is reason to know that an Indian child is involved in a proceeding covered by the Act, the Act applies, whether-or-not the child's tribe opts to become involved. The minimum federal standards set out in the ICWA apply based on the child's status as an Indian child. The child's tribe is not required to take action to enforce these requirements. A child's tribe does have a right to participate at any point in the case if they choose. A tribe may choose to participate in a state court proceeding in several capacities:

- A tribe may petition to transfer the case to the tribe. All tribes have the authority to decide cases whether or not they have a formal court, although for the most part, tribes that seek case transfers do have formal courts.

- The child's tribe may, without intervening, exercise rights granted under the Act to alter the minimum federal standards, which the state court must then follow. (Examples include altering placement preferences by resolution, and re-defining various definitions contained in the Act that reference tribal law or culture).

- The child's tribe has a right to intervene as a party at any point in an Indian child custody proceeding covered by the Act. An intervening tribe may fully participate as a party to a proceeding.

    - Without intervening as a party, California Rules of Court, Rule 5.534(e) allows a tribe to designate a representative (for example, an individual affiliated with a local Indian child welfare program), with the consent of the court and without intervening as a party, to participate in the case performing all the functions a CASA volunteer may perform.

    - Tribes may clarify the authority of a tribal representative participating in a case via resolution or other appropriate documentation, including Judicial Council form ICWA-040, which allows the tribe to confirm whether it is intervening or authorizing permissive participation.

    - Case law and California Rules of Court authorize non-attorneys, as well as attorneys, to appear on behalf of tribes.

- A tribe may provide evidence and testimony.

- Many tribes operate child and family service programs. Representatives of these programs may be available, not as a representative of the child's tribe, but as support service providers. Depending upon how the tribal program is designed, service providers may be available in cases involving Indian children from other tribes.

4. What are "active efforts" and when must they be provided?

One of the minimum federal standards imposed by the ICWA is that any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

- Active efforts means affirmative, active, thorough and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.
- Active efforts must involve assisting the parent(s) or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.
- Federal and state law provide detailed examples of activities that constitute active efforts.
- To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and the Indian child's parent(s), extended family members, Indian custodian(s) and tribe.
- Active efforts must be tailored to the facts and circumstances of the case and may change depending upon the stage of government intervention and/or the court proceeding. (See, Desk Reference Section III, 31-102).

5. We have very few Indian cases, and therefore we have no readily available Qualified Expert Witnesses (QEW) as required by the ICWA. How do we determine who can qualify?

Many issues may arise in an Indian child custody proceeding where the testimony of an expert may be appropriate. Because the Act involves tribal law and Indian standards, not subjects within the common experience of most state court judges, any issue involving such matters may benefit from expert testimony. However, there are mandatory findings that must be made where expert testimony is particularly appropriate or required. These include the services requirements of section 1912 (d) of the Act (active efforts to provide services to prevent break-up of the Indian family), and the expert witness requirement of section 1912 (e) and (f) that support placement or termination of parental rights (expert testimony that continued custody is likely to result in serious emotional or physical damage to the child). For a general discussion of QEW requirements, see ACIN No. I-40-10, *Requirement of the Use of an Expert Witness by the Indian Child Welfare Act*.

Amendments to California law that took effect in 2019 have further clarified qualifications for a QEW and for how the qualifications can be confirmed. (W.I.C. §224.6.) When testimony of a "qualified expert witness" is required in an Indian child custody proceeding, a "qualified expert witness" shall be qualified to testify regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and shall be qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. A person may be designated by the child's tribe as qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. The individual may not be an employee of the person or agency recommending foster care placement or termination of parental rights.

Persons with the following characteristics are most likely to meet the requirements for a QEW for purposes of Indian child custody proceedings:

(1) A person designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.

(2) A member or citizen of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.

(3) An expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe.

The court or any party may request the assistance of the Indian child's tribe or Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

The court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony only if the parties have so stipulated in writing and the court is satisfied the stipulation is made knowingly, intelligently, and voluntarily.

G. Questions about Tribal Courts and Jurisdiction

1. What do I need to know about tribal court jurisdiction and the ICWA?

a. What is jurisdiction?

Jurisdiction is the power of a government to exercise authority over persons and things in a specified territory. When a government has jurisdictional authority, its laws or regulations will apply, and its courts may be the forum in which disputes are heard and where cases involving violations of the law are adjudicated.

b. What jurisdiction do tribes have over child welfare cases?

Generally, states have no authority over tribal governments or within Indian Reservation areas unless expressly authorized by Congress. In five mandatory states, including California, a federal law known as Public Law 280 granted states criminal and some civil jurisdiction in Indian Country. A person does not need to live on their tribe's reservation or trust lands in order for the tribe to have jurisdiction in an the ICWA case involving the child. The ICWA recognizes a tribe's jurisdictional authority based on both territory and on the membership or citizenship of the child in the tribe. As a general matter, in California:

- *Both the state and Indian tribes have jurisdiction over child custody matters within tribal land areas* located within California – unless the tribe has taken advantage of an option in the ICWA to petition for exclusive jurisdiction.

- Only one tribe in California has exclusive jurisdiction over Indian child custody cases within its reservation, the Washoe Tribe located in Alpine County.

- Remaining tribes in California have concurrent jurisdiction with the state and possess governmental powers to make and enforce their own laws and to decide their own cases. Tribes do not need formal court systems to exercise this authority but increasing numbers of tribes are developing them.

- Individual Indians within California may be citizens of tribes of other states. If the individuals normally reside outside of California, then their tribe may have exclusive jurisdiction.

The ICWA sets out the following jurisdictional options for tribes that support the exercise of tribal authority, including the following:

- The ICWA provides the process for Indian tribes to petition to exercise exclusive or referral jurisdiction.

- If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over Indian child custody matters or is under the jurisdiction or dependent of a tribal court, the ICWA provides that the tribe has exclusive jurisdiction. Any state action that is filed would need to be dismissed and child delivered to the tribe.

- In any state court Indian child custody proceeding, the ICWA provides options for transferring the case to the child's tribe.

Practice Tip: *When speaking of transfer, reference is often made to transferring a case to tribal court. Practitioners should be aware that this does not mean a tribe must have a formal court system before a case can be transferred.*
The ICWA broadly defines tribal court as follows:

> *"tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings. (25 U.S.C.§1903 (12).)*

c. What is domicile and why does it matter?

Domicile is a legal concept that provides a standard demonstrating a sufficient connection of an individual with a government's territory to allow that government to exercise jurisdiction over the individual, although domicile is not the only basis on which jurisdiction can be asserted.

- **"Domicile"** in the case of an Indian child, means:

  (A) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

  (B) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

- For Indian child custody cases, domicile matters because domicile and residence (where someone lives) impact inquiry, jurisdiction, and reason to know a child may be an Indian child.

  - Beginning at initial contact, social workers must inquire about Indian status. Inquiry requires, among other things, asking whether the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village.

  - If the child is or there is reason to know the child is an Indian child, the social workers must assess whether the child is in the exclusive jurisdiction of a tribe, that is, whether they reside or are domiciled on a reservation where the tribe has exclusive jurisdiction, or are a ward of a tribal court.

  - The ICWA must be applied to a case any time there is reason to know the child is an Indian child. The circumstances providing reason to know include residence or domicile of the child, the child's parents, or Indian custodian is on a reservation or in an Alaska Native village.

For additional information on jurisdiction, see Section II and III of this Desk Reference.

Learning Resource
Bureau of Indian Affairs, Frequently Asked Questions

For additional information about Indians and Tribes visit the Bureau of Indian Affairs *Frequently Asked Questions* for answers to the questions listed below: https://www.bia.gov/frequently-asked-questions

Why Tribes Exist Today in the United States
What are Indian treaty rights?
What is the legal status of American Indian and Alaska Native tribes?
What is the federal Indian trust responsibility?
What is a federally recognized tribe?
How is federal recognition status conferred?
What does tribal sovereignty mean to American Indians and Alaska Natives?
What is a federal Indian reservation?
Are there any federal Indian reservations in Alaska?
Are there other types of "Indian lands"?
Does the United States still make treaties with Indian tribes?

The Nature of Federal-Tribal and State-Tribal Relations
What is the relationship between the tribes and the United States?
What is the relationship between the tribes and the individual states?
What is Public Law 280 and where does it apply?

Tribal Government: Powers, Rights, and Authorities
What are inherent powers of tribal self-government?
How do tribal members govern themselves?
How are tribal governments organized?
What is the jurisdiction of tribal courts?
What is meant by tribal self-determination and self-governance?

Our Nation's American Indian and Alaska Native Citizens
Who is an American Indian or Alaska Native?
How large is the national American Indian and Alaska Native population?
Why are American Indians and Alaska Natives also referred to as Native Americans?
Are American Indians and Alaska Natives wards of the Federal Government?
Are American Indians and Alaska Natives citizens of the United States?
Do American Indians and Alaska Natives have the right to vote?
Do American Indians and Alaska Natives have the right to hold public office?
Do American Indians and Alaska Natives have special rights different from other citizens?
Do American Indians and Alaska Natives pay taxes?
Do laws that apply to non-Indians also apply to Indians?
Do all American Indians and Alaska Natives speak a single traditional language?
Must all American Indians and Alaska Natives live on reservations?
Do American Indians and Alaska Natives serve in the Armed Forces?

The Assistant Secretary - Indian Affairs, the BIA, and the BIE
Who is the Assistant Secretary – Indian Affairs?
What is the Bureau of Indian Affairs?
What is the BIA's history?
What is the BIA's relationship today with American Indians and Alaska Natives?
How does the BIA carry out its mission?
What is the Bureau of Indian Education?

INDIAN CHILD WELFARE ACT DESK REFERENCE:

SECTION V.
THE INDIAN CHILD WELFARE ACT (ICWA) GLOSSARY

COMMON ICWA DEFINITIONS

V. The Indian Child Welfare Act (ICWA) Glossary

The Challenge

- The use of inconsistent or imprecise terminology creates tension with tribes and confusion resulting in the Indian Child Welfare Act (ICWA) compliance problems.
    - The ICWA contains its own unique definition of a number of terms which are commonly used to express something different in the child welfare context. Examples include “child custody proceeding”, “foster care placement”, “extended family”, and Indian “parent”.
    - State statutes and California Department of Social Services (CDSS) documents use a multitude of terms relating to Indians and tribes, many of which are not expressly defined and are loosely used. Examples include indiscriminately used and sometimes undefined terms such as:
        1. American Indian; Indian; Indian ancestry; Native American; Native American heritage;
        2. Indian Tribe; California Native American Tribe; Non-Federally Recognized Tribe
        3. ICWA Eligible
        4. On or near reservation service area

The Solution

- To achieve ICWA compliance, it is important that terms be clearly defined and carefully and consistently applied. Federal Indian law involves more than a century of legislation and case law responding to the unique history, status, and changing circumstances of Indians and tribes. Federal law contains express definitions, many specific to particular contexts.
    - Federally recognized **Indian tribes are** quasi-sovereign ***governments*** who, by virtue of the U.S. Constitution and federal law, enjoy a government-to-government relationship with each other, the federal government, and the 50 states.
    - In the exercise of their internal sovereign powers, ***Indian tribes*** *may* regulate domestic relations, including child welfare, and ***are service providers*** if they choose to operate child welfare programs pursuant to tribal and federal law.

- Federally recognized ***Indian tribes*** and other groups descend from historic tribal nations that ***are distinct ethnic/cultural groups***.

- ICWA compliance requires terminology that relates to the varied capacities in which tribes interact with child welfare systems – as governments, as service providers and as cultural groups – and applies that terminology in the appropriate circumstances.

ICWA Glossary:

TERM	AUTHORITY	DEFINITION
Active Efforts	25 CFR §23.2; WIC §224.1 (f)	*Active efforts* means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example: (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal; (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services; (3) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues; (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents; (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's tribe; (6) Taking steps to keep siblings together whenever possible; (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child; (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources; (9) Monitoring progress and participation in services; (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available; and (11) Providing post-reunification services and monitoring.

TERM	AUTHORITY	DEFINITION
		♦♦♦ ***PRACTICE TIP:*** *2016 ICWA Adoption and Foster Care Analysis and Reporting System (AFCARS) translates the active efforts definition from 25 CFR §23.2 into data elements that must be reported on in all cases throughout the state involving Indian children. The 2020 AFCARS final rule eliminated these data elements. To support ICWA compliance CDSS has committed to including all the 2016 ICWA AFCARS in the new CCWIS statewide data system being built. These data elements are subject to CCWIS data quality standards that require data to be consistent and complete. All required federal reporting data must be housed in the CCWIS system.*
Agency	25 CFR §23.102 45 CFR §1355.20 WIC §10553.12 (Tribal background checks)	*Agency* means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements. *Title IV-E agency* means the state or tribal agency administering or supervising the administration of the Title IV-B and Title IV-E plans. For the purpose of Title IV-E, *tribal agency* means the agency of the Indian Tribe, Indian Tribal organization (as those terms are defined in section 479B(a) of the Act) or consortium of Indian tribes that is administering or supervising the administration of the Title IV-E and Title IV-B, subpart 1 plan. *Tribal agency* means an entity designated by a federally recognized tribe as authorized to approve a home consistent with the ICWA, for the purpose of placement of an Indian child into foster or adoptive care, including the authority to conduct a criminal or child abuse background check of, and grant exemptions to, an individual who is a prospective foster parent or adoptive parent, an adult who resides or is employed in the home of an applicant for approval, any person who has a familial or intimate relationship with any person living in the home of an applicant, or an employee of a tribal agency who may have contact with a child. ♦♦♦ ***PRACTICE TIP:*** *The ICWA definition of "Agency" was incorporated into the 2016 AFCARS with respect to <u>specific</u> data elements related to the Indian Child Welfare Act. These elements generally relating to the minimum federal standards for state courts. For other data elements, such as child and family circumstances at removal, the ICWA definitions did not apply. The 2020 AFCARS eliminated this incorporation of ICWA definitions, along with most of the related data elements. The approach of utilizing ICWA definitions may nevertheless be useful as California moves forward in its commitment to building all the 2016 data elements in its new statewide data system.* ♦♦♦

TERM	AUTHORITY	DEFINITION
		Relative to tribal IV-E agreements, relevant definitions would be found in the Social Security Act[1], which in turn incorporate definitions from the Indian Self-Determination and Education Assistance Act.[2]
Federally Recognized California Tribes	Bureau of Indian Affairs, Pacific Region	*The Bureau of Indian Affairs* (BIA) identifies a total of 109 federally recognized tribes that are located within the BIA Pacific Region (which consists solely of California) or have territory (trust lands) in California. All 109 tribes are considered *California tribes*. Tribes can be located via the BIA's interactive national Tribal Leaders Directory. https://www.bia.gov/bia/ois/tribal-leaders-directory/ Tribes served by the Western Region office include: 1. Chemehuevi Indian Tribe – Tribal headquarters located in California 2. Colorado River Indian Tribe – Tribal headquarters located in Arizona 3. Fort Mojave Indian Tribe– Tribal headquarters located in California 4. Quechan Tribe of the Fort Yuma Indian Reservation – Tribal headquarters located in Arizona 5. Woodfords Community (Washoe Tribe of Nevada and California)- Tribal headquarters located in California The Governor's Tribal Advisor maintains a contact list of all 109 CA tribes at http://www.tribalgovtaffairs.ca.gov/
Child Custody Proceeding	25 CFR §23.2 (Elaborates on definition in 25 USC §1903);	*Child custody proceeding*. (1) *Child custody proceeding* means and includes any action, other

[1] Sec. 479B. **[**42 U.S.C. 679c**]** (a) Definitions of Indian Tribe; Tribal Organizations.—In this section, the terms "Indian tribe" and "tribal organization" have the meanings given those terms in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

[2] 25 U.S.C. 450b provides controlling definitions as follows:
(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
(l) "Tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant

TERM	AUTHORITY	DEFINITION
	WIC §224.1 (d)(1)	than an emergency proceeding, that may culminate in one of the following outcomes: (i) *Foster care placement*, which is any action removing an Indian child from his or her 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 is any action resulting in the termination of the parent-child relationship; (iii) *Preadoptive placement*, which is 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; or (iv) *Adoptive placement*, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. (2) An action that may culminate in one of these four outcomes is considered a separate child custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child custody proceedings involving any given Indian child. Within each child custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child custody proceeding.
	WIC §224.1 (d)(2)	*Indian child custody proceeding* does not include a voluntary foster care or guardianship placement if the parent or Indian custodian retains the right to have the child returned upon demand.
Consortium	25 CFR §23.2	*Consortium* means an association or partnership of two or more eligible applicants who enter into an agreement to administer a grant program and to provide services under the grant to Indian residents in a specific geographical area when it is administratively feasible to provide an adequate level of services within the area.
Continued Custody	25 CFR §23.2; WIC §224.1 (i)	*Continued custody* means physical custody or legal custody or both, under any applicable tribal law or tribal custom or state law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child is deemed to have had custody of a child.
Custody	WIC §224.1 (j)	*Custody* means physical custody or legal custody or both, under any applicable tribal law or tribal custom or state law.

TERM	AUTHORITY	DEFINITION
Designated Tribal Agents for Service of Notice	25 CFR §23.12	The regulations implementing the Indian Child Welfare Act, 25 U.S.C. 1901 et seq., provide that Indian tribes may designate an agent other than the tribal chairman for service of notice of proceedings under the Act. See 25 CFR 23.12. The Secretary of the Interior is required to annually update and publish in the Federal Register the names and addresses of the designated tribal agents. The most current publication is posted on the Bureau of Indian Affairs website at https://www.bia.gov/bia/ois/dhs/icwa. The current federal register list of agent's for service of ICWA Notice is posted on the California Courts Tribal/State Programs landing page, currently under "What's New" https://www.courts.ca.gov/programs-tribal.htm.
Domicile	25 CFR §23.2; WIC §224.1 (k)	*Domicile* means: (1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere. (2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.
Emergency Proceeding	WIC §224.1 (l)	*Emergency proceeding* for purposes of juvenile dependency proceedings is the initial petition hearing held pursuant to Section 319.
Extended Family Member	25 CFR §23.2 (Clarifies definition in 25 USC §1903); WIC §224.1 (c)	*Extended family member* is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.
Foster Care Placement	25 CFR §23.2; WIC §224.1 (d)(1)(a)	*Foster care placement* is any action removing an Indian child from his or her 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
ICWA Eligible	(Clarifying guidance needed).	*ICWA eligible* is a term loosely used to identify children subject to the ICWA minimum federal standards for state courts. Two problems exist with this: First, the term is *not* formally defined, although its usage suggests it is intended to mean an Indian child involved in a child custody proceeding subject to the ICWA minimum federal standards for state courts. Second, some of the minimum federal standards apply to children whenever there is *reason to know* they may be Indian. Under California law and the federal ICWA regulations, there is a duty of inquiry in ALL child custody cases. In this regard, for inquiry purposes, ALL cases are ICWA cases and all children are eligible for at least some provisions. If the term eligible is meant to encompass a particular meaning, that meaning should be clearly defined.

TERM	AUTHORITY	DEFINITION
		♦♦♦ ***PRACTICE TIP:*** *While ALL children are subject to the ICWA requirement of inquiry, based on 2016 federal ICWA regulations and 2020 AFCARS regulations, "ICWA eligible" or "ICWA applies" likely is meant to include children who are subject to the ICWA minimum federal standards for state courts, that is, children the county knows or has reason to know meet the definition of an Indian child as defined in the ICWA.*
Indian (ICWA)	25 USC §1903 (3)	*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.
	25 USC §1934	*Indian* defined for certain purposes For the purposes of sections 1932 and 1933 of this title (ICWA title II, Indian Child and Family Programs), the term "Indian" shall include persons defined in section 1603(c) of this title. (Redesignated section 1603 (13).)
	25 USC §1912	Pending court proceedings (a) Notice In any involuntary proceeding in a State court, where the court <u>knows or has reason to know that an Indian child is involved</u>, 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 . . .
	25 USC §1603 (13)	(13) *Indian* The term *Indian*, unless otherwise designated, means any person who is a member of an Indian tribe, as defined in subsection (d) hereof, except that, for the purpose of sections 1612 and 1613 of this title, such terms shall mean any individual who: (A) Irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the state in which they reside, or who is a descendant, in the first or second degree, of any such member, or (B) Is an Eskimo or Aleut or other Alaska Native, or (C) Is considered by the Secretary of the Interior to be an Indian for any purpose, or (D) Is determined to be an Indian under regulations promulgated by the Secretary.
	25 USC §1603 (3)	
	25 USC §1679	(3) *California Indian* The term California Indian means any Indian who is eligible for health services provided by the Indian Health Service pursuant to section 1679 of this title.

TERM	AUTHORITY	DEFINITION
		Eligibility of California Indians (a) In general The following California Indians shall be eligible for health services provided by the Service: (1) Any member of a federally recognized Indian tribe. (2) Any descendant of an Indian who was residing in California on June 1, 1852, if such descendant— (A) Is a member of the Indian community served by a local program of the Service; and (B) Is regarded as an Indian by the community in which such descendant lives. (3) Any Indian who holds trust interests in public domain, national forest, or reservation allotments in California. (4) Any Indian of California who is listed on the plans for distribution of the assets of rancherias and reservations located within the State of California under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian. ♦♦♦ ***PRACTICE TIP:*** *AFCARS defines race - American Indian or Alaska Native as having "origins in any of the original peoples of North or South American (including Central America), and maintains Tribal affiliation or community attachment."* ***Race ≠ Political Status*** *Among a host of racial categories, CDSS must collect information on American Indian or Alaska Native race. This involves self-identification and IS NOT the same thing as political status that results from membership/citizenship in a federally recognized tribe.* *For application of the ICWA minimum federal standards for state courts "Indian" does not refer to race but rather to political status. The child must be a member or eligible for membership and the child of a member of a federally recognized tribe.* *Race, ethnicity/culture are relevant for some purposes, but the application of the ICWA standards to only one class of people is based not on race but on political status.*
Indian Child	25 CFR §23.2 (Elaborates on definition in 25 USC §1903)	*Indian child* means any unmarried person who is under age 18 and either: (1) a member or citizen of an Indian tribe; or (2) eligible for membership or citizenship in an Indian tribe and is the biological child of a member/citizen of an Indian tribe.

TERM	AUTHORITY	DEFINITION
Indian Child's Tribe	25 USC §1903 (5); WIC §224.1 (e)	*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. (25 CFR §23.2 references § 23.109 of the regulations, which discusses how a court determines the child's tribe). Consistent with federal regulations, the WIC code definition elaborates on the process for determining the child's tribe.
Indian Country	18 U.S.C §1151	*Indian country* as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
Indian Custodian	25 CFR §23.2 (Elaborates on definition in 25 USC §1903)	*Indian custodian* means any Indian who has legal custody of an Indian child under applicable tribal law or custom or under applicable state law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to tribal law or tribal custom or state law.
Indian Foster Home	25 CFR §23.2 WIC §224.1 (m)	*Indian foster home* means a foster home where one or more of the licensed or approved foster parents is an "Indian" as defined in 25 U.S.C. 1903(3). (i.e., member of a federally recognized tribe).
Indian Organization	25 USC §1903(7); 25 CFR §102	*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. ♦♦♦ ***PRACTICE TIP:*** *Note: this ICWA definition is separate and distinct from the definition of tribal organization applicable in the Title IV-E and IV-B context. See footnote 2, above.*
Indian Tribe (Federally Recognized)	25 USC §1903(8) 25 CFR § 83.2 Purpose.	*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 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended. Acknowledgment of tribal existence by the Department (i.e. recognition) is a prerequisite to the protection, services, and benefits of the federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-

TERM	AUTHORITY	DEFINITION
	25 CFR §83.6(a) Duties of the Department.	government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected. The Department shall publish in the FEDERAL REGISTER, by January 30 of each year, a list of all Indian tribes entitled to receive services from the Bureau of Indian Affairs by virtue of their status as Indian tribes. https://www.govinfo.gov/content/pkg/FR-2020-01-30/pdf/2020-01707.pdf
Indian Tribe (Historic/ Aboriginal/ Ancestral)	*ICWA; Designated Tribal Agents for Service of Notice - Listing of Tribes by Historical Affiliation* is a link on the BIA Division of Human Services Page in the Indian Child Welfare Section.	Historic/aboriginal/ancestral tribe means an aboriginal group, that is, one of those groups whose pre-Columbian ancestors were indigenous to the lands within the United States. These peoples were composed of numerous distinct tribes, bands, and groups, commonly referred to by the Bureau of Indian Affairs as historic or ancestral tribes. Federally recognized tribes represent these historic tribes, or groups traceable to such tribes, which survive intact today as sovereign nations. Indian ancestry often reflects both historic and federally recognized tribal affiliations. The Bureau of Indian Affairs Division of Human Services page maintains a link to the list identifying federally recognized tribes to historic tribal affiliation. Link to BIA site: https://www.bia.gov/bia/ois/dhs The link to the list is: Designated tribal agents for service of notice - Listing of Tribes by Historical Affiliation.
Indian Tribe (Non-Federally Recognized)	CDSS Division 31, section 31.002 (n)(3)	*Non-federally recognized tribe* means an Indian tribe, band, nation or other organized group or community of Indians that is not recognized by the Secretary of the Interior as eligible for the federal services provided to Indians.
Involuntary Proceeding	25 CFR §23.2; WIC §224.1 (n)	*Involuntary proceeding* means a child custody proceeding in which the parent does not consent of his or her free will to the foster care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.
Jurisdiction	25 USC §1911	Unless otherwise vested in the state, an Indian tribe has *exclusive jurisdiction* over child custody proceedings involving an Indian child who resides or is domiciled on the reservation, or who is a ward of the tribal court, regardless of domicile. Where the tribe has exclusive jurisdiction, *the state court has no jurisdiction* and must dismiss or transfer the proceeding to tribal court. Two noted exceptions to exclusive tribal jurisdiction: 1. Emergency removal. A state can exercise jurisdiction over a child temporarily located off the reservation in order to prevent imminent physical damage or harm to the child.

TERM	AUTHORITY	DEFINITION
		2. States can validly exercise *concurrent jurisdiction* over Indian children residing or domiciled on a reservation where the federal government has delegated limited civil jurisdiction to the state in which the tribe is located, as under P.L. 280. Through P.L. 280, Congress delegated to the State of California civil jurisdiction over private causes of actions involving Indians in "Indian Country" without extinguishing tribal authority. As a result, even if a child is domiciled or resides on the reservation, the state may acquire valid initial jurisdiction. However, the state shall transfer the proceeding to the jurisdiction of the child's tribe upon the petition by either parent, the Indian custodian, or the child's tribe, unless the court finds that good cause exists not to transfer jurisdiction. This has also been called *referral jurisdiction* or *"concurrent but presumptively tribal" jurisdiction*. If the tribal court declines to accept transfer of the proceeding, the state court retains jurisdiction. ♦♦♦ ***PRACTICE TIP:*** *Jurisdiction has many shades of meaning. The primary emphasis is on powers. It can describe the powers of an office, a nation, a court, etc. When applied to a government, it refers to a government's legal power to make and enforce laws over its people and territory. In this context, jurisdiction is measured in terms of the power that one government or agency has in relationship to the power exercised by another.*
Native American	BIA, FAQs - Why are American Indians and Alaska Natives also referred to as Native Americans?	The term *Native American* came into broad usage in the 1970's as an alternative to *American Indian*. Since that time, however, it has been gradually expanded within the public lexicon to include *all* Native peoples of the United States and its trust territories, i.e., American Indians, Alaska Natives, Native Hawaiians, Chamorros, and American Samoans, as well as persons from Canada First Nations and indigenous communities in Mexico and Central and South America who are U.S. residents. When referring to American Indian or Alaska Native persons, it is still appropriate to use the terms "American Indian" and "Alaska Native." These terms denote the cultural and historical distinctions between persons belonging to the indigenous tribes of the continental United States (American Indians) and the indigenous tribes and villages of Alaska (Alaska Natives, i.e., Eskimos, Aleuts, and Indians). They also refer specifically to persons eligible for benefits and services funded or directly provided by the BIA. https://www.bia.gov/FAQs/
Parent	25 USC §1903(9)	*Parent or parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

TERM	AUTHORITY	DEFINITION
Pre-Adoptive Placement		See Child Custody Proceeding.
Reason to Believe	See, WIC §224.2 (e)	While at times a child's Indian status and the identity of their tribe can be readily confirmed, often needed information is not readily available. Rather, required inquiry about Indian status may produce vague statements of possible native heritage or possible tribal affiliation identified only to an historic/ancestral tribal group rather than a specific federally recognized tribe. Just because the family does not know their membership status does not mean that ICWA does not apply. Membership/citizenship issues can be factually and legally complicated and requirements differ from tribe to tribe. Tribes are the ultimate experts on their own membership/citizenship rules and are the only ones equipped to make membership/citizenship determinations. W.I.C. §224.2 (e) refers to these statements about Indian ancestry or possible tribal affiliation as *reason to believe the child may be an Indian child. Reason to believe* requires due diligent further inquiry and investigation of the child's possible Indian status.
Reason to Know	23 CFR §107(c); See, WIC §224.2 (d)	A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child custody proceeding is an Indian child if: (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child; (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child; (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child; (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village; (5) The court is informed that the child is or has been a ward of a Tribal court; or (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.
Reservation	25 CFR §23.2 (Clarifies definition in 25 USC §1903)	*Reservation* means Indian country as defined in 18 U.S.C 1151 and any lands not covered under that section, title to which is 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.

TERM	AUTHORITY	DEFINITION
	18 U.S.C §1151	. . . Indian country, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
Service Area	25 CFR §23.2 45 CFR 1355.20	*Service area* solely for newly recognized or restored Indian tribes without established reservations means those service areas congressionally established by Federal law to be the equivalent of a reservation for the purpose of determining the eligibility of a newly recognized or restored Indian tribe and its members for all federal services and benefits. The definition of *foster family home* specifies that "The licensing authority must be a State authority in the State in which the foster family home is located, a Tribal authority with respect to a foster family home on or near an Indian Reservation, or a Tribal authority of a Tribal title IV-E agency with respect to a foster family home in the Tribal title IV-E agency's service area" The IV-E/IV-B regulations do not define *on or near an Indian Reservation* or *service area*.[3] ♦♦♦ ***PRACTICE TIP:*** *The BIA has a designated process, involving publication in the Federal Register, for establishing on or near service areas applicable to BIA social services funding. ACF provides no such process in the IV-E context. California has identified tribal service areas for Tribal TANF purposes but has no identified process for identifying Tribal Service areas for purposes of tribal licensing and approval of homes. Caution should be exercised with respect to placements in homes licensed or approved by a tribe other than the child's tribe outside reservation boundaries to assure there is a jurisdictional basis for the tribe's regulation of the home.*
Sovereignty	Canby, *American*	*Sovereignty* is a word of many meanings. At its most basic, the term refers to the inherent right or power to govern. This right is inherent in the group itself and is not delegated. The federal government, federally recognized tribes, and the states are all sovereigns. A

[3] In the ACF Child Welfare Policy Manual, the only guidance provided is:
"Section 1931 of the Indian Child Welfare Act (ICWA) authorizes Indian tribes and tribal organizations to establish and operate child and family services programs "on or near reservations," including a system for licensing or otherwise regulating Indian foster and adoptive homes. We use this language at section 1355.20 of the regulations to remain consistent with the ICWA."
https://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy.jsp?idFlag=9 The BIA has a designated process, involving publication in the Federal Register, for establishing on or near service areas applicable to BIA social services funding. ACF provides no such process.

TERM	AUTHORITY	DEFINITION
	Indian Law in a nutshell, 6th edition.	county is delegated authority from a state and is not a sovereign but a political subdivision of the state. At the time of European discovery of America, tribes were sovereign. By entering into treaties with tribes and leaving them to regulate their own internal affairs, the federal government recognized the sovereign status of the tribes. Over time the courts have clarified that tribal sovereignty has been diminished somewhat. However, unless expressly qualified by federal law, tribes retain full powers of internal self-government.
Tribal Affiliation	CWS/CMS XTools	*Tribal affiliation* is indistinguishably used to refer to tribal membership/citizenship as well as to descent/cultural affiliation. In CWS-CMS, two drop-down lists exist for tribal groups, one designated Indian Tribe Type, which XTools defines as referring to tribal affiliations. The second is Tribal Organization which XTools defines as ". . . a sovereign nation affiliated with one or more Indian Tribe Types. Beyond this the distinctions are not clearly defined and cannot be said to conform to Bureau of Indian Affairs lists. There is no list for Non-Federally Recognized groups and such groups may have been included in one or both lists over time. Notwithstanding, the lists generally correspond to historic tribal groups and federally recognized tribes, respectively.
Tribal Customary Adoption	CDSS Div 31 (t)(9).	*Tribal customary adoption* means an adoption of an Indian child who is a dependent of a county court and that, pursuant to Welfare and Institutions Code section 366.24, is finalized by and through the customs, laws or traditions of the child's tribe. Termination of parental rights is not required to effectuate the adoption.
Tribally Approved Home (TAH)	WIC §224.1 (r) CDSS Div 31 (t)(12) RFA Written Directive Sec 3-01(a)(72)	*Tribally approved home* means a home that has been licensed or approved by an Indian child's tribe, or a tribe or tribal organization designated by the Indian child's tribe, for foster care or adoptive placement of an Indian child using standards established by the child's tribe pursuant to Section 1915 of the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.). A tribally approved home is not required to be licensed or approved by the state or county and is equivalent to a state-licensed or county-licensed or approved home, including an approved resource family home. Background check requirements for foster care or adoptive placement as required by Sections 1522 and 1522.1 of the Health and Safety Code shall apply to a tribally approved home. *Tribally approved home* means a home that has been licensed or approved by an Indian tribe for foster care or adoptive placements of an Indian child using standards established by the tribe pursuant to ICWA at Title 25, U.S.C. section 1915, is not required to be licensed by the state or county, and is equivalent to a state or county licensed home. Background check requirements for foster or adoptive placement as required by Health and Safety Code sections 1522 and 1522.1 apply to a Tribally Approved Home.

TERM	AUTHORITY	DEFINITION
Termination of Parental Rights		See *Child Custody Proceeding*
Tribal Court	25 USC §1903(7); 25 CFR §102	*Tribal court* means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child custody proceedings.
Upon Demand	WIC §224.1 (p)	*Upon demand* means, in the case of an Indian child, the parent or Indian custodian may regain physical custody during a voluntary proceeding simply upon verbal request, without any delay, formalities, or contingencies.
Voluntary Proceeding	25 CFR §102; WIC §224.1 (q)	*Voluntary proceeding* means a child custody proceeding that is not an involuntary proceeding, such as a proceeding for foster care, pre-adoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

INDIAN CHILD WELFARE ACT DESK REFERENCE:

APPENDICES

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES - OFFICE OF TRIBAL AFFAIRS JOB AIDS

JUDICIAL COUNCIL OF CALIFORNIA (JCC) JOB AIDS

FEDERAL AND STATE AUTHORITY

HOME

OFFICE OF TRIBAL AFFAIRS
CALIFORNIA DEPARTMENT OF SOCIAL SERVICES

Tribal Government 101

Separate Sovereigns

SOVEREIGNTY? A nation or state's supreme power within its borders. Sovereignty is inherent, comes from within the group and is not delegated.

In the U.S. Constitutional framework there are **3 types of domestic sovereigns:**

Federal	State	Tribal
• U.S. Government	• 50 States	• 573 Tribes

Tribes as Quasi-Sovereign Nations

Fundamental principles governing decisions on the nature of Tribal powers

1. Indian tribes possess, in the first instance (at contact), all powers of any sovereign state.

2. Conquest renders tribes subject to the legislative power of the U.S. (*Plenary Power*) and terminates the external powers of sovereignty of the tribe, but does not, by itself, affect the internal sovereignty of the tribe.

3. Internal sovereign powers are subject to qualification by treaties and by *express legislation by Congress*, but, except as expressly qualified, full powers of internal sovereignty are vested in the tribes and their duly constituted governments.

    - These 3 principles set out the basic frame work of Federal Indian Law. Title 25 of the U.S. Code is titled *Indians* and contains 2 volumes of laws that qualify tribal powers, including statutes that address the *special case of California*.

    - Laws that apply only to Indians are permitted by the U.S. Constitution because they are **not based on race or ethnicity** but on **political status**, i.e., the unique history of Indians and membership/citizenship in a quasi-sovereign Indian tribe.

Government-to-Government Terminology Tribes are quasi-sovereign governments and can interact on a governmental basis with the federal and state governments. Such interactions involve terminology such as Jurisdiction; Full Faith and Credit; Comity; Delegation; Intergovernmental Agreements; Licensure; Regulation; citizenship (tribal membership versus racial or ethnic status); etc.

Interests, Authority and Capacity Tribes are discrete sovereigns but are impacted by federal and state laws and may engage with federal and state processes in many ways – as governments, as agents, as service providers, as clients, etc. The authority and capacity of a tribal interest should not be assumed but should be clearly established. Like states, tribes have diverse interests and authority. Why and how something is done may be of great significance.

CA Federally Recognized Tribes, Contemporary CA Tribal Sovereigns

Generally, a tribe must be *federally recognized* to stand in a government-to-government relationship with the United States. The Bureau of Indian Affairs (BIA) is the federal agency that administers the tribal recognition system, BIA identifies the number of California tribes as 109. This includes 104 Tribes located within the jurisdiction of the BIA Pacific Region (California) and 5 with trust lands (Indian Country) in California but who are under the jurisdiction of the BIA Western Region.

OFFICE OF TRIBAL AFFAIRS
CALIFORNIA DEPARTMENT OF SOCIAL SERVICES

HOME

Tribal Government 101

Tribal Sovereigns

Sovereignty is a nation or a state's supreme power to govern itself within its borders. Sovereignty is inherent, comes from within the group and is not delegated. In the U.S. Constitutional framework there are **3 types of domestic sovereigns:**

- The **United States**
- 50 **states** and
- 573 ***federally recognized*** **Indian tribes**

What is a federally-recognized tribe?

A federally-recognized tribe is 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 of the Interior, Bureau of Indian Affairs (BIA) because of their status as Indians. The BIA annually publishes a list in the Federal Register of recognized tribes that are acknowledged to have the immunities and privileges available to federally recognized Indian tribes by virtue of their **government-to-government relationship** with the United States as well as the responsibilities, powers, limitations and obligations that they possess as such tribes. (25 Code of Federal Regulation, 83.5.) The Bureau of Indian Affairs maintains a directory of the tribal leaders of federally recognized tribes at https://www.bia.gov/tribal-leaders-directory. Federal laws as administered by the BIA have recognized as tribes groups of Indians occupying Reservations. (Membership may include Indians from multiple historic tribes OR only a small % of members of a particular historic tribes.)

Why are Indian tribes treated differently from other groups?

Laws applying to only Indians (such as ICWA) are permitted by the U.S. Constitution because they are **not based on race or ethnicity** but on **political status**, i.e., membership/citizenship in a quasi-sovereign Indian tribe.

What is a historic/aboriginal tribe and why does it matter?

A historic tribe is a distinct tribal group/nation in existence when Columbus arrived in America. The groups are generally identified by anthropological and linguistic markers. Contemporary federally recognized tribes descend from these historic tribal groups/nations. Cultural practices of these historic groups continue. The Federal Register list of tribes, which is now considered determinative of federally recognized (government-to-government) status, has only been in existence since about 1980. The tribal names on the list often correspond to land areas rather than to aboriginal or historic cultural tribal groupings as a result of practices of the BIA . Because of this, the BIA maintains a *List of Designated Tribal Agents By (Historic) Tribal Affiliation.* This list is cited in the BIA's *Indian Child Welfare Act; Designated Tribal Agents for Service of Notice* Federal Register publication.

Example:

It is not uncommon for Indian people to identify to an historic tribal affiliation instead of a federally recognized tribe a child may be eligible for membership in. For example, the federally recognized Coast Indian Community of the Resighini Rancheria gets its name from Gus Resighini, the non-Indian land owner the BIA purchased the property from. A Resighini Rancheria family is likely to say that they are Yurok (their historic tribal affiliations) rather than identifying to Gus Resighini.

TWO TRIBAL LANES IMPACTING CDSS ICWA/TRIBAL WORK

Q Since the Bureau of Indian Affairs now publishes a list of federally recognized Indian tribes, is historic tribal identity relevant today?

A Yes! **Political status** and **Historic tribal affiliation** may be thought of as **distinct but important "lanes" that impact state/tribal work.** It is important to be aware of each, the differences, and how they interact.

TWO TRIBAL LANES IMPACTING CDSS ICWA/TRIBAL WORK

Historic/cultural affiliation interacts with modern tribal status and is important for many reasons, including -

- Contemporary tribal existence is anchored in historic tribal land ties, traditional values and cultural practices.
- Solutions to problems plaguing tribal communities will most likely be found in tribal traditions rather than in non-Indian systems.
- Indians commonly identify to their historic tribal affiliation, tribal service areas often reach beyond reservation boundaries to historic tribal territories.

Lane One

Racial/Cultural/Ethnic Groups

Historic/Aboriginal Tribes

Historic CA Tribal Sovereigns

- Generally, anthropological groupings (tribes) identified as discrete cultural/ethnic groups occupying a defined territory.
- Racial/ethnic identity. Indian ancestry.
- Traditional systems and cultural practices continue irrespective of federal recognition.
- Some Federal and California laws apply to *non-federally-recognized* Indians and Tribes

Culture Matters

Traditional law and customs, traditional child rearing practices,

Tribal culture

Racial/ethnic identity, Indian ancestry

Cal. WIC §306.6 Participation by unrecognized tribe

ICWA Indian Community Standards; culturally appropriate placement

ICWA §1934. Second (broader) definition of "Indian" for off reservation programs

Lane Two

"Political Status" (not racial/ethnic)

Federally Recognized Tribes (FRTs)

Contemporary CA Tribal Sovereigns

- Derived from Historic Tribes.
- FRTs are quasi-sovereign and *each* stands in an independent government-to-government relationship with the U.S.
- FRTs have powers of self-government
- Tribes may operate programs, including services for non-federally-recognized California Indians

Tribal Governmental Exercise

Jurisdiction, Intergovernmental Agreements, Protocols; Full Faith and Credit . . .

Placement licensing/approval authority; Background Checks, SB 1460

Tribal Consultation

ICWA Minimum Federal Standards for State Courts

17 Tribal TANF Program

Federal IV-B Funding Eligible. Direct federal IV-E funding or Agreements with States (Two IV-E Tribal Agreements)

JOB AID: THE INDIAN CHILD WELFARE ACT (ICWA) A POWERFUL AND MULTI-FACETED STATUTE

ICWA Legislative History and Purpose

- After Congressional hearings revealed a pattern of wholesale public and private removal of Indian children Congress found that "the States . . . have often failed to recognize the **essential tribal relations** of Indian people ***and*** the **cultural and social standards** prevailing in Indian communities and families." (25 USC §1901 (5).)
- As a result of the "**special relationship** between the U.S. and Indian tribes and their members and the **federal responsibility** to Indian people" Congress passed the ICWA to remedy "abusive child welfare practices." *(Holyfield)*

ICWA and Political Status

- The ICWA acknowledges a **special relationship between tribes and the federal government** and seeks to protect **essential tribal relations.** (25 U.S.C. §1901, et seq.)
  - Nature of these relationships are premised on more than ethnic or cultural considerations.
  - Indians as members of federally recognized sovereign tribal nations are not simply separate racial or cultural groups, but also **separate political groups** that stand in a government-to-government relationship with the United States.
  - An Indian child is a "citizen" of a tribe and entitled to the incidents of that status. The ICWA is very much concerned with these legal/political relationships.

ICWA – A POWERFUL AND <u>MULTIFACETED</u> STATUTE

♦ Addresses all of the following ♦

I. **Tribal Rights and Opportunities**

II. **Minimum Federal Standards for State Court Proceedings**

III. **Indian Social and Cultural Considerations**

I. <u>Tribal Rights and Opportunities (25 U.S.C. §§1903, 1911, 1918, 1919)</u>

- Jurisdiction and tribal governmental authority

  • Concurrent or exclusive tribal control over some cases • Opportunity to reassume jurisdiction • Case transfers to tribal court • Sovereign authority to determine tribal membership • Ability to regulate (license or approve) placements for member/citizen children • Full Faith and Credit

- Agreements between Tribes and States Authorized • Right to intervene in state cases

- Ability to Alter Standards that MUST be Applied in State Proceedings (whether or not Tribe intervenes). Examples include definitions (as defined by tribal law or custom), and Changing the Placement Preferences by resolution

II. ICWA Minimum Federal Standards (MFS) for State Courts (§§1911 – 123)

- Generally: • Involve interplay of Federal, State and Tribal law • Impose procedural (how) and substantive (what) requirements • Apply to state court proceedings • Apply whether or not the child's Tribe intervenes or is otherwise involved with the case •Do not apply to tribal proceedings unless adopted by the tribe

- MFS remove subjective assessments in favor of express requirements that, if met, advance the best interest of Indian children and the stability and security of Indian tribes and families

- **MFS Procedural and Substantive Requirements (§§1911 – 123)**
  - Inquiry: • *continuing duty* in *ALL cases*, from *initial contact*) • Due Diligence - further investigation when *reason to believe*
  - Notice (and all MFS apply) whenever it is known or there is *reason to know* the child is an Indian
  - Intervention (child's tribe, parents, Indian custodian)
  - Active Efforts (from initial contact)
  - Elevated Evidentiary Burdens
  - Qualified Expert Witness Testimony
  - Foster and Adoptive Placement Preferences
  - Adopted Indian Child Right to Information
  - Invalidation of Proceedings for violation of designated provisions of ICWA
  - Higher state or federal standard of protection to the rights of parent or Indian custodian applies

III. Indian Social and Cultural Considerations (§§1903, 1912, 1915, 1934)

- Assessment, treatment and placement standards require adherence to tribal and in some cases Indian community standards and cultural dictates. (see, 25 U.S.C. 1912, 1915, 1934)
- Second definition of "Indian." A special (and much more inclusive) definition of *Indian* is set forth for services eligibility - reflects the common history suffered by Indian people throughout the nation. (see, 25 U.S.C. §1934)
- Title II authorizes grants for Indian child and family service programs. (Broad program authorizations – both as to range of services and eligibility for services.)
- Min. fed standards (MFS) include definitions "as defined by tribal law or custom" or in absence thereof, as in the Act.

JOB AID: ICWA Inquiry. Overview of key requirements of AB 3176, clarifying how probation and child welfare are required to implement ICWA inquiry as of January 1, 2019

The focus of ICWA inquiry and investigation is always to determine whether the child is or may be an Indian child—i.e., a member of a federally recognized tribe or eligible for membership and the biological child of a member.

Early Investigation of Indian Status by the Agency

AB 3176 confirms California law by clarifying that both probation and child welfare have a *continuing* duty to investigate a child's possible Indian status beginning at *first contact* with the child and family.

- This applies to *all* children.
- The agency cannot wait to inquire until court action or removal is contemplated. When a report of child abuse or neglect is made, the reporting party must be asked if he or she has information that the child may be an Indian child (224.2(a)).[1]
- If probation or child welfare receives temporary custody of a child, it must inquire whether the child is or may be an Indian child and where the child, parents, or Indian custodian is domiciled (224.2(b); 306(b)).

"Reason to Believe" and Early Communication with Child's Tribe

When the agency's early investigation gives "reason to believe" (224.2(e)) that the child is an Indian child, further inquiry is required. This inquiry must include:

- Interviewing the child, parents, Indian custodian, and extended family members;
- Contacting the Bureau of Indian Affairs (BIA) and California Department of Social Services; and
- Contacting tribes with which the child may be affiliated and others who may have information about the child's potential status.

Contact with the tribes must include, at a minimum, making telephone, facsimile, or electronic mail contact with each tribe's designated agent for receipt of ICWA notice and sharing information identified by the tribe as necessary for the tribe to make a membership or eligibility determination, as well as information on the current status of the child and the case. *At this point, however, there would be no requirement to send formal ICWA notice by registered or certified mail, return receipt requested.*

At the first court hearing, including the detention hearing in a dependency case, to ensure that the agency has fulfilled its duty of inquiry, the agency must submit materials to the court that evidence that the agency has asked the child, parents, legal guardian, Indian custodian, and all extended family members with which the agency has had contact whether the child is, **or may be,** an Indian child, and where the child and parents or Indian custodian are domiciled, i.e., if they live on an Indian reservation

[1] This and all future references are to the Welfare and Institutions Code, unless otherwise stated.

or in an Alaska Native Village (224.2(b)). This evidence can be provided on the *Indian Child Inquiry Attachment* (form ICWA-010(A)), in the court report, or in some other form of attachment. What is important is to ensure that the names of the individuals asked, the questions that were asked, and the responses that were given are provided in enough detail to show that the requirements of Welfare and Institutions Code section 224.2(b) were fulfilled.

"Reason to know" and ICWA requirements

Based on the information that the agency received as a result of its inquiry, the agency should decide whether that information provided a "reason to believe" the child could be an Indian child.

- If so, the agency should conduct further inquiry, including interviewing the parents, child, available extended family members, and other relevant individuals;
- Contacting the California Department of Social Services and/or BIA; and, most important, engaging in an exchange of information with tribes with which the child is potentially affiliated (224.2(e)(1)–(3)).

This exchange of information, however, does not constitute formal ICWA notice. At this point the exchange of information includes at a minimum telephone, facsimile, or electronic mail contact to each tribe's designated agent for receipt of notices under ICWA. If, during this initial or further inquiry, the agency has "reason to know" that the child is an Indian child, then the agency has a further obligation to provide the tribe or tribes with formal notice under ICWA.

Unlike "reason to believe," which is not defined in the statute, the factors that give the agency and the court "reason to know" that the child is an Indian child are stated in section 224.2(d). They include any of the following circumstances:

- The child, a parent, a member of the extended family, or basically anyone else with an interest in the child tells the court that the child is an Indian child or that he or she has information indicating that the child is an Indian child.
- The residence or domicile of the child or parents or Indian custodian is on a reservation or Alaska Native village.
- There is information that the child is or was under the jurisdiction of a tribal court.
- The child or a parent possesses an identification card (or other document from a tribe or the BIA) indicating membership or citizenship in an Indian tribe

As discussed above, when there is reason to know that the child is an Indian child, the agency must:

- Compile and present evidence by way of report, declaration, or testimony that the agency has used due diligence, including at a minimum the above, to work with all tribes to determine the child's status;
- Ensure that formal ICWA notice was provided to the tribe or tribes; and
- Treat the child as an Indian child unless and until the court can make a finding on the record that the child does not meet the definition of an Indian child.

The Role of the BIA and CDSS in ICWA inquiry

Inquiring whether a child is an Indian child is required in ***all*** state child custody cases. The goal of inquiry is to determine Indian status -- i.e., membership/citizenship in a federally recognized tribe or political connection as eligible for membership and the child of a member of a federally recognized tribe. Because of complicated law and history, heritage (descent/blood quantum derived from historic tribes) is often a determining factor in finding the child's contemporary federally recognized tribe.

Tribal membership standards commonly require demonstrated connection to an ancestor listed on an historic federal roll or schedule and/or a specified quantum of Indian blood. For this reason, detailed ancestry information must be provided to tribes to enable the tribe to exercise its sovereign authority to determine its membership. Neither the Bureau of Indian Affairs or the CDSS possess authority to make tribal membership determinations.

Due to complicated law and history, Identification of Indian status often begins from a racial designation or inquiry about Indian heritage. Respondents may not answer by identifying to a federally recognized tribe (something they may not know) but rather to an historic or ancestral tribal affiliation(s).

- The role of the Bureau of Indian Affairs and the CDSS is to assist in identifying the federally recognized tribes a child may be a member of or eligible for membership in. When the child's federally recognized tribe is not known or readily identified, inquiry should include questions about the child's affiliation with an historic or Tribal ancestral group.
- The Bureau of Indian Affairs and the CDSS may then assist with locating the identity of and contact information for federally recognized tribes affiliated with the identified ancestral group.
    - For example, if the ancestral group of "Cherokee" is identified, the Tribal Affiliation list maintained by the Bureau of Indian Affairs identifies to that historic Cherokee affiliation 4 separate federally recognized tribes. Similarly, if the ancestral group of "Paiute" is identified, the Tribal Affiliation list identifies to that historic Paiute affiliation 26 federally recognized tribes.

To assist in identifying and contacting the child's tribe, the Bureau of Indian Affairs makes available on its website the list of federally recognized tribes, and a tribal leaders directory at https://www.bia.gov/tribal-leaders-directory. It also makes available a list of *Indian Child Welfare Act; Designated Tribal Agents for Service of Notice* at https://www.bia.gov/bia/ois/dhs/icwa. The designated agent list identifies who the Bureau of Indian Affairs recommends as the tribe's contact for Indian child welfare purposes.

Federally recognized tribes may not correspond to historic (ancestral) tribal groups. Because Indians commonly identify to their historic tribal or ancestral group, the Bureau of Indian Affairs published in the Federal Register a *List of Designated Tribal Agents By (Historic) Tribal Affiliation*. (77 Fed. Reg. 45816, 45837 (August 1, 2012). A corresponding *List of Designated Tribal Agents By Tribal Affiliation* may be accessed at https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/webteam/docx/idc1-033200.docx.

Possible Inquiry Results

Inquiry is required in all state child custody cases and results in one of the following categories (that may be subject to change based upon additional information):

Category/Class	What it is	What it requires
Non-Indian	No indication that the child is Indian (member or eligible for membership and the child of a member)	There is a continuing duty to inquire about whether the child is or may be an Indian child throughout the life of all state child custody cases. ICWA does not otherwise apply.
Reason to believe (Heritage cases)	While at times a child's Indian status and identify of their tribe can be readily confirmed, commonly this information is not available. Rather, inquiry may produce vague statements of possible heritage and guesses at possible tribal affiliation, often to historic/ancestral tribal groups rather than to specific federally recognized tribes. AB 3179 refers to this group as *reason to believe the child may be an Indian child.*	*Reason to* believe requires only further inquiry/investigation to confirm Indian status and identification of child's federally-recognized tribe(s). Due diligence is required but ICWA does not otherwise apply.
Reason to know	Federal ICWA regulations and state law list facts that provide reason to know the child is Indian (i.e., a member or eligible for membership and the child of a member of a federally-recognized tribe).	Reason to know requires further inquiry and application of ICWA minimum federal standards to the case (e.g., notification, active efforts, expert testimony, placement preferences, etc.)
Indian child	Children whose Indian status can be confirmed (i.e., children who are a member or eligible for membership and the child of a member of a federally-recognized tribe)	Indian status requires application of ICWA minimum federal standards to the case (e.g., notification, active efforts, expert testimony, placement preferences, etc.) The child's tribe may exercise rights and opportunities provided by ICWA to the child's tribe.
non-federally-recognized Indian child	Non-federally-recognized tribes are groups that may be self-identified, petitioning for federal recognition, or state recognized. They do not enjoy the rights and privileges of federally recognized tribes.	WIC §366.6 permits a court to allow a child's non-federally-recognized tribe to participate in a juvenile case, similar to a CASA volunteer. ICWA does not otherwise apply.

Judicial Council of California (JCC) Tribal/State Programs
INDEX of ICWA Job Aids

There are many resources available on the JCC website developed pursuant to a collaboration with the CDSS. To navigate to ICWA resources: Search "CA Courts" → select CA Courts Home www.courts.ca.gov → Programs (On small screens it may be necessary to click a small index icon in the upper left for a drop-down of available tabs, which includes Programs) → Tribal/State Programs → Indian Child Welfare Act.

The job aids selected for inclusion in this guide and listed below incorporate the 2019 state law changes represented by AB 3176 which conformed state law to the federal ICWA regulations. They address specialized topics or are quick references to the federal and state laws addressing the ICWA.

- ICWA Information Sheet: Delinquency, Native American Identification and ICWA https://www.courts.ca.gov/documents/ICWA-Delinquency-factsheet.pdf

- ICWA Information Sheet: Delinquency – Child's Indian Status – Right to Political and Cultural Connections – ICWA Requirements https://www.courts.ca.gov/documents/ICWA-Delinquency-factsheet.pdf

- ICWA Information Sheet, Tribal Participation in State court proceedings governed by ICWA http://www.courts.ca.gov/documents/icwa-Tribal-Participation-factsheet.pdf

ICWA REQUIREMENTS REFERENCE CHARTS

- ICWA Requirements, Revised January 2020 http://www.courts.ca.gov/documents/ICWARequirements.pdf

- Probate Courts, Requirements Under the Indian Child Welfare Act (ICWA) and Senate Bill 678, Revised March 2015 https://www.courts.ca.gov/documents/ICWAProbateCourtRequirements.pdf

- Probation Departments Requirements – Indian Child Welfare Act and Senate Bill 678, Revised January 2020 https://www.courts.ca.gov/documents/ICWAProbationRequirements.pdf

- Social Service Departments Requirements – Indian Child Welfare Act, SB 678 & AB 1325, Revised January 2020 file://cdss/cfsd/Central%20Office/OTA/1.%20New%20OTA%20Common/Office%20of%20Tribal%20Affairs%20(OTA)/2020_ICWA_deskreference/Appendices/JCC%20Job%20Aids/ICWA-SSDRequirements.pdf

- Family Courts Requirements Under the Indian Child Welfare Act an Senate Bill 678, Revised January 2020 https://www.courts.ca.gov/documents/ICWAFamilyCtsRequirements.pdf

JUDICIAL COUNCIL
OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

ICWA Information Sheet: Delinquency – Child's Indian Status – Right to Political and Cultural Connections – ICWA Requirements

Overview

The Indian Child Welfare Act ("ICWA" 25 U.S.C. §§1901 *et. seq.*) and corresponding state law are the source of significant legal rights and protections for Indian children and their tribes. Some, but not all of ICWA's requirements apply to **all** juvenile cases, including delinquency cases. In addition, ICWA is not the **only** reason why a child's Indian status and American Indian heritage is of importance in a delinquency case. Whether or not ICWA itself applies, children who identify as American Indian have unique legal protections and access to unique resources.

Duty of Inquiry

A juvenile probation department has an affirmative and continuing duty to inquire about a child's Indian status, that is, whether the child is a member or eligible for membership in an Indian tribe and the child of a member of an Indian tribe. Inquiry must occur whenever the department makes contact with a child that could result in a petition under Section 601 or 602 (Welf. & Inst. Code § 224.2(a)) and whenever a child is placed in the temporary custody of the probation department pursuant to Welfare and Institutions Code § 307 (Welf. & Inst. Code § 224.2(b).) The duty to inquire begins at initial contact and the probation officer must complete this inquiry even if the child comes into contact with the probation department as a result of conduct that would be considered a crime if the child were an adult. (*In re. W.B.* (2012) 55 Cal. 4th 30, 40)

This duty of inquiry includes asking the child, parents, legal guardian, Indian custodian (if any), extended family members and others who have an interest in the child whether the child is, or may be, an Indian child and where the child, the parents, or Indian custodian is domiciled. (Welf. & Inst. Code § 224.2(b).) If this inquiry gives the probation officer "reason to believe" that the child is an Indian child, the probation officer must make further inquiry as soon as practicable. The purpose of further inquiry is to discover whether the child is a member (citizen) of a federally recognized Indian tribe and includes at a minimum:

1. Interviewing the child, parents, Indian custodian, and extended family members to gather the information required in Welf. & Inst. Code § 224.3(a)(5). (Welf. & Inst. Code § 224.2(e)(1)). Essentially this is a family tree back to great-grandparents;
2. Contacting the Bureau of Indian Affairs and California State Department of Social Services for assistance in identifying the names and contact information of the tribes the child may be a member or eligible for membership in; and
3. Contacting the tribes and any other person that may reasonably be expected to have information regarding the child's membership or citizenship status or eligibility. This contact with the tribes is distinct from sending notice on the form ICWA-030. You must make these contacts even if you are not required to send the ICWA-030 notice. This contact must include at a minimum contacting the tribe's designated agent for receipt of ICWA notice by telephone, facsimile or email and sharing information with the tribe necessary to make a membership determination. If the tribe determines the child is a member or eligible for membership you must share information about the current status of the child and the case. (Welf. & Inst. Code § 224.3(e)(3)).

If as a result of this inquiry the probation officer knows or has reason to know that the child is an Indian child, then ICWA requirements beyond inquiry may apply in certain circumstances.

When do ICWA requirements beyond inquiry apply?

All of the remaining ICWA requirements such as notice, active efforts, qualified expert witness testimony and heightened evidentiary standards apply only when a child is either in foster care or at risk of entering foster care and one of the three additional factors apply:

1. The petition under Welfare and Institutions Code section 601 or 602 alleges only status offenses and no conduct which would be criminal if the child were over age 18. (This includes allegations such as a child refuses to obey the orders of a parent or guardian, is beyond parental control, violates age-based curfew ordinances, or is truant or disobedient in school or has engaged in underage drinking or underage possession of alcohol or tobacco because even though this conduct is prohibited in the Penal Code, such conduct would not be a crime if committed by an adult.) (*In re. W.B.* at 42);
2. The court has set a hearing to terminate parental rights (regardless of whether or not there was "criminal" conduct) (*In re. W.B.* at 59); or
3. The court has placed the child in foster care, or in an adoptive or pre-adoptive placement, due to abuse or neglect in the child's home. (*In re. W.B.* at 60). In these situations, the court must make a specific finding that placement outside the home of the parent or legal guardian is based entirely on harmful conditions within the child's home. (*In re. W.B.* at 59) Without such a specific finding it is presumed that the placement is based at least in part on the child's criminal conduct. (*In re. W.B.* at 60) If there is such a finding, then ICWA requirements apply regardless of whether the conduct which brought the child before the court was criminal in nature.

Significance of Native American & Indian Identification (regardless of ICWA application)

Services for Native American Children

Following inquiry, if a child and the child's family identify as Native American, that is, as possessing native heritage or a cultural connection with an Indian tribe, then, whether or not ICWA itself applies, as **in all cases** the family's cultural identity is important for case planning and placement purposes. Native American children and their families may be entitled to a broad range of services which should be used whenever possible when developing case plans. You can find these services in your area by looking here http://www.courts.ca.gov/5807.htm. Programs may have different eligibility requirements. Some services are available to all individuals who self-identify as American Indian or indigenous while others may only be available to members of federally recognized tribes.

Following inquiry, if a child is an Indian child that is or may be placed in a foster care placement, identifying the child's tribe is important and legally required under the Welfare and Institutions Code apart from ICWA itself. A child's tribe is a required member of the Child and Family Team (CFT) convened for development of the child's case plan, including provisions relating to services and placement. Collaboration with the child's tribe is required as a matter of state law and may expand options available for the child through the provision of culturally appropriate services and through application of tribal standards to assessments and placement approvals. (Welf. & Inst. Code § 16501(a)(4))

Legal Rights of All Native American and Indian Children in Foster Care (regardless of ICWA)

If the child is a member or eligible for membership in a tribe, you are required to look to tribal members when seeking a foster care placement for an Indian child (ie a child who is a member or eligible for membership in a tribe) regardless of whether ICWA applies to the case. (Welf. & Inst. Code §§ 727.1 (a); 16501.1 (c))

All children placed in foster care have rights as specified in California law, commonly known as the Foster Youth Bill of Rights. (W.I.C. §16001.9) Native American children, regardless of membership in a federally recognized tribe, enjoy the following rights:

1. To receive adequate clothing and grooming and hygiene products that respect the child's culture and ethnicity.
2. To be placed with a relative or nonrelative extended family member if an appropriate and willing individual is available. (This is also the first order of placement in the ICWA placement preferences.)
3. To participate in extracurricular, cultural, racial, ethnic, personal enrichment, and social activities.

4. To attend religious services, activities, and ceremonies of the child's choice, including, but not limited to, engaging in traditional Native American religious practices.

Indian children who are placed into foster care are entitled to all the same rights as other foster children under WIC 16001.9 and also have unique protections for their cultural and political identity as Indian children. These protections for the cultural and political rights of Indian children in foster care apply equally whether they are placed in foster care under WIC §§300, 601 or 602 (WIC 16001.9(a).) These protections include the right to:

1. a placement that upholds the prevailing social and cultural standards of the child's Indian community, including, but not limited to, family, social, and political ties; (WIC 16001.9(a)(1))
2. be provided with names and contact information for representatives of the child's Indian tribe and to communicate with these individuals privately; (WIC 16001.9(a)(11))
3. have contact with tribal members and members of the child's Indian community consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe; (WIC 16001.9(a)(14)
4. engage in traditional Native American religious practices; (WIC 16001.9(a)(15)
5. have probation personnel who have received instruction on ICWA and on cultural competency and sensitivity relating to, and best practices for, providing adequate care to Indian children in out-of-home care; (WIC 16001.9(a)(20)
6. recognition of the child's political affiliation with an Indian tribe or Alaskan village, including a determination of the child's membership or citizenship in an Indian tribe or Alaskan village; to receive assistance in becoming a member of an Indian tribe or Alaskan village in which the child is eligible for membership or citizenship; to receive all benefits and privileges that flow from membership or citizenship in an Indian tribe or Alaskan village; and to be free from discrimination based on the child's political affiliation with an Indian tribe or Alaskan village; (WIC 16001.9(a)(21)
7. have a representative of the child's Indian tribe in attendance during hearings; (WIC 16001.9(34)
8. a case plan that includes protecting the essential tribal relations and best interests of the Indian child by assisting the child in establishing, developing, and maintaining political, cultural, and social relationships with the child's Indian tribe and Indian community; (WIC 16001.9(37))

Probation and social services must ensure that all of these rights are respected, including assisting a child to become enrolled with the child's tribe when the child is eligible for membership but requires enrollment.

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ICWA Information Sheet: Tribal participation in State court proceedings governed by ICWA.

Under ICWA and corresponding state law, an Indian child's tribe must receive notice of any state court proceedings governed by ICWA involving an Indian child. These proceedings include dependency proceedings, some delinquency proceedings, some family code proceedings and probate guardianship proceedings concerning an Indian child. (see 25 USC § 1903; Fam. Code §§ 170, 177, 3041, Prob. Code § 1459.5, WIC §§ 224, 224.1 CRC 5.480 & 7.1015) Federal and state law mandate and acknowledge a number of substantive and procedural rights of an Indian child's tribe in such state court proceedings, including a right to participate in various ways and an absolute right to intervene in such proceedings "at any point".

Rights if a tribe chooses not to intervene:

An Indian child's tribe is not required to formally intervene in proceedings. If the tribe acknowledges the child, all of ICWA's substantive requirements apply even if the tribe does not intervene. A non-intervening tribe must continue to receive notice of all court hearings involving the child. The tribe must be consulted with respect to the placement of the child. (CRC 5.482(g)) The tribe must be consulted with respect to case planning for both the Indian parents and the Indian child and those case plans must use the available resources of the tribe, extended family members, other Indian service agencies and individual Indian caregivers. (CRC 5.484 (c); CRC 5.690 (c); WIC § 361.7)

Whether or not the tribe intervenes, a representative of the Indian child's tribe is entitled to be present at all court proceedings involving the Indian child (CRC 5.530 (B) (7)) and may address the court, receive notice of hearings, examine all court documents relating to the dependency case, submit written reports and recommendations to the court, and perform other duties and responsibilities as requested or approved by the court. (CRC 5.534 (i))

Right of Intervention:

An Indian child's tribe may intervene, orally or in writing, at any point in the proceedings and may, but is not required to, file with the court the *Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child* (form ICWA-040) to give notice of their intent to intervene. (CRC rule 5.482 (e); WIC § 224.4; 25 USC § 1911 (c))

The juvenile court has no discretion to deny a tribe's request to intervene. (*In re Desiree F.* (2000) 99 Cal.Rptr.2d 688, 83 Cal.App.4th 460)

Rights of the Intervening Tribe:

A tribe, as an intervening party, is entitled to all rights afforded to any party in a proceeding, including the right to sit at counsel table, the right to examine witnesses, and the right to be given copies of documents. See CCP §387; see also CRC 5.482(e) and Judicial Council form ICWA-040.

Who May Appear on Behalf of the Tribe:

The tribe may choose to be represented by an attorney at the tribe's expense, but the tribe may also designate any person to represent them in court, and this representative must be given the same rights and courtesies as the attorneys involved. (CJER ICWA Bench Handbook, 2013 at page 32).

The court may not limit the tribe's ability to participate effectively in the case if the tribe chooses to be represented by a non-attorney.[1] States' laws regulating attorneys and the practice of law cannot interfere with or burden the federally protected right of the tribe to participate in the proceedings.[2]

California Rule of Court, rule 5.534 specifically addresses this issue:

> **(i) Tribal representatives (25 U.S.C. §§ 1911, 1931-1934)**
> The tribe of an Indian child is entitled to intervene as a party at any stage of a dependency proceeding concerning the Indian child.
> (1) The tribe may appear by counsel or by a representative of the tribe designated by the tribe to intervene on its behalf.

The California Rules of the Court, Rule 5.534(i)(1) permits intervention by an attorney or by a representative and makes no distinction between the rights granted to each respectively.

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[1] *State v. Jennifer M.*, 277 Neb. 1023, 1024 (2009)
[2] *State ex rel Juvenile Department of Lane County v. Shuey*, 119 Ore.App. 185 (1993); *In the Interest of N.N.E.*, 752 N.W.2d 1 (2008)

Revised 01/2020

Indian Child Welfare Act ("ICWA") Requirements*

Applicability (25 U.S.C. §§1901-1923, 1903(i); 25 C.F.R. §§23.2, 23.103, 23.107; Guidelines B.1 & B.2; W.I.C. §§224.1, 224.3; Fam. Code §170; Prob. Code, §§1459.5(a), 1516.5(d); Rule 5.480)
ICWA applies to any state court case involving an Indian child that may result in a voluntary or involuntary foster care placement; guardianship placement; custody placement under Family Code section 3041; declaration freeing a child from the custody & control of one or both parents; termination of parental rights; or voluntary or involuntary adoptive placement including all proceedings under WIC sections 300 et seq. & 601 & 602 et seq. when the child is in foster care or at risk of entering foster care & one of the following: 1) the proceedings are based on conduct that would not be a crime if committed by an adult, 2) the court is setting a hearing to terminate parental rights, or 3) the court finds that the foster care placement is based entirely on conditions within the child's home & not even in part upon the child's criminal conduct.

Indian Child (25 U.S.C. §1903(4); 25 C.F.R. §23.2; Guideline B.1; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a) & (b))
Is an unmarried person under the age of 18 who is (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe & is a biological child of a member of an Indian tribe. Indian child may include a person over 18, but under 21, years who is a dependent of the court unless that person elects not to have ICWA apply. A determination by a tribe or the Bureau of Indian Affairs (BIA), absent a determination by the tribe to the contrary, that a child is or is not a member or eligible for membership is conclusive. The child is NOT required to be affiliated with the same tribe the parent is a member of. (25 U.S.C. §1903(4)). Enrollment is NOT required to establish membership unless the tribe confirms that enrollment is required. (WIC, §224.2(h))

Indian Custodian (25 U.S.C. §1903(6); 25 C.F.R. §23.2; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a))
Is any person who has legal custody of an Indian child under tribal law or custom or state law or to whom temporary physical care, custody, & control has been transferred by the parent.

Intervention/Invalidation (25 U.S.C. §§1911(c), 1914; Fam. Code, §§175(e), 177(a); Prob. Code, §§1459(e), 1459.5(b); WIC, §§224(e), 224.4; Rules 5.482(d) & 5.487)
An Indian custodian, & Indian child's tribe have the right to intervene at any point in the proceeding. If ICWA applies, the Indian child, parent, Indian custodian, or the child's tribe may petition any court of competent jurisdiction to invalidate the proceedings for not complying with the requirements of sections 1911 (jurisdiction; transfer; intervention; full faith and credit to public acts, records, and judicial proceedings of Indian tribes), 1912 (notice, appointment of counsel, examination of reports or other documents, active efforts, qualified expert witness testimony) or 1913 (consent requirements) of ICWA.

Inquiry (25 C.F.R. §23.107(a); Fam. Code, §177(a); Prob. Code, §§1459.5(b), 1513(h); WIC, §224.2; Rules 5.481(a) & (b); 5.482(c) & 5.668(c))
In all child custody proceedings, the court & the petitioner, including a social worker, a probation officer, a licensed adoption agency or adoption service provider, or an investigator must ask the child, the parents or legal guardians, Indian custodian and extended family members as soon as possible whether there is information indicating the child is or may be an Indian child & must affirm on the petition that inquiry has been made. If that initial inquiry gives reason to believe the child is an Indian child, further inquiry regarding the possible Indian status of the child must be done as soon as practical. This further inquiry must include at a minimum interviewing the parents, Indian custodian and extended family members to gather ancestry information, contacting the California Department of Social Services (CDSS) & the BIA for assistance in identifying tribes and tribal contact information, contacting others that may reasonably be expected to have information about the child's status, and contacting tribe(s) by telephone, facsimile or email and sharing with the tribe(s) any information the tribe(s) require to make a determination about the child's status. In all child custody cases, at their first court appearance, the parent or guardian must be ordered

*Based on The Indian Child Welfare Act 25 U.S.C. §§ 1901-1963; Indian Child Welfare Act Regulations 25 C.F.R. Part 23; Guidelines for Implementing the Indian Child Welfare Act and California statutes and rules of court.

HOME

to complete *Parental Notification of Indian Status* (form ICWA-020), & the court must ask all participants whether they have information indicating the child is or may be an Indian child & instruct them to inform the court if they subsequently receive such information.

Reason to Know the Child Is an Indian Child (25 C.F.R. §23.107(c); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.2(d); Rule 5.481(b))
The following circumstances give "reason to know" the child is an Indian child: 1. A person having an interest in the child provides information suggesting that the child is an Indian child; 2. The residence or domicile of the child, the child's parents, or an Indian custodian is on a reservation or other tribal lands or in an Alaska Native village; 3. The child is or was a ward of a tribal court; or 4. Either parent or the child possesses an I.D. card indicating membership in an Indian tribe. If there is "reason to know" the court must require the petitioner to provide evidence that the petitioner has used due diligence to identify and work with all tribes the child may be affiliated with to verify the child's status; require formal ICWA notice by registered or certified mail return receipt requested as discussed below; and must treat the child as an Indian child unless and until the court can confirm that the child is not an Indian child in accordance with WIC § 224.2(i)).

Notice (25 U.S.C. §1912(a); 25 C.F.R. §§23.11 & 23.111; Guidelines D.1-D.7; Fam. Code, §180; Prob. Code, §1460.2; WIC, §§224.3, 727.4(a)(2); Rule5.481(c))
When: For any hearing that may culminate in an order for foster care placement, including a guardianship placement, termination of parental rights or declaration freeing the child from the custody & control of one or both parents, preadoptive placement or adoptive placement.
How: Party seeking foster care placement, guardianship, termination of parental rights, or order declaring the child free from the custody & control of one or both parents, must notify the parent(s), Indian custodian, & the tribe(s) there is reason to know the child is a member of or eligible for membership in, of the pending proceedings by registered or certified mail, return receipt requested as specified in Fam. Code, §180, Prob. Code, §1460.2, or WIC, §224.3. *Notice of Involuntary Child Custody Proceedings for an Indian Child* (form ICWA-030) is required to be completed & sent for all cases except excluded delinquency proceedings, for every hearing that may culminate in one of the outcomes listed above. In addition to the information included on form ICWA-030, the party must also include: 1. Information regarding the Indian child's Indian custodian including: all known names, including maiden, married, former, & aliases; current & former addresses; birthdates; places of birth & death; tribal enrollment numbers; & any other identifying information, if known. 2. A copy of the child's birth certificate if available.
3. A copy of the petition by which the proceeding was initiated. 4. The location, mailing address, & telephone number of the court & all parties notified. When a child's Indian tribe is identified, the tribe is entitled to notice of all other hearings and service of all documents in the same manner as all other parties.

Active Efforts (25 U.S.C. §1912(d); 25 C.F.R. §§23.2 & 23.120; Guidelines E.1-E.6; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§ 224.1(f), 361.7; Rule5.485(c))
The party seeking an involuntary foster care placement, guardianship, order freeing the child from the custody & control of one or both parents, or termination of parental rights must provide evidence to the court that active efforts have been made to provide remedial services & rehabilitative programs designed to prevent the breakup of the Indian family & that these efforts were unsuccessful. What constitutes active efforts is assessed on a case-by-case basis. Active efforts must be affirmative, active, thorough, & timely. If an agency is involved, active efforts must begin at first contact with the family when there is reason to know the child may be an Indian child. If an agency is involved, active efforts must include assisting the parents through the steps of a case plan & accessing or developing the resources necessary to satisfy the case plan. Active efforts must consider the prevailing social & cultural values & way of life of the Indian child's tribe. Active efforts must include the available resources of extended family members, the tribe, Indian social service agencies, & individual Indian caregivers. Active efforts
must be documented in detail in the record.

Qualified Expert Witness (QEW) Testimony (25 U.S.C. §1912(e); 25 C.F.R. §§23.121 & 23.122; Guidelines G.1 & G.2; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§224.6, 361.7(c); Rule 5.485(a))
To involuntarily order foster care or adoptive placement, guardianship or terminate parental rights, when there is reason to know the child is an Indian child, the court must require testimony of a QEW regarding whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious
emotional or physical damage. The QEW cannot be an employee of the person or agency seeking the foster care placement or termination of parental rights.

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Persons most likely to meet the requirements for a QEW are: 1. A person designated by the tribe as being qualified to testify to the prevailing social and cultural standards of the tribe; 2. a member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; 3. An expert witness having substantial experience in the delivery of child and family services to Indians, & extensive knowledge of prevailing social & cultural standards & child-rearing practices of the Indian child's tribe. The court may accept a declaration or affidavit from a
QEW in lieu of testimony only if the parties stipulate in writing and the court is satisfied that the stipulation is made knowingly, intelligently, and voluntarily.

Placement Preferences (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §361.31; Rule5.485(b))
The following placement preferences & standards must be followed whenever there is reason to know the child is an Indian child and the child is removed from the physical custody of his or her parents or Indian custodian. The court must analyze the availability of placements within the preferences in descending order without skipping.
Foster Care, Guardianships, & Custody to Non-parent: The court must order the least restrictive setting that most approximates a family situation within reasonable proximity to the child's home & meets the child's special needs, if any. Preference must be given in the following order: 1. a member of the child's extended family as defined in 25 U.S.C. §1903(2); 2. a foster home licensed, approved, or specified by the Indian child's tribe; 3. an Indian foster home licensed or approved by an authorized non-Indian licensing authority; 4. an institution approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.
Adoptive Placements: Preference must be given in the following order: 1. a member of the Indian child's extended family as defined in 25 U.S.C. §1903(2); 2. other members of the Indian child's tribe; 3. another Indian family.
For both foster care and adoptive placements, the tribe, may establish a different preference order by resolution. This order of preference must be followed if it provides for the least restrictive setting.

Placement Standards & Records (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5**;** Fam. Code, §§177(a), 3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361(c)(6), 361.31, 361.7(c), 366.26(c)(2)(B); Rule5.484(b)(1))
The preferences of the child (if old enough) & the parent(s) must be considered. Placement standards must be the prevailing social & cultural standards of the child's tribe or the Indian community in which the parent or extended family member resides or extended family member maintains social & cultural ties. A determination of the applicable prevailing social & cultural standards may be confirmed by the Indian child's tribe or QEW testimony. CDSS must maintain a record of each placement of an Indian child. CDSS must also maintain evidence of efforts to comply with the placement preferences where ever the placement deviates from the preferences.

Good Cause to Deviate From the Placement Preferences (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; WIC, §361.31(h); Rule5.484(b)(2) & (3))
The court may deviate from the placement preferences list above only upon a finding of good cause. If a party asserts there is good cause to deviate from the placement preferences those reasons must be contained in the record either orally or in writing. The party requesting a different order has the burden of establishing good cause. The court may base a decision to deviate from the placement preferences on: 1. The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference; 2. The request of the child, if the child is of sufficient age & capacity to understand the decision that is being made; 3. The presence of a sibling attachment that can be maintained only through a particular placement;
4. The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; 5. The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining

whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social & cultural ties. A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement. A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.
Burden of Proof & Qualified Expert Witness (25 U.S.C. §1912(e), (f); 25 C.F.R. §23.121; Guideline G.1**;** Fam. Code, §§3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361.7(c), 366.26(c)(2)(B); Rule5.484(a)) The burden of proof to place a child in foster care, appoint a guardian, & award custody to a non-parent is *clear & convincing evidence,* including testimony of a qualified expert witness establishing that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The burden of proof to terminate parental rights is *beyond a reasonable doubt,* including testimony of a qualified expert witness establishing that continued custody of the child by the child's custodian is likely to result in serious emotional or physical damage to the child.
Adoption (25 U.S.C. §§1917, 1951; 25 C.F.R. §23.140; Guideline J.2; Fam. Code, §9208; Rule 5.487) The court must provide the Secretary of the Interior a copy of the adoption order & other information needed to show: 1. the name & tribal affiliation of the Indian child; 2. the names & addresses of the biological parents; 3. the names & addresses of the adoptive parents; 4. the identity of any agency having files or information relating to such adoptive placement; 5. any confidential parent affidavits; and 6. any information relating to Tribal membership or eligibility for Tribal membership of the adopted child. At the request of an adopted Indian child over the age of 18, the court must provide information about the individual's tribal affiliation, biological parents, & other information as may be necessary to protect any rights flowing from the individual's relationship tothe tribe.
Jurisdiction & Transfer (25 U.S.C. §1911(a), (b); 25 C.F.R. §23.110; Guidelines F.1-F.6; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §305.5 Rule 5.483) Exclusive Jurisdiction: If an Indian child is a ward of the tribal court or resides or is domiciled on a reservation of a tribe that exercises exclusive jurisdiction, notice must be sent to the tribe by the next working day following removal. If the tribe determines that the child is under the exclusive jurisdiction of the tribe, the state court must dismiss the case & ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including the pleadings & any court record. Transfer to Tribal Jurisdiction: If the above exclusive jurisdiction does not apply, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribal jurisdiction. The court must transfer the proceedings unless there is good cause not to do so. Either parent may object to the transfer, or the tribe may decline the transfer of the proceedings.
Right to Counsel (25 U.S.C. §1912(b); Fam. Code, §180(b)(5)(G)(v); Prob. Code, §1474; WIC, §317(a)(2)) The parent, Indian custodian, or Indian guardian, if indigent, has the right to court-appointed counsel.
Examination of Reports & Documents (25 U.S.C. §1912(c); Fam. Code, §177(a); Prob. Code, §1459.5(b)) The parent, Indian child, Indian custodian, tribe, & their attorneys have the right to examine all court documents related to the Indian child-custody case.
Full Faith & Credit (25 U.S.C. §1911(d); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.5) Full faith & credit to the public acts, records, & judicial proceedings of any Indian tribe is required.
Right to Additional Time (25 U.S.C. §1912 (a); 25 C.F.R. §23.112; Fam Code §180(e); Prob. Code §1460.2(e); WIC §224.2(d); Rule5.482(a)) With the exception of an emergency proceeding as defined in 25 C.F.R. §23.113 the court cannot go ahead with a hearing that meets the definition of "child custody proceeding" under ICWA until 10 days after receipt of notice by tribe(s) & BIA & must grant 20 extra days for preparation ifrequested.

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JUDICIAL COUNCIL
OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

Family Courts
Requirements Under the Indian Child Welfare Act, Federal Regulations and California laws*

I. Determining Application and Definitions

A. ICWA inquiry must be done in every case, including those arising under the Family Code, that may result in adoption, termination of parental rights, or the granting of care and custody of a to someone other than the child's parents where the parents cannot have the child returned on demand. The goal of this inquiry is to determine whether the child is an Indian child. If this inquiry gives "reason to believe" the child may be an Indian child, further inquiry as discussed below is required. If at any point there is "reason to know" the child is an Indian child, then ICWA will apply to the "Indian child custody proceeding". The definition of "Indian child custody proceeding" includes cases under the Family Code resulting in an adoption (i.e., agency, independent, intercountry, relative, guardian, domestic partner, and stepparent), termination of parental rights, freedom from parental custody and control, or other child custody proceeding under the Family Code, (i.e., Fam. Code, §§ 3041, 7541, 7600 et seq., 7660 et seq., 7800 et seq., 8500 et seq., 8600, 8700 et seq., 8800 et seq., and 9000 et seq.) that involve an Indian child. (25 U.S.C. § 1903(1); Fam. Code, § 170(c); Cal. Rules of Court, rule 5.480.)

B. An "Indian child" is under the age of 18, unmarried and is either (a) a member of an Indian tribe or (b) eligible for membership and the biological child of a member. (25 U.S.C. § 1903(4); Fam. Code § 170 (a))

C. An "Indian custodian" is an Indian person who has custody of an Indian child under tribal or state law or to whom temporary physical custody and control of such child has been given by the child's parent. (25 U.S.C. § 1903(6); Fam. Code § 170(a))

D. "Foster care placement" includes 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. (25 U.S.C. §1903(1)(i))

II. Investigation/Inquiry

A. *Initial inquiry:* Before filing a petition, application, or other request of the court that could result in any of the outcomes set out in I. A. above, the party seeking the order must ask the child (if the child is old enough), the parents, the Indian custodian or guardian, and available extended family members or others who would reasonably know, whether the child is or may be an Indian child. (Fam. Code §177(a); Welf. & Inst. Code, § 224.2(a) & (b); California Rules of Court, rule 5.481(a)). Regardless of whether there is any Indian ancestry, the party must then complete the *Indian Child Inquiry Attachment* (form ICWA-010(A)) and attach it to the petition. Wherever possible, prior to the first appearance, each of the child's parents, Indian custodian, or guardian should complete the *Parental Notification of Indian Status* (form ICWA-020), and those forms should be filed with the court. (Welf. & Inst. Code, § 224.2; Fam. Code, § 177(a); Cal. Rules of Court, rule 5.481(a).) If the parents are not available before the first appearance, the court will order them to fill out the ICWA-020 forms at the first appearance. If the parents do not appear, the Court will order the party filing the petition, application, or other request to use reasonable diligence to find the parents and have them complete the ICWA-020 forms. (Cal. Rules of Court, rule 5.481(a)(3)).

B. *Court's inquiry on the record:* At the first appearance by each participant, the court must ask the participant whether they know or have reason to know the child is an Indian child and instruct them to inform the court if they subsequently receive information providing reason to know the child is an Indian child. (25 C.F.R. § 23.107; Fam. Code § 177(a); Welf. & Inst. Code § 224.2(c); Cal. Rules of Court, rule 5.481(a))

C. *Affirmative and continuing duty to inquire:* The court, court-connected investigator, party seeking the order (i.e., petitioner), adoption service provider, and licensed adoption agency all have an affirmative and continuing duty to inquire whether a child is or may be an Indian child. This means that inquiry

*All citations in this chart are to the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.), federal regulations implementing ICWA found at 25 C.F.R. Part 23, federal Guidelines for Implementing the Indian Child Welfare Act 2016 available on the BIA website at https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf; California Welfare & Institutions Code, California Family Code, and California Rules of Court current as of January 1, 2020.

is not a one-time occurrence. If the child's parents are not present or available at the first appearance and ICWA-020 forms are not completed and filed, the court **must** order the party to use reasonable diligence to find the parents and complete the ICWA-020 forms. (Cal. Rules of Court, rule 5.481(a)(3).)

D. *Concealing or falsifying facts concerning Indian status/sanctions*: Any party who falsifies or conceals a material fact concerning whether the child is an Indian child or counsels a party to do so is subject to sanctions by the court. (Welf. & Inst. Code, § 224.3(e); Fam. Code, § 180(f).)

E. *Further inquiry:* If, as a result of this inquiry or from any other source, any of the persons with a duty to inquire has "reason to believe" that the child is an Indian child, they must make further inquiry to learn about the child's Indian heritage. In particular they must **(1)** interview the child, the child's parents, available extended family members, and anyone else who might reasonably have information about the child's heritage to gather the information required by Welf. & Inst. Code § 224.3(a)(5); **(2)** contact the Bureau of Indian Affairs (BIA) and the California Department of Social Services (CDSS) for assistance in contacting appropriate tribes; and **(3)** contact the tribes the child may be affiliated with by phone, fax and email to determine the child's Indian status. (Welf. & Inst. Code, § 224.2(e); Fam. Code, § 177(a); Cal. Rules of Court, rule 5.481(a)(4).) The petitioner must on an ongoing basis include in its filings a detailed description of all inquiries, and further inquiries it has undertaken, and all information received pertaining to the child's Indian status, as well as evidence of how and when this information was provided to the relevant tribes. Whenever new information is received, that information must be expeditiously provided to the tribes. (Cal. Rules of Court, Rule 5.481(a)(5).

F. R*eason to know:* If the petitioner or the court ever have reason to know the child is an Indian child, in addition to the further inquiry discussed in E. above, formal notice as discussed in V below must be provided and all provisions of ICWA must be applied unless and until a determination can be made that the child is NOT an Indian child. (25 C.F.R. § 23.107(b); Fam. Code § 177(a); Welf. & Inst. Code § 224.(f), (g) & (i)). There is "reason to know" if:

1. A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family informs the court that the child is an Indian child.
2. The residence or domicile of the child, the child's parents, or Indian custodian is on a reservation or in an Alaska Native village.
3. Any participant in the proceeding, officer of the court, Indian tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child.
4. The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child.
5. The court is informed that the child is or has been a ward of a tribal court.
6. The court is informed that either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe. (25 C.F.R. § 23.107; Welf. & Inst. Code, § 224.2(d); Cal. Rules of Court, rule 5.481(b).)

G. *Document inquiry on petitions:* Item 8 on form ADOPT-200 requires you to indicate whether the child may have Indian ancestry and to attach the *Adoption of Indian Child* (form ADOPT-220) if you answer yes. (Note: Completion of the ADOPT-220 form is **in addition to** completion of the ICWA- 010(A) and ICWA-020 forms.)

III. Consent Requirements for Voluntary Proceedings (25 U.S.C. § 1913; 25 C.F.R. §§23.124-23.128; Fam. Code, § 8606.5)

A. In voluntary proceedings that could lead to one of the outcomes discussed in I A. above, the court must ask all participants to state on the record whether there is reason to believe the child is an Indian child. (25 C.F.R. §23.124)

B. If there is "reason to believe" the court must ensure that inquiry and further inquiry as discussed in II above have been completed and must determine whether there is "reason to know" the child is an Indian child. (25 C.F.R. §23.124)

C. If there is "reason to know" the child is an Indian child, or if the court concludes the child is an Indian child, the court must ensure that the placement of the child complies with 25 C.F.R. §§23.129-23.132. (25 C.F.R. §23.124)

D. ICWA sets out special requirements when a parent or Indian custodian voluntarily gives up rights regarding an Indian child. A valid consent must meet the following criteria:

- Not be given within 10 days after the birth of the child;
- Be in writing, be recorded before a judge of the court, and be accompanied by the judge's certificate that the terms and consequences of the consent have been fully explained in detail and have been fully understood by the parent or Indian custodian;
- If the parent or Indian custodian does not understand English, the court must certify that the explanation has been interpreted into a language that the parent or Indian custodian understands;
- If the consent is custody under Family Code section 3041, it must provide that the parent or Indian custodian may withdraw consent at anytime

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and upon such withdrawal of consent, all provisions of the Indian Child Welfare Act, including inter alia 25 U.S.C. § 1913(b), shall apply;

- If the consent relates to the termination of parental rights or adoptive placement, the consent of the parent may be withdrawn for any reason at any time before the entry of the final decree of termination or adoption as the case may be, and the child shall be returned to the parent. (25 U.S.C. § 1913(c); 25 C.F.R. §23.125.)

IV. Right to Counsel (25 U.S.C. § 1912(b); Fam. Code, §§ 7860, 7862)

Indigent parents and Indian custodians are entitled to court-appointed counsel in any involuntary proceeding.

V. ICWA Notice Requirements

A. If there is "reason to know" (See Section II (F) above) that the child is an Indian child, notice in form ICWA-030 must be sent to the child's parents or guardians, the Indian custodian (if any), the tribe, the Sacramento office of the BIA (if applicable), and the Secretary of the Interior (if applicable) for each hearing that could culminate in a result under section I. A, above. (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.3; Fam. Code, § 180; California Rules of Court, rule 5.481(b).) In addition to the notice on form ICWA-030 required for specific hearing types, once a child's tribe has been identified, the tribe must be provided with all other notices provided to any other party to the case.

B. *What to send:* Send mandatory form ICWA-030, *Notice of Child Custody Proceeding for Indian Child*, including attachments and copies of the petition.

C. *Where/who to notice:* Notice must be sent to the child's parents, including the adoptive parents, the guardian, the Indian custodian (if any), and the child's potential tribe(s).

D. *How to send ICWA-030 notice:* Formal ICWA notice on the ICWA-030 for the specified hearings must be sent by registered or certified mail, return receipt requested, or personal service.

E. *Where to send tribal notice:* When sending notices to the child's tribe(s), the notices must be addressed to the tribal chair or the tribe's designated agent for service of ICWA notice. A link to the list of designated agents for service of ICWA notice may be found on the BIA website at https://www.bia.gov/bia/ois/dhs/icwa. Send notice to all tribes of which the child may be a member or eligible for membership until the court determines which tribe is the child's tribe, after which notice need be sent only to that tribe. (Welf. & Inst. Code, §§ 224.2, 224.3; California Rules of Court, rule 5.481(c).)

F. *Purpose of notice:* The purpose of notice is to let the tribe(s) know of the child custody proceeding potentially involving an Indian child and allow the tribes to investigate to determine whether the child is a tribal member or eligible for membership and whether or not to participate in the proceedings. Therefore, it is important that the information you provide be complete and accurate. If it is not, your notice may be held to be inadequate. (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.3; California Rules of Court, rule 5.481(b).)

G. *How to prove notice:* File **with the court** copies of all notices, the certified mail receipts, all return receipts (green postcards), and all responses from a tribe or the BIA. (Note: It is not sufficient for you to state or testify that notice was sent. The notices themselves and proof of notice must be filed with the court. (Fam. Code, § 180 (d); Welf. & Inst. Code, § 224.3(c); Cal. Rules of Court, rule 5.482(c).)

VI. Intervention/Tribal Participation (25 U.S.C. § 1911(c); Fam. Code, § 177(a); Welf. & Inst. Code, § 224.4; Cal. Rules of Court, rules 5.482(d), 5.534(e))

A. The child's parents, Indian custodian, and tribe have an absolute right to intervene at any point in the proceedings.

B. The tribe may choose to be represented by an attorney or may designate a non-attorney to act as tribal representative for the state court proceedings. In any case, the tribe is entitled to all the rights of a party.

C. If the tribe does not formally intervene as a party, it may still exercise those rights listed in California Rules of Court, rule 5.534(e)(2).

D. The court must facilitate tribal participation in hearings by permitting telephonic or other remote appearance options without a fee. (25 C.F.R. § 23.133; Guidelines Welf. & Inst. Code § 224.2(k)

(Note: If the child is an Indian child, ICWA applies whether or not a tribe takes any formal steps in the proceedings.)

VII. Timing/Continuance (25 U.S.C. § 1912(a); Fam. Code, § 180(e); Welf. & Inst. Code, § 224.3(d); Cal. Rules of Court, rule 5.482(a))

A. No hearing can be held until at least 10 days after receipt of notice by the child's parents, Indian custodian, and tribe(s).

B. On request, the parents, Indian custodian, and tribe are entitled to up to 20 additional days to prepare for a hearing.

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VIII. Active Efforts (25 U.S.C. § 1912(d); 25 C.F.R. §§ 23.2 & 23.120; Guideline E.; Fam. Code, § 177(a); Welf. & Inst. Code, § 361.7; Cal. Rules of Court, rule 5.485(c).)

A. In any involuntary proceeding involving an Indian child, the party seeking the order must provide proof that active efforts have been made to provide remedial and rehabilitative programs and services to prevent the breakup of the Indian family and that these efforts have provenunsuccessful.

B. Active efforts must be made in a manner consistent with the prevailing social and cultural conditions and way of life of the child's tribe and must use the available resources of the extended family, the tribe, and other Indian services.

C. Active efforts must be documented in detail in the record.

IX. Evidentiary Requirements (25 U.S.C. § 1912(e) & (f); 25 C.F.R. §§ 23.131 & 23.122; Guideline G.; Welf. & Inst. Code, §§ 361, 361.31, 361.7(c); Fam. Code, §§ 177(a) & 7892.5; Cal. Rules of Court, rule 5.485(a))

A. Before an order for the involuntary "foster-care placement"[1] of an Indian child (i.e., an order under Fam. Code, § 3041) there must be clear and convincing evidence, including the testimony of at least one qualified expert witness (QEW), that taking into account the prevailing social and cultural standards of the child's tribe, continued custody of the child with the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

B. Before an order involuntarily terminating parental rights to an Indian child, there must be evidence supported by the testimony of at least one QEW **beyond a reasonable doubt** that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

C. *Who can serve as a QEW*? A person knowledgeable in the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices can serve as a QEW. Likely persons include, a person designated by the tribe, a member of the child's tribe who is recognized by the tribal community as having the necessary expertise, an expert with substantial experience in the delivery of services to Indians and extensive knowledge of prevailing social and cultural standards and child-rearing practices of the child's tribe. (25 U.S.C. § 1912(e); Welf. & Inst.Code, § 224.6; Fam. Code, § 177(a); Cal. Rules of Court, rule 5.485(a).)

X. Placement Preferences (25 U.S.C. § 1915; 25 C.F.R. §§ 23.129-23.132; Fam. Code, § 177(a); Welf. & Inst. Code, § 361.31; Cal. Rules of Court, rule 5.485(b))

A. *Foster-care placement:* ICWA establishes a hierarchy of preferences for involuntary "foster-care placement". Placements must be in the least restrictive setting that most approximates a family, in which the child's special needs, if any, may be met and which is in reasonable proximity to his or her home. In any foster-care placement, preference shall be given, in descending order, to (1) a member of the Indian child's extended family; (2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

B. *Adoptive placement:* In any adoptive placement, preference shall be given, in absence of good cause to the contrary, to placement with (1) a member of the child's extended family, (2) other members of the Indian child's tribe, (3) other Indian families, or (4) if no such placement is available, with a family committed to maintaining the child's connections with his or her tribe. (Note: Even in a case involving the voluntary relinquishment of an Indian child, the adoptive placement preferences should be followed.)

C. *Tribe may alter order of preferences:* The child's tribe may by resolution adopt another order of preference. (25 U.S.C. § 1915(c); Welf. & Inst.Code §361.31(d); Cal. Rules of Court, rule 5.485(b)(6).)

D. *Must consult with tribe on placement:* Any person involved in the placement of an Indian child must consult with the child's tribe to secure a placement that complies with the ICWA placement preferences. Placement preferences must be analyzed and the tribe consulted each time there is a change in the child's placement. (Cal. Rules of Court, rules 5.482(f) & 5.485(b)(4).)

E. *Good cause to deviate:* The court must find good cause to justify deviating from the placement preferences. The burden of establishing good cause to deviate is on the party requesting the deviation. The court may consider the request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the preferences, the request of the child if of sufficient age and capacity, the presence of a

[1] ICWA defines such placement as any action removing an Indian child from a parent or Indian custodian for placement with another, where the parent or Indian custodian cannot have the child returned on demand but where parental rights have not been terminated. (25 U.S.C. § 1903(1)(i).)

sibling attachment that can be maintained only through a specific placement, the extraordinary physical or emotional needs of the child, or the unavailability of a suitable placement within the preferences, but only with proof that there was a diligent search for a placement within the preferences. A placement may not depart from the preferences based on the socioeconomic status of a placement or solely on the basis of ordinary bonding and attachment that flowed from time spent in a placement in violation of ICWA. (25 C.F.R. § 23.132; Fam. Code § 177(a); Welf. & Inst. Code § 361.31,
Cal. Rules of Court, rule 5.485(b)(5))

XI. Notice to Secretary of Interior/Child's Right to Know (25 U.S.C. §§ 1917, 1951; Fam. Code, §§ 9208, 9209)

A. On the adoption of an Indian child, the clerk of the court must send notice to the Secretary of the Interior. This notice must provide sufficient information to establish the following:
   1. The name and tribal affiliation of the child;
   2. The names and addresses of the biological parents;
   3. The names and addresses of the adoptive parents; and
   4. The identity of any agency having files or information relating to the adoptive placement.

   If the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the information above must still be disclosed, but the affidavit shall be included with the other information. (Fam. Code §9208)

B. On turning 18, an adopted Indian child is entitled to all information necessary to protect any rights flowing from the individual's tribal relationship.

HOME

Probate Courts
Requirements Under the Indian Child Welfare Act (ICWA)* and Senate Bill 678

I. Determining Application and Definitions (at every hearing) (25 U.S.C. § 1903; Prob. Code, § 1459.5(b); Welf. & Inst. Code, §§ 224.2(a)(5), 224.3(a); Cal. Rules of Court, rules 7.1015(d)(2), 5.481(a))[1]

A. ICWA applies to any proceeding, including guardianships and conservatorships under the Probate Code, that grants the temporary care, custody, and control of an "Indian child" to someone other than the child's parents or Indian custodian when the parents or Indian custodian cannot have the child returned on demand or that results in the termination of parental rights to or the adoption of an Indian child.

B. An "Indian child" is under the age of 18, unmarried and either (1) a member of an Indian tribe or (2) eligible for membership of an Indian tribe and the biological child of a member of a tribe.

C. An "Indian custodian" is 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 have been transferred by the parent of such child. *Note:* Indian custodianship does not require any formal documentation.

II. Consent (*Note:* If the parent or Indian custodian consents to the guardianship of an Indian child, many of the procedural and substantive provisions of ICWA do not apply. However, for consent to be valid under ICWA, it must meet ALL of the requirements stated in this provision. (25 U.S.C. § 1913(a)–(b); Prob. Code, §§ 1459(b) and (d) and 1500.1))

A. The consent must be in writing.

B. The consent cannot be taken before or within 10 days after the birth of the child.

C. The consent must be recorded before a judge.

D. The judge must certify that the terms and consequences of the consent were fully explained to the parents or Indian custodian in detail. The judge must further certify either that the parents or Indian custodian fully understood the explanation in English or that it was interpreted in a language that the parents or Indian custodian understood.

E. The parents or the Indian custodian have the right to withdraw their consent at any time and, on such withdrawal of consent, all provisions of the Indian Child Welfare Act, including inter alia 25 U.S.C. § 1913(b), shall apply. (*Note:* 25 U.S.C. § 1913(b) provides that a parent or Indian custodian may withdraw consent to a foster care placement under state law at any time and, on such withdrawal, the child shall be returned to the parent or Indian custodian. Probate Code section 1500.1(b), on the other hand, states that consent to guardianship of an Indian child may be withdrawn for any reason at any time **before the issuance of letters of guardianship** and the child shall be returned to the parent. Probate Code section 1459(d) states that where this code, other state law, or federal law provides a higher standard of protection, the court shall apply the higher state or federal standard.)

*All citations in this chart are to the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq.; California Probate Code, California Welfare and Institutions Code, and California Rules of Court.

[1] Prob. Code, § 1459(b) and Cal. Rules of Court, rule 7.1015(d)(7), incorporate various provisions of the Welf. & Inst. Code and juvenile rules of court into probate proceedings.

III. Investigation and Inquiry (Welf. & Inst. Code, § 224.3; Prob. Code, § 1459.5(b); Cal. Rules of Court, rule 7.1015(d))

A. **Initial investigation.** Before filing a petition, the petitioner must inquire of the child (if old enough), the parents, the Indian custodian, or others whether the child is or may be an Indian child and must complete the *Indian Child Inquiry Attachment* (form ICWA-010(A)) and attach it to the petition. (Prob. Code, § 1459.5(b); Cal. Rules of Court, rule 7.1015(d)(2).)

B. **Inquiry of parents.** The parents and/or Indian custodian or other guardian of the child must, if possible, complete the *Parental Notification of Indian Status* (form ICWA-020). If the parents are available, this can be done before the first hearing. If not done before the first hearing and these people appear at the hearing, the court should order the parents, Indian custodian, or guardian to complete form ICWA-020 at that time. If form ICWA-020 is not yet completed and the parents and/or Indian custodian or guardian do not appear at the first hearing, the court will order the petitioners to use reasonable diligence to find the parents, Indian custodian, or guardian; advise them that the court has ordered them to complete form ICWA-020; and have them complete the form.

C. If, after the use of reasonable diligence, the petitioner is not able to have the parents, Indian custodian, or guardian complete form ICWA-020 and a court investigator is appointed, the court investigator should make every effort to have the parents, Indian custodian, or guardian complete form ICWA-020. (Welf. & Inst. Code, § 224.3; Prob. Code, § 1459.5(b); Cal Rules of Court, rules 5.481(a)(1), 7.1015(d).)

D. **Affirmative and continuing duty to inquire.** The court, court-connected investigator, and petitioners all have an affirmative and continuing duty to inquire whether a child is or may be an Indian child. Inquiry is not a one-time occurrence. Ongoing efforts should be made to determine the child's Indian status by asking relatives and others who may reasonably have information as they become available. (Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.481(a)(3), 7.1015(d).)

E. **Concealing or falsifying facts concerning Indian status and sanctions.** Any person who falsifies or conceals a material fact concerning whether the child is an Indian child or counsels a party to do so is subject to sanctions by the court. (Welf. & Inst. Code, § 224.2(e); Prob. Code, § 1460.2(f).)

F. **Further inquiry.** If, as a result of this inquiry or from any other source, any of the persons with a duty to inquire has "reason to know" that the child is an Indian child, he or she must make further inquiry to learn about the child's Indian heritage. In particular, he or she must (1) ask family members, (2) contact the Bureau of Indian Affairs (BIA), and (3) contact the tribe and anyone else who might reasonably have information about the child's heritage. (Welf. & Inst. Code, § 224.3(c); Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.481(a)(4), 7.1015(d)(5)–(6).)

G. **How do I know? Tips to help figure out if you have reason to know the child is an Indian child.**

1. If the child, an Indian tribe, an Indian organization, an attorney, a public or private agency, or a member of the child's extended family says or provides information to anyone involved in the case suggesting that the child may be an Indian child;
2. If the child, the child's parents, or an Indian custodian live in a predominantly Indian community; or
3. The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service. (Welf. & Inst. Code, § 224.3(b); Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.481(a)(5), 7.1015(d)(7).)

IV. ICWA Notice Requirements (25 U.S.C. § 1912(a); 25 C.F.R. § 23.11; Welf. & Inst. Code, §§ 224.2, 224.3; Prob. Code, §§ 1459.5(b), 1460.2; Cal. Rules of Court, rules 5.481(b), 7.1015(c))

A. If you have "reason to know" (as described in section III F above) that the child is an Indian child, you must complete *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) and send it to the child's parents or guardians, the Indian custodian (if any), the tribe or tribes, the Sacramento office of the BIA, and/or the Secretary of the Interior as early as possible. (25 U.S.C. § 1912(a); Prob. Code, § 1460.2; Cal. Rules of

Court, rules 5.481(b), 7.1015 (c).) It is the responsibility of the petitioner or his or her attorney to gather the necessary information and to complete form ICWA-030. (Cal. Rules of Court, rule 7.1015(c)(2).) If the petitioner is represented by an attorney, it is the attorney's responsibility to serve form ICWA-030 in the prescribed manner. (Cal. Rules of Court, rule 7.1015(c)(3).) If the petitioner is not represented by an attorney, it is the court clerk's responsibility to serve form ICWA-030. (Cal. Rules of Court, rule 7.1015(c)(4).)

B. **What to send.** Send mandatory *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030), including attachments, a copy of the petition, and the child's birth certificate if it is available.

C. **Who to provide notice to.** Notice must be sent to the child's parents, including the adoptive parents, the guardians, the Indian custodian (if any), the child's potential tribe or tribes, and either the Sacramento area director of the BIA (if you do not know the child's tribe) or the Secretary of the Interior (if you do). (See F. below.)

D. **How to send notice.** Notice must be sent by registered or certified mail, return receipt requested, but if a tribe intervenes in the case you may thereafter send notice to it in the same manner as to other parties.

E. **Where to send tribal notice.** When sending notices to the child's tribe or tribes, the notices must be addressed to the tribal chair or other tribal representative designated for receipt of ICWA notice. The list of designated agents for service of ICWA notice may be found at http://edocket.access.gpo.gov/2010/pdf/2010-11696.pdf . The tribal information list maintained by the California Department of Social Services can be found at: http://www.childsworld.ca.gov/res/pdf/CDSSTribes.pdf . Send notice to all tribes of which the child may be a member or eligible for membership until the court makes a determination as to which tribe is the child's tribe, after which notice need only be sent to that tribe. (Welf. & Inst. Code, §§ 224.2, 224.3; Prob. Code, §§ 1459.5(b), 1460.2; Cal. Rules of Court, rules 5.481(b), 7.1015(c).)

F. **If you know the child's tribe.** If the child is a member of a particular identified tribe, you do not need to send notice to the regional BIA office, but you must send a copy of the notice to the Secretary of the Interior.

G. **Purpose of notice.** The purpose of notice is to let the tribes know of the involuntary child custody proceeding potentially involving an Indian child and allow the tribes to investigate to determine whether the child is a tribal member or eligible for membership and whether or not to participate in the proceedings. Therefore, it is important that the information you provide be complete and accurate. If it is not, your notice may be held to be inadequate. (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.2; Cal. Rules of Court, rules 5.481(b), 7.1015(c).)

H. **How to prove notice.** You must file **with the court** all notices, the **original** certified mail receipts, the **original** return receipts, and copies ofall responses from a tribe or the BIA. *Note:* It is not sufficient for you to state that proper notice was sent.

I. **How long to send notice?** Notice should be sent for every hearing so long as you have "reason to know" the child is an Indian child. This means you do not need to keep sending ICWA notice if all potential tribes respond that the child is not a member or eligible for membership or if the court makes a determination under Welfare and Institutions Code section 224.3(e)(3) or otherwise that ICWA does not apply.

V. Timelines and Continuances (25 U.S.C. § 1912(a); Prob. Code, § 1459.5(b); Welf. & Inst. Code, § 224.2(d); Cal. Rules of Court, rules 5.482(a), 7.1015(b))

A. No hearing can be held until at least 10 days after receipt of notice by the child's parents, Indian custodian, and tribe or tribes.

B. On request, the parents, Indian custodian, and tribe or tribes are entitled to up to 20 additional days to prepare for a hearing.

VI. Intervention and Tribal Participation (25 U.S.C. § 1911(c); Prob. Code, § 1459.5(b); Welf. & Inst. Code, § 224.4; Cal. Rules of Court, rules 5.482(e), 5.534(i), and 7.1015(b))

A. The child's parents, Indian custodian, and tribe may intervene at any point in the proceedings.

B. The tribe may be represented by an attorney or may designate a nonattorney to act as tribal representative for the state court proceedings. In any case, the intervening tribe is entitled to all the rights of a party.

C. If the tribe does not formally intervene as a party, it may still seek permission to exercise those rights listed in rule 5.534(i)(2) of the California Rules of Court.
(Note: If the child is an Indian child, ICWA applies whether or not a tribe takes any formal steps in the proceedings.)

VII. Transfer to a Tribal Court (25 U.S.C. § 1911(b); Prob. Code, § 1459.5(b); Welf. & Inst. Code, § 305.5; Cal. Rules of Court, rules 5.483, 7.1015(b))

A. **Exclusive tribal jurisdiction and mandatory transfer.** If the child is already a ward of a tribal court or is domiciled or resides on a reservation of a tribe that exercises exclusive jurisdiction over child welfare proceedings, then the state court has no jurisdiction and the matter must be transferred to the tribal court. Currently there is only one tribe in California—the Washoe Tribe of California and Nevada—that exercises exclusive jurisdiction over child welfare proceedings. However many children in California are members of out-of-state tribes that may exercise exclusive jurisdiction. There are at least 10 tribal courts currently operating in California (and many more outside of California); therefore, Indian children in California may already be wards of tribal courts. It is important to determine the residence or domicile of an Indian child and determine whether or not the child is already a ward of a tribal court.

B. **Concurrent Jurisdiction.** If a tribal court does not have exclusive jurisdiction, it may have concurrent jurisdiction, in which case the child's parents, Indian custodian, or tribe may request that the matter be transferred to the tribal court. When such a request is made, the state court **must** transfer jurisdiction unless there is "good cause" not to transfer. What constitutes "good cause" and what factors the court is entitled and not entitled to consider is stated in rules 5.483(d) and 7.1015(b) of the California Rules of Court.

VIII. Right to Counsel (25 U.S.C. § 1912(b); Prob. Code, §1474)

A. **Appointment of counsel.** Indigent parents and Indian custodians are entitled to court-appointed counsel in any involuntary child custody proceeding that could interfere with their custody of the Indian child.

IX. Duties of a Court investigator (Prob. Code, § 1513(h); Cal. Rules of Court, rules 5.481(a), 7.1015(d))

A. **Inquiry.** Court-connected investigators share the affirmative and continuing duty to inquire whether a child subject to guardianship or conservatorship proceedings is or may be an Indian child.

B. **Consultation with the child's tribe.** In cases involving Indian children, the person making the investigation and report under Probate Code section 1513 is required to consult with the child's tribe and include in the report the information provided by the tribe.

X. Active Efforts (25 U.S.C. § 1912(d); Prob. Code, § 1459.5(b) (incorporating Welf. & Inst. Code, § 361.7); Cal. Rules of Court, rules 5.484(c), 7.1015(b))

A. In any involuntary proceeding involving an Indian child, the party seeking the order must provide evidence that "active efforts" have been made to provide remedial and rehabilitative programs and services to prevent the breakup of the Indian family and that these efforts have proven unsuccessful.

B. Active efforts must be made in a manner consistent with the prevailing social and cultural conditions and way of life of the child's tribe and must use the available resources of the extended family, the tribe, and other Indian services. This requirement applies to private individuals seeking guardianship of Indian children. Examples of activities that may constitute active efforts are lending money, offering housing, helping to find programs and services, driving to appointments, etc.

C. Active efforts must include steps necessary to secure tribal membership for a child if the child is eligible for membership in a tribe. (Cal. Rules of Court, rules 5.484(c), 7.1015(b).)

XI. Evidentiary Requirements (25 USC § 1912(e); Prob. Code, § 1459.5(b); Welf & Inst. Code, §§ 361, 361.31, 361.7(c); Cal. Rules of Court, rules 5.484(a), 7.1015(b))

A. Before an order is made for the involuntary "foster-care placement"[2] of an Indian child, there must be clear and convincing evidence,[3] including the testimony of at least one qualified expert witness (QEW), that, taking into account the prevailing social and cultural standards of the child's tribe, continued custody of the child with his or her parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (25 U.S.C. § 1912(e); Welf. & Inst. Code, §§ 361, 361.31, 361.7(c); Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.484(a), 7.1015(b).)

B. **Who can serve as a qualified expert witness?** A person knowledgeable in the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices, can serve as a QEW. Likely persons include a member of the child's tribe, an expert with substantial experience in the delivery of services to Indians (i.e., a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, historian, or elder), or another professional. (25 U.S.C. § 1912(e); Welf. & Inst. Code, § 224.6; Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.484(a), 7.1015(b).)

XII. Placement Preferences (25 U.S.C. § 1915; Prob. Code, § 1459.5(b); Welf. & Inst. Code, § 361.31; Cal. Rules of Court, rules 5.484(b), 7.1015(b))

A. **Foster-care placement preferences.** ICWA establishes a hierarchy of preferences for involuntary foster-care placement. Placements must be in the least restrictive setting that most approximates a family in which the child's special needs, if any, may be met and which is in reasonable proximity to his or her home. In any foster-care placement, preference shall be given, in descending order, to (1) a member of the Indian child's extended family; (2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

B. **Tribe may alter order of placement.** The child's tribe may by resolution adopt another order of preference. (25 U.S.C. § 1915(c); Welf. & Inst. Code, § 361.31; Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.484(b)(4), 7.1015(b).)

C. **Must consult with tribe on placement.** Any person involved in the placement of an Indian child must consult with the child's tribe to secure a placement that complies with ICWA placement preferences. (Cal. Rules of Court, rules 5.482(g), 7.1015(b).)

D. **Good cause to deviate.** Good cause may include the following considerations: the request of the parent or Indian custodian, the request of the Indian child when of sufficient age, the extraordinary physical or emotional needs of the Indian child as established by a QEW, or the unavailability of suitable families based on a documented diligent effort. The burden of establishing good cause to deviate is on the party requesting the deviation. (Prob. Code, § 1459.5(b); Welf. & Inst. Code, § 361.31; Cal. Rules of Court, rules 5.484 (b), 7.1015(b).)

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[2] ICWA defines such placement as any action removing an Indian child from a parent or Indian custodian for placement with another, when the parent or Indian custodian cannot have the child returned on demand but when parental rights have not been terminated. (25 U.S.C. § 1903(1)(i).)

[3] Note that ICWA and Senate Bill 678 mandate evidence "beyond a reasonable doubt" before an order terminating parental rights. This does not apply, however, in Probate Code proceedings because Prob. Code, § 1516.5(d) prohibits a proceeding to have a child declared free from the custody and control of one or both parents in a guardianship proceeding involving an Indian child.

Social Service Departments
Requirements — Indian Child Welfare Act, Federal ICWA Regulations, AB 1325 & AB 3176*

I. Investigation/Intake Requirements

A. *Initial inquiry:* When the agency has first contact concerning any child, including when a party reports child abuse or neglect or when the child is placed into the temporary custody of the agency under WIC 306 or WIC 307, the social worker must ask the child, parents, guardians, Indian custodians, relatives, and the party reporting child abuse or neglect whether the child may be an Indian child (a member of a tribe or eligible for membership and the child of a member of a tribe) and where the child, parents and Indian custodian are domiciled. (WIC §224.2 (a) & (b)) Do not assume a child may or may not be an Indian child based on appearance, family name, or generalizations. This inquiry must be done in every case. The precise questions that must be asked and the documentation of inquiry that must be in each case file are set out in CDSS guidance. Inquiry is required in all cases. The agency has an affirmative and continuing duty of ICWA inquiry throughout the life of a case.

B. *Further inquiry:* If inquiry gives "reason to believe" that the child may be an Indian child, further inquiry is required. (WIC §224.2(e)) Further inquiry requires: (1) interviewing the parents, Indian custodian and extended family members to gather information required by WIC §224.3, including ancestry information back to the child's great-grandparents, and other lineal ancestors identified as important to the child's Indian status; (2) contacting the Bureau of Indian Affairs (BIA) and the California Department of Social Services (CDSS) for assistance identifying federally recognized tribes the child may be affiliated with based on the information gathered, and contact information for those tribes if the agency is not able to identify and contact the tribes without assistance; and (3) contacting the tribe(s) the child may be affiliated with by telephone, facsimile and/or email and sharing all available information identified by the tribe(s) as necessary to make a membership or eligibility determination.

C. *When do I have "reason to believe"?* You have "reason to believe" when someone tells you they think the child or parents have Indian ancestry connected to a particular tribe, even if they do now know whether the parents or child are members or eligible for membership in a tribe.

D. *Document inquiry thoroughly in the case file and on* Juvenile Dependency Petition *(form JV-100 or form JV-110) and* Indian Child Inquiry Attachment *(form ICWA-010(A):*

1. Item 2 on JV-100, and JV-110 requires you to have conducted an initial ICWA inquiry and further inquiry if warranted.
2. You are responsible for documenting your investigation on ICWA-010(A). If the child is an Indian child, you and the court will need to take specific steps to prevent the breakup of the child's Indian family.
3. Document in the ICWA-010(A) or in the court report, everyone you asked about Indian status and what their responses were. If you have "reason to believe" also document all efforts to interview extended family members, all contacts with the BIA & CDSS and all tribal contacts.
4. You are responsible for ensuring that both parents and the Indian custodian or guardian, if any, complete and return *Parental Notification of Indian Status* (form ICWA-020). If the parents are not available, provide evidence to the court of all efforts you have made to have the parent(s) complete the ICWA-020 form.

E. *When do I have "reason to know"?* Following initial inquiry and further inquiry you have "reason to know the child is an Indian child" if:

1. Anyone with an interest in the child provides you with information indicating that the child is an Indian child;

*All citations in this chart refer to the Indian Child Welfare Act (25 U.S.C. 1901 et seq. or "ICWA"), federal regulations implementing ICWA (25 C.F.R. Part 23), California Welf. & Inst. Code ("WIC") and California Rules of Court, ("CRC"). Citations are to law current as of January 1, 2020.

2. If the child, the child's parents, or an Indian custodian reside or are domiciled on a reservation or in an Alaska Native Village;
3. The child is or ever has been under the jurisdiction of a tribal court; or
4. The child or either parent has an identification card or other document indicating membership in an Indian tribe. (WIC, § 224.2(d))

F. *What happens when I have "reason to know"?* If you have reason to know the child is an Indian child, you must:

1. Use due diligence to work with all tribes the child may be a member of or eligible for membership in to verify the child's Indian status. (WIC § 224.2 (g));
2. If there is reason to believe that the child is under the jurisdiction of a tribal court or resides or is domiciled on lands of a tribe that exercises exclusive jurisdiction over child custody proceedings you must contact the tribe by the next working day to make arrangements, as necessary, to transfer the child to the jurisdiction of the tribe. You must transfer custody of the child to the tribe within 24 hours of the tribe's confirmation the child is subject to exclusive tribal jurisdiction. (WIC §306(d) If you are unable to confirm tribal jurisdiction or are unable to transfer custody of the child to the tribe, you must proceed in state court and inform the court at the first hearing that the child may be subject to tribal jurisdiction. If confirmation if then received from the tribe, you must move to dismiss the petition.
3. Provide the tribe(s) with notice on the ICWA-030 form for all hearings that could result in foster care placement, termination of parental rights, preadoptive placement or adoptive placement of the child. (WIC §§224.2(f) & 224.3(b));
4. Provide active efforts to prevent removal, unless emergency removal is necessary to prevent imminent physical damage or harm to the child. (WIC §306(f)(4)); and
5. Comply with ICWA placement preferences if there is any removal, including an emergency removal, of the child from the custody of the parents or Indian custodian. (WIC §361.31(b)).

G. *Document active efforts:* If you know or have reason to know the child is an Indian child from initial contact, you must find resources and services that are culturally specific to the Indian child's family and directed at the issues the family is experiencing. You must actively pursue identification of the child's tribe and work with the child's tribe and extended family in developing these services. You must assist the parents in overcoming any barriers to accessing services. These resources and services are the *active efforts* that you must document to show that you are actively trying to prevent the breakup of the child's Indian family. Just as you would document *reasonable efforts* in non-ICWA cases, you must also document these active efforts thoroughly in the case file and in the court report before the child can be removed from his or her parent or Indian custodian and, in the event the family does not reunify, before parental rights can be terminated. You can find resources to help fulfill the active efforts requirement at *http://www.courts.ca.gov/5807.htm* . (ICWA § 1912(d); WIC §§224.1(f); 361.7; 727.4(d)(5)(D); CRC 5.485(c).)

II. ICWA Notice Requirements

A. If you know or have reason to know the child is an Indian child, you must send a *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) to the child's parents or guardians, Indian custodian (if any), tribe(s) with which the child may be affiliated; and the Sacramento Office of the BIA; or the Secretary of the Interior for every hearing that may result in foster care placement, termination of parental rights, preadoptive placement or adoptive placement.

B. *What to send:* Use mandatory form ICWA-030, *Notice of Child Custody Proceeding for Indian Child*, including attachments and a copy of the child's birth certificate where available, the petition and the report prepared for the hearing.

C. *Where and whom to send formal ICWA notice:* ICWA notice must be sent to the child's parents, including adoptive parents, guardian, Indian custodian (if any), the child's tribe or potential tribe(s), and either the Sacramento Area Director of the BIA if you do not know the child's tribe or the Secretary of the Interior if you do know (see F below).

D. *How to send notice*: Notice must be sent via registered/certified mail, return receipt requested. If a tribe intervenes in the case, you may thereafter send notice to it in the same manner as to other parties.

E. *Where to send tribal notice:* When sending notices to the child's tribe, they must be addressed to the tribal chairperson or other tribal representative designated for receipt of ICWA notice. The list of designated agents for service of ICWA notice may be found at: https://www.bia.gov/bia/ois/dhs/icwa. Send notice to the child's tribe, or to all tribes of which the child may be a member or eligible for membership until the court determines which tribe is the child's tribe, after which notice need be sent only to the tribe determined to be the Indian child's tribe. (WIC, §§ 224.2, 224.3; CRC 5.481(b).)

F. If you know the child's tribe (i.e., child is an enrolled member), notice does not need to go to other tribes, and you do not need to send notice to the regional BIA office.

G. *Purpose of notice:* The purpose of notice is to let the tribe know of the involuntary child custody proceeding potentially involving one of its children and to allow it to investigate to determine whether the child is a tribal member or eligible for membership and whether or not to participate in the proceedings. Therefore, it is important that the information you provide is complete and accurate. If it is not, your notice may be held to be inadequate. (ICWA § 1912(a); WIC, § 224.3; CRC 5.481(c).)

H. *How to prove notice:* File with the court copies of all notices, with the certified mail receipts, any return receipts, and all responses from a tribe or the BIA.

I. *Notices for hearings other than those listed in A.:* Once a child's tribe has been identified, the tribe is entitled to notices of all hearings not listed in A. above in the same manner and to the same extent as all other parties.

NOTE: For notices sent on the ICWA-030 by registered/certified mail, return receipt requested, it is not sufficient for you to state on the report that notice was sent. The green return receipt must be in the court file, with a copy in the social worker's file.

III. Emergency Removal/Detention Requirements for Indian Child (ICWA §§ 1912(d), 1915 (b), 1922; 25 C.F.R. §§23.2 & 23.113; WIC §§ 224.1; 319 (b), (d), (e) & (i); 361.31, 361.7, 636(c)(2); CRC 5.484(b) & (c).)

A. If it is known or there is reason to know the child is an Indian child, removal from parental custody without full compliance with the procedural and substantive requirements of ICWA is only authorized if there is proof that such removal is necessary to prevent imminent physical damage or harm to the child. (25 U.S.C. § 1922) A detention hearing under WIC 319 is deemed an "emergency proceeding" if it is known or there is reason to know the child is an Indian child. (WIC § 224.1(l))

B. The emergency removal or detention hearing may not be continued beyond 30 days unless the court makes specific findings under WIC §319(e)(2)(A)-(C). (25 C.F.R. §23.113; WIC §319(e)(2)) Any party may request an ex parte hearing prior to the dispositional hearing to seek return of the child. (WIC § 319.4) Emergency removals should generally not last longer than 30 days. The dispositional hearing must be completed within 30 days after the detention hearing unless the court finds that exceptional circumstances exist. The absence of a qualified expert witness does not, by itself, constitute exceptional circumstances. (WIC § 352 (b))

C. *Report Requirements:* Provide documentation to support your inquiry concerning possible Indian status and results of inquiry. If that inquiry gave you "reason to believe" or "reason to know" the child is or may be an Indian child you must submit evidence of your further inquiry and due diligence to determine the child's status in accordance with WIC 224.2 (e) & (g). Address all of the requirements of WIC 319(b)(1)-(9);

D. Provide documentation to support the required court findings regarding reasonable efforts and active efforts to prevent removal.

E. Provide documentation concerning consultation with the tribe concerning placement and how the placement fits within the ICWA placement preferences.

NOTE – the emergency removal/detention of an Indian child generally cannot last for more than 30 days. This means that you must prepare to get to disposition within 30 days of the detention hearing unless exceptional circumstances justify detention beyond that time. The child's tribe is a required member of the Child and Family Team (CFT). (Welf. & Inst. Code § 16501(a)(4)) Within the 30 day timeframe, you must convening a CFT to advise on development of the case plan, and identify a qualified expert witness.

IV. Jurisdiction Report/Hearing Requirements for Indian Child

A. Provide documentation to support your ongoing efforts to determine the child's tribal membership or eligibility status and the results of those efforts.

B. Provide documentation to support the required court findings regarding reasonable efforts and active efforts to prevent removal.

C. Provide notice in accordance with section II above.

V. Disposition Report Requirements If an Indian Child Is Removed from Parental Custody

A. Document any further inquiry efforts you have made to determine the child's Indian and tribal membership status by completing and attaching ICWA-010(A) to the disposition report.

B. In collaboration with the child's tribe, prepare a case plan that includes resources and services that are remedial, rehabilitative, and culturally specific to the Indian child's family and are designed to prevent the breakup of the Indian family. (ICWA § 1912(d); WIC, § 361.7; CRC 5.484(c)). In preparing this case plan you must solicit and integrate the input of the child's identified Indian tribe. (CRC 5.690(c))

C. Discuss with the child's identified Indian tribe whether tribal customary adoption as defined in section 366.24 is an appropriate permanent plan for the child if reunification is unsuccessful and include the contents of this discussion in your report. (WIC § 358.1; 361.5(g)(1)(G))

D. Comply with ICWA notice requirements discussed in section II above.

E. *Timing:* Generally, the "emergency removal" or detention of an Indian child cannot last more than 30 days from the detention hearing without getting to a hearing where the full substantive protections of ICWA are applied. (WIC §352 (b)) No hearing can be held until 10 days after receipt of notice by the tribe and others entitled to ICWA notice. The parents, Indian custodian (if any), and tribe are entitled to an additional 20 days to prepare for the hearing on request. (ICWA § 1912 (a); WIC, § 224.2(d); CRC 5.483(a).)

F. If you know the child's tribe, you should consult with the tribe in developing the case plan and determining what services are appropriate forthe parents and the child, and in finding an appropriate placement for the child.

G. Obtain a qualified expert witness (QEW) meeting the requirements of section VI(B) below to testify at the hearing.

H. In consultation with the child's tribe, make efforts to obtain a placement that complies with the ICWA placement preferences set out in section VI(D) and (E) below and document those efforts in your dispositional report.

I. Document in the report your active efforts and reasonable efforts and make recommended legal findings for the court to adopt. (ICWA § 1912(d); WIC, § 361.7.)

J. Ensure that you have all the evidence necessary to support the disposition that you are recommending. In particular ensure that any foster-care placement recommendation complies with the requirements for ICWA foster placement set out in section VI below.

VI. Foster Placement Requirements

A. *ICWA preferences:* The foster-care placement of an Indian child must comply with the ICWA placement preferences and must meet the heightened ICWA evidentiary standards.

B. *Evidentiary standard*: Provide proof by clear and convincing evidence, including the testimony of at least one qualified expert witness (QEW) that, taking into account the prevailing social and cultural standards of the child's tribe, continued custody of the child by the parent, or Indian custodian is likely to result in serious emotional or physical damage to the child. (ICWA § 1912(e); WIC, §§ 361, 361.31, 361.7(c); CRC 5.485(a).)

C. *Who can serve as QEW?* A person knowledgeable in prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices. In descending order this includes a knowledgeable person who is designated by the child's tribe, a member of the child's tribe, an expert with substantial experience in delivery of child and family services to Indians (e.g., social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, historian, or elder). (WIC § 224.6)

NOTE: An employee of your social services department cannot serve as a QEW. (ICWA § 1912 (e); WIC, § 224.6; CRC 5.485(a).)

D. *Placement preferences:* As with any child, the placement should be the least restrictive setting that most approximates a family and in which the child's special needs, if any, may be met. Unless the child's tribe has by resolution specified a different preference, preference must be given in order of priority to placement with (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs. If no placement is available that meets these preferences, efforts must be made to place the child with a family committed to preserving the child's family ties and tribal relations. (ICWA § 1915(b); WIC, § 361.31; CRC 5.485(b).)

E. *Consultation with tribe:* When you know the child's tribe, you must consult with the tribe and make use of tribal services when formulating your placement recommendation. (WIC § 361.31(g))

F. *Documentation of efforts regarding placement:* The court must make a finding that the placement accords with ICWA or that there is good cause to depart from the placement preferences. You must document in your report what efforts were made to find a placement that meets the preferences of ICWA. These efforts would include contacts with members of the child's extended family, contacts with the child's tribe seeking input and resources for placement, and contacts with other relevant Indian organizations (see I(E) for resources). These efforts should be made and documented each time there is a change in the Indian child's placement. (ICWA § 1916(b); WIC, § 361.31; CRC 5.482(f).)

VII Status Review, Permanency Planning, and Postpermanency Planning Hearing Requirements

A. Document further inquiry efforts you have made to determine if an Indian child is involved by completing and attaching ICWA-010(A) to the report.

B. Provide notice in accordance with section II above.

C. Consult with tribe, specifically including a discussion of whether tribal customary adoption as defined in section 366.24 is an appropriate permanent plan for the child if reunification is unsuccessful and include the contents of this discussion in your report. (WIC § 358.1; 361.5(g)(1)(G)) .

D. Prepare and file a report with recommended legal findings and orders supported by evidence of continued compliance with:

1. Reasonable and active efforts requirement discussed in I(E) above; and
2. Efforts to find a placement that complies with ICWA preferences as discussed in VI(D) above.

VIII. Termination of Parental Rights Requirements (WIC, §§ 366.26, 727.31)

A. You must provide evidence supported by the testimony of at least one QEW **beyond a reasonable doubt** that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

B. You must consult with the tribe in formulating the permanent plan for the child, specifically including a discussion of whether tribal customary adoption as defined in section 366.24 is an appropriate permanent plan for the child if reunification is unsuccessful and include the contents of this discussion in your report. (WIC § 358.1; 361.5(g)(1)(G)) .

C. Prepare and file a report with recommended legal findings and orders supported by evidence of continued compliance with:

1. Reasonable efforts and active efforts requirements discussed in I(E) above (ICWA § 1912(d); WIC, §§ 361.7, 366.26(c)(2)(B); CRC 5.485(a) & (c).); and
2. Compliance with adoptive preferences of ICWA if the recommended permanent plan for the child is adoption.

Absent good cause to the contrary, for any adoptive placement of an Indian child, preference of placement shall be given in priority order to (i) a member of the child's extended family, (ii) other members of the Indian child's tribe, or (iii) other Indian families. (ICWA § 1915(a); WIC, § 727.3.)

D. *Good cause not to terminate parental rights:* State law now recognizes that at the option of the tribe, tribal customary adoption is an appropriate

permanent plan. California law also recognizes other exceptions to termination of parental rights (TPR) for tribal children. Many tribal cultures do not believe in TPR. Accordingly, it is good cause not to terminate if TPR would interfere with connection to tribal community or membership or the child's tribe has identified guardianship, long-term foster care, or another permanent plan as the preferred plan for the child. (WIC, § 366.26(c)(2)(B)); CRC 5.485(b).)

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Indian Child Welfare Act ("ICWA") Requirements*

Applicability (25 U.S.C. §§1901-1923, 1903(i); 25 C.F.R. §§23.2, 23.103, 23.107; Guidelines B.1 & B.2; W.I.C. §§224.1, 224.3; Fam. Code §170; Prob. Code, §§1459.5(a), 1516.5(d); Rule 5.480)
ICWA applies to any state court case involving an Indian child that may result in a voluntary or involuntary foster care placement; guardianship placement; custody placement under Family Code section 3041; declaration freeing a child from the custody & control of one or both parents; termination of parental rights; or voluntary or involuntary adoptive placement including all proceedings under WIC sections 300 et seq. & 601 & 602 et seq. when the child is in foster care or at risk of entering foster care & one of the following: 1) the proceedings are based on conduct that would not be a crime if committed by an adult, 2) the court is setting a hearing to terminate parental rights, or 3) the court finds that the foster care placement is based entirely on conditions within the child's home & not even in part upon the child's criminal conduct.

Indian Child (25 U.S.C. §1903(4); 25 C.F.R. §23.2; Guideline B.1; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a) & (b))
Is an unmarried person under the age of 18 who is (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe & is a biological child of a member of an Indian tribe. Indian child may include a person over 18, but under 21, years who is a dependent of the court unless that person elects not to have ICWA apply. A determination by a tribe or the Bureau of Indian Affairs (BIA), absent a determination by the tribe to the contrary, that a child is or is not a member or eligible for membership is conclusive. The child is NOT required to be affiliated with the same tribe the parent is a member of. (25 U.S.C. §1903(4)). Enrollment is NOT required to establish membership unless the tribe confirms that enrollment is required. (WIC, §224.2(h))

Indian Custodian (25 U.S.C. §1903(6); 25 C.F.R. §23.2; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a))
Is any person who has legal custody of an Indian child under tribal law or custom or state law or to whom temporary physical care, custody, & control has been transferred by the parent.

Intervention/Invalidation (25 U.S.C. §§1911(c), 1914; Fam. Code, §§175(e), 177(a); Prob. Code, §§1459(e), 1459.5(b); WIC, §§224(e), 224.4; Rules 5.482(d) & 5.487)
An Indian custodian, & Indian child's tribe have the right to intervene at any point in the proceeding. If ICWA applies, the Indian child, parent, Indian custodian, or the child's tribe may petition any court of competent jurisdiction to invalidate the proceedings for not complying with the requirements of sections 1911 (jurisdiction; transfer; intervention; full faith and credit to public acts, records, and judicial proceedings of Indian tribes), 1912 (notice, appointment of counsel, examination of reports or other documents, active efforts, qualified expert witness testimony) or 1913 (consent requirements) of ICWA.

Inquiry (25 C.F.R. §23.107(a); Fam. Code, §177(a); Prob. Code, §§1459.5(b), 1513(h); WIC, §224.2; Rules 5.481(a) & (b); 5.482(c) & 5.668(c))
In all child custody proceedings, the court & the petitioner, including a social worker, a probation officer, a licensed adoption agency or adoption service provider, or an investigator must ask the child, the parents or legal guardians, Indian custodian and extended family members as soon as possible whether there is information indicating the child is or may be an Indian child & must affirm on the petition that inquiry has been made. If that initial inquiry gives reason to believe the child is an Indian child, further inquiry regarding the possible Indian status of the child must be done as soon as practical. This further inquiry must include at a minimum interviewing the parents, Indian custodian and extended family members to gather ancestry information, contacting the California Department of Social Services (CDSS) & the BIA for assistance in identifying tribes and tribal contact information, contacting others that may reasonably be expected to have information about the child's status, and contacting tribe(s) by telephone, facsimile or email and sharing with the tribe(s) any information the tribe(s) require to make a determination about the child's status. In all child custody cases, at their first court appearance, the parent or guardian must be ordered

*Based on The Indian Child Welfare Act 25 U.S.C. §§ 1901-1963; Indian Child Welfare Act Regulations 25 C.F.R. Part 23; Guidelines for Implementing the Indian Child Welfare Act and California statutes and rules of court.

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to complete *Parental Notification of Indian Status* (form ICWA-020), & the court must ask all participants whether they have information indicating the child is or may be an Indian child & instruct them to inform the court if they subsequently receive such information.

Reason to Know the Child Is an Indian Child (25 C.F.R. §23.107(c); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.2(d); Rule 5.481(b))
The following circumstances give "reason to know" the child is an Indian child: 1. A person having an interest in the child provides information suggesting that the child is an Indian child; 2. The residence or domicile of the child, the child's parents, or an Indian custodian is on a reservation or other tribal lands or in an Alaska Native village; 3. The child is or was a ward of a tribal court; or 4. Either parent or the child possesses an I.D. card indicating membership in an Indian tribe. If there is "reason to know" the court must require the petitioner to provide evidence that the petitioner has used due diligence to identify and work with all tribes the child may be affiliated with to verify the child's status; require formal ICWA notice by registered or certified mail return receipt requested as discussed below; and must treat the child as an Indian child unless and until the court can confirm that the child is not an Indian child in accordance with WIC § 224.2(i)).

Notice (25 U.S.C. §1912(a); 25 C.F.R. §§23.11 & 23.111; Guidelines D.1-D.7; Fam. Code, §180; Prob. Code, §1460.2; WIC, §§224.3, 727.4(a)(2); Rule5.481(c))
When: For any hearing that may culminate in an order for foster care placement, including a guardianship placement, termination of parental rights or declaration freeing the child from the custody & control of one or both parents, preadoptive placement or adoptive placement.
How: Party seeking foster care placement, guardianship, termination of parental rights, or order declaring the child free from the custody & control of one or both parents, must notify the parent(s), Indian custodian, & the tribe(s) there is reason to know the child is a member of or eligible for membership in, of the pending proceedings by registered or certified mail, return receipt requested as specified in Fam. Code, §180, Prob. Code, §1460.2, or WIC, §224.3. *Notice of Involuntary Child Custody Proceedings for an Indian Child* (form ICWA-030) is required to be completed & sent for all cases except excluded delinquency proceedings, for every hearing that may culminate in one of the outcomes listed above. In addition to the information included on form ICWA-030, the party must also include: 1. Information regarding the Indian child's Indian custodian including: all known names, including maiden, married, former, & aliases; current & former addresses; birthdates; places of birth & death; tribal enrollment numbers; & any other identifying information, if known. 2. A copy of the child's birth certificate if available.
3. A copy of the petition by which the proceeding was initiated. 4. The location, mailing address, & telephone number of the court & all parties notified. When a child's Indian tribe is identified, the tribe is entitled to notice of all other hearings and service of all documents in the same manner as all other parties.

Active Efforts (25 U.S.C. §1912(d); 25 C.F.R. §§23.2 & 23.120; Guidelines E.1-E.6; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§ 224.1(f), 361.7; Rule5.485(c))
The party seeking an involuntary foster care placement, guardianship, order freeing the child from the custody & control of one or both parents, or termination of parental rights must provide evidence to the court that active efforts have been made to provide remedial services & rehabilitative programs designed to prevent the breakup of the Indian family & that these efforts were unsuccessful. What constitutes active efforts is assessed on a case-by-case basis. Active efforts must be affirmative, active, thorough, & timely. If an agency is involved, active efforts must begin at first contact with the family when there is reason to know the child may be an Indian child. If an agency is involved, active efforts must include assisting the parents through the steps of a case plan & accessing or developing the resources necessary to satisfy the case plan. Active efforts must consider the prevailing social & cultural values & way of life of the Indian child's tribe. Active efforts must include the available resources of extended family members, the tribe, Indian social service agencies, & individual Indian caregivers. Active efforts
must be documented in detail in the record.

Qualified Expert Witness (QEW) Testimony (25 U.S.C. §1912(e); 25 C.F.R. §§23.121 & 23.122; Guidelines G.1 & G.2; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§224.6, 361.7(c); Rule 5.485(a))
To involuntarily order foster care or adoptive placement, guardianship or terminate parental rights, when there is reason to know the child is an Indian child, the court must require testimony of a QEW regarding whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious
emotional or physical damage. The QEW cannot be an employee of the person or agency seeking the foster care placement or termination of parental rights.

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Persons most likely to meet the requirements for a QEW are: 1. A person designated by the tribe as being qualified to testify to the prevailing social and cultural standards of the tribe; 2. a member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; 3. An expert witness having substantial experience in the delivery of child and family services to Indians, & extensive knowledge of prevailing social & cultural standards & child-rearing practices of the Indian child's tribe. The court may accept a declaration or affidavit from a
QEW in lieu of testimony only if the parties stipulate in writing and the court is satisfied that the stipulation is made knowingly, intelligently, and voluntarily.

Placement Preferences (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §361.31; Rule5.485(b))
The following placement preferences & standards must be followed whenever there is reason to know the child is an Indian child and the child is removed from the physical custody of his or her parents or Indian custodian. The court must analyze the availability of placements within the preferences in descending order without skipping.
Foster Care, Guardianships, & Custody to Non-parent: The court must order the least restrictive setting that most approximates a family situation within reasonable proximity to the child's home & meets the child's special needs, if any. Preference must be given in the following order: 1. a member of the child's extended family as defined in 25 U.S.C. §1903(2); 2. a foster home licensed, approved, or specified by the Indian child's tribe; 3. an Indian foster home licensed or approved by an authorized non-Indian licensing authority; 4. an institution approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.
Adoptive Placements: Preference must be given in the following order: 1. a member of the Indian child's extended family as defined in 25 U.S.C. §1903(2); 2. other members of the Indian child's tribe; 3. another Indian family.
For both foster care and adoptive placements, the tribe, may establish a different preference order by resolution. This order of preference must be followed if it provides for the least restrictive setting.

Placement Standards & Records (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5**;** Fam. Code, §§177(a), 3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361(c)(6), 361.31, 361.7(c), 366.26(c)(2)(B); Rule5.484(b)(1))
The preferences of the child (if old enough) & the parent(s) must be considered. Placement standards must be the prevailing social & cultural standards of the child's tribe or the Indian community in which the parent or extended family member resides or extended family member maintains social & cultural ties. A determination of the applicable prevailing social & cultural standards may be confirmed by the Indian child's tribe or QEW testimony. CDSS must maintain a record of each placement of an Indian child. CDSS must also maintain evidence of efforts to comply with the placement preferences where ever the placement deviates from the preferences.

Good Cause to Deviate From the Placement Preferences (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; WIC, §361.31(h); Rule5.484(b)(2) & (3))
The court may deviate from the placement preferences list above only upon a finding of good cause. If a party asserts there is good cause to deviate from the placement preferences those reasons must be contained in the record either orally or in writing. The party requesting a different order has the burden of establishing good cause. The court may base a decision to deviate from the placement preferences on: 1. The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference; 2. The request of the child, if the child is of sufficient age & capacity to understand the decision that is being made; 3. The presence of a sibling attachment that can be maintained only through a particular placement;
4. The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; 5. The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining

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whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social & cultural ties. A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement. A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.
Burden of Proof & Qualified Expert Witness (25 U.S.C. §1912(e), (f); 25 C.F.R. §23.121; Guideline G.1**;** Fam. Code, §§3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361.7(c), 366.26(c)(2)(B); Rule5.484(a)) The burden of proof to place a child in foster care, appoint a guardian, & award custody to a non-parent is *clear & convincing evidence,* including testimony of a qualified expert witness establishing that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The burden of proof to terminate parental rights is *beyond a reasonable doubt,* including testimony of a qualified expert witness establishing that continued custody of the child by the child's custodian is likely to result in serious emotional or physical damage to the child.
Adoption (25 U.S.C. §§1917, 1951; 25 C.F.R. §23.140; Guideline J.2; Fam. Code, §9208; Rule 5.487) The court must provide the Secretary of the Interior a copy of the adoption order & other information needed to show: 1. the name & tribal affiliation of the Indian child; 2. the names & addresses of the biological parents; 3. the names & addresses of the adoptive parents; 4. the identity of any agency having files or information relating to such adoptive placement; 5. any confidential parent affidavits; and 6. any information relating to Tribal membership or eligibility for Tribal membership of the adopted child. At the request of an adopted Indian child over the age of 18, the court must provide information about the individual's tribal affiliation, biological parents, & other information as may be necessary to protect any rights flowing from the individual's relationship tothe tribe.
Jurisdiction & Transfer (25 U.S.C. §1911(a), (b); 25 C.F.R. §23.110; Guidelines F.1-F.6; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §305.5 Rule 5.483) Exclusive Jurisdiction: If an Indian child is a ward of the tribal court or resides or is domiciled on a reservation of a tribe that exercises exclusive jurisdiction, notice must be sent to the tribe by the next working day following removal. If the tribe determines that the child is under the exclusive jurisdiction of the tribe, the state court must dismiss the case & ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including the pleadings & any court record. Transfer to Tribal Jurisdiction: If the above exclusive jurisdiction does not apply, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribal jurisdiction. The court must transfer the proceedings unless there is good cause not to do so. Either parent may object to the transfer, or the tribe may decline the transfer of the proceedings.
Right to Counsel (25 U.S.C. §1912(b); Fam. Code, §180(b)(5)(G)(v); Prob. Code, §1474; WIC, §317(a)(2)) The parent, Indian custodian, or Indian guardian, if indigent, has the right to court-appointed counsel.
Examination of Reports & Documents (25 U.S.C. §1912(c); Fam. Code, §177(a); Prob. Code, §1459.5(b)) The parent, Indian child, Indian custodian, tribe, & their attorneys have the right to examine all court documents related to the Indian child-custody case.
Full Faith & Credit (25 U.S.C. §1911(d); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.5) Full faith & credit to the public acts, records, & judicial proceedings of any Indian tribe is required.
Right to Additional Time (25 U.S.C. §1912 (a); 25 C.F.R. §23.112; Fam Code §180(e); Prob. Code §1460.2(e); WIC §224.2(d); Rule5.482(a)) With the exception of an emergency proceeding as defined in 25 C.F.R. §23.113 the court cannot go ahead with a hearing that meets the definition of "child custody proceeding" under ICWA until 10 days after receipt of notice by tribe(s) & BIA & must grant 20 extra days for preparation ifrequested.

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CALIFORNIA COURTS

Website for the California Judicial Branch

http://www.courts.ca.gov/home.htm

ICWA-related State Documents

(As of January 1, 2020)

State Statutes (An index of the statutes is set out at the end of this document.)

- California Family Code Provisions Implementing the Indian Child Welfare Act
  http://www.courts.ca.gov/documents/ICWAFamilyCode.pdf
- California Probate Code Sections implementing the Indian Child Welfare Act
  http://www.courts.ca.gov/documents/ICWAProbateCode.pdf
- California Welfare and Institutions Code Provisions implementing the Indian Child Welfare Act
  http://www.courts.ca.gov/documents/ICWA-WelfareCode.pdf

ICWA-related California Rules of Court

http://www.courts.ca.gov/cms/rules/index.cfm?title=five

- Rule 5.480. Application
- Rule 5.481. Inquiry and notice
- Rule 5.482. Proceedings after notice
- Rule 5.483. Dismissal and Transfer of case
- Rule 5.484. Emergency proceedings involving an Indian child
- Rule 5.485. Placement of an Indian child
- Rule 5.486. Termination of parental rights
- Rule 5.487. Petition to invalidate orders
- Rule 5.488. Adoption record keeping
- Rule 5.534. General Provisions All Proceedings – see subsection (i) Tribal Representatives
- Rule 5.550. Continuances – see subsections (c)(3) and (d)
- Rule 5.570. Request to change court order (petition for modification) – see subsections (e)(5) & (6) and (h)(1)(B)
- Rule 5.668(c). Commencement of hearing-explanation of proceedings – see subsection (c)

- Rule 5.674. Conduct of hearing; admission, no contest, submission – see subsections (c), (d), and (e)
- Rule 5.676. Requirements for detention – see subsections (b) & (d)
- Rule 5.678. Findings in support of detention; factors to consider; reasonable efforts; active efforts; detention alternatives – see subsection (c)(2)
- Rule 5.690. General conduct of disposition hearing – see subsections (a)(1)(C)(v) & (d)
- Rule 5.725. Selection of permanent plan – see subsection (e)
- Rule 5.785. General conduct of hearing
- Rule 7.1015. Indian Child Welfare Act in guardianship and certain conservatorship proceedings (Prob. Code, §§ 1459.5, 1460.2)

ICWA-related Judicial Council Forms

http://www.courts.ca.gov/forms.htm?filter=ICW

Sample Cover Sheet ICWA-10(A): The ICWA-10(A) Indian Child Inquiry Attachment form is not designed as a fillable document. However, there may be situations when it will be advisable to file a supplemental ICWA-10(A) form when new information is obtained following the filing of the Petition. The Sample Cover Sheet has been developed for those situations in which a party wishes to file a supplemental ICWA-10(A) to document further inquiry and information on Indian status. This document is for convenience and reference only. It is not a mandatory or approved Judicial Council form.

**Forms marked with an asterisk are adopted for mandatory use by all courts.*

Form Name	Description
ICWA-005-INFO	Information Sheet on Indian Child Inquiry Attachment and Notice of Child Custody Proceeding for Indian Child
ICWA-005-INFO S	Information Sheet on Indian Child Inquiry Attachment and Notice of Child Custody Proceeding for Indian Child (Spanish)
ICWA-010(A)*	Indian Child Inquiry Attachment
ICWA-010(A) S	Indian Child Inquiry Attachment (Spanish)

ICWA-020*	Parental Notification of Indian Status
ICWA-020 S	Parental Notification of Indian Status (Spanish)
ICWA-030*	Notice of Child Custody Proceeding for Indian Child
ICWA-030 S	Notice of Child Custody Proceeding for Indian Child (Spanish)
ICWA-030(A)	Attachment to Notice of Child Custody Proceeding for Indian Child (Indian Child Welfare Act)
ICWA-030(A) S	Attachment to Notice of Child Custody Proceeding for Indian Child (Indian Child Welfare Act) (Spanish)
ICWA-040	Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child
ICWA-050	Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction
ICWA-060	Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction
ADOPT-220*	Adoption of Indian Child
ADOPT-225*	Parent of Indian Child Agrees to End Parental Rights

Index of State Statutes Implementing the Indian Child Welfare Act

- California Family Code Provisions Implementing the Indian Child Welfare Act
  http://www.courts.ca.gov/documents/ICWAFamilyCode.pdf
- California Probate Code Sections implementing the Indian Child Welfare Act
  http://www.courts.ca.gov/documents/ICWAProbateCode.pdf
- California Welfare and Institutions Code Provisions implementing the Indian Child Welfare Act
  http://www.courts.ca.gov/documents/ICWA-WelfareCode.pdf

California Family Code Provisions Implementing the Indian Child Welfare Act1

§ 170. Definitions; eligible membership in more than one tribe

§ 175. Legislative findings and declarations

§ 177. Governing law in Indian child custody proceedings

§ 180. Notice of proceedings; parties; requirements; time to send

§ 185. Indian child of tribe not recognized to have tribal status under federal law; tribal participation at hearings

§ 295. Validity of marriages and divorces

§ 3041. Custody award to nonparent; findings of court; hearing

§ 3402. Definitions

§ 3404. Native American children

§ 7660.5. Waiver of right to notice by presumed father; adoption proceedings under Indian Child Welfare Act

§ 7822. Abandoned children; right to action; declaration of abandonment; Indian children

§ 7892.5. Declaration that Indian child is free from custody or control of parent

§ 7901.1. Request outside state; home study to assess safety and suitability of child placement; Requirements

§ 7906.5. Request inside state; home study to assess safety and suitability of child placement; Requirements

§ 7907.3. Bringing or sending of Indian child into another state

§ 7950. Relatives; race, color or national origin

§ 8600.5. Tribal customary adoption not applicable to this part

§ 8606.5. Consent to adoption of Indian children

§ 8619. Children of Indian ancestry; information; certificate of degree of Indian blood

§ 8616.5. Postadoption contact agreements

§ 8620. Determination of identity as Indian child for purposes of relinquishment or adoption placement; procedures; civil penalty for violations

§ 8707.1. Recruitment of potential adoptive parents; ethnic, racial, and cultural diversity

§ 8708. Race, color, or national origin of adoptive parent or child; nonresident status of adoptive Parent

§ 8709. Consideration of religious background; best interest of child

§ 8710. Adoptive placement with relatives; placement criteria

§ 9208. Children of Indian ancestry; notice to United States Secretary of the Interior

§ 9209. Children of Indian ancestry; adoptees who have reached age eighteen; access to information

§ 9210. Actions commenced under this part; conditions required for California court jurisdiction; Exceptions

Welfare and Institutions Code provisions implementing the Indian Child Welfare Act which are incorporated by reference into the Family Code pursuant to section 177.

§ 224.2. Determination whether child is an Indian child; considerations; scope of inquiry; membership Status

§ 224.3. Matters involving an Indian child; notice to interested parties; time to notify; proof

§ 224.4. Intervention in proceedings by tribe

§ 224.5. Full faith and credit to tribal proceedings and records

§ 224.6. Testimony of qualified expert witnesses; qualifications; participation at hearings; written reports and recommendations

§ 305.5. Indian child custody proceedings; child as ward of tribal court or subject to exclusive jurisdiction of tribe; transfer of proceedings to tribal court; petition for transfer

§ 361.31. Placement of Indian children; considerations; priority of placement in adoptions; departure from placement preferences; record of foster care

§ 361.7. Termination of parental rights or involuntary placement of Indian children; standards

California Probate Code Provisions Implementing the Indian Child Welfare Act1

§1449 Indian child custody proceedings; definitions; membership in more than one tribe

§1459. Legislative findings and declarations; children of Indian ancestry

§1459.5. Application of federal law to proceedings involving children of Indian ancestry

§1460.2. Proposed ward or conservatee may be a child of Indian ancestry; notice to interested parties; requirements; time; proof

§1474. Matters involving children of Indian ancestry

§1500.1. Consent by Indian child's parent; requirements

§1510. Petition for appointment; contents

§1511. Notice of hearing

§1513. Investigation; filing of report and recommendation concerning proposed guardianship; contents of report; confidentiality; application of section

§1516.5. Proceeding to have child declared free from custody and control of one or both parents

Provisions of the Welfare and Institutions Code Incorporated by Reference by Probate Code 1459.5(b)[2]:

§ 224.2. Determination whether child is an Indian child; considerations; scope of inquiry; membership Status

§ 224.4. Intervention in proceedings by tribe

§ 224.5. Full faith and credit to tribal proceedings and records

§ 224.6. Testimony of qualified expert witnesses; qualifications; participation at hearings; written reports and recommendations

Welfare and Institutions Code Provisions Implementing the Indian Child Welfare Act

(Listed alphabetically by subject as some subjects appear in multiple sections.)

Active Efforts: §224.1 (f); §306 (f)(4); §319 (f)(2); §361(e); §361.7; §366(a)(1)(B) [document at each status review]; §366.26(c)(2)(B) [no termination of parental rights without a showing of active efforts]

Agreements with tribes: §10553.1

Application: §224(c);

Best interests of child: §224 (a)(2);

Continuance: §352(b)[lack of a QEW is not sufficient basis for continuance]; §354 [lack of QEW not sufficient basis for];

Court Appointed Special Advocates: §110

Detention: §309(a)(3); §315 [hearing under 319 considered an emergency removal]; §319(b), (d), (e) &(i); §319.4 [ex parte request for return when emergency has ended]; §11462.022 [agency must makeactive efforts to comply with placement preferences upon detention when there is reason to believe child is an Indian child]

Due diligence to work with tribes: §224.2 (g) §224.2 (i)(2)

Emergency proceeding: §224.1 (l); §305.5 (g); §306 (c); §315; §319 (b), (d), (e) & (i); §319.4 [Ex parterequest for return when emergency has ended]; §361.31(b);

Enrollment: §224.2 (h)

Extended family member: §224.1 (c)

Full faith and credit for tribal proceedings and records: §224.5

Further inquiry: §224.2 (e); §224.2 (i)(2)

Higher standard: §224(d)

Indian Child Custody Proceeding: §224.1 (d)

Indian child: §224(c); §224.1 (b)

Indian child's tribe: §224.1 (e)

Indian foster home: §224.1 (m)

Inquiry, initial: §224.2 (a), (b) & (c); §306 (b);

Intervention: §224.4

Invalidation: §

Involuntary: §224.1 (n); §361.7;

Jurisdiction: §305.5

Membership: §224.2 (h)

Multidisciplinary team: §18964(b) [information from tribe]

Notice: §224.3;

Notify: §306(d)

Permanency: §366.24 [Tribal Customary Adoption]; §366.26(b)(2)[Tribal customary adoption];§366.26(c)(1)(A)[For Indian child "relative" includes extended family member under ICWA];§366.26(c)(1)(B)(vi) [compelling reasons not to terminate parental rights and to choose an alternative permanent plan for an Indian child]

Placement Preferences: §224 (a)(1); §224 (b); §309 (d) & (e); §319 (h) & (i); §361.2(e)(6); §361.31;§11391 [for purposes of kin-gap assistance, relative, includes a member of the child's tribe and an Indian custodian]; §11462.022 [agency must try to place within preferences upon detention when reason to know]; §16504.6 [Tribe may make a criminal exemption request directly to CDSS or to county]

Qualified Expert Witness: §224.6; §352 (b); §354; §361.7 (c); §366.26(c)(2)(B) [testimony required to terminate parental rights to an Indian child]

Reason to believe: §224.2 (e);

Reason to know: §224.2 (d), (f), (g), (i)

Removal (standards): §224.6 (b); §309 (a)(3); §361.7 (c);

Transfer: §305.5; §306(d); §381 [must get priority on court calendar]; §827.15 [case file and materialsthat must be transferred to tribal court];

Tribal Customary Adoption: §366.24; §366.26(e)(2)-(3);

Tribally Approved home: §10553.12

Unrecognized tribes: §306.6

Voluntary (relinquishment or placement): §224.1 (n), (q); §361(b)(4); §16507.4(b)(3) [voluntary relinquishment of Indian child must comply with ICWA];

United States Code
Title 25. Indians
Chapter 21 – Indian Child Welfare

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation 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 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.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "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.

(2) “extended family member” shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) “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 section 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 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;

(11) “Secretary” means the Secretary of the Interior; and

(12) “tribal court” means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe,

or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(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.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

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, 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.

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred

and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to--

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under Titles IV-B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under Titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to--

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

§ 1934. "Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show--

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

CODE OF FEDERAL REGULATIONS, TITLE 25: INDIANS

PART 23—INDIAN CHILD WELFARE ACT

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Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901-1952.
Source: 59 FR 2256, Jan. 13, 1994, unless otherwise noted.

Subpart A—Purpose, Definitions, and Policy

§23.1 Purpose.

The purpose of the regulations in this part is to govern the provision of funding for, and the administration of Indian child and family service programs as authorized by the Indian Child Welfare Act of 1978 (Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 2, 9, 1901-1952).

§23.2 Definitions.

Act means the Indian Child Welfare Act (ICWA), Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.*

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

Assistant Secretary means the Assistant Secretary—Indian Affairs, the Department of the Interior.

Bureau of Indian Affairs (BIA) means the Bureau of Indian Affairs, the Department of the Interior.

Child-custody proceeding. (1) "Child-custody proceeding" means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:

> (i) ***Foster-care placement,*** which is any action removing an Indian child from his or her 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 is any action resulting in the termination of the parent-child relationship;
>
> (iii) ***Preadoptive placement,*** which is 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; or
>
> (iv) ***Adoptive placement,*** which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

Consortium means an association or partnership of two or more eligible applicants who enter into an agreement to administer a grant program and to provide services under the grant to Indian residents in a specific geographical area when it is administratively feasible to provide an adequate level of services within the area.

Continued custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of a child.

Custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.

Domicile means:

(1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

(2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

Emergency proceeding means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Extended family member is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

Grant means a written agreement between the BIA and the governing body of an Indian tribe or Indian organization wherein the BIA provides funds to the grantee to plan, conduct or administer specific programs, services, or activities and where the administrative and programmatic provisions are specifically delineated.

Grantee means the tribal governing body of an Indian tribe or Board of Directors of an Indian organization responsible for grant administration.

Grants officer means an officially designated officer who administers ICWA grants awarded by the Bureau of Indian Affairs, the Department of the Interior.

Hearing means a judicial session held for the purpose of deciding issues of fact, of law, or both.

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 section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

Indian child means any unmarried person who is under age 18 and either:

(1) Is a member or citizen of an Indian Tribe; or

(2) Is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

Indian child's Tribe means:

(1) The Indian Tribe in which an Indian child is a member or eligible for membership; or

(2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in §23.109.

Indian custodian means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has

been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.

Indian foster home means a foster home where one or more of the licensed or approved foster parents is an "Indian" as defined in 25 U.S.C. 1903(3).

Indian organization, solely for purposes of eligibility for grants under subpart D of this part, means any legally established group, association, partnership, corporation, or other legal entity which is owned or controlled by Indians, or a majority (51 percent or more) of whose members are Indians.

Indian preference means preference and opportunities for employment and training provided to Indians in the administration of grants in accordance with section 7 (b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450).

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians federally 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 3 (c) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602 (c).

Involuntary proceeding means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

Off-reservation ICWA program means an ICWA program administered in accordance with 25 U.S.C. 1932 by an off-reservation Indian organization.

Parent* or *parents means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is 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.

Secretary means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.

Service areas solely for newly recognized or restored Indian tribes without established reservations means those service areas congressionally established by Federal law to be the equivalent of a reservation for the purpose of determining the eligibility of a newly recognized or restored Indian tribe and its members for all Federal services and benefits.

State court means any agent or agency of a state, including the District of Columbia or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

Status offenses mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (*e.g.,* truancy, incorrigibility).

Subgrant means a secondary grant that undertakes part of the obligations of the primary grant, and assumes the legal and financial responsibility for the funds awarded and for the performance of the grant-supported activity.

Technical assistance means the provision of oral, written, or other relevant information and assistance to prospective grant applicants in the development of their grant proposals. Technical assistance may include a preliminary review of an application to assist the applicant in identifying the strengths and weaknesses of the proposal, ongoing program planning, design and evaluation, and such other program-specific assistance as is necessary for ongoing grant administration and management.

Title II means title II of Public Law 95-608, the Indian Child Welfare Act of 1978, which authorizes the Secretary to make grants to Indian tribes and off-reservation Indian organizations for the establishment and operation of Indian child and family service programs.

Tribal court means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.

Tribal government means the federally recognized governing body of an Indian tribe.

Upon demand means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.

Value means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Voluntary proceeding means a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

[59 FR 2256, Jan. 13, 1994, as amended at 81 FR 38864, June 14, 2016]

§23.3 Policy.

In enacting the Indian Child Welfare Act of 1978, Pub. L. 95-608, the Congress has declared that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and Indian families by the establishment of minimum Federal standards to prevent the arbitrary removal of Indian children from their families and tribes and to ensure that measures which prevent the breakup of Indian families are followed in child custody proceedings (25 U.S.C. 1902). Indian child and family service programs receiving title II funds and operated by federally recognized Indian tribes and off-reservation Indian organizations shall reflect the unique values of Indian culture and promote the stability and security of Indian children, Indian families and Indian communities. It is the policy of the Bureau of Indian Affairs to emphasize and facilitate the comprehensive design, development and implementation of Indian child and family service programs in coordination with other Federal, state, local, and tribal programs which strengthen and preserve Indian families and Indian tribes.

§23.4 Information collection.

(a) The information collection requirements contained in §23.13 of this part have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.,* and assigned clearance number 1076-0111.

(1) This information will be used to determine eligibility for payment of legal fees for indigent Indian parents and Indian custodians, involved in involuntary Indian child custody proceedings in state courts, who are not eligible for legal services through other mechanisms. Response to this request is required to obtain a benefit.

(2) Public reporting for this information collection is estimated to average 10 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any aspect of this information collection should be mailed or hand-delivered to the Bureau of Indian Affairs, Information Collection Clearance Officer, Room 336-SIB, 1849 C Street, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs Paperwork Reduction Project—1076-0111, Office of Management and Budget, Washington, DC 20503.

(b) The information collection requirements contained in §§23.21; 23.31; 23.46; 23.47, and 23.71 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1076-0131. The information collection requirements under §§23.21 and 23.31 are collected in the form of ICWA grant applications from Indian tribes and off-reservation Indian organizations. A response to this request is required to obtain grant funds. The information collection requirements under §23.46 are collected in compliance with applicable OMB circulars on financial management, internal and external controls and other fiscal assurances in accordance with existing Federal grant administration and reporting requirements. The grantee information collection requirements under §23.47 are collected in the form of quarterly and annual program performance narrative reports and statistical data as required by the grant award document. Pursuant to 25 U.S.C. 1951, the information collection requirement under §23.71 is collected from state courts entering final adoption decrees for any Indian child and is provided to and maintained by the Secretary.

(1) Public reporting for the information collection at §§23.21 and 23.31 is estimated to average 32 hours per response, including the time for reviewing the grant application instructions, gathering the necessary information and data, and completing the grant application. Public reporting for the information collection at §§23.46 and 23.47 is estimated to average a combined total of 16 annual hours per grantee, including the time for gathering the necessary information and data, and completing the required forms and reports. Public reporting for the information collection at §23.71 is estimated to average 4 hours per response, including the time for obtaining and preparing the final adoption decree for transmittal to the Secretary.

(2) Direct comments regarding any of these burden estimates or any aspect of these information collection requirements should be mailed or hand-delivered to the Bureau of Indian Affairs, Information Collection Clearance Officer, room 336-SIB, 1849 C Street, NW., Washington, DC, 20240; and the Office of Information and Regulatory Affairs Paperwork Reduction Project—1076-0131, Office of Management and Budget, Washington, DC 20503.

Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel in State Courts

§23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in §23.111, consistent with the confidentiality requirement in §23.111(d)(6)(ix). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by §23.111.

(b)(1) For child-custody proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, or any territory or possession of the United States, notices must be sent to the following address: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.

(2) For child-custody proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices must be sent to the following address: Minneapolis Regional Director, Bureau of Indian Affairs, 5600 American Blvd. W, Ste. 500, Bloomington, MN 55437.

(3) For child-custody proceedings in Nebraska, North Dakota, or South Dakota, notices must be sent to the following address: Aberdeen Regional Director, Bureau of Indian Affairs, 115 Fourth Avenue SE., Aberdeen, South Dakota 57401.

(4) For child-custody proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), or the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods or Woodward, notices must be sent to the following address: Anadarko Regional Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6) of this section.

(5) For child-custody proceedings in Wyoming or Montana (except for notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), notices must be sent to the following address: Billings Regional Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(6) For child-custody proceedings in the Texas counties of El Paso and Hudspeth or in Colorado or New Mexico (exclusive of notices to the Navajo Nation from the New Mexico counties listed in paragraph (b)(9) of this section), notices must be sent to the following address: Albuquerque Regional Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to

the Navajo Nation must be sent to the Navajo Regional Director at the address listed in paragraph (b)(9) of this section.

(7) For child-custody proceedings in Alaska (except for notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska), notices must be sent to the following address: Alaska Regional Director—Attn: Human Services, Bureau of Indian Affairs, 3601 C Street, Suite 1258, Anchorage, Alaska 99503. Notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(8) For child-custody proceedings in Arkansas, Missouri, or the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Stephens, Tulsa, Wagoner, or Washington, notices must be sent to the following address: Muskogee Regional Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For child-custody proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi Tribe of Arizona and the San Juan Southern Paiute Tribe of Arizona) or Navajo (except for notices to the Hopi Tribe of Arizona); the New Mexico counties of McKinley (except for notices to the Zuni Tribe of the Zuni Reservation), San Juan, or Socorro; or the Utah county of San Juan, notices must be sent to the following address: Navajo Regional Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Southern Paiute Tribes of Arizona must be sent to the Phoenix Regional Director at the address listed in paragraph (b)(10) of this section. Notices to the Zuni Tribe of the Zuni Reservation must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6 of this section).

(10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9) of this section), Nevada, or Utah (exclusive of San Juan County), notices must be sent to the following address: Phoenix Regional Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For child-custody proceedings in Idaho, Oregon, or Washington, notices must be sent to the following address: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, must also be sent to the Portland Regional Director.

(12) For child-custody proceedings in California or Hawaii, notices must be sent to the following address: Sacramento Regional Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in §23.2, or is unable to locate the parents or Indian custodians,

the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

[81 FR 38866, June 14, 2016, as amended at 83 FR 55268, Nov. 5, 2018]

§23.12 Designated tribal agent for service of notice.

Any Indian tribe entitled to notice pursuant to 25 U.S.C. 1912 may designate by resolution, or by such other form as the tribe's constitution or current practice requires, an agent for service of notice other than the tribal chairman and send a copy of the designation to the Secretary or his/her designee. The Secretary or his/her designee shall update and publish as necessary the names and addresses of the designated agents in the Federal Register. A current listing of such agents shall be available through the area offices.

§23.13 Payment for appointed counsel in involuntary Indian child custody proceedings in state courts.

(a) When a state court appoints counsel for an indigent Indian party in an involuntary Indian child custody proceeding for which the appointment of counsel is not authorized under state law, the court shall send written notice of the appointment to the BIA Regional Director designated for that state in §23.11. The notice shall include the following:

(1) Name, address, and telephone number of attorney who has been appointed.

(2) Name and address of client for whom counsel is appointed.

(3) Relationship of client to child.

(4) Name of Indian child's tribe.

(5) Copy of the petition or complaint.

(6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.

(7) Certification by the court that the Indian client is indigent.

(b) The Regional Director shall certify that the client is eligible to have his or her appointed counsel compensated by the BIA unless:

(1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C. 1903 (1);

(2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903 (4);

(3) The client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903 (9), nor the child's Indian custodian as defined in 25 U.S.C. 1903 (6);

(4) State law provides for appointment of counsel in such proceedings;

(5) The notice to the Regional Director of appointment of counsel is incomplete; or

(6) Funds are not available for the particular fiscal year.

(c) No later than 10 days after receipt of the notice of appointment of counsel, the Regional Director shall notify the court, the client, and the attorney in writing whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the BIA. If certification is denied, the notice shall include written reasons for that decision, together with a statement that complies with 25 CFR 2.7 and that informs the applicant that the decision may be appealed to the Assistant Secretary. The Assistant Secretary shall consider appeals under this subsection in accordance with 25 CFR 2.20 (c) through (e). Appeal procedures shall be as set out in part 2 of this chapter.

(d) When determining attorney fees and expenses, the court shall:

(1) Determine the amount of payment due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in state juvenile delinquency proceedings; and

(2) Submit approved vouchers to the Regional Director who certified eligibility for BIA payment, together with the court's certification that the amount requested is reasonable under the state standards considering the work actually performed in light of criteria that apply in determining fees and expenses for appointed counsel in state juvenile delinquency proceedings.

(e) The Regional Director shall authorize the payment of attorney fees and expenses in the amount requested in the voucher approved by the court unless:

(1) The amount of payment due the state-appointed counsel is inconsistent with the fees and expenses specified in §23.13 (d)(1); or

(2) The client has not been certified previously as eligible under paragraph (c) of this section; or

(3) The voucher is submitted later than 90 days after completion of the legal action involving a client certified as eligible for payment of legal fees under paragraph (b) of this section.

(f) No later than 15 days after receipt of a payment voucher, the Regional Director shall send written notice to the court, the client, and the attorney stating the amount of payment, if any, that has been authorized. If the payment has been denied, or the amount authorized is less than the amount requested in the voucher approved by the court, the notice shall include a written statement of the reasons for the decision together with a statement that complies with 25 CFR 2.7 and that informs the client that the decision may be appealed to the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (e); 43 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.340.

(g) Failure of the Regional Director to meet the deadline specified in paragraphs (c) and (f) of this section may be treated as a denial for purposes of appeal under paragraph (f) of this section.

(h) Payment for appointed counsel does not extend to Indian tribes involved in state court child custody proceedings or to Indian families involved in Indian child custody proceedings in tribal courts.

Subpart C—Grants to Indian Tribes for Title II Indian Child and Family Service Programs

§23.21 Noncompetitive tribal government grants.

(a) *Grant application information and technical assistance.* Information on grant application procedures and related information may be obtained from the appropriate Agency Superintendent or Regional Director. Pre-award and ongoing technical assistance to tribal governments shall be provided in accordance with §23.42 of this part.

(b) *Eligibility requirements for tribal governments.* The tribal government(s) of any Indian tribe or consortium of tribes may submit a properly documented application for a grant to the appropriate Agency Superintendent or Regional Director. A tribe may neither submit more than one application for a grant nor be the beneficiary of more than one grant under this subpart.

(1) Through the publication of a Federal Register announcement at the outset of the implementation of the noncompetitive grant award process during which tribal applications will be solicited, the Assistant Secretary will notify eligible tribal applicants under this subpart of the amount of core funds available for their ICWA program. The funding levels will be based on the service area population to be served. Upon the receipt of this notice from the Agency Superintendent or appropriate Regional Director, tribal applicants shall submit a completed ICWA application no later than 60 days after the receipt of this notice.

(2) A grant to be awarded under this subpart shall be limited to the tribal governing body(ies) of the tribe(s) to be served by the grant.

(3) For purposes of eligibility for newly recognized or restored Indian tribes without established reservations, such tribes shall be deemed eligible to apply for grants under this subpart to provide ICWA services within those service areas legislatively identified for such tribes.

(4) A grantee under this subpart may make a subgrant to another Indian tribe or an Indian organization subject to the provisions of §23.45.

(c) *Revision or amendment of grants.* A grantee under this subpart may submit a written request and justification for a post-award grant modification covering material changes to the terms and conditions of the grant, subject to the approval of the grants officer. The request shall include a narrative description of any significant additions, deletions, or changes to the approved program activities or budget in the form of a grant amendment proposal.

(d) Continued annual funding of an ICWA grant under this subpart shall be contingent upon the fulfillment of the requirements delineated at §23.23(c).

(e) Monitoring and program reporting requirements for grantees under this subpart are delineated at §§23.44 and 23.47.

§23.22 Purpose of tribal government grants.

(a) Grants awarded under this subpart are for the establishment and operation of tribally designed Indian child and family service programs. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and to ensure that the permanent removal of an Indian child from the custody of his or her Indian parent or Indian custodian shall be a last resort. Such child and family service programs may include, but need not be limited to:

(1) A system for licensing or otherwise regulating Indian foster and adoptive homes, such as establishing tribal standards for approval of on-reservation foster or adoptive homes;

(2) The operation and maintenance of facilities for counseling and treatment of Indian families and for the temporary custody of Indian children with the goal of strengthening Indian families and preventing parent-child separations;

(3) Family assistance, including homemaker and home counselors, protective day care and afterschool care, recreational activities, respite care, and employment support services with the goal of strengthening Indian families and contributing to family stability;

(4) Home improvement programs with the primary emphasis on preventing the removal of children due to unsafe home environments by making homes safer, but not to make extensive structural home improvements;

(5) The employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters, but not to establish tribal court systems;

(6) Education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) A subsidy program under which Indian adoptive children not eligible for state or BIA subsidy programs may be provided support comparable to that for which they could be eligible as foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(8) Guidance, legal representation and advice to Indian families involved in tribal, state, or Federal child custody proceedings; and

(9) Other programs designed to meet the intent and purposes of the Act.

(b) Grants may be provided to tribes in the preparation and implementation of child welfare codes within their jurisdiction or pursuant to a tribal-state agreement.

(c) Grantees under this subpart may enhance their capabilities by utilizing ICWA funds as non-Federal matching shares in connection with funds provided under titles IV-B, IV-E and XX of the Social Security Act or other Federal programs which contribute to and promote the intent and purposes of the Act through the provision of comprehensive child and family services in coordination with other tribal, Federal, state, and local resources available for the same purpose.

(d) Program income resulting from the operation of programs under this subpart, such as day care operations, may be retained and used for purposes similar to those for which the grant was awarded.

§23.23 Tribal government application contents.

(a) The appropriate Regional Director shall, subject to the tribe's fulfillment of the mandatory application requirements and the availability of appropriated funds, make a grant to the tribal governing body of a tribe or consortium of tribes eligible to apply for a grant under this subpart.

(b) The following mandatory tribal application requirements must be submitted to the appropriate Agency Superintendent or Regional Director in accordance with the timeframe established in §23.21 (b) of this subpart:

(1) A current tribal resolution requesting a grant by the Indian tribe(s) to be served by the grant. If an applicant is applying for a grant benefiting more than one tribe (consortium), an authorizing resolution from each tribal government to be served must be included. The request must be in the form of a current tribal resolution by the tribal governing body and shall include the following information:

(i) The official name of tribe(s) applying for the grant and who will directly benefit from or receive services from the grant;

(ii) The proposed beginning and ending dates of the grant;

(iii) A provision stating that the resolution will remain in effect for the duration of the program or until the resolution expires or is rescinded; and

(iv) The signature of the authorized representative of the tribal government and the date thereof.

(2) A completed Application for Federal Assistance form, SF-424.

(3) A narrative needs assessment of the social problems or issues affecting the resident Indian population to be served; the geographic area(s) to be served; and estimated number of resident Indian families and/or persons to receive benefits or services from the program.

(4) A comprehensive developmental multi-year plan in narrative form describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include:

(i) The program goals and objectives, stated in measurable terms, to be achieved through the grant;

(ii) A narrative description of how Indian families and communities will benefit from the program; and

(iii) The methodology, including culturally defined approaches, and procedures by which the tribe(s) will accomplish the identified goals and objectives.

(5) An internal monitoring system to measure progress and accomplishments, and to assure that the quality and quantity of actual performance conforms to the requirements of the grant.

(6) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services.

(i) The plan must include proposed key personnel; their qualifications, training or experience relevant to the services to be provided; responsibilities; Indian preference criteria for employment; and position descriptions.

(ii) In accordance with 25 U.S.C. 3201 *et seq.* (Pub. L. 101-630), title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute. Grantees must initiate character and background investigations of said personnel prior to their actual employment, and complete the investigations in a timely manner.

(7) A program budget and budget narrative justification submitted on an annual basis for the amount of the award and supported by the proposed plan, appropriate program services and activities for the applicable grant year.

(8) Identification of any consultants and/or subgrantees the applicant proposes to employ; a description of the consultant and/or subgrantee services to be rendered; the qualifications and experience in performing the identified services; and the basis for the cost and amount to be paid for such services.

(9) A certification by a licensed accountant that the bookkeeping and accounting procedures which the tribe(s) uses or intends to use meet existing Federal standards for grant management and administration specified at §23.46.

(10) A system for managing property and recordkeeping which complies with subpart D of 43 CFR part 2 implementing the Privacy Act (5 U.S.C. 552a) and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant.

(11) A listing of equipment, facilities, and buildings necessary to carry out the grant program. Liability insurance coverage for buildings and their contents is recommended for grantees under this subpart.

(12) Pursuant to the Drug-Free Workplace Act of 1988, tribal programs shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) Continued annual funding of an ICWA program under this subpart shall be contingent upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation must be submitted together with an annual budget and budget narrative justification in accordance with paragraph (b)(7) of this section. Minimum standards for receiving a satisfactory evaluation shall include:

(1) The timely submission of all fiscal and programmatic reports;

(2) A narrative program report indicating work accomplished in accordance with the applicant's approved multi-year plan and, if applicable, a description of any modification in programs or activities to be funded in the next fiscal year; and

(3) The implementation of mutually determined corrective action measures, if applicable.

Subpart D—Grants to Off-Reservation Indian Organizations for Title II Indian Child and Family Service Programs

§23.31 Competitive off-reservation grant process.

(a) Grant application procedures and related information may be obtained from the Regional Director designated at §23.11 for processing ICWA notices for the state in which the applicant is located. Pre-award and ongoing technical assistance of off-reservation Indian organization grantees shall be provided in accordance with §23.42.

(b) Prior to the beginning of or during the applicable year(s) in which grants for off-reservation programs will be awarded competitively, the Assistant Secretary—Indian Affairs shall publish in the Federal Register an announcement of the grant application process for the year(s), including program priorities

or special considerations (if any), applicant eligibility criteria, the required application contents, the amount of available funding and evaluation criteria for off-reservation programs.

(c) Based on the announcement described in paragraph (b) of this section, an off-reservation applicant shall prepare a multi-year developmental application in accordance with §23.33 of this subpart. To be considered in the area competitive review and scoring process, a complete application must be received by the deadline announced in the Federal Register by the Regional Director designated at §23.11 for processing ICWA notices for the state in which the applicant is located.

(d) Eligibility requirements for off-reservation Indian organizations. The Secretary or his/her designee shall, contingent upon the availability of funds, make a multi-year grant under this subpart for an off-reservation program when officially requested by a resolution of the board of directors of the Indian organization applicant, upon the applicant's fulfillment of the mandatory application requirements and upon the applicant's successful competition pursuant to §23.33 of this subpart.

(e) A grant under this subpart for an off-reservation Indian organization shall be limited to the board of directors of the Indian organization which will administer the grant.

(f) Continued annual funding of a multi-year grant award to an off-reservation ICWA program under this subpart shall be contingent upon the grantee's fulfillment of the requirements delineated at §23.33 (e).

(g) Monitoring and program reporting requirements for grants awarded to off-reservation Indian organizations under this subpart are delineated at §§23.44 and 23.47.

§23.32 Purpose of off-reservation grants.

The Secretary or his/her designee is authorized to make grants to off-reservation Indian organizations to establish and operate off-reservation Indian child and family service programs for the purpose of stabilizing Indian families and tribes, preventing the breakup of Indian families and, in particular, to ensure that the permanent removal of an Indian child from the custody of his/her Indian parent or Indian custodian shall be a last resort. Child and family service programs may include, but are not limited to:

(a) A system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(b) The operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children with the goal of strengthening and stabilizing Indian families;

(c) Family assistance (including homemaker and home counselors), protective day care and afterschool care, employment support services, recreational activities, and respite care with the goal of strengthening Indian families and contributing toward family stability; and

(d) Guidance, legal representation and advice to Indian families involved in state child custody proceedings.

§23.33 Competitive off-reservation application contents and application selection criteria.

(a) An application for a competitive multi-year grant under this subpart shall be submitted to the appropriate Regional Director prior to or on the announced deadline date published in the Federal Register. The Regional Director shall certify the application contents pursuant to §23.34 and forward the application within five working days to the area review committee, composed of members designated by the Regional Director, for competitive review and action. Modifications and/or information received after the close of the application period, as announced in the Federal Register, shall not be reviewed or considered by the area review committee in the competitive process.

(b) Mandatory application requirements for Indian organization applicants shall include:

(1) An official request for an ICWA grant program from the organization's board of directors covering the duration of the proposed program;

(2) A completed Application for Federal Assistance form, SF 424;

(3) Written assurances that the organization meets the definition of Indian organization at §23.2;

(4) A copy of the organization's current Articles of Incorporation for the applicable grant years;

(5) Proof of the organization's nonprofit status;

(6) A copy of the organization's IRS tax exemption certificate and IRS employer identification number;

(7) Proof of liability insurance for the applicable grant years; and

(8) Current written assurances that the requirements of Circular A-128 for fiscal management, accounting, and recordkeeping are met.

(9) Pursuant to the Drug-Free Workplace Act of 1988, all grantees under this subpart shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) *Competitive application selection criteria.* The Regional Director or his/her designated representative shall select those proposals which will in his/her judgment best promote the proposes of the Act. Selection shall be made through the area review committee process in which each application will be scored individually and ranked according to score, taking into consideration the mandatory requirements as specified above and the following selection criteria:

(1) The degree to which the application reflects an understanding of the social problems or issues affecting the resident Indian client population which the applicant proposes to serve;

(2) Whether the applicant presents a narrative needs assessment, quantitative data and demographics of the client Indian population to be served;

(3) Estimates of the number of Indian people to receive benefits or services from the program based on available data;

(4) Program goals and objectives to be achieved through the grant;

(5) A comprehensive developmental multi-year narrative plan describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include a narrative description of the program; the program goals

and objectives, stated in measurable terms, to be achieved through the grant; and the methodology, including culturally defined approaches, and procedures by which the grantee will accomplish the identified goals and objectives;

(6) An internal monitoring system the grantee will use to measure progress and accomplishments, and to ensure that the quality and quantity of actual performance conforms to the requirements of the grant;

(7) Documentation of the relative accessibility which the Indian population to be served under a specific proposal already has to existing child and family service programs emphasizing the prevention of Indian family breakups, such as mandatory state services. Factors to be considered in determining accessibility include:

(i) Cultural barriers;

(ii) Discrimination against Indians;

(iii) Inability of potential Indian clientele to pay for services;

(iv) Technical barriers created by existing public or private programs;

(v) Availability of transportation to existing programs;

(vi) Distance between the Indian community to be served under the proposal and the nearest existing programs;

(vii) Quality of services provided to Indian clientele; and

(viii) Relevance of services provided to specific needs of the Indian clientele.

(8) If the proposed program duplicates existing Federal, state, or local child and family service programs emphasizing the prevention of Indian family breakups, proper and current documented evidence that repeated attempts to obtain services have been unsuccessful;

(9) Evidence of substantial support from the Indian community or communities to be served, including but not limited to:

(i) Tribal support evidenced by a tribal resolution or cooperative service agreements between the administrative bodies of the affected tribe(s) and the applicant for the duration of the grant period, or

(ii) Letters of support from social services organizations familiar with the applicant's past work experience;

(10) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services. The plan must include proposed key personnel, their qualifications, training or experience relevant to the services to be provided, responsibilities, Indian preference criteria for employment and position descriptions. In accordance with 25 U.S.C. 3201 *et seq.* (Pub. L. 101-630), title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute prior to their actual employment;

(11) The reasonableness and relevance of the estimated overall costs of the proposed program or services and their overall relation to the organization's funding base, activities, and mission;

(12) The degree to which the detailed annual budget and justification for the requested funds are consistent with, and clearly supported by, the proposed plan and by appropriate program services and activities for the applicable grant year;

(13) The applicant's identification of any consultants and/or subgrantees it proposes to employ; description of the services to be rendered; the qualifications and experience of said personnel, reflecting the requirements for performing the identified services; and the basis for the cost and the amount to be paid for such services;

(14) Certification by a licensed accountant that the bookkeeping and accounting procedures that the applicant uses or intends to use meet existing Federal standards for grant administration and management specified at §23.46;

(15) The compliance of property management and recordkeeping systems with subpart D of 43 CFR part 2 (the Privacy Act, 5 U.S.C. 552a), and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant;

(16) A description of the proposed facilities, equipment, and buildings necessary to carry out the grant activities; and

(17) Proof of liability insurance coverage for the applicable grant year(s).

(d) Two or more applications receiving the same competitive score will be prioritized in accordance with announcements made in the Federal Register pursuant to §23.31 (b) for the applicable year(s).

(e) Continued annual funding of a multi-year grant award to an off-reservation ICWA program under this subpart shall be contingent upon the availability of appropriated funds and upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation shall be submitted together with an annual budget and budget narrative justification in accordance with paragraph (c)(10) of this section. Minimum standards for receiving a satisfactory evaluation shall include the timely submission of all fiscal and programmatic reports; a narrative program report indicating work accomplished in accordance with the initial approved multi-year plan; and the implementation of mutually determined corrective action measures, if applicable.

§23.34 Review and decision on off-reservation applications by Regional Director.

(a) *Area office certification.* Upon receipt of an application for a grant by an off-reservation Indian organization at the area office, the Regional Director shall:

(1) Complete and sign the area office certification form. In completing the area certification form, the Regional Director shall assess and certify whether applications contain and meet all the application requirements specified at §23.33. Regional Directors shall be responsible for the completion of the area office certification forms for all applications submitted by off-reservation Indian organizations.

(2) Acknowledge receipt of the application to the applicant and advise the applicant of the disposition of the application within 10 days of receipt; and

(3) Transmit all applications within five working days of receipt to the area review committee for competitive review and subsequent approval or disapproval of the applications.

(b) *Area office competitive review and decision for off-reservation applications.* Upon receipt of an application for an off-reservation grant under this part requiring the approval of the Regional Director, the Regional Director shall:

(1) Establish and convene an area review committee, chaired by a person qualified by knowledge, training and experience in the delivery of Indian child and family services.

(2) Review the area office certification form required in paragraph (a) of this section.

(3) Review the application in accordance with the competitive review procedures prescribed in §23.33. An application shall not receive approval for funding under the area competitive review and scoring process unless a review of the application determines that it:

(i) Contains all the information required in §23.33 which must be received by the close of the application period. Modifications of the grant application received after the close of the application period shall not be considered in the competitive review process.

(ii) Receives at least the established minimum score in an area competitive review, using the application selection criteria and scoring process set out in §23.33. The minimum score shall be established by the Central Office prior to each application period and announced in the Federal Register for the applicable grants year(s).

(4) Approve or disapprove the application and promptly notify the applicant in writing of the approval or disapproval of the application. If the application is disapproved, the Regional Director shall include in the written notice the specific reasons therefore.

(c) The actual funding amounts for the initial grant year shall be subject to appropriations available nationwide and the continued funding of an approved off-reservation grant application under subpart D of this part shall be subject to available funds received by the respective area office for the applicable grant year. Initial funding decisions and subsequent decisions with respect to funding level amounts for all approved grant applications under this part shall be made by the Regional Director.

§23.35 Deadline for Central Office action.

Within 30 days of the receipt of grant reporting forms from the Regional Directors identifying approved and disapproved applications pursuant to subpart D of this part and recommended funding levels for approved applications, the Secretary or his/her designee shall process the Regional Directors' funding requests.

Subpart E—General and Uniform Grant Administration Provisions and Requirements

§23.41 Uniform grant administration provisions, requirements and applicability.

The general and uniform grant administration provisions and requirements specified at 25 CFR part 276 and under this subpart are applicable to all grants awarded to tribal governments and off-reservation

Indian organizations under this part, except to the extent inconsistent with an applicable Federal statute, regulation or OMB circular.

§23.42 Technical assistance.

(a) Pre-award and ongoing technical assistance may be requested by an Indian tribe or off-reservation Indian organization from the appropriate agency or area office to which the tribe or organization will be submitting an application for funds under subparts C and D of this part. A request for pre-award technical assistance by an off-reservation Indian organization must be received by the Regional Director designated at §23.11 for the state in which the applicant is located no later than 10 days prior to the application deadline to assure sufficient time for area response.

(b) Pre-award and ongoing technical assistance may be provided by the appropriate BIA agency or area office for purposes of program planning and design, assistance in establishing internal program monitoring and evaluation criteria for ongoing grant administration and management, and for other appropriate assistance requested.

(c) The area social services staff shall provide technical assistance to grantees upon receipt of an authorized request from the grantee or when review of the grantee's quarterly performance reports shows that:

(1) An ICWA program is yielding results that are or will be detrimental to the welfare of the intended Indian beneficiaries of the program;

(2) A program has substantially failed to implement its goals and objectives;

(3) There are serious irregularities in the fiscal management of the grant; or

(4) The grantee is otherwise deficient in its program performance.

(5) Upon receiving an authorized request from the grantee, the area social services staff and/or grants officer shall provide the necessary technical assistance to arrive at mutually determined corrective action measures and their actual implementation, if necessary, and the timeframes within which said corrective actions will be implemented.

§23.43 Authority for grant approval and execution.

(a) *Tribal government programs.* The appropriate Agency Superintendent or Regional Director may approve a grant application and its subsequent execution under subpart C when the intent, purpose and scope of the application pertains solely to reservations located within the service area jurisdiction of the agency or area office.

(b) *Off-reservation programs.* The appropriate Regional Director may approve a grant application and its subsequent execution under subpart D when the intent, purpose and scope of the grant proposal pertains to off-reservation Indian service populations or programs.

§23.44 Grant administration and monitoring.

All grantees under this part shall be responsible for managing day-to-day program operations to ensure that program performance goals are being achieved and to ensure compliance with the provisions of the grant award document and other applicable Federal requirements. Unless delegated to the Agency

Superintendent, appropriate area office personnel designated by the Regional Director shall be responsible for all grant program and fiscal monitoring responsibilities.

§23.45 Subgrants.

A tribal government grantee may make a subgrant under subpart C of this part, provided that such subgrants are for the purpose for which the grant was made and that the grantee retains administrative and financial responsibility over the activity and the funds.

§23.46 Financial management, internal and external controls and other assurances.

Grantee financial management systems shall comply with the following standards for accurate, current and complete disclosure of financial activities.

(a) OMB Circular A-87 (Cost principles for state and local governments and federally recognized Indian tribal governments).

(b) OMB Circular A-102 (Common rule 43 CFR part 12).

(c) OMB Circular A-128 (Single Audit Act).

(d) OMB Circular A-110 or 122 (Cost principles for non-profit organizations and tribal organizations, where applicable).

(e) *Internal control.* Effective control and accountability must be maintained for all grants. Grantees must adequately safeguard any property and must ensure that it is used solely for authorized purposes.

(f) *Budget control.* Actual expenditures must be compared with budgeted amounts for the grant. Financial information must be related to program performance requirements.

(g) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, grant documents, or other information required by the grantee's financial management system. The Secretary or his/her designee may review the adequacy of the financial management system of an Indian tribe(s) or off-reservation Indian organization applying for a grant under this part.

(h) Pursuant to 18 U.S.C. 641, whoever embezzles, steals, purloins, or knowingly converts to his or her use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or whoever receives, conceals, or retains the same with intent to convert it to his or her use or gain, knowing it to have been embezzled, stolen, purloined, or converted shall be fined not more than $10,000 or imprisoned not more than 10 years, or both; but if the value of such property does not exceed the sum of $100, he or she shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§23.47 Reports and availability of information to Indians.

(a) Any tribal government or off-reservation Indian organization receiving a grant under this part shall make general programmatic information and reports concerning that grant available to the Indian people it serves or represents. Access to this information may be requested in writing and shall be made

available within 10 days of receipt of the request. Except as required by title IV of Pub. L. 101-630, the Indian Child Protection and Family Violence Prevention Act, grantees shall hold confidential all information obtained from persons receiving services from the program, and shall not release such information without the individual's written consent. Information may be disclosed in a manner which does not identify or lead to the identification of particular individuals.

(b) Grantees shall submit Standard Form 269 or 269A on a quarterly and an annual basis to report their status of funds by the dates specified in the grant award document.

(c) Grantees shall furnish and submit the following written quarterly and annual program reports by the dates specified in the award document:

(1) Quarterly and annual statistical and narrative program performance reports which shall include, but need not be limited to, the following;

(i) A summary of actual accomplishments and significant activities as related to program objectives established for the grant period;

(ii) The grantee's evaluation of program performance using the internal monitoring system submitted in their application;

(iii) Reports on all significant ICWA direct service grant activities including but not limited to the following information:

(A) Significant title II activities;

(B) Data reflecting numbers of individuals referred for out-of-home placements, number of individuals benefiting from title II services and types of services provided, and

(C) Information and referral activities.

(iv) Child abuse and neglect statistical reports and related information as required by 25 U.S.C. 2434, Pub. L. 99-570, the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986;

(v) A summary of problems encountered or reasons for not meeting established objectives;

(vi) Any deliverable or product required in the grant; and

(vii) Additional pertinent information when appropriate.

(2) The BIA may negotiate for the provision of other grant-related reports not previously identified.

(d) Events may occur between scheduled performance reporting dates which have significant impact on the grant-supported activity. In such cases, the grantee must inform the awarding agency as soon as problems, delays, adverse conditions, or serious incidents giving rise to liability become known and which will materially impair its ability to meet the objectives of the grant.

§23.48 Matching shares and agreements.

(a) Grant funds provided to Indian tribes under subpart C of this part may be used as non-Federal matching shares in connection with funds provided under titles IV-B, IV-E and XX of the Social Security

Act or such other Federal programs which contribute to and promote the purposes of the Act as specified in §§23.3 and 23.22 (25 U.S.C. 1931).

(b) Pursuant to 25 U.S.C. 1933, in furtherance of the establishment, operation, and funding of programs funded under subparts C and D of this part, the Secretary may enter into agreements with the Secretary of Health and Human Services. The latter Secretary is authorized by the Act to use funds appropriated for the Department of Health and Human Services for programs similar to those funded under subparts C and D of this part (25 U.S.C. 1931 and 1932), provided that authority to make payment pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

§23.49 Fair and uniform provision of services.

(a) Grants awarded under this part shall include provisions assuring compliance with the Indian Civil Rights Act; prohibiting discriminatory distinctions among eligible Indian beneficiaries; and assuring the fair and uniform provision by the grantees of the services and assistance they provide to eligible Indian beneficiaries under such grants. Such procedures must include criteria by which eligible Indian beneficiaries will receive services, recordkeeping mechanisms adequate to verify the fairness and uniformity of services in cases of formal complaints, and an explanation of what rights will be afforded an individual pending the resolution of a complaint.

(b) Indian beneficiaries of the services to be rendered under a grant shall be afforded access to administrative or judicial bodies empowered to adjudicate complaints, claims, or grievances brought by such Indian beneficiaries against the grantee arising out of the performance of the grant.

§23.50 Service eligibility.

(a) Tribal government Indian child and family service programs. Any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in §23.2 is eligible for services provided under 25 U.S.C. 1931 of the Act. Tribal membership status shall be determined by tribal law, ordinance, or custom. The tribe may, under subpart C, extend services to nontribal family members related by marriage to tribal members, provided such services promote the intent and purposes of the Act. A tribe may also, within available resources, extend services under this part to individuals who are members of, or are eligible for membership in other Indian tribes, and who reside within the tribe's designated service area.

(b) Off-reservation Indian child and family service programs and agreements with the Secretary of Health and Human Services pursuant to 25 U.S.C. 1933. For purposes of eligibility for services provided under 25 U.S.C. 1932 and 1933 of the Act, any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in §23.2, or the definition of Indian as defined in 25 U.S.C. 1603(c), shall be eligible for services. Tribal membership status shall be determined by tribal law, ordinance, or custom.

§23.51 Grant carry-over authority.

Unless restricted by appropriation, and contingent upon satisfactory program evaluations from the appropriate area or agency office for an existing program, grantees are authorized to carry over unliquidated grant funds which remain at the end of a budget period. Such funds may be carried over

for a maximum period of two years beyond the initial grant funding period and must be utilized only for the intent, purpose and scope of the original grant. These carry-over grant funds shall not be reprogrammed into other appropriation activities or subactivities. Funds carried over into another fiscal year will be added to the grantee's new fiscal year funding amount.

§23.52 Grant suspension.

(a) When a grantee has materially failed to comply and remains out of compliance with the terms and conditions of the grant, the grants officer may, after reasonable notice to the grantee and the provision of requested technical assistance, suspend the grant. The notice preceding the suspension shall include the effective date of the suspension, the corrective measures necessary for reinstatement of the grant and, if there is no immediate threat to safety, a reasonable timeframe for corrective action prior to actual suspension.

(b) No obligation incurred by the grantee during the period of suspension shall be allowable under the suspended grant, except that the grants officer may at his/her discretion allow necessary and proper costs which the grantee could not reasonably avoid during the period of suspension if such costs would otherwise be allowable under the applicable cost principles.

(c) Appropriate adjustments to the payments under the suspended grant will be made either by withholding the payments or by not allowing the grantee credit for disbursements which the grantee may make in liquidation of unauthorized obligations the grantee incurs during the period of suspension.

(d) Suspension shall remain in effect until the grantee has taken corrective action to the satisfaction of the grants officer, or given assurances satisfactory to the grants officer that corrective action will be taken, or until the grants officer cancels the grant.

§23.53 Cancellation.

(a) The grants officer may cancel any grant, in whole or in part, at any time before the date of completion whenever it is determined that the grantee has:

(1) Materially failed to comply with the terms and conditions of the grant;

(2) Violated the rights as specified in §23.49 or endangered the health, safety, or welfare of any person; or

(3) Been grossly negligent in, or has mismanaged the handling or use of funds provided under the grant.

(b) When it appears that cancellation of the grant will become necessary, the grants officer shall promptly notify the grantee in writing of this possibility. This written notice shall advise the grantee of the reason for the possible cancellation and the corrective action necessary to avoid cancellation. The grants officer shall also offer, and shall provide, if requested by the grantee, any technical assistance which may be required to effect the corrective action. The grantee shall have 60 days in which to effect this corrective action before the grants officer provides notice of intent to cancel the grant as provided for in paragraph (c) of this section.

(c) Upon deciding to cancel for cause, the grants officer shall promptly notify the grantee in writing of that decision, the reason for the cancellation, and the effective date. The Regional Director or his/her designated official shall also provide a hearing for the grantee before cancellation. However, the grants

officer may immediately cancel the grant, upon notice to the grantee, if the grants officer determines that continuance of the grant poses an immediate threat to safety. In this event, the Regional Director or his/her designated official shall provide a hearing for the grantee within 10 days of the cancellation.

(d) The hearing referred to in paragraph (c) of this section shall be conducted as follows:

(1) The grantee affected shall be notified, in writing, at least 10 days before the hearing. The notice should give the date, time, place, and purpose of the hearing.

(2) A written record of the hearing shall be made. The record shall include written statements submitted at the hearing or within five days following the hearing.

Subpart F—Appeals

§23.61 Appeals from decision or action by Agency Superintendent, Regional Director or Grants Officer.

A grantee or prospective applicant may appeal any decision made or action taken by the Agency Superintendent, Regional Director, or grants officer under subpart C or E of this part. Such an appeal shall be made to the Assistant Secretary who shall consider the appeal in accordance with 25 CFR 2.20 (c) through (e). Appeal procedures shall be as set out in part 2 of this chapter.

§23.62 Appeals from decision or action by Regional Director under subpart D.

A grantee or applicant may appeal any decision made or action taken by the Regional Director under subpart D that is alleged to be in violation of the U.S. Constitution, Federal statutes, or the regulations of this part. These appeals shall be filed with the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (e); 43 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.340. However, an applicant may not appeal a score assigned to its application or the amount of grant funds awarded.

§23.63 Appeals from inaction of official.

A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, may make the official's inaction the subject of an appeal under part 2 of this chapter.

Subpart G—Administrative Provisions

§23.71 Recordkeeping and information availability.

(a) The Division of Human Services, Bureau of Indian Affairs (BIA), is authorized to receive all information and to maintain a central file on all State Indian adoptions. This file is confidential and only designated persons may have access to it.

(b) Upon the request of an adopted Indian who has reached age 18, the adoptive or foster parents of an Indian child, or an Indian Tribe, BIA will disclose such information as may be necessary for purposes of Tribal enrollment or determining any rights or benefits associated with Tribal membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, BIA must certify to the Indian child's Tribe, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment under the criteria established by such Tribe.

(c) BIA will ensure that the confidentiality of this information is maintained and that the information is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.

[81 FR 38867, June 14, 2016]

Subpart H—Assistance to State Courts

§23.81 Assistance in identifying witnesses.

Upon the request of a party in an involuntary Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying qualified expert witnesses. Such requests for assistance shall be sent to the Regional Director designated in §23.11(c). The BIA is not obligated to pay for the services of such expert witnesses.

§23.82 Assistance in identifying language interpreters.

Upon the request of a party in an Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying language interpreters. Such requests for assistance should be sent to the Regional Director designated in §23.11(c). The BIA is not obligated to pay for the services of such language interpreters.

§23.83 Assistance in locating biological parents of Indian child after termination of adoption.

Upon the request of a child placement agency, the court or an Indian tribe, the Secretary or his/her designee shall assist in locating the biological parents or prior Indian custodians of an adopted Indian child whose adoption has been terminated pursuant to 25 U.S.C. 1914. Such requests for assistance should be sent to the Regional Director designated in §23.11(c).

Subpart I—Indian Child Welfare Act Proceedings

Source: 81 FR 38867, June 14, 2016, unless otherwise noted.

General Provisions

§23.101 What is the purpose of this subpart?

The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

§23.102 What terms do I need to know?

The following terms and their definitions apply to this subpart. All other terms have the meanings assigned in §23.2.

Agency means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements.

Indian organization means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a Tribe, or a majority of whose members are Indians.

§23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of “Indian child,” then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

§23.104 What provisions of this subpart apply to each type of child-custody proceeding?

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in §23.103(a):

Section	**Type of proceeding**
23.101-23.106 (General Provisions)	Emergency, Involuntary, Voluntary.

Pretrial Requirements:	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?)	Emergency, Involuntary, Voluntary.
23.108 (Who makes the determination as to whether a child is a member whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?)	Emergency, Involuntary, Voluntary.
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?)	Emergency, Involuntary, Voluntary.
23.110 (When must a State court dismiss an action?)	Involuntary, Voluntary.
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?)	Involuntary (foster-care placement and termination of parental rights).
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and termination of parental rights).
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency.
23.114 (What are the requirements for determining improper removal?)	Involuntary.
Petitions to Transfer to Tribal Court:	
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).

23.118 (How is a determination of “good cause” to deny transfer made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
Adjudication of Involuntary Proceedings:	
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and termination of parental rights).
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and termination of parental rights).
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement and termination of parental rights).
23.123 Reserved	N/A.
Voluntary Proceedings:	
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary.
23.125 (How is consent obtained?)	Voluntary.
23.126 (What information must a consent document contain?)	Voluntary.
23.127 (How is withdrawal of consent to a foster-care placement achieved?)	Voluntary.
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary.
Dispositions:	
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary.
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary.

23.131 (What placement preferences apply in foster-care or preadoptive placements?)	Involuntary, Voluntary.
23.132 (How is a determination of “good cause” to depart from the placement preferences made?)	Involuntary, Voluntary.
Access:	
23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary.
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary.
23.135 Reserved.	N/A.
Post-Trial Rights & Responsibilities:	
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?)	Involuntary (if consent given under threat of removal), voluntary.
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent it involved a specified violation), involuntary, voluntary.
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary.
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary.
Recordkeeping:	
23.140 (What information must States furnish to the Bureau of Indian Affairs?)	Involuntary, Voluntary.
23.141 (What records must the State maintain?)	Involuntary, Voluntary.
23.142 (How does the Paperwork Reduction Act affect this subpart?)	Emergency, Involuntary, Voluntary.
Effective Date:	

23.143 (How does this subpart apply to pending proceedings?)	Emergency, Involuntary, Voluntary.
Severability:	
23.144 (What happens if some portion of part is held to be invalid by a court of competent jurisdiction?)	Emergency, Involuntary, Voluntary.

Note: For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

§23.105 How do I contact a Tribe under the regulations in this subpart?

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its Web site at *www.bia.gov.*

(b) For a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to be directed to the appropriate office or individual.

(c) If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, DC (see *www.bia.gov*).

§23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

Pretrial Requirements

§23.107 How should a State court determine if there is reason to know the child is an Indian child?

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an “Indian child,” the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the

child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

§23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?

(a) The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.

(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

(c) The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an "Indian

child." An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation.

§23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

(a) If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe.

(b) If the Indian child meets the definition of "Indian child" through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of "Indian child" through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

§23.110 When must a State court dismiss an action?

Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and §23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:

(a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive

jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

§23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental-rights proceeding is an Indian child, the court must ensure that:

(1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and

(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to:

(1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (*see* §23.105 for information on how to contact a Tribe);

(2) The child's parents; and

(3) If applicable, the child's Indian custodian.

(c) Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

(d) Notice must be in clear and understandable language and include the following:

(1) The child's name, birthdate, and birthplace;

(2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;

(3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;

(4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);

(5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;

(6) Statements setting out:

(i) The name of the petitioner and the name and address of petitioner's attorney;

(ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.

(iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.

(iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.

(v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.

(vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and §23.115.

(vii) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.

(viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.

(ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

(e) If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see *www.bia.gov*). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in §23.112, and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

§23.112 What time limits and extensions apply?

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and §23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows:

(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111;

(2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111;

(3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the child-custody proceeding as provided in 25 U.S.C. 1912(a) and §23.111; and

(4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and §23.111 may also be available under State law or pursuant to extensions granted by the court.

§23.113 What are the standards for emergency proceedings involving an Indian child?

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;

(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or

(3) Restoring the child to the parent or Indian custodian.

(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child;

(2) The name and address of the child's parents and Indian custodians, if any;

(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;

(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see *www.bia.gov*);

(5) The residence and the domicile of the Indian child;

(6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;

(7) The Tribal affiliation of the child and of the parents or Indian custodians;

(8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;

(9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and

(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;

(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and

(3) It has not been possible to initiate a “child-custody proceeding” as defined in §23.2.

§23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

Petitions To Transfer to Tribal Court

§23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

§23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

§23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

(a) Either parent objects to such transfer;

(b) The Tribal court declines the transfer; or

(c) Good cause exists for denying the transfer.

§23.118 How is a determination of “good cause” to deny transfer made?

(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.

(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider:

(1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;

(2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;

(3) Whether transfer could affect the placement of the child;

(4) The Indian child's cultural connections with the Tribe or its reservation; or

(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

§23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

Adjudication of Involuntary Proceedings

§23.120 How does the State court ensure that active efforts have been made?

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail in the record.

§23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of

the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

§23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

§23.123 [Reserved]

Voluntary Proceedings

§23.124 What actions must a State court undertake in voluntary proceedings?

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in §23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in §23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

(c) State courts must ensure that the placement for the Indian child complies with §§23.129-23.132.

§23.125 How is consent obtained?

(a) A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain to the parent or Indian custodian:

(1) The terms and consequences of the consent in detail; and

(2) The following limitations, applicable to the type of child-custody proceeding for which consent is given, on withdrawal of consent:

(i) For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned; or

(ii) For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or

(iii) For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.

(c) The court must certify that the terms and consequences of the consent were explained on the record in detail in English (or the language of the parent or Indian custodian, if English is not the primary language) and were fully understood by the parent or Indian custodian.

(d) Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(e) A consent given prior to, or within 10 days after, the birth of an Indian child is not valid.

§23.126 What information must a consent document contain?

(a) If there are any conditions to the consent, the written consent must clearly set out the conditions.

(b) A written consent to foster-care placement should contain, in addition to the information specified in paragraph (a) of this section, the name and birthdate of the Indian child; the name of the Indian child's Tribe; the Tribal enrollment number for the parent and for the Indian child, where known, or some other indication of the child's membership in the Tribe; the name, address, and other identifying information of the consenting parent or Indian custodian; the name and address of the person or entity, if any, who arranged the placement; and the name and address of the prospective foster parents, if known at the time.

§23.127 How is withdrawal of consent to a foster-care placement achieved?

(a) The parent or Indian custodian may withdraw consent to voluntary foster-care placement at any time.

(b) To withdraw consent, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(c) When a parent or Indian custodian withdraws consent to a voluntary foster-care placement, the court must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.

§23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?

(a) A parent may withdraw consent to voluntary termination of parental rights at any time prior to the entry of a final decree of termination.

(b) A parent or Indian custodian may withdraw consent to voluntary adoption at any time prior to the entry of a final decree of adoption.

(c) To withdraw consent prior to the entry of a final decree of adoption, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(d) The court in which the withdrawal of consent is filed must promptly notify the person or entity who arranged any voluntary preadoptive or adoptive placement of such filing, and the Indian child must be returned to the parent or Indian custodian as soon as practicable.

Dispositions

§23.129 When do the placement preferences apply?

(a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in §23.130 and §23.131 apply.

(b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.

(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under §23.132 exists to not apply those placement preferences.

§23.130 What placement preferences apply in adoptive placements?

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) Other members of the Indian child's Tribe; or

(3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

§23.131 What placement preferences apply in foster-care or preadoptive placements?

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that:

(1) Most approximates a family, taking into consideration sibling attachment;

(2) Allows the Indian child's special needs (if any) to be met; and

(3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;

(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

§23.132 How is a determination of "good cause" to depart from the placement preferences made?

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

(1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) The presence of a sibling attachment that can be maintained only through a particular placement;

(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must

conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Access

§23.133 Should courts allow participation by alternative methods?

If it possesses the capability, the court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

§23.134 Who has access to reports and records during a proceeding?

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

§23.135 [Reserved]

Post-Trial Rights & Responsibilities

§23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, the State court may invalidate the voluntary adoption upon finding that the parent's consent was obtained by fraud or duress.

(b) Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition.

(c) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the final decree of adoption, order the consent revoked, and order that the child be returned to the parent.

§23.137 Who can petition to invalidate an action for certain ICWA violations?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster-care placement or termination of parental rights under state law where it is alleged that 25 U.S.C. 1911, 1912, or 1913 has been violated:

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's Tribe.

(b) Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.

§23.138 What are the rights to information about adoptees' Tribal affiliations?

Upon application by an Indian who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree of adoption must inform such individual of the Tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

§23.139 Must notice be given of a change in an adopted Indian child's status?

(a) If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe whenever:

(1) A final decree of adoption of the Indian child has been vacated or set aside; or

(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child.

(b) The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court.

(1) Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.

(2) The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained in detail in English (or the language of the parent or Indian custodian, if English is not the primary language), and were fully understood by the parent or Indian custodian.

(3) Where confidentiality is requested or indicated, execution of the waiver need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(4) The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.

(5) A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation.

Recordkeeping

§23.140 What information must States furnish to the Bureau of Indian Affairs?

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW, Mail Stop 3645 MIB, Washington, DC 20240, along with the following information, in an envelope marked “Confidential”:

(1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;

(2) Names and addresses of the biological parents;

(3) Names and addresses of the adoptive parents;

(4) Name and contact information for any agency having files or information relating to the adoption;

(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and

(6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

(b) If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in paragraph (a) of this section, the State courts in that State need not fulfill those same duties.

[59 FR 2256, Jan. 13, 1994, as amended at 83 FR 55268, Nov. 5, 2018]

§23.141 What records must the State maintain?

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

§23.142 How does the Paperwork Reduction Act affect this subpart?

The collections of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076-0186. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number. Send comments regarding this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer—Indian Affairs, 1849 C Street NW., Washington, DC 20240.

Effective Date

§23.143 How does this subpart apply to pending proceedings?

None of the provisions of this subpart affects a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement that was initiated prior to December 12, 2016, but the provisions of this subpart apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

Severability

§23.144 What happens if some portion of this part is held to be invalid by a court of competent jurisdiction?

If any portion of this part is determined to be invalid by a court of competent jurisdiction, the other portions of the part remain in effect. For example, the Department has considered separately whether the provisions of this part apply to involuntary and voluntary proceedings; thus, if a particular provision is held to be invalid as to one type of proceeding, it is the Department's intent that it remains valid as to the other type of proceeding.

Guidelines for Implementing the Indian Child Welfare Act

December 2016

U.S. Department of the Interior
Office of the Assistant Secretary – Indian Affairs
Bureau of Indian Affairs

The Bureau of Indian Affairs Guidelines explain the purpose of the Guidelines as follows:

> These guidelines are intended to assist those involved in child custody proceedings in understanding and uniformly applying the Indian Child Welfare Act (ICWA) and U.S. Department of the Interior (Department) regulations (also referred to as a "rule").
>
> While not imposing binding requirements, these guidelines provide a reference and resource for all parties involved in child custody proceedings involving Indian children. These guidelines explain the statute and regulations and also provide examples of best practices for the implementation of the statute, with the goal of encouraging greater uniformity in the application of ICWA. These guidelines replace the 1979 and 2015 versions of the Department's guidelines.
>
> "Reader's Tip: Under each heading of these guidelines is a regulatory provision (if there is one) and then guidelines to provide guidance, recommended practices, and suggestions for implementation. The text of the regulation is included as part of these guidelines for ease of reference and also because it reflects the Department's guidance on ICWA's requirements.

Because the Guidelines for Implementing the Indian Child Welfare Act is a lengthy document, only the Table of Contents is included in these appendices as a convenience to orient the reader to the information addressed in the Guidelines.

The Guidelines may be accessed on the Bureau of Indian Affairs webpage at:
https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf

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(Listed alphabetically by subject as some subjects appear in multiple sections.)

Active Efforts: §224.1 (f); §306 (f)(4); §319 (f)(2); §361(e); §361.7; §366(a)(1)(B) [document at each

status review]; §366.26(c)(2)(B) [no termination of parental rights without a showing of active efforts]

Agreements with tribes: §10553.1

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Detention: §309(a)(3); §315 [hearing under 319 considered an emergency removal]; §319(b), (d), (e) &(i); §319.4 [ex parte request for return when emergency has ended]; §11462.022 [agency must makeactive efforts to comply with placement preferences upon detention when there is reason to believe child is an Indian child]

Due diligence to work with tribes: §224.2 (g) §224.2 (i)(2)

Emergency proceeding: §224.1 (l); §305.5 (g); §306 (c); §315; §319 (b), (d), (e) & (i); §319.4 [Ex parterequest for return when emergency has ended]; §361.31(b);

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Indian child's tribe: §224.1 (e)

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Inquiry, initial: §224.2 (a), (b) & (c); §306 (b);

Intervention: §224.4

Invalidation: §224 (e)

Involuntary: §224.1 (n); §361.7;

Jurisdiction: §305.5

Membership: §224.2 (h)

Multidisciplinary team: §18964(b) [information from tribe]

Notice: §224.3;

Notify: §306(d)

Permanency: §366.24 [Tribal Customary Adoption]; §366.26(b)(2)[Tribal customary adoption];§366.26(c)(1)(A)[For Indian child "relative" includes extended family member under ICWA];§366.26(c)(1)(B)(vi) [compelling reasons not to terminate parental rights and to choose an alternative permanent plan for an Indian child]

Placement Preferences: §224 (a)(1); §224 (b); §309 (d) & (e); §319 (h) & (i); §361.2(e)(6); §361.31;§11391 [for purposes of kin-gap assistance, relative, includes a member of the child's tribe and an Indian custodian]; §11462.022 [agency must try to place within preferences upon detention when reason to know]; §16504.6 [Tribe may make a criminal exemption request directly to CDSS or to county]

Qualified Expert Witness: §224.6; §352 (b); §354; §361.7 (c); §366.26(c)(2)(B) [testimony required to terminate parental rights to an Indian child]

Reason to believe: §224.2 (e);

Reason to know: §224.2 (d), (f), (g), (i)

Removal (standards): §224.6 (b); §309 (a)(3); §361.7 (c);

Transfer: §305.5; §306(d); §381 [must get priority on court calendar]; §827.15 [case file and materialsthat must be transferred to tribal court];

Tribal Customary Adoption: §366.24; §366.26(e)(2)-(3);

Tribally Approved home: §10553.12

Unrecognized tribes: §306.6

Voluntary (relinquishment or placement): §224.1 (n), (q); §361(b)(4); §16507.4(b)(3) [voluntary relinquishment of Indian child must comply with ICWA];

Judicial Council of California
INDEX of ICWA Rules and Forms

PRACTICE TIP: The California Rules of Court are a useful resource for orienting the practitioner to how ICWA applies to California juvenile proceedings in that they set forth in a focused presentation the requirements of state and federal law as an Indian child moves through the state court process.

To navigate to rules and forms: Search "CA Courts" → select CA Courts Home www.courts.ca.gov → Forms and Rules. (On small screens it may be necessary to click a small index icon in the upper left for a drop-down of available taps, which includes Forms & Rules)

ICWA-RELATED CALIFORNIA RULES OF COURT
https://www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_480

- Rule 5.480. Application (Fam. Code, §§ 170, 177, 3041; Prob. Code, § 1459.5; Welf. & Inst. Code, §§ 224, 224.1)
- Rule 5.481. Inquiry and notice (Fam. Code, §§ 177(a), 180; Prob. Code, §§ 1459.5(b), 1460.2; Welf. & Inst. Code, §§ 224.2, 224.3)
- Rule 5.482. Proceedings after notice (Fam. Code, §§ 177(a), 180(d), (e); Prob. Code, §§ 1459.5(b), 1460.2(d), (e); Welf. & Inst. Code, §§ 224.2(c), (d); 25 U.S.C. § 1916(b))
- Rule 5.483. Transfer of case (Fam. Code, § 177(a); Prob. Code, § 1459.5(b); Welf. & Inst. Code, § 305.5; Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584 (Nov. 26, 1979) Bureau of Indian Affairs Guideline C)
- Rule 5.484. Placement of an Indian child (Fam. Code, § 177(a); Prob. Code, § 1459.5(b); Welf. & Inst. Code, §§ 361, 361.31, 361.7(c))
- Rule 5.485. Termination of parental rights (Fam. Code, § 7892.5; Welf. & Inst. Code, §§ 361.7, 366.26(c)(2)(B))
- Rule 5.486. Petition to invalidate orders (Fam. Code, § 175(e); Prob. Code, § 1459(e); Welf. & Inst. Code, § 224(e))
- Rule 5.487. Adoption record keeping (Fam. Code, § 9208)
- Rule 5.534(i). General Provisions All Proceedings - Tribal Representatives
- Rule 5.690. General conduct of disposition hearing
- Rule 5.785. General conduct of hearing
- Rule 7.1015. Indian Child Welfare Act in guardianship and certain conservatorship proceedings (Prob. Code, §§ 1459.5, 1460.2)

ICWA-RELATED JUDICIAL COUNCIL FORMS
https://www.courts.ca.gov/forms.htm?filter=ICW

Sample Cover Sheet ICWA-10(A): The ICWA-10(A) Indian Child Inquiry Attachment form is not designed as a fillable document. However, there may be situations when it will be advisable to file a supplemental ICWA-10(A) form when new information is obtained following the filing of the

Petition. The Sample Cover Sheet has been developed for those situations in which a party wishes to file a supplemental ICWA-10(A) to document further inquiry and information on Indian status. This document is for convenience and reference only. It is not a mandatory or approved Judicial Council form.

**Forms marked with an asterisk are adopted for mandatory use by all courts.*

Form Name	Description
ICWA-005-INFO	Information Sheet on Indian Child Inquiry Attachment and Notice of Child Custody Proceeding for Indian Child
ICWA-005-INFO S	Information Sheet on Indian Child Inquiry Attachment and Notice of Child Custody Proceeding for Indian Child (Spanish)
ICWA-010(A)*	Indian Child Inquiry Attachment
ICWA-010(A) S	Indian Child Inquiry Attachment (Spanish)
ICWA-020*	Parental Notification of Indian Status
ICWA-020 S	Parental Notification of Indian Status (Spanish)
ICWA-030*	Notice of Child Custody Proceeding for Indian Child
ICWA-030 S	Notice of Child Custody Proceeding for Indian Child (Spanish)
ICWA-030(A)	Attachment to Notice of Child Custody Proceeding for Indian Child (Indian Child Welfare Act)
ICWA-030(A) S	Attachment to Notice of Child Custody Proceeding for Indian Child (Indian Child Welfare Act) (Spanish)
ICWA-040	Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child
ICWA-050	Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction

ICWA-060	Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction
ADOPT-220*	Adoption of Indian Child
ADOPT-225*	Parent of Indian Child Agrees to End Parental Rights

2020 ICWA-related California Rules of Court

Rule 5.480. Application[1]

This chapter addressing the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) as codified in various sections of the Family Code, Probate Code, and Welfare and Institutions Codes, applies to most proceedings involving Indian children that may result in an involuntary foster care placement; guardianship or conservatorship placement; custody placement under Family Code section 3041; declaration freeing a child from the custody and control of one or both parents; termination of parental rights; preadoptive placement; or adoptive placement. This chapter applies to:

(1) Proceedings under Welfare and Institutions Code section 300 et seq.;

(2) Proceedings under Welfare and Institutions Code sections 601 and 602 et seq., whenever the child is either in foster care or at risk of entering foster care. In these proceedings, inquiry is required in accordance with rule 5.481(a). The other requirements of this chapter contained in rules 5.481 through 5.487 apply only if:

(A) The court's jurisdiction is based on conduct that would not be criminal if the child were 18 years of age or over;

(B) The court has found that placement outside the home of the parent or legal guardian is based entirely on harmful conditions within the child's home. Without a specific finding, it is presumed that placement outside the home is based at least in part on the child's criminal conduct, and this chapter shall not apply; or

(C) The court is setting a hearing to terminate parental rights of the child's parents.

(3) Proceedings under Family Code section 3041;

(4) Proceedings under the Family Code resulting in adoption or termination of parental rights; and

(5) Proceedings listed in Probate Code section 1459.5 and rule 7.1015.

This chapter does not apply to voluntary foster care and guardianship placements where the child can be returned to the parent or Indian custodian on demand.

Rule 5.480 amended effective January 1, 2020; adopted effective January 1, 2008; previously amended effective January 1, 2013, and July 1, 2003.

Rule 5.481. Inquiry and notice

(a) Inquiry

The court, court-connected investigator, and party seeking a foster-care placement, guardianship, conservatorship, custody placement under Family Code section 3041, declaration freeing a child from the custody or control of one or both parents, termination of parental rights, preadoptive placement, or adoption have an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all proceedings identified in rule 5.480. The court, court-connected investigator, and party include the county welfare department, probation department, licensed adoption agency, adoption service provider, investigator, petitioner, appointed guardian or conservator of the person, and appointed fiduciary.

[1] Rule headings are live links to the California Rules of Court posted on the Callifornia Courts website, where all court rules and forms can be accessed. https://www.courts.ca.gov/formsrules.htm

(1) The party seeking a foster-care placement, guardianship, conservatorship, custody placement under Family Code section 3041, declaration freeing a child from the custody or control of one or both parents, termination of parental rights, preadoptive placement, or adoption must ask the child, if the child is old enough, and the parents, Indian custodian, or legal guardians, extended family members, others who have an interest in the child, and where applicable the party reporting child abuse or neglect, whether the child is or may be an Indian child and whether the residence or domicile of the child, the parents, or Indian custodian is on a reservation or in an Alaska Native village, and must complete the *Indian Child Inquiry Attachment* (form ICWA-010(A)) and attach it to the petition unless the party is filing a subsequent petition, and there is no new information.

(2) At the first appearance by a parent, Indian custodian, or guardian, and all other participants in any dependency case; or in juvenile wardship proceedings in which the child is at risk of entering foster care or is in foster care; or at the initiation of any guardianship, conservatorship, proceeding for custody under Family Code section 3041, proceeding to terminate parental rights, proceeding to declare a child free of the custody and control of one or both parents, preadoptive placement, or adoption proceeding; and at each hearing that may culminate in an order for foster care placement, termination of parental rights, preadoptive placement or adoptive placement, as described in Welfare and Institutions Code section 224.1(d)(1), or that may result in an order for guardianship, conservatorship, or custody under Family Code section 3041; the court must:

(A) Ask each participant present whether the participant knows or has reason to know the child is an Indian child;

(B) Instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child; and

(C) Order the parent, Indian custodian, or guardian, if available, to complete *Parental Notification of Indian Status* (form ICWA-020).

(3) If the parent, Indian custodian, or guardian does not appear at the first hearing, or is unavailable at the initiation of a proceeding, the court must order the person or entity that has the inquiry duty under this rule to use reasonable diligence to find and inform the parent, Indian custodian, or guardian that the court has ordered the parent, Indian custodian, or guardian to complete *Parental Notification of Indian Status* (form ICWA-020).

(4) If the social worker, probation officer, licensed adoption agency, adoption service provider, investigator, or petitioner knows or has reason to know or believe that an Indian child is or may be involved, that person or entity must make further inquiry as soon as practicable by:

(A) Interviewing the parents, Indian custodian, and "extended family members" as defined in 25 United States Code section 1903, to gather the information listed in Welfare and Institutions Code section 224.3(a)(5), Family Code section 180(b)(5), or Probate Code section 1460.2(b)(5);

(B) Contacting the Bureau of Indian Affairs and the California Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership; and

(C) Contacting the tribes and any other person who reasonably can be expected to have information regarding the child's membership status or eligibility. These contacts must at a minimum include the contacts and sharing of information listed in Welfare and Institutions Code section 224.2(e)(3).

(5) The petitioner must on an ongoing basis include in its filings a detailed description of all inquiries, and further inquiries it has undertaken, and all information received pertaining to the child's Indian status, as well as evidence of how and when this information was provided to the relevant tribes. Whenever new information is received, that information must be expeditiously provided to the tribes.

(Subd (a) amended effective January 1, 2020; previously amended effective January 1, 2013.)

(b) Reason to know the child is an Indian child

(1) There is reason to know a child involved in a proceeding is an Indian child if:

(A) A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family informs the court the child is an Indian child;

(B) The residence or domicile of the child, the child's parents, or Indian custodian is on a reservation or in an Alaska Native village;

(C) Any participant in the proceeding, officer of the court, Indian tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(D) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(E) The court is informed that the child is or has been a ward of a tribal court; or

(F) The court is informed that either parent or the child possesses an identification card indicating membership or citizenship in an Indian tribe.

(2) When there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an Indian child, the court must confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the tribes of which there is reason to know the child may be a member, or eligible for membership, to verify whether the child is in fact a member or whether a biological parent is a member and the child is eligible for membership. Due diligence must include the further inquiry and tribal contacts discussed in (a)(4) above.

(3) Upon review of the evidence of due diligence, further inquiry, and tribal contacts, if the court concludes that the agency or other party has fulfilled its duty of due diligence, further inquiry, and tribal contacts, the court may:

(A) Find there is no reason to know the child is an Indian child and the Indian Child Welfare Act does not apply. Notwithstanding this determination, if the court or a party subsequently receives information that was not previously available relevant to the child's Indian status, the court must reconsider this finding; or

(B) Find it is known the child is an Indian child, and that the Indian Child Welfare Act applies, and order compliance with the requirements of the act, including notice in accordance with (c) below; or

(C) Find there is reason to know the child is an Indian child, order notice in accordance with (c) below, and treat the child as an Indian child unless and until the court determines on the record that the child is not an Indian child.

(4) A determination by an Indian tribe that a child is or is not a member of, or eligible for membership in, that tribe, or testimony attesting to that status by a person authorized by the tribe to provide that determination, must be conclusive. Information that the child is not enrolled, or is not eligible for enrollment in, the tribe is not determinative of the child's membership status unless the tribe also confirms in writing that enrollment is a prerequisite for membership under tribal law or custom.

(Subd (b) adopted effective January 1, 2020.)

(c) Notice

(1) If it is known or there is reason to know an Indian child is involved in a proceeding listed in rule 5.480, except for a wardship proceeding under Welfare and Institutions Code sections 601 and 602 et seq., the social worker, petitioner, or in probate guardianship and conservatorship proceedings, if the petitioner is unrepresented, the court, must send *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) to the parent or legal guardian and Indian custodian of an Indian child, and the Indian child's tribe, in the manner specified in Welfare and Institutions Code section 224.3, Family Code section 180, and Probate Code section 1460.2 for all initial hearings that may result in the foster care placement, termination of parental rights, preadoptive placement, or adoptive placement, or an order of guardianship, conservatorship, or custody under Family Code section 3041. For all other hearings, and for continued hearings, notice must be provided to the child's parents, legal guardian or Indian custodian, and tribe in accordance with Welfare and Institutions Code sections 292, 293, and 295.

(2) If it is known or there is reason to know that an Indian child is involved in a wardship proceeding under Welfare and Institutions Code sections 601 and 602 et seq., the probation officer must send *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) to the parent or legal guardian, Indian custodian, if any, and the child's tribe, in accordance with Welfare and Institutions Code section 727.4(a)(2) in any case described by rule 5.480(2)(A)-(C).

(3) The circumstances that may provide reason to know the child is an Indian child include the circumstances specified in (b)(1).

(4) Notice to an Indian child's tribe must be sent to the tribal chairperson unless the tribe has designated another agent for service.

(Subd (c) relettered and amended effective January 1, 2020; adopted as subd (b); previously amended effective January 1, 2013 and July 1, 2013.)

Rule 5.481 amended effective January 1, 2020; adopted effective January 1, 2008; previously amended effective January 1, 2013, and July 1, 2013.

Advisory Committee Comment

Federal regulations (25 C.F.R. § 23.105) and state law (Welf. & Inst. Code, § 224.2(e)) contain detailed recommendations for contacting tribes to fulfill the obligations of inquiry, due diligence, information sharing, and notice under the Indian Child Welfare Act and state law.

Rule 5.482. Proceedings after notice

(a) Timing of proceedings

(1) If it is known or there is reason to know a child is an Indian child, a court hearing that may result in a foster care placement, termination of parental rights, preadoptive placement, or adoptive placement must not proceed until at least 10 days after the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs has received notice, except as stated in sections (a)(2) and (3).

(2) The detention hearing in dependency cases and in delinquency cases in which the probation officer has assessed that the child is in foster care or it is probable the child will be entering foster care described by rule 5.480(2)(A)-(C) may proceed without delay, provided that:

(A) Notice of the detention hearing must be given as soon as possible after the filing of the petition initiating the proceeding; and

(B) Proof of notice must be filed with the court within 10 days after the filing of the petition.

(3) The parent, Indian custodian, or tribe must be granted a continuance, if requested, of up to 20 days to prepare for the proceeding, except for specified hearings in the following circumstances:

(A) The detention hearing in dependency cases and in delinquency cases described by rule 5.480(2)(A)-(C);

(B) The jurisdiction hearing in a delinquency case described by rule 5.480(2)(A)-(C) in which the court finds the continuance would not conform to speedy trial considerations under Welfare and Institutions Code section 657; and

(C) The disposition hearing in a delinquency case described by rule 5.480(2)(A)-(C) in which the court finds good cause to deny the continuance under Welfare and Institutions Code section 682. A good cause reason includes when probation is recommending the release of a detained child to his or her parent or to a less restrictive placement. The court must follow the placement preferences under rule 5.485 when holding the disposition hearing.

(Subd (a) amended effective January 1, 2020; previously amended effective January 1, 2013, and July 1, 2013.)

(b) Proof of notice

Proof of notice in accordance with this rule must be filed with the court in advance of the hearing, except for those excluded by (a)(2) and (3), and must include *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030), return receipts, and any responses received from the Bureau of Indian Affairs and tribes.

(Subd (b) amended effective January 1, 2020; previously amended effective January 1, 2013.)

(c) Determination of applicability of the Indian Child Welfare Act

(1) If the court finds that proper and adequate inquiry, further inquiry, and due diligence were conducted under Welfare and Institutions Code section 224.2 and, if applicable, notice provided under Welfare and Institutions Code section 224.3, and the court determines there is no reason to know the child is an Indian child, the court may make a finding that the Indian Child Welfare Act does not apply to the proceedings.

(2) The determination of the court that the Indian Child Welfare Act does not apply in (c)(1) is subject to reversal based on sufficiency of the evidence. The court must reverse its determination if it subsequently receives information providing reason to believe that the

child is an Indian child and order the social worker or probation officer to conduct further inquiry under Welfare and Institutions Code section 224.3.

(Subd (c) amended effective January 1, 2020; adopted as subd (d); previously amended effective January 1, 2013; previously relettered as subd (c) effective August 15, 2016.)

(d) Intervention

The Indian child's tribe and Indian custodian are entitled to intervene, orally or in writing, at any point in the proceedings. The tribe may, but is not required to, file with the court the *Notice of Designation of Tribal Representative in a Court Proceeding Involving an Indian Child* (form ICWA-040) to give notice of its intent to intervene.

(Subd (d) amended effective January 1, 2016; adopted as subd (e); previously amended effective January 1, 2013; previously relettered as subd (d) effective August 15, 2016.)

(e) Posthearing actions

Whenever an Indian child is removed from a guardian, conservator, other custodian, foster home, or institution for placement with a different guardian, conservator, custodian, foster home, institution, or preadoptive or adoptive home, the placement must comply with the placement preferences and standards specified in Welfare and Institutions Code section 361.31.

(Subd (e) relettered effective August 15, 2016; adopted as subd (f); previously amended effective January 1, 2013.)

(f) Consultation with tribe

Any person or court involved in the placement of an Indian child in a proceeding described by rule 5.480 must use the services of the Indian child's tribe, whenever available through the tribe, in seeking to secure placement within the order of placement preference specified in rule 5.485.

(Subd (f) amended effective January 1, 2020; adopted as subd (g); previously amended effective July 1, 2013; previously relettered as subd (f) effective August 15, 2016.)

Rule 5.482 amended effective January 1, 2020; adopted effective January 1, 2008; previously amended effective January 1, 2013, July 1, 2013, and August 15, 2016.

Rule 5.483. Dismissal and Transfer of case

(a) Dismissal when tribal court has exclusive jurisdiction

Subject to the terms of any agreement between the state and the tribe under 25 United States Code section 1919:

(1) If the court receives information at any stage of the proceeding suggesting that the Indian child is already the ward of the tribal court or is domiciled or resides within a reservation of an Indian tribe that has exclusive jurisdiction over Indian child custody proceedings under 25 United States Code section 1911 or 1918 the court must expeditiously notify the tribe and the tribal court that it intends to dismiss the case upon receiving confirmation from the tribe or tribal court that the child is a ward of the tribal court or subject to the tribe's exclusive jurisdiction.

(2) When the court receives confirmation that the child is already a ward of a tribal court or is subject to the exclusive jurisdiction of an Indian tribe, the state court must dismiss the proceeding and ensure that the tribal court is sent all information regarding the proceeding,

including, but not limited to, the pleadings and any state court record. If the local agency has not already transferred physical custody of the Indian child to the child's tribe, the state court must order that the local agency do so forthwith and hold in abeyance any dismissal order pending confirmation that the Indian child is in the physical custody of the tribe.

(3) This section does not preclude an emergency removal consistent with 25 United States Code section 1922, 25 Code of Federal Regulations part 23.113, and Welfare and Institutions Code section 319 to protect the child from risk of imminent physical damage or harm and if more time is needed to facilitate the transfer of custody of the Indian child from the county welfare department to the tribe.

(Subd (a) amended effective January 1, 2020.)

(b) Presumptive transfer of case to tribal court with concurrent state and tribal jurisdiction

Unless the court finds good cause under subdivision (d), the court must order transfer of a case to the tribal court of the child's tribe if the parent, the Indian custodian, or the child's tribe requests.

(c) Documentation of request to transfer a case to tribal court

(1) The parent, the Indian custodian, or the child's tribe may request transfer of the case, either orally or in writing or by filing *Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction* (form ICWA-050).

If the request is made orally, the court must document the request and make it part of the record.

(2) Upon receipt of a transfer petition, the state court must ensure that the tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the tribal court wishes to decline the transfer.

(Subd (C) amended effective January 1, 2020.)

(d) Cause to deny a request to transfer to tribal court with concurrent state and tribal jurisdiction

(1) Either of the following circumstances constitutes mandatory good cause to deny a request to transfer:

(A) One or both of the child's parents objects to the transfer in open court or in an admissible writing for the record; or

(B) The tribal court of the child's tribe declines the transfer.

(2) In assessing whether good cause to deny the transfer exists, the court must not consider:

(A) Socioeconomic conditions and the perceived adequacy of tribal social services or judicial systems;

(B) Whether the child custody proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or tribe did not receive notice of the child custody proceeding until an advanced stage. It must not, in and of itself, be considered an unreasonable delay for a party to wait until reunification efforts have failed and reunification services have been terminated before filing a petition to transfer;

(C) Whether there have been prior proceedings involving the child for which no transfer petition was filed;

(D) Whether transfer could affect the placement of the child; or

(E) Whether the Indian child has cultural connections with the tribe or its reservation.

(3) If it appears that there is good cause to deny a transfer, the court must hold an evidentiary hearing on the transfer and make its findings on the record.

(Subd (d) amended effective January 1, 2020; previously amended effective January 1, 2013.)

(e) Evidentiary burdens

(1) The burden of establishing good cause to deny a request to transfer is on the party opposing the transfer.

(2) If the court believes, or any party asserts, that good cause to deny the request exists, the reasons for that belief or assertion must be stated orally on the record or in writing, in advance of the hearing, and made available to all parties who are requesting the transfer, and the petitioner must have the opportunity to provide information or evidence in rebuttal of the belief or assertion.

(Subd (e) relettered effective January 1, 2020; adopted as subd (f); previously amended effective January 1, 2013.)

(f) Order on request to transfer

(1) The court must issue its final order on the *Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction* (form ICWA-060).

(2) When a matter is being transferred from the jurisdiction of a juvenile court, the order must include:

(A) All of the findings, orders, or modifications of orders that have been made in the case;

(B) The name and address of the tribe to which jurisdiction is being transferred;

(C) Directions for the agency to release the child case file to the tribe having jurisdiction under section 827.15 of the Welfare and Institutions Code;

(D) Directions that all papers contained in the child case file must be transferred to the tribal court; and

(E) Directions that a copy of the transfer order and the findings of fact must be maintained by the transferring court.

(Subd (f) relettered effective January 1, 2020; adopted as subd (g); previously amended effective January 1, 2016.)

(g) Advisement when transfer order granted

When the court grants a petition transferring a case to tribal court under Welfare and Institutions Code section 305.5, Family Code section 177(a), or Probate Code section 1459.5(b) and rule 5.483, the court must advise the parties orally and in writing that any appeal to the order for transfer to a tribal court must be made before the transfer to tribal jurisdiction is finalized and that failure to request and obtain a stay of the order for transfer will result in a loss of appellate jurisdiction.

(Subd (g) relettered effective January 1, 2020; adopted as subd (h); previously amended effective January 1, 2016.)

(h) Proceeding after transfer

When, under Welfare and Institutions Code section 305.5, Family Code section 177(a), or Probate Code section 1459.5(b), the court transfers any proceeding listed in rule 5.480, the court must proceed as follows:

(1) Dismiss the proceeding or terminate jurisdiction if the court has received proof that the tribal court has accepted the transfer of jurisdiction;

(2) Make an order transferring the physical custody of the child to a designated representative of the tribal court (not necessarily the same "designated representative" identified in the *Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child* (form ICWA-040)); and

(3) Include in the *Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction* (form ICWA-060) all contact information for the designated tribal court representative.

(Subd (h) relettered effective January 1, 2020; adopted as subd (h); previously relettered as subd (i) effective January 1, 2016.)

Rule 5.483 amended effective January 1, 2020; adopted effective January 1, 2008; previously amended effective January 1, 2013 and January 1, 2016.

Advisory Committee Comment

Once a transfer to tribal court is finalized as provided in rule 5.483(h), the appellate court lacks jurisdiction to order the case returned to state court (*In re M.M.* (2007) 154 Cal.App.4th 897).

As stated by the Court of Appeal in *In re M.M.*, the juvenile court has the discretion to stay the provisions of a judgment or order awarding, changing, or affecting custody of a minor child "pending review on appeal or for any other period or periods that it may deem appropriate" (Code Civ. Proc., § 917.7), and the party seeking review of the transfer order should first request a stay in the lower court. (See *Nuckolls v. Bank of California, Nat. Assn.* (1936) 7 Cal.2d 574, 577 [61 P.2d 927] ["Inasmuch as the [L]egislature has provided a method by which the trial court, in a proper case, may grant the stay, the appellate courts, assuming that they have the power, should not, except in some unusual emergency, exercise their power until the petitioner has first presented the matter to the trial court."].) If the juvenile court should deny the stay request, the aggrieved party may then petition this court for a writ of supersedeas pending appeal. (Cal. Rules of Court, rule 8.112).

Subdivision (g) and this advisory committee comment are added to help ensure that an objecting party does not inadvertently lose the right to appeal a transfer order.

Rule 5.484. Emergency proceedings involving an Indian child

(a) Standards for removal

Whenever it is known or there is reason to know the case involves an Indian child, the court may not order an emergency removal or placement of the child without a finding that the removal or placement is necessary to prevent imminent physical damage or harm to the child. The petition requesting emergency removal or continued emergency placement of the child or its accompanying documents must contain the following:

(1) A statement of the risk of imminent physical damage or harm to the child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child;

(2) The name, age, and last known address of the Indian child;

(3) The name and address of the child's parents and Indian custodian, if any;

(4) The steps taken to provide notice to the child's parents, Indian custodian, and tribe about the emergency proceeding;

(5) If the child's parents and Indian custodian are unknown, a detailed explanation of what efforts have been made to locate and contact them;

(6) The residence and the domicile of the Indian child;

(7) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with that reservation or village;

(8) The tribal affiliation of the child and of the parents or Indian custodian;

(9) A specific and detailed account of the circumstances that led to the emergency removal of the child;

(10) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to contact the tribe and transfer the child to the tribe's jurisdiction; and

(11) A statement of the efforts that have been taken to assist the parents or Indian custodian so the Indian child may safely be returned to their custody.

(b) Return of Indian child when emergency situation has ended

(1) Whenever it is known or there is reason to know the child is an Indian child and there has been an emergency removal of the child from parental custody, any party who asserts that there is new information indicating that the emergency situation has ended may request an ex parte hearing by filing a request on *Request for Ex Parte Hearing to Return Physical Custody of an Indian Child* (form ICWA-070) to determine whether the emergency situation has ended.

(2) If the request provides evidence of new information establishing that the emergency placement is no longer necessary, the court must promptly schedule a hearing. At the hearing the court must consider whether the child's removal and placement is still necessary to prevent imminent physical damage or harm to the child. If the court determines that the child's emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child, the court must order the child returned to the physical custody of the parents or Indian custodian.

(3) In accordance with rules 3.10 and 3.20, this procedure is governed by the provisions of division 6, chapter 3 and division 11, chapter 4 of title 3 of the California Rules of Court.

(c) Time limitation on emergency proceedings

An emergency removal must not continue for more than 30 days unless the court makes the following determinations:

(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;

(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian tribe; and

(3) It has not been possible to have a hearing that complies with the substantive requirements of the Indian Child Welfare Act for a foster care placement proceeding.

Rule 5.484 adopted effective January 1, 2020.

Rule 5.485. Placement of an Indian child

(a) Evidentiary burdens

In any child custody proceeding listed in rule 5.480, the court may not order placement of an Indian child unless it finds by clear and convincing evidence that continued custody with the parent or Indian custodian is likely to cause the Indian child serious emotional or physical damage and it considers evidence regarding prevailing social and cultural standards of the child's tribe, including that tribe's family organization and child-rearing practices.

(1) Testimony by a "qualified expert witness," as defined in Welfare and Institutions Code section 224.6, Family Code section 177(a), and Probate Code section 1459.5(b), is required before a court orders a child placed in foster care or terminates parental rights.

(2) Stipulation by the parent, Indian custodian, or tribe, or failure to object, may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the person or tribe has been fully advised of the requirements of the Indian Child Welfare Act and has knowingly, intelligently, and voluntarily waived them. Any such stipulation must be agreed to in writing.

(3) Failure to meet non-Indian family and child-rearing community standards, or the existence of other behavior or conditions that meet the removal standards of Welfare and Institutions Code section 361, will not support an order for placement absent the finding that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage.

(Subd (a) amended effective January 1, 2013.)

(b) Standards and preferences in placement of an Indian child

(1) All placements of an Indian child must be in the least restrictive setting that most approximates a family situation and in which the child's special needs, if any, may be met.

(2) Unless the court finds by clear and convincing evidence that there is good cause to deviate from them, whenever it is known or there is reason to know the child is an Indian child, all placement in any proceeding listed in rules 5.480 and 5.484 must follow the specified placement preferences in Family Code section 177(a), Probate Code section 1459(b), and Welfare and Institutions Code section 361.31.

(3) The court must analyze the availability of placements within the placement preferences in descending order without skipping. The court may deviate from the preference order only for good cause, which may include the following considerations:

(A) The requests of the parent or Indian custodian if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(B) The requests of the Indian child, when of sufficient age and capacity to understand the decision being made;

(C) The presence of a sibling attachment that can be maintained only through a particular placement;

(D) The extraordinary physical, mental, or emotional needs of the Indian child, including specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; or

(E) The unavailability of a suitable placement within the placement preferences based on a documented diligent effort to identify placements meeting the preference criteria. The standard for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(4) The placement preferences must be analyzed and considered each time there is a change in the child's placement. A finding that there is good cause to deviate from the placement preferences does not affect the requirement that a diligent search be made for a subsequent placement within the placement preferences.

(5) The burden of establishing good cause for the court to deviate from the preference order is on the party requesting that the preference order not be followed. A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another or solely on the basis of ordinary bonding or attachment that flowed from time spent in a nonpreferred placement that was made in violation of the Indian Child Welfare Act.

(6) The tribe, by resolution, may establish a different preference order, which must be followed if it provides for the least restrictive setting.

(7) The preferences and wishes of the Indian child, when of sufficient age, and the parent must be considered, and weight given to a consenting parent's request for anonymity.

(8) When no preferred placement is available, active efforts must be made and documented to place the child with a family committed to enabling the child to have visitation with "extended family members," as defined in rule 5.481(a)(4)(A), and participation in the cultural and ceremonial events of the child's tribe.

(Subd (b) amended effective January 1, 2020; previously amended effective January 1, 2013.)

(c) Active efforts

In addition to any other required findings to place an Indian child with someone other than a parent or Indian custodian, or to terminate parental rights, the court must find that active efforts have been made, in any proceeding listed in rule 5.480, to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and must find that these efforts were unsuccessful. These active efforts must include affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite the child with his or her family, must be tailored to the facts and circumstances of the case, and must be consistent with the requirements of Welfare and Institutions Code section 224.1(f).

(1) The active efforts must be documented in detail in the record.

(2) The court must consider whether active efforts were made in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe.

(3) Active efforts to provide services must include pursuit of any steps necessary to secure tribal membership for a child if the child is eligible for membership in a given tribe, as well as attempts to use the available resources of extended family members, the tribe, tribal and other Indian social service agencies, and individual Indian caregivers.

(Subd (c) amended effective January 1, 2020; previously amended effective January 1, 2013.)

Rule 5.485 renumbered and amended effective January 1, 2020; adopted as rule 5.484 effective January 1, 2008; previously amended effective January 1, 2013.

Rule 5.486. Termination of parental rights

(a) Evidentiary burdens

The court may only terminate parental rights to an Indian child or declare an Indian child free of the custody and control of one or both parents if at the hearing terminating parental rights or declaring the child free of the custody and control of one or both parents, the court:

(1) Finds by clear and convincing evidence that active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family were made; and

(2) Makes a determination, supported by evidence beyond a reasonable doubt, including testimony of one or more "qualified expert witnesses" as defined in Welfare and Institutions Code section 224.6 and Family Code section 177(a), that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

(b) When parental rights may not be terminated

The court may not terminate parental rights to an Indian child or declare a child free from the custody and control of one or both parents if the court finds a compelling reason for determining that termination of parental rights would not be in the child's best interest. Such a reason may include:

(1) The child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child. For purposes of an Indian child, "relative" must include an "extended family member," as defined in the Indian Child Welfare Act (25 U.S.C. § 1903(2));

(2) Termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights; or

(3) The child's tribe has identified tribal customary adoption, guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.

(Subd (b) amended effective January 1, 2020.)

Rule 5.486 renumbered and amended effective January 1, 2020; adopted as rule 5.485 effective January 1, 2008; previously amended effective January 1, 2013.

Rule 5.487. Petition to invalidate orders

(a) Who may petition

Any Indian child who is the subject of any action for foster-care placement, guardianship or conservatorship placement, custody placement under Family Code section 3041, declaration freeing

a child from the custody and control of one or both parents, preadoptive placement, adoptive placement, or termination of parental rights; any parent or Indian custodian from whose custody such child was removed; and the Indian child's tribe may petition the court to invalidate the action on a showing that the action violated the Indian Child Welfare Act.

(Subd (a) was amended effective January 1, 2020.)

(b) Court of competent jurisdiction

If the Indian child is a dependent child or ward of the juvenile court or the subject of a pending petition, the juvenile court is a court of competent jurisdiction with the authority to hear the request to invalidate the foster placement or termination of parental rights.

(c) Request to return custody of the Indian child

If a final decree of adoption is vacated or set aside, or if the adoptive parents voluntarily consent to the termination of their parental rights, a biological parent or prior Indian custodian may request a return of custody of the Indian child.

(1) The court must reinstate jurisdiction.

(2) In a juvenile case, the juvenile court must hold a new disposition hearing in accordance with 25 United States Code section 1901 et seq. where the court may consider all placement options as stated in Welfare and Institutions Code sections 361.31(b), (c), (d), and (h).

(3) The court may consider placement with a biological parent or prior Indian custodian if the biological parent or prior Indian custodian can show that placement with him or her is not detrimental to the child and that the placement is in the best interests of the child.

(4) The hearing on the request to return custody of an Indian child must be conducted in accordance with statutory requirements and the relevant sections of this rule.

Rule 5.487 renumbered and amended effective January 1, 2020; adopted as rule 5.486 effective January 1, 2008; previously amended effective January 1, 2013

Rule 5.488. Adoption record keeping

(a) Copies of adoption decree and other information to the Secretary of the Interior

After granting a decree of adoption of an Indian child, the court must provide the Secretary of the Interior with a copy of the decree and the following information:

(1) The name and tribal affiliation of the Indian child;

(2) The names and addresses of the biological parents;

(3) The names and addresses of the adoptive parents; and

(4) The agency maintaining files and records regarding the adoptive placement.

(b) Affidavit of confidentiality to the Bureau of Indian Affairs

If a biological parent has executed an affidavit requesting that his or her identity remain confidential, the court must provide the affidavit to the Bureau of Indian Affairs, which must ensure the confidentiality of the information.

Rule 5.488 renumbered effective January 1, 2020; adopted as rule 5.487 effective January 1, 2008; previously amended effective January 1, 2013.

Advisory Committee Comment

This chapter was adopted, effective January 1, 2008, as the result of the passage of Senate Bill 678 (Ducheny; Stats. 2006, ch. 838), which codified the federal Indian Child Welfare Act into California's Family, Probate, and Welfare and Institutions Codes affecting all proceedings listed in rule 5.480. Rule 5.664, which applied the Indian Child Welfare Act but was limited in its effect to juvenile proceedings, was repealed effective January 1, 2008, and was replaced by this chapter.

As of January 1, 2008, only the Washoe Tribe of Nevada and California is authorized under the Indian Child Welfare Act to exercise exclusive jurisdiction as discussed in rule 5.483.

Title 5, Family and Juvenile Rules-Division 2, Rules Applicable in Family and Juvenile Proceedings-Chapter 3, Adoptions under the Hague Adoption Convention; adopted effective July 1, 2013.

Rule 5.534. General Provisions All Proceedings – see subsection (i) Tribal Representatives

(e) Tribal representatives (25 U.S.C. §§ 1911, 1931-1934)

The tribe of an Indian child is entitled to intervene as a party at any stage of a dependency proceeding concerning the Indian child.

(1) The tribe may appear by counsel or by a representative of the tribe designated by the tribe to intervene on its behalf. When the tribe appears as a party by a representative of the tribe, the name of the representative and a statement of authorization for that individual or agency to appear as the tribe must be submitted to the court in the form of a tribal resolution or other document evidencing an official act of the tribe.

(2) If the tribe of the Indian child does not intervene as a party, the court may permit an individual affiliated with the tribe or, if requested by the tribe, a representative of a program operated by another tribe or Indian organization to:

(A) Be present at the hearing;

(B) Address the court;

(C) Receive notice of hearings;

(D) Examine all court documents relating to the dependency case;

(E) Submit written reports and recommendations to the court; and

(F) Perform other duties and responsibilities as requested or approved by the court.

(Subd (e) relettered effective January 1, 2017; adopted as subd (i) effective January 1, 1997; previously amended effective July 1, 2002, and January 1, 2007.)

Rule 5.550. Continuances – see subsections (c)(3) and (d)

(c) Continuances of detention hearings (§§ 319, 322, 635, 636, 638)

(1) On the motion of the child, parent, or guardian, the court must continue the detention hearing for one court day or for a reasonable period to permit the moving party to prepare any relevant evidence on the issue of detention. Unless otherwise ordered by the court, the child must remain in custody pending the continued hearing.

(2) At the initial detention hearing, if the court continues the hearing under (c)(1) or for any other reason, or sets the matter for rehearing, the court must either find that the continuance of the child in the parent's or guardian's home is contrary to the child's welfare or order the child released to the custody of the parent or guardian. The court may enter this finding on a temporary basis, without prejudice to any party, and reevaluate the finding at the time of the continued detention hearing.

(3) When the court knows or has reason to know the child is an Indian child, the detention hearing may not be continued beyond 30 days unless the court makes the findings required by section 319(e)(2).

(Subd (c) amended effective January 1, 2020; adopted effective January 1, 1998; previously amended effective July 1, 2002, and January 1, 2007.)

(d) Continuances of a dispositional hearing when the court knows or has reason to know the child is an Indian child (§ 352(b))

(1) When the court knows or has reason to know that the case involves an Indian child, no continuance of a dispositional may be granted that would result in the hearing being held longer than 30 days after the hearing at which the minor was ordered removed or detained unless the court finds that there are exceptional circumstances requiring a continuance.

(2) The absence of an opinion from a qualified expert witness must not, in and of itself, support a finding that exceptional circumstances exist.

(Subd (d) adopted effective January 1, 2020.)

Rule 5.550 amended effective January 1, 2020; adopted effective January 1, 1991; previously amended effective January 1, 1998, January 1, 1999, July 1, 2002, and July 1, 2016; previously amended and renumbered as rule 5.550 effective January 1, 2007.

Rule 5.570. Request to change court order (petition for modification) – see subsections (e)(5) & (6) and (h)(1)(B)

(e) Grounds for grant of petition (§§ 388, 778)

(5) For a petition filed under section 388(c)(1)(A), the court may terminate reunification services during the time periods described in section 388(c)(1) only if the court finds by a preponderance of evidence that reasonable services have been offered or provided, and, by clear and convincing evidence, that the change of circumstance or new evidence described in the petition satisfies a condition in section 361.5(b) or (e). In the case of an Indian child, the court may terminate reunification services only if the court finds by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family within the meaning of sections 224.1(f) and 361.7 and that these efforts have proved unsuccessful. The court may grant the petition after following the procedures in (f), (g), and (h).

(6) For a petition filed under section 388(c)(1)(B), the court may terminate reunification services during the time periods described in section 388(c)(1) only if the court finds by a

preponderance of evidence that reasonable services have been offered or provided, and, by clear and convincing evidence, that action or inaction by the parent or guardian creates a substantial likelihood that reunification will not occur. Such action or inaction includes, but is not limited to, failure to visit the child or failure to participate regularly and make substantive progress in a court-ordered treatment program. In determining whether the parent or guardian has failed to visit the child or to participate regularly or make progress in a court-ordered treatment plan, the court must consider factors including, but not limited to, the parent or guardian's incarceration, institutionalization, or participation in a residential substance abuse treatment program. In the case of an Indian child, the court may terminate reunification services only if the court finds by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family within the meaning of sections 224.1(f) and 361.7 and that these efforts have proved unsuccessful. The court may grant the petition after following the procedures in (f), (g), and (h).

(h) Conduct of hearing (§ 388)

(1) The petitioner requesting the modification under section 388 has the burden of proof.

(A) If the request is for the removal of the child from the child's home, the petitioner must show by clear and convincing evidence that the grounds for removal in section 361(c) exist.

(B) If the request is for termination of court-ordered reunification services, the petitioner must show by clear and convincing evidence that one of the conditions in section 388(c)(1)(A) or (B) exists and must show by a preponderance of the evidence that reasonable services have been offered or provided. In the case of an Indian child, the court may terminate reunification services only if the court finds by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family within the meaning of sections 224.1(f) and 361.7 and that these efforts have proved unsuccessful.

Rule 5.668(c). Commencement of hearing-explanation of proceedings – see subsection (c)

(c) Indian Child Welfare Act inquiry (§ 224.2(c) & (g))

(1) At the first appearance in court of each party, the court must ask each participant present at the hearing whether:

(A) The participant knows or has reason to know the child is an Indian child;

(B) The residence or domicile of the child, the child's parents, or Indian custodian is on a reservation or in an Alaska Native village;

(C) The child is or has ever been a ward of a tribal court; and

(D) Either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe.

(2) The court must also instruct all parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child, and order the parents,

Indian custodian, or guardian, if available, to complete *Parental Notification of Indian Status* (form ICWA-020).

(3) If there is reason to believe that the case involves an Indian child, the court must require the agency to proceed in accordance with section 224.2(e).

(4) If it is known, or there is reason to know, the case involves an Indian child, the court must proceed in accordance with rules 5.481 et seq. and treat the child as an Indian child unless and until the court determines on the record after review of the report of due diligence described in section 224.2(g) that the child does not meet the definition of an Indian child.

(Subd (C) adopted effective January 1, 2020.)

Rule 5.674. Conduct of hearing; admission, no contest, submission – see subsections (c), (d), and (e)

(c) Detention hearing; rights of child, parent, Indian custodian, or guardian (§§ 311, 319)

At the detention hearing, the child, the parent, Indian custodian, and the guardian have the right to assert the privilege against self-incrimination and the right to confront and cross-examine:

(1) The preparer of a police report, probation or social worker report, or other document submitted to the court; and

(2) Any person examined by the court under section 319. If the child, parent, Indian custodian, Indian child's tribe, or guardian asserts the right to cross-examine preparers of documents submitted for court consideration, the court may not consider any such report or document unless the preparer is made available for cross-examination.

(Subd (c) amended effective January 1, 2020; adopted as subd (c); previously amended and relettered as subd (d) effective July 1, 2002; previously amended and relettered as subd (c) effective January 1, 2017; previously amended effective January 1, 2007.)

(d) No parent, Indian custodian, or Indian child's tribe or guardian present and not noticed (§ 321)

If the court orders the child detained at the detention hearing and no parent, Indian custodian, or Indian child's tribe or guardian is present and no parent, Indian custodian, or Indian child's tribe or guardian has received actual notice of the detention hearing, a parent, Indian custodian, or Indian child's tribe or guardian may file an affidavit alleging the failure of notice and requesting a detention rehearing. The clerk must set the rehearing for a time within 24 hours of the filing of the affidavit, excluding noncourt days. At the rehearing the court must proceed under rules 5.670-5.678.

(Subd (d) amended effective January 1, 2020; previously adopted effective January 1, 2017.)

(e) Hearing for further evidence; prima facie case (§ 321)

If the court orders the child detained, and the child, a parent, an Indian custodian, an Indian child's tribe, a guardian, or counsel requests that evidence of the prima facie case be presented, the court must set a prima facie hearing for a time within 3 court days to consider evidence of the prima facie case or set the matter for jurisdiction hearing within 10 court days. If at the hearing the petitioner fails to establish the prima facie case, the child must be released from custody.

(Subd (e) amended effective January 1, 2020; previously adopted effective January 1, 2017.)

Rule 5.674 amended effective January 1, 2020; repealed and adopted as rule 1444 effective January 1, 1998; previously amended and renumbered as rule 5.674 effective January 1, 2007; previously amended effective July 1, 2002, January 1, 2016, and January 1, 2017.

Rule 5.676. Requirements for detention – see subsections (b) & (d)

(a) Requirements for detention (§ 319)

No child may be ordered detained by the court unless the court finds that:

(1) A prima facie showing has been made that the child is described by section 300;

(2) Continuance in the home of the parent, Indian custodian, or guardian is contrary to the child's welfare; and

(3) One or more of the grounds for detention in rule 5.678 is found.

(Subd (a) amended effective January 1, 2020; previously amended effective July 1, 2002, and January 1, 2007.)

(b) Additional requirements for detention of Indian child

If it is known, or there is reason to know the child is an Indian child, the child may not be ordered detained unless the court also finds that detention is necessary to prevent imminent physical damage or harm to the child. The court must state the facts supporting this finding on the record.

(Subd (b) adopted effective January 1, 2020.)

(c) Evidence required at detention hearing

In making the findings required to support an order of detention, the court may rely solely on written police reports, probation or social worker reports, or other documents.

The reports relied on must include:

(1) A statement of the reasons the child was removed from the parent's custody;

(2) A description of the services that have been provided, including those under section 306, and of any available services or safety plans that would prevent or eliminate the need for the child to remain in custody;

(3) If a parent is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent, information and a recommendation regarding whether the child can be returned to the custody of that parent;

(4) Identification of the need, if any, for the child to remain in custody; and

(5) If continued detention is recommended, information about any parent or guardian of the child with whom the child was not residing at the time the child was taken into custody and about any relative or nonrelative extended family member as defined under section 362.7 with whom the child may be detained.

(Subd (c) relettered effective January 1, 2020; adopted as subd (b); previously amended effective July 1, 2002, and January 1, 2007.)

(d) Additional evidence required at detention hearing for Indian child

If it is known, or there is reason to know the child is an Indian child, the reports relied on must also include:

(1) A statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent the imminent physical damage or harm to the child;

(2) The steps taken to provide notice to the child's parents, Indian custodian, and tribe about the hearing under section 224.3;

(3) If the child's parents and Indian custodian are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate Bureau of Indian Affairs regional director;

(4) The residence and the domicile of the Indian child;

(5) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with that reservation or village;

(6) The tribal affiliation of the child and of the parents or Indian custodian;

(7) A specific and detailed account of the circumstances that caused the Indian child to be taken into temporary custody;

(8) If the child is believed to reside or be domiciled on a reservation in which the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and that are being made to contact the tribe and transfer the child to the tribe's jurisdiction; and

(9) A statement of the efforts that have been taken to assist the parents or Indian custodian so the Indian child may safely be returned to their custody.

(Subd (d) adopted effective January 1, 2020.)

Rule 5.676 amended effective January 1, 2020; repealed and adopted as rule 1445 effective January 1, 1998; previously amended effective July 1, 2002, and January 1, 2016; previously amended and renumbered as rule 5.676 effective January 1, 2007

Rule 5.678. Findings in support of detention; factors to consider; reasonable efforts; active efforts; detention alternatives – see subsection (c)(2)

(a) Findings in support of detention (§ 319; 42 U.S.C. § 672)

The court must order the child released from custody unless the court makes the findings specified in section 319(c), and where it is known, or there is reason to know the child is an Indian child, the additional finding specified in section 319(d).

(Subd (a) amended effective January 1, 2020; previously amended effective July 1, 2002, January 1, 2007, and January 1, 2019.)

(b) In determining whether to release or detain the child under (a), the court must consider the factors in section 319(f).

(Subd (b) amended effective January 1, 2020; previously amended effective July 1, 2002, January 1, 2007, January 1, 2016, and January 1, 2019.)

(c) Findings of the court-reasonable or active efforts (§ 319; 42 U.S.C. § 672)

(1) Whether the child is released or detained at the hearing, the court must determine whether reasonable efforts have been made to prevent or eliminate the need for removal and must make one of the following findings:

(A) Reasonable efforts have been made; or

(B) Reasonable efforts have not been made.

(2) Where it is known or there is reason to know the child is an Indian child, whether the child is released or detained at the hearing, the court must determine whether active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and whether those efforts have been successful. Those active efforts must be documented in detail in the record, and the court must make one of the following findings:

(A) Active efforts have been made and were successful; or

(B) Active efforts have been made and were not successful; or

(C) Active efforts have not been made; and

(D) The court orders the department to initiate or continue services in accordance with section 358.

(3) The court must also determine whether services are available that would prevent the need for further detention.

(4) The court must not order the child detained unless the court, after inquiry regarding available services, finds that there are no reasonable services that would prevent or eliminate the need to detain the child or that would permit the child to return home.

(5) If the court orders the child detained, the court must proceed under section 319(d)-(e).

(Subd (c) amended effective January 1, 2020; adopted as subd (d); previously amended and relettered effective July 1, 2002; previously amended effective January 1, 2007, and January 1, 2019.)

Rule 5.690. General conduct of disposition hearing – see subsections (a)(1)(C)(v) & (d)

(a) Social study (§§ 280, 309, 358, 358.1, 360, 361.5, 16002(b))

(1) The petitioner must comply with the following when preparing the social study:

. . .

(C) The social study must include a discussion of the social worker's efforts to comply with section 309(e) and rule 5.637, including but not limited to:

(i) The number of relatives identified and the relationship of each to the child;

(ii) The number and relationship of those relatives described by item (i) who were located and notified;

(iii) The number and relationship of those relatives described by item (ii) who are interested in ongoing contact with the child;

(iv) The number and relationship of those relatives described by item (ii) who are interested in providing placement for the child; and

(v) If it is known or there is reason to know the child is an Indian child, efforts to locate extended family members as defined in section 224.1, and evidence that all individuals contacted have been provided with information about the option of obtaining approval for placement through the tribe's license or approval procedure.

(d) Timing

Notwithstanding any other law, if a minor has been removed from the custody of the parents or Indian custodians or guardians, a continuance may not be granted that would result in the dispositional hearing, held under section 361, being completed more than 60 days, or 30 days in the case of an Indian child, after the hearing at which the minor was ordered removed or detained, unless the court finds that there are exceptional circumstances requiring a continuance. If the court knows or has reason to know that the child is an Indian child, the absence of the opinion of a qualified expert witness must not, in and of itself, support a finding that exceptional circumstances exist.

Rule 5.725. Selection of permanent plan – see subsection (e)

(e) Procedures-adoption

(1) The court must follow the procedures in section 366.24 or 366.26, as appropriate.

(2) An order of the court terminating parental rights, ordering adoption under section 366.26 or, in the case of an Indian child, ordering tribal customary adoption under section 366.24, is conclusive and binding on the child, the parent, and all other persons who have been served under the provisions of section 294. Once a final order of adoption has issued, the order may not be set aside or modified by the court, except as provided in section 366.26(e)(3) and (i)(3) and rules 5.538, 5.540, and 5.542 with regard to orders by a referee.

(Subd (e) amended effective January 1, 2020; adopted as subd (d); previously relettered as subd (e) effective January 1, 1992, as subd (f) effective January 1, 2005, and as subd (e) effective January 1, 2010; previously amended effective July 1, 1992, January 1, 1995, July 1, 2002, January 1, 2006, January 1, 2007, July 1, 2010, January 1, 2015, and January 1, 2017.)

Rule 5.785. General conduct of hearing

(a) Social study (§§ 280, 702, 706.5)

The probation officer must prepare a social study of the child, which must contain all matters relevant to disposition, including any parole status information, and a recommendation for disposition.

(1) In any case in which the probation officer is recommending placement in foster care or in which the child is already in foster care placement or pending placement under an earlier order, the social study must include a case plan as described in (c).

(2) The probation officer must submit the social study and copies of it to the clerk at least 48 hours before the disposition hearing is set to begin, and the clerk must make the copies

available to the parties and attorneys. A continuance of up to 48 hours must be granted on the request of a party who has not been furnished a copy of the social study in accordance with this rule.

(Subd (a) amended effective January 1, 2007; previously amended effective July 1, 2002.)

(b) Evidence considered (§ 706)

The court must receive in evidence and consider the social study and any relevant evidence offered by the petitioner, the child, or the parent or guardian. The court may require production of other relevant evidence on its own motion. In the order of disposition the court must state that the social study has been read and considered by the court.

(Subd (b) amended effective July 1, 2002.)

(c) Case plan

When a child is detained and is at risk of entering foster care placement, the probation officer must prepare a case plan.

(1) The plan must be completed and filed with the court by the date of disposition or within 60 calendar days of initial removal, whichever occurs first.

(2) The court must consider the case plan and must find as follows:

(A) The probation officer solicited and integrated into the case plan the input of the child, the child's family, in a case described by rule 5.480(2)(A)-(C) the child's identified Indian tribe, and other interested parties; or

(B) The probation officer did not solicit and integrate into the case plan the input of the child, the child's family, in a case described by rule 5.480(2)(A)-(C) the child's identified Indian tribe, and other interested parties. If the court finds that the probation officer did not solicit and integrate into the case plan the input of the child, the child's family, the child's identified Indian tribe, and other interested parties, the court must order that the probation officer solicit and integrate into the case plan the input of the child, the child's family, in a case described by rule 5.480(2)(A)-(C) the child's identified Indian tribe, and other interested parties, unless the court finds that each of these participants was unable, unavailable, or unwilling to participate.

(3) For a child 12 years of age or older and in a permanent placement, the court must consider the case plan and must find as follows:

(A) The child was given the opportunity to review the case plan, sign it, and receive a copy; or

(B) The child was not give the opportunity to review the case plan, sign it, and receive a copy. If the court makes such a finding, the court must order the probation officer to give the child the opportunity to review the case plan, sign it, and receive a copy, unless the court finds that the child was unable, unavailable, or unwilling to participate.

(4) If the probation officer believes that the child will be able to return home through reasonable efforts by the child, the parents or guardian, and the probation officer, the case plan must include the elements described in section 636.1(b).

(5) If the probation officer believes that foster care placement is the most appropriate disposition for the child, the case plan must include all of the information required by section 706.6.

(Subd (c) amended effective July 1, 2013; adopted effective July 1, 2002; previously amended effective January 1, 2007.)

Rule 5.785 amended effective July 1, 2013; adopted as rule 1492 effective January 1, 1991; previously amended effective July 1, 2002; previously amended and renumbered effective January 1, 2007.

Rule 7.1015. Indian Child Welfare Act in guardianship and certain conservatorship proceedings (Prob. Code, §§ 1459.5, 1460.2)

Rule 7.1015. Indian Child Welfare Act in guardianship and certain conservatorship proceedings (Prob. Code, §§ 1459.5, 1460.2)

(a) Definitions

As used in this rule, unless the context or subject matter otherwise requires:

(1) "Act" means the Indian Child Welfare Act (25 United States Code sections 1901–1963).

(2) "Petitioner" means and refers to a petitioner for the appointment of a guardian of the person of a child or a petitioner for the appointment of a conservator of the person of a formerly married minor child.

(b) Applicability of this rule and rules 5.480 through 5.487

(1) This rule applies to the following proceedings under division 4 of the Probate Code when the proposed ward or conservatee is an Indian child, within the meaning of the act:

(A) A guardianship of the person or the person and estate in which the proposed guardian of the person is not the proposed ward's natural parent or Indian custodian within the meaning of the act;

(B) A conservatorship of the person or the person and estate of a formerly married minor in which the proposed conservator is not a natural parent or Indian custodian of the minor and is seeking physical custody of the proposed conservatee.

(2) Unless the context otherwise requires, rules 5.480 through 5.487 apply to the proceedings listed in (1).

(3) When applied to the proceedings listed in (1), references in rules 5.480 through 5.487 to social workers, probation officers, county probation departments, or county social welfare departments are references to the petitioner or petitioners for the appointment of a guardian or conservator of the person of an Indian child and to an Indian child's appointed temporary or general guardian or conservator of the person.

(4) If the court appoints a temporary or general guardian or conservator of the person of the child involved in a proceeding listed in (1), the duties and responsibilities of a petitioner under this rule are transferred to and become the duties and responsibilities of the appointed guardian or conservator. The petitioner must cooperate with and provide any information the petitioner has concerning the child to the appointed guardian or conservator.

(c) Notice

If, at any time after the filing of a petition for appointment of a guardian or conservator for a minor child, the court or petitioner knows or has reason to know, within the meaning of Probate Code sections 1449 and 1459.5 and Welfare and Institutions Code section 224.3(b), that an Indian child is

involved, the petitioner and the court must notify the child's parents or legal guardian and Indian custodian, and the Indian child's tribe, of the pending proceeding and the right of the tribe to intervene, as follows:

(1) Notice to the Indian child's parents, Indian custodian, and Indian tribe of the commencement of a guardianship or conservatorship must be given by serving copies of the completed *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030), the petition for appointment of a guardian or conservator, and all attachments, by certified or registered mail, fully prepaid with return receipt requested.

(2) The petitioner and his or her attorney, if any, must complete the *Notice* and the petitioner must date and sign the declaration. If there is more than one petitioner, the statements about the child's ancestors and background provided in the *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) must be based on all information known to each petitioner, and all petitioners must sign the declaration.

(3) When the petitioner is represented by an attorney in the proceeding, the attorney must serve copies of the *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) in the manner described in (1) and sign the declaration of mailing on the *Notice*.

(4) When the guardianship or conservatorship petitioner or petitioners are not represented by an attorney in the proceeding, the clerk of the court must serve the *Notice* in the manner described in (1) and sign the certificate of mailing on the *Notice.*

(5) The original of all *Notices of Child Custody Proceeding for Indian Child* (form ICWA-030) served under the act, and all return receipts and responses received, must be filed with the court before the hearing.

(6) Notice to an Indian child's tribe must be sent to the tribal chairperson unless the tribe has designated another agent for service.

(7) Notice must be served on all tribes of which the child may be a member or eligible for membership. If there are more tribes or bands to be served than can be listed on the last page of the *Notice*, the additional tribes or bands may be listed on an *Attachment to Notice of Child Custody Proceeding for Indian Child* (form ICWA-030(A)).

(8) Notice under the act must be served whenever there is any reason to know that the child is or may be an Indian child and for every hearing after the first hearing unless and until it is determined that the act does not apply to the proceeding.

(9) If, after a reasonable time following the service of notice under the act-but in no event less than 60 days-no determinative response to the *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) is received, the court may determine that the act does not apply to the proceeding unless further evidence of its applicability is later received.

(10) If an Indian child's tribe intervenes in the proceeding, service of the *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) is no longer required and subsequent notices to the tribe may be sent to all parties in the form and in the manner required under the Probate Code and these rules. All other provisions of the act, this rule, and rules 5.480 through 5.487 continue to apply.

(11) Notice under the act must be served in addition to all notices otherwise required for the particular proceeding under the provisions of the Probate Code.

(d) Duty of inquiry

(1) The court, a court investigator or county officer appointed to conduct an investigation under Probate Code section 1513 or 1826, a petitioner, and an appointed temporary or general guardian or conservator of the person of a minor child each have an affirmative and continuing duty to inquire whether the child involved in the matters identified in (b)(1) is or may be an Indian child.

(2) Before filing his or her petition, the petitioner must ask the child involved in the proceeding, if the child is old enough, and the parents, any other legal guardian, and any Indian custodian, whether the child is or may be an Indian child, and must complete items 1c and 8 of the *Guardianship Petition-Child Information Attachment* (form GC-210(CA)) and attach it to his or her petition.

(3) At the first personal appearance by a parent or previously appointed legal guardian at a hearing in a guardianship or conservatorship, the court must if requested by petitioner, or may on its own motion, order the parent or legal guardian to complete a *Parental Notification of Indian Status* (form ICWA-020) and deliver the completed form to the petitioner.

(4) If the parent, Indian custodian, or guardian does not personally appear at a hearing in a proceeding identified in (b)(1), the court may order the petitioner to use reasonable diligence to find and ask the parent, Indian custodian, or legal guardian to complete and deliver to petitioner a *Parental Notification of Indian Status* (form ICWA-020).

(5) If the court or county investigator, petitioner, appointed guardian or conservator, or the attorney for a petitioner or appointed guardian or conservator, knows or has reason to know that an Indian child is involved in the proceeding, he or she must make further inquiry as soon as practicable by:

(A) Interviewing the parents, Indian custodian, and "extended family members" as defined in 25 United States Code section 1903(2), to gather the information listed in Probate Code section 1460.2(b)(5) that is required to complete the *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030);

(B) Contacting the U.S. Department of the Interior, Bureau of Indian Affairs and the California Department of Social Services for assistance in identifying the names and contact information of the tribes of which the child may be a member or eligible for membership; and

(C) Contacting the tribes and any other person who reasonably can be expected to have information regarding the child's tribal membership status or eligibility for membership.

(6) If the court knows or has reason to know that an Indian child is involved in the proceeding, the court may direct any of the persons named in (5) to conduct the inquiry described in that paragraph.

(7) The circumstances that may provide reason to know the child is an Indian child include the following:

(A) The child or person having an interest in the child, including an Indian tribe, an Indian organization, an officer of the court, a public or private agency, or a member of the child's extended family, informs or otherwise provides information suggesting that the child is an Indian child to the court or to any person listed in (5);

(B) The residence or domicile of the child, the child's parents, or an Indian custodian is in a predominantly Indian community; or

(C) The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the U.S. Department of Health and Human Services, Indian Health Service, or Tribal Temporary Assistance to Needy Families benefits.

(Subd (d) amended effective July 1, 2012.)

Rule 7.1015 amended effective July 1, 2012; adopted effective January 1, 2008.