JUDICIAL COUNCIL
OF CALIFORNIA
TRIBAL COURT–STATE COURT FORUM

www.courts.ca.gov/forum.htm
forum@jud.ca.gov

TRIBAL COURT–STATE COURT FORUM

OPEN MEETING AGENDA

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1))
THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS
THIS MEETING IS BEING RECORDED

Date:	October 6, 2016
Time:	12:15–1:15 p.m.
Location:	Conference Call
Public Call-In Number	1-877-820-7831 and enter Passcode: 4133250

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(2))

Public Comment
This meeting will be conducted by teleconference. As such, the public may only submit written comments for this meeting.

Written Comment
In accordance with California Rules of Court, rule 10.75(k)(1), written comments pertaining to any agenda item of a regularly noticed open meeting can be submitted up to one complete business day before the meeting. For this specific meeting, comments should be e-mailed to forum@jud.ca.gov or mailed or delivered to 455 Golden Gate Avenue, San Francisco, CA 94102, attention: Jennifer Walter. Only written comments received by 12:15 p.m. on October 5, 2016 will be provided to advisory body members.

III. Discussion and Possible Action Items (Items 1-10)

Item 1
Approval of Minutes for June 9, 2016

Item 2
Cochairs Report

- Mark Your Calendars: Next Forum In-Person Meeting is February 16, 2016 in San Francisco
- Forum Letter of Support for Federal Funding for Tribes in California
- An American Genocide: The United States and the California Indian Catastrophe by Benjamin Madley (see book review: Naming America's Own Genocide)
- Hope to see you at the Native American Indian Court Judges Association (NAICJA) Pre-Institute on ICWA (October 18th) and Conference (October 19-21) at Morongo (Riverside County)
-

Item 3
Pre-Institute: Judicial Roundtable on the Indian Child Welfare Act (ICWA), A Complement to the ICWA Workshop at the Juvenile Law Institute
December 5, 2016, Garden Grove, California
(Sponsored by the Casey Family Programs, the National American Indian Court Judges Association, and the Forum)
Presenters: Judge Wiseman
Jenny Walter

Item 4
Forum's Presentation to the Commission on Access to Justice
Presenters: Justice Dennis Perluss
Judge Christine Williams

Item 5
Report on Tribal Access to Title IVE Background Checks
Presenters: Ms. Delia Parr

Item 6
Update on SB 406 Study
Presenters: Jenny Walter

Item 7
California Implementation of the New Federal Regulations and Proposed Guidelines-Forum Discussion
Facilitator: Judge Leonard Edwards

IV. Adjournment

Adjourn

JUDICIAL COUNCIL
OF CALIFORNIA
TRIBAL COURT–STATE COURT FORUM

www.courts.ca.gov/forum.htm
forum@jud.ca.gov

TRIBAL COURT–STATE COURT FORUM

MINUTES OF OPEN MEETING

June 9, 2016
8:30am -5:00pm
In Person

Advisory Body Members Present:	*Hon. Abby Abinanti, Co-chair, and Hon. Dennis M. Perluss, Co-chair*, Hon. April Attebury, Hon. Leonard Edwards, Hon. Mark Juhas, Hon. Patricia Lenzi, Hon. Lester Marston, Hon. Mark Radoff, Hon. Sunshine Sykes, Hon. Juan Ulloa, Hon. Claudette White, Hon. Christopher Wilson, Hon. Joseph Wiseman, and Hon. Zeke Zeidler
Advisory Body Members Absent:	Ms. Jacqueline Davenport, Hon. Gail Dekreon, Hon. Michael Golden, Hon. Cynthia Gomez, Mr. Olin Jones, Hon. Suzanne Kingsbury, Hon. William Kockenmeister, Hon. Anthony Lee, Hon. David Nelson, Hon. John Sugiyama, Hon. Allen Sumner, Hon. Christine Williams and Hon. Sarah Works
Others Present:	Ms. Natasha Anderson, Mr. Sam Barry, Hon. Richard Blake, Ms. Nikki Borchardt Campbell, Ms. Vida Castaneda, Ms. Lisa Cook, Ms. Sylvia Deporto, Mr. Frank Dominguez, Ms. Sheri Fremont, Ms. Nicole Garcia, Mr. Jerry Gardner, Professor Carole Goldberg, Ms. Ann Gilmour, Mr. Brian Hebert, Mr. Ricardo Hernandez, Hon. Jim Humes, Dr. Carrie Johnson, Hon. Lawrence King, Mr. Michael Newman, Ms. Mary Trimble Norris, Ms. Delia Parr, Hon. Amy Pellman, Ms. Mary Jane Risling, Mr. Sheldon Spotted Elk, Ms. Lauren Van Schilfgaarde, Ms. Jennifer Walter and Ms. Kelly Winston.

OPEN MEETING

Call to Order and Roll Call
The co-chairs called the meeting to order at 8:30 am

Approval of Minutes
The committee approved the April 14, 2016 minutes.

DISCUSSION AND ACTION ITEMS (ITEMS 1–8)

Item 1
Invocation
At the request of Judge Abby Abinanti, Judge Patricia Lenzi opened the meeting with a brief personal introduction and invocation as follows:

> I am of the Wolf Clan and a member of the St. Regis Mohave Tribe. My great grandmother was a clan mother, and her great grandfather was a traditional chief. Our clan mothers choose the traditional chiefs. I thank you and apologize for stepping over

anyone else that may feel that they may be more appropriate to give this opening prayer; but I've been asked, so I am honored to speak.

Creator, thank you for allowing us to gather together to learn and work together. This is a group that has tried very hard to make things better for tribes, courts and for all people in each of our justice systems. Because we come together, we are able to work and improve the lives of everyone we touch. I want to share a thought that someone once gave me during an invocation—we all have soft heads and open hearts. None of our heads are so hard that we cannot accept new information and none of our hearts are so closed that we cannot open them to new information and new ways of thinking and working. So I thank you all and ask that we all keep our heads soft and our hearts open for this day.

Item 2

Welcome and Introductions

Justice Dennis Perluss and Judge Abby Abinanti thanked Judge Lenzi, welcomed participants, and asked them to take notes in their workbooks. Justice Perluss explained that member feedback in these workbooks helps inform forum priorities and, in particular, the statewide roundtables and the federal court improvement program focusing on the Indian Child Welfare Act.

Item 3

Session 1: Forum Member Project Updates

Educational Projects

Judge Abinanti described three of the forum's current educational projects: (1) collaboration with the California Chief Justice's Power of Democracy Steering Committee to develop a civic learning opportunity for native and nonnative youth to learn about local issues in Humboldt and Del Norte Counties; (2) collaboration with the Center for Judicial Education Research (CJER) Curriculum Committee to incorporate the forum's Federal Indian Law Toolkit into the existing CJER online toolkits; and (3) collaboration with independent filmmaker on a documentary, *Tribal Justice in California*.

Cross Cultural Exchanges—Child Support and Domestic Violence

Yurok and Humboldt- Child Support

Judge Abinanti described these exchanges and how they model the collaborative relationships among tribal and state court judges at a local level and foster partnerships among tribal and non-tribal agencies and service providers. Through these exchanges, which are judicially convened on tribal lands, participants identify areas of mutual concern, new ways of working together, and coordinated approaches to enforcing tribal and state court orders. Judge Abinanti and Judge Wilson described the recent exchange at Klamath, which focused on child support and brought together judges from Humboldt, Del Norte, and Yurok courts, as well as representatives from the statewide Department of Child Support Services, the local tribal and county child support services, and other partners. Judge Abinanti described how simply getting everyone together to

open lines of communication was all that was needed. Before the exchange, case transfers from state court to tribal court had virtually stopped. During the exchange, because participants began to understand one another and the different court and agency processes, they were able to identify and fix problems. After the exchange, everyone experienced success—the smooth transfer of cases from state court to tribal court, the provision of services to noncustodial parents, and the resolution of paternity and tribal membership issues. Judge Abinanti underscored the difference between tribal court and state court: the tribal court can take the extra time to engage and understand families. She described how her tribal court hears from parents and extended family members in child support cases—a grandmother may offer to babysit, a father may provide wood or fish in lieu of monetary support, and the whole family can discuss and resolve more than the narrow legal issues of child support.

Cahto Tribe, Coyote Valley, Hopland, and Manchester Point Arena & Mendocino—Domestic Violence

Judge Joseph Wiseman described the exchange at Hopland convened by the Mendocino Superior Court and the Northern California Intertribal Court System. Participants included court representatives and local, county, and tribal professionals who work in the fields of child welfare, juvenile and criminal law, education, mental health, probation, social services, victim and other supportive services. He described how the event brought these stakeholders together to discuss services for tribal members and their families impacted by domestic violence. Participants discussed topics such as tribal courts, the recognition and enforcement of protection orders, and collaboration among law enforcement and court systems to improve offender accountability and the provision of culturally appropriate services. Unlike the experience in the rest of the state, Judge Wiseman remarked that his protection orders are promptly entered into the California Department of Justice database by the local state court, which is one of four state courts (Humboldt, Kern, Mendocino, and Riverside) that has direct access to the California Law Enforcement Telecommunications System. Judge Wiseman encouraged forum members to use the services of S.T.E.P.S. to Justice offered by the Judicial Council's tribal/state programs, which enabled him and Judge David Nelson to convene the exchange.

Yurok and Humboldt—Child Welfare, Drug Court, and Domestic Violence

Judge Christopher Wilson described how tribal and nontribal agencies in Humboldt County are working together to do a better job of early identification of children with Indian ancestry and directing funds and services to meet their educational and other needs. He also described the dependency drug court that he and Judge Abinanti are creating that will hear cases in the more rural areas of the county where the population is severely impacted by drugs. Together, they are addressing express and implicit cultural bias, improving public trust and confidence in the courts, and providing more culturally appropriate services for offenders and their families. During the child support exchange, Judge Wilson reported that participants were able to overcome distrust, bridge the disconnect between state and tribal courts, and identify policy recommendations, such as language changes to the rule of court that would remove subjectivity and opportunity for cultural bias. Since the exchange, the courts have convened subsequent meetings, incorporated a

cultural component into both the Yurok and non-Yurok domestic violence programs, and defined mandatory community service hours to include reconnecting and engaging with children.

Quechan Tribe and Imperial-—Child Welfare and Domestic Violence
Judge Claudette White and Judge Juan Ulloa described how the cross-court cultural exchanges and their participation statewide on the forum has had positive effects locally. They shared stories from the early days when local law enforcement refused to enforce the tribal court's protection orders. Judge Ulloa described one particular incident when Judge White called him from the local sheriff's office and a three-way conversation ensued during which the officer acknowledged that Judge White was a judge that he held an order with her signature, and yet he would not enforce it. Judge Ulloa and Judge White remarked that their tribal-county-court relations had come a long way since this first encounter with law enforcement. Judge White described the very first exchange they convened, with the assistance of the Tribal/State Programs staff, and how it has served as a blueprint for further meetings and trainings. They have witnessed these exchanges not only educating, but also changing attitudes and behavior. Recently, Judge Ulloa and Judge White convened a training to address topics such as child protection reporting, recognition and enforcement of protection orders, cyberbullying, and human trafficking. As part of S.T.E.P.S. to Justice, Tribal/State Programs staff assisted with this training. As a result of the most recent exchange, the county domestic violence presenters are helping the Quechan Tribe create a domestic violence response team.

Tribal Court Access to California Restraining and Protection Oder System and Jurisdictional Tools
Judge Patricia Lenzi, Justice Dennis Perluss, and Jenny Walter reported on the meeting of March 16, 2016, convened by the California Attorney General's Office, to address lack of recognition and enforcement of tribal protection orders in violation of state and federal full faith and credit statutes. Representatives from the U.S. Department of Justice, the California State Sheriffs Association (CSSA), California Indian Legal Services (CILS), the Yurok Tribal Court, and tribal advocates participated. Despite agreement on the law, the position of California DOJ and CSSA is that law enforcement, as a practical matter, will not recognize or enforce any protection order, tribal or nontribal, unless it is in the California Restraining and Protective Order System (CARPOS), which can be viewed through the California Law Enforcement Telecommunications System (CLETS). Despite the general support from the groups represented at this meeting, no solutions were offered to give tribal courts direct access to CLETS to enter their orders into CARPOS. In a follow-up to this meeting, the forum co-chairs sent a letter to the meeting organizers recommending policy changes. Specifically, they recommended that the California Attorney General, in collaboration with CSSA, reaffirm that federal and state laws require an officer enforce a tribal protection order whether or not it is registered in, or verified through, CARPOS or another database. Such a policy statement should also reassure officers that state law provides for immunity from civil liability for good faith enforcement of tribal protection orders that are regular on their face. They also recommended that, since tribal court access to statewide and federal databases is critical to achieve victim and officer safety, tribal courts should be given this access to enter their orders. Some potential solutions may be a legal opinion

or letter by the California Attorney General authorizing access, a technological advance that creates a firewall so orders can be entered but other material not read by tribal courts, or a pilot project through the U.S. Department of Justice to permit access to the federal database.

After some discussion about the feasibility of a legislative solution, Justice Humes suggested that a California DOJ bulletin might be the appropriate vehicle for making these type of statewide policy interpretations and announcements.

Delia Parr, of CILS, explained that the legislative interpretation that tribes are not public agencies means that tribes in California that operate their own title IV-E programs are not able to access the DOJ database to conduct background checks on members in potential homes for Indian children. This topic will be placed on the agenda for the next meeting so that forum members could learn more about the partnership between DOJ and the California Department of Social Services to address this problem.

Ms. Walter updated the group on steps taken since the March 2016 meeting. The California DOJ is pursuing whether the Sycuan Tribal Council will approve its Sycuan Tribal Police Department to enter tribal protection orders for any California tribe that asks. This solution is still a workaround and, according to CILS, not all tribes will be willing to share their orders with the Sycuan Tribal Police Department. The California DOJ, CILS, CSSA, and Peace Officer Standards and Training have approved the jurisdictional tools that the forum developed, and CSSA has mailed them to their membership. These tools are available as part of the e-binder and are posted to the forum's website.

SB 406

Judge Mark Radoff described SB 406 and explained that it will sunset on January 1, 2018 if the Legislature does not extend it. The forum, in collaboration with U.C. Davis School of Law, is conducting a study to support a legislative proposal to lift the sunset and expand the scope of the bill to civil judgments beyond money judgments. Judge Radoff reviewed the summary of the survey responses, noting that more than 70% of the state court judges answered the survey, whereas only 30% of tribal court judges answered the survey, and only three respondents answered the practitioner survey. Judge Radoff directed members to their meeting materials for the summary of the survey responses and urged his tribal court colleagues to help increase the response rate.

Brian Hebert, executive director of the California Law Revision Commission (CLRC), described CLRC and its limited role in studying the standards of recognition in SB 406. He explained that the commission works in areas expressly authorized by the Legislature and has issued a tentative recommendation. He encouraged forum members to submit public comments before August 1, 2016.

Break

Item 4

Session 2: Indian Child Welfare Act (ICWA) Updates

ICWA—Federal Regulations, Federal Compliance, and Cases

Ann Gilmour introduced the topic by describing the interplay between the federal law, the federal regulations, and California's state statutes codifying ICWA. She highlighted that many of the challenges to ICWA in California and other states involve cases where the child has no connections to his or her tribe.

Judge Leonard Edwards reported that ICWA is under attack by a number of critics. The Goldwater Institute and others have brought lawsuits in five different states claiming that ICWA is unconstitutional because it is based on race, rather than political status. Numerous recent editorials favor the adoptive families and not the Native American families of origin, citing bonding and attachment with the first non-Native family where the child was placed. What we are experiencing, Judge Edwards explained, is the continuation of the same historical pressure that existed when ICWA was first enacted. It started with a trust relationship. The federal government promised to protect Indian children. Nevertheless, Indian children were removed from their family homes and placed in group homes and with non-Indian families. The government wanted to assimilate Native Americans and took their children. In 1966, under the Indian Adoptive Act, the government placed large numbers of Native American children in white homes believing that this was best thing for them. Congress took testimony for a number of years and heard the toll this had taken on tribal community after tribal community, understanding that these policies advanced cultural genocide. Congress determined that this injustice must end and enacted ICWA. However, it was not until 2001 that the director of the Child Welfare League of America apologized for its role in the removal of large numbers of Indian children from their families and tribes. Today, ICWA is at risk because the same historical pressures exist.

Judge Edwards described his research interviewing many Native American adults who report the negative effects of growing up without their cultures. They describe growing up angry and depressed because they knew they were different, but did not know why. They knew they might be loved, but love does not provide identity. In this way, they all describe suffering from what is termed split feather syndrome[1] growing up different in an inhospitable world.

ICWA California Department of Justice Taskforce Report (Task Force Report)

[1] The term "Split Feather" refers to adult Indians, who were expatriated (adoptees, foster children) from their homes and cultures as children and placed in non-Indian homes. Since there are no statistical data to determine the exact parameters of the Split Feather Syndrome, it is assumed that the term "Split Feather" would apply to any individual who suffers a particular set of psychological, social, and emotional disabilities directly related to the experience of expatriation. http://www.nativecanadian.ca/Native_Reflections/split_feather_syndrome.htm

Mr. Michael Newman reported that in November 2015, the California Department of Justice's Bureau of Children's Justice (BCJ) established the Task Force to learn from tribal communities their experience with ICWA compliance in juvenile dependency cases. The Task Force members included seven tribal co-chairs and one tribal court judge who met regularly and gathered information and data statewide.

Judge Abinanti and Ms. Parr described the report highlights. They emphasized that noncompliance with both procedural and substantive protections of ICWA was reported in every county in California. They reported on the following findings:

- Stage of the Case Where Most Noncompliance: pre-removal, active efforts, jurisdiction and placement;
- Most Common Areas of Noncompliance: notice and inquiry, active efforts, placement and use of qualified expert witnesses; and
- Most Noted Obstacles to Compliance: lack of counsel for tribes, lack of knowledge about ICWA on the part of judges, attorneys, and social workers, hostility to tribal participation/input in case, and, all too often, failure to provide meaningful notice to tribes.

The report contains twenty-five recommendations relating to education for counsel and social workers, consolidated courts, appointed counsel for tribes, attorney fees, sanctions, binding pre-dispositional agreement, codification of ICWA application and enforcement in the foster care bill of rights, state monitoring/oversight, agency report sections on ICWA, ICWA data collection, tribal access to records, culturally appropriate services, ICWA units within agencies, lower case counts for social workers handling ICWA cases, establishment of California Department of Social Services (CDSS) Office of Native American Affairs, CDSS share federal block grants with tribes, share state funding for placement recruitment with tribes, criminal background exemptions, active efforts, expert witnesses, periodic reports to include tribal contact information, agency pleadings reviewed and approved by county counsel, CDSS Tribal Consultation Process, judicial competency, tribal title IV-E unit within CDSS, de facto parent process, and criminal penalties for willful ICWA violations.

As an attorney for CILS who helped with the drafting of this report, Ms. Parr shared personal remarks. What is unusual about this report is that the effort was led by tribal leaders, and consequently, tribes across the state feel a real sense of ownership of the report and its recommendations. Many of the recommendations call for legislation and education. Ms. Parr asked for support to implement these recommendations from the forum and the BCJ.

As Task Force Co-chair, Judge Abinanti shared personal remarks about the report. She focused on two of the report's recommendations: appointed counsel for tribes and consolidated courts. She explained that without attorneys for tribes, the judges are unable to make informed decisions and tribes are unable to meaningfully participate. She pointed out that all the parties except

tribes have attorneys, and said she could think of no other case type where all but one party is represented. She asked members to think about whether this is fair and explained it leads to uninformed decisions. She urged courts to consolidate resources in specialized ICWA calendars so that judges, attorneys, social workers and advocates can develop an expertise in ICWA. The report underscores that ICWA specialization and education would translate into better understanding about the process and a fairer process for the parties.

ICWA Statewide Workgroup & Consultation Policy, Data & Systems

Kelly Winston, Bureau Chief at CDSS and Mary Risling, Tribal Consultant at CDSS, described the agency's work related to ICWA compliance including the ICWA Work Group and the development of and upcoming rollout of CDSS's tribal consultation process in coordination with the tribal consultation process of Health and Human Services. Ms. Risling described her work on the agency's new case management system and the need to define terms so that data can be analyzed across systems. She gave the example of "ICWA Eligible Child," which is not defined and is used differently across systems. Ms. Risling described looking forward to working closely with the state judicial branch and local courts that are implementing electronic court case management systems so that required data can be captured and shared electronically across systems in smart forms.

Representatives from the Los Angeles County Superior Court described the Odyssey Tyler court case management system. A majority of California's state courts are using this system, which can be configured to capture various kinds of ICWA-related data. For example, the system can flag ICWA cases, notice tribes, and run reports to obtain an accurate total of ICWA cases. Courts are just beginning to explore these system features.

California Statutes and Rules of Court — Implementation Issues, Proposed Legislative, and Rule Proposals

This part of the session was postponed for a future forum meeting giving members time to review the federal ICWA regulations and staff time to analyze the regulations and their potential impact on California legislation and rules of court.

Item 5

Session 3: Funding

Judge Richard Blake and Natasha Anderson, Deputy Associate Director, Tribal Justice Support Directorate, Bureau of Indian Affairs, described new funding for tribal courts in California. Congress has finally begun to recognize the needs of tribal judicial systems in mandatory P.L. 280 states (in comparison, tribes in non-P.L. 280 states receive 638 grants to support tribal justice systems) and allocated $10 million to the Bureau of Indian Affairs Office of Justice Services' Tribal Justice Support Directorate. The funding is for assessing needs, considering options, and design, development, and piloting tribal court systems for tribal communities.

Item 6

Session 4: Working Lunch
State of Tribal Courts: Where We Stand After Dollar General and Other Recent Cases

Professor Carole Goldberg began her presentation by stating that as of June 9, 2016, the U.S. Supreme Court had not issued its opinion in Dollar General Corporation v. Mississippi Band of Choctaw Indians.[2] An adverse decision in the case has far-reaching potential for negatively affecting tribal sovereignty and the authority of Indian tribal courts. The issue presented to the Supreme Court is whether tribal courts have jurisdiction to decide civil tort claims against individuals or companies that are not members of the tribe. A local Dollar General store on the Choctaw reservation offered young tribal members internships as part of a training program. Dollar Store was sued when a 13-year-old boy accused the manager of soliciting sex and offering to pay him large sums of money in exchange for sexual acts. The lawsuit was filed in tribal court, but Dollar General sued separately in federal court to contest the tribal court's jurisdiction. After losing in the lower courts, Dollar General sought review in the Supreme Court. The outcome of the case threatens to shift the delicate balance between United States government and the governments of Native American tribes. In essence, Dollar General seeks a ruling that tribal courts cannot adjudicate ordinary tort disputes involving non-Native Americans. The case could redefine interactions between the federal government and tribes as sovereign nations within U.S. borders.

Professor Goldberg described the Dollar General case in the historical arc of tribal-state court relations in California. Many tribal justice systems are undergoing unprecedented change as tribal nations consider extending their inherent criminal jurisdiction over non-Indians in domestic violence cases, as provided by the Violence Against Women Act Reauthorization Act of 2013 (VAWA Amendments), and as they implement the enhanced sentencing options for Indians provided by the Tribal Law and Order Act of 2010 (TLOA) and tribal jurisdiction over drug crimes, domestic violence against children, and crimes against law enforcement officers provided by the Tribal Youth and Community Protection Act of 2016. The jurisdictional reforms recommended by the Indian Law and Order Commission—up to and including the ability of Indian nations to exit the federal criminal justice system and to retrocede from state criminal jurisdiction in P.L. 280 states—will present ever greater opportunities for strengthening locally accountable, tribally based criminal justice systems. Professor Goldberg posed several questions and shared her insights to these questions: Are we at a turning point as we examine criminal jurisdiction, civil jurisdiction, and options for tribes in P.L. 280 states, the constitutionality of tribal jurisdiction, the future of retrocession, and the lack of funding for tribes in California.

Item 7

Session 5: Continuum of Care Reform (CCR) and ICWA in California

Ms. Sylvia Deporto, Child Welfare Director, San Francisco Human Services Agency, described CCR and how it is helping with ICWA compliance. "Continuum of care" refers to the range of care settings for children in foster care, from the least restrictive and least service-intensive (for instance, a placement with an individual foster family or an extended family member) to the

[2] On June 23, 2016, the U.S. Supreme Court affirmed the ruling of the United of the States Court of Appeals for the Fifth Circuit by an equally divided court (4-4).

most restrictive and most service-intensive (for instance, a group home with required participation in mental health treatment and limits on when the youth can leave the facility). CCR is a comprehensive reform effort to make sure that children in foster care have their day-to-day physical, mental, and emotional needs met; that they have the greatest chance to grow up in permanent and supportive homes; and that they have the opportunity to grow into self-sufficient, successful adults. Child welfare agencies are giving foster families, now called resource families, training and support so that they are better prepared to care for the children living with them. California has continued to move away from the use of long-term group home care. These reforms create a timeline to implement this shift in placement options and related performance measures. They build upon many years of policy and practice changes designed to improve outcomes for children in foster care. Depending on the type of placement and needs of a child in foster care, core wrap-around services are provided. They may include arranging access to specialized mental health treatment, providing transitional support from foster placement to permanent home placement, supporting connections with siblings and extended family members, providing transportation to school and other educational activities, and teaching independent living skills to older youth and non-minor dependents. By providing these core services and supports in ICWA cases, social workers are focused on reconnecting these young people with their tribal communities and giving them a sense of belonging.

Item 8:

Session 6: Local ICWA Roundtable—Updates on Strategies for Reducing Disparities and Disproportionality

The forum through the Judicial Council's Tribal/State Programs promotes these local partnerships aimed at improving compliance with ICWA. Chairs from the Los Angeles ICWA Stakeholders' Roundtable, Riverside Tribal Alliance, and the Bay Area Collaboration of American Indian Resources provided the forum with information about their roundtables and the steps they have taken to address disproportionality and disparities.

Los Angeles Roundtable

Dr. Carrie Johnson, Director of United American Indian Involvement, and Judge Amy Pellman, Los Angeles Superior Court, co-chairs of the Los Angeles ICWA Stakeholders' Roundtable, described their roundtable. In June 2013, Judge Pellman requested the technical assistance of Tribal STAR and the Judicial Council's Tribal/State Programs to help convene tribal elders, ICWA advocates, tribal community leaders, TANF providers, school district representatives, parents' attorneys, children's attorneys, county counsel, adoption attorneys, representatives from the Los Angeles County Department of Children and Family Services, tribal representatives from tribes located outside California, local tribal representatives, Native service providers, Casey Family Agency representatives, American Indian Children's Council representatives and statewide ICWA task force representatives. Judge Pellman described her vision to bring together all ICWA stakeholders in Los Angeles County for quarterly meetings in an effort to improve relations, increase effective communication, work on collaborative projects, improve long-

standing issues and overall provide better potential outcomes for Native American families. Dr Johnson commended Judge Pellman and reported that the roundtable had made great strides in these areas.

The roundtable maintains a variety of subcommittees that include establishing a peacemaking court program, tribal engagement and outreach, recruitment of Native American foster homes, culturally competent resources and services, and the inquiry/notice/training subcommittee. The roundtable has had positive outcomes, such as sharing Native-specific resources through the resource directory, Red Pages, recruitment of Native foster homes through a number of media outlets, and launching a peacemaking program.

Riverside County Tribal Alliance (Alliance) for Indian Children and Families

Judge Sunshine Sykes, Riverside Superior Court and chair of the Riverside County Tribal Alliance, described the Alliance, which is dedicated to increasing participation, communication, and understanding among the court, the tribes, and county agencies serving Native American families. The Alliance was formed in 2005 under the leadership of the Riverside Superior Court. The goal is to minimize court and county intervention and increase tribal participation and control over Native American children and families by developing culturally appropriate services. Alliance members are working to create and sustain partnerships founded upon understanding, communication, and cultural awareness among the sovereign tribal nations and community and governmental agencies. The Alliance meets three times a year. Meetings are hosted by Alliance members and include presentations and discussions involving cultural awareness issues and tribal programs. The Alliance has developed work groups that meet regularly throughout the year to discuss tribal and court issues. These workgroups focus on tribal expert witnesses, education, placement and foster care, and domestic violence.

The Bay Area Collaborative of American Indian Resources (BACAIR)

Ms. Mary Trimble-Norris, Director of the American Indian Child Resource Center, and Ms. Sylvia Deporto described BACAIR, which is a gathering of Native American agency, state, and county representatives that practice within a framework of respect, wellness, cultural affirmation, healing and restoration for American Indian/Alaska Native families residing in the greater Bay Area. BACAIR promotes culturally appropriate responsiveness; strengthens permanent connections; informs policy and practice; honors government-to-government relations; provides guidance through governmental and agency systems; and facilitates awareness and access to resources for American Indian/Alaska Native families through collaboration, advocacy, engagement and education. BACAIR recently updated its brochure and developed a booklet for parents with information on ICWA and Bay Area resources. Currently, Alameda and San Francisco social service departments are participating in BACAIR. BACAIR has improved the accuracy of data collection, reduced disproportional numbers of Native children in foster care, and seen an increase in tribal enrollment of Native children. BACAIR trainings have resulted in improved inquiry and notice practices in the counties. BACAIR has working/affinity groups that meet regularly throughout the year to discuss policy, outreach and practice.

Item 9:
Session 7: National Level News and Programs

Tribal Law and Policy Institute (TLPI)
Jerry Gardner, Director of TLPI, described his organization and online resources relating to tribal/state collaborations, Walking on Common Ground, and tribal news, Tribal Law Updates. Mr. Gardner invited members to attend the 15th National Indian Nations Conference: Justice for Victims of Crime December 8-10, 2016. This conference provides opportunities for tribal, state, and federal participants to share knowledge, experience, and ideas for developing and improving strategies and programs that serve the unique needs of crime victims in Indian Country. Mr. Gardner also described the work of the Native American Concerns Committee of the American Bar Association's Section of Civil Rights and Social Justice, which has planned two teleconferences to discuss the new ICWA regulations and the Dollar General decision and recently has made policy recommendations in support of the Tribal Law and Order Commission Report relating to juvenile justice in Indian country and Alaskan Native concerns. He invited members to the ABA's 2016 Annual Meeting in August, and the program on Tribal Courts in the 21st Century on August 5, 2016. Mr. Gardner also provided information on the recent U.S. Senate Committee on Indian Affairs legislative hearing on S. 2785, The Tribal Youth and Community Protection Act, and S. 2920, the Tribal Law and Order Reauthorization of 2016. The former would amend the domestic violence criminal jurisdiction provision included as Section 904 of Violence Against Women Act 2013 to affirm tribal jurisdiction over certain non-Indians who commit crimes against native children in Indian country, certain drug offenses, and related crimes. The latter would reauthorize the Tribal Law and Order Act, which authorizes expanded sentencing authority for tribal justice systems, clarifies jurisdiction in P.L. 280 states, and requires enhanced information sharing.

Casey Family Programs (Casey)[3] and National American Indian Court Judges Association (NAICJA)
Sheldon Spotted Elk, Director of Casey's ICWA Programs, described his organization, which is the nation's largest operating foundation focused on safely reducing the need for foster care and building Communities of Hope for children and families across America.

Judge Richard Blake, NAICJA President, described the organization. Established in 1969, NAICJA is a national association comprised of tribal justice personnel and others devoted to supporting and strengthening tribal justice systems through education, information sharing, and advocacy. Casey and NAICJA have teamed up to promote dialogue, conduct needs assessments, and help jurisdictions improve compliance with the Indian Child Welfare Act. They will be working with the forum to plan two ICWA roundtables. The first is tentatively scheduled in the south on October 18th right before the NAICJA Conference at Morongo. The second will be in the north at a location to be determined by the forum, NAICJA, and Casey Family Programs.

[3] The forum and Tribal/State Programs staff would like to thank Casey Family Programs for its generosity in hosting the dinner meeting on June 8, 2016, which preceded this forum meeting. It was both informative and offered an opportunity for forum members, guests, and staff to strengthen their collaboration.

Item 10:
Session 8: Planning for ICWA Statewide Roundtables 2016-2017

Nikki Borchardt Campbell, NAICJA Executive Director, and Mr. Spotted Elk, facilitated a discussion to begin planning for the ICWA Roundtables. Forum members asked for topics to include (1) the history and context for ICWA, including historical trauma; (2) cultural bias through group exercises to identify cultural bias; (3) new laws: regulations, guidelines, and case law; (4) judicial oversight/how to prevent reversals on appeal; (5) information on the California ICWA Task Force Report; and (6) data collection.

The group discussed ways to attract judges to attend—convening the roundtables in conjunction with existing state judicial educational programs, such as CJER's Institutes (Cow County May 2017 and Juvenile Law Institute December 2016) or Beyond the Bench (December 2017), paying for associated travel and lodging expenses for judges, including topics that interest judges such as items 3 and 4 listed above.

The group discussed the type of format for the roundtables, identifying the benefits of public hearing, in-person educational workshop, and regional webinar formats. The group discussed the benefits of not only focusing on judicial education, but also including all who work in the child welfare system (for example, attorneys, social workers, and tribal advocates).

The group discussed other potential locations—tribe in northern California to host, Sacramento, and Palo Alto (in May during Mother's Day weekend, the Stanford American Indian Organization and the Stanford Powwow Planning Committee host a Pow Wow).

Item 11:
Session 9: Forum Priorities 2016-2017 and Court Improvement Program Grant
The forum co-chairs directed members to the annual report, which describes the forum's projects and lists them by priority and category type: policies, education, and tribal/state partnerships. They encouraged members to review and give feedback on current projects, as well as to suggest new ones.

Ms. Walter described a federal grant opportunity for $500,000 a year for five years for a total of $2,500,000 to improve ICWA compliance, posted in April by the Health and Human Services Department with a deadline of June 22, 2016. She thanked forum members and representatives from BACAIR, CWDA, NAICJA, and TLPI for providing letters of support for the grant application, which will be submitted by the Judicial Council of California as the lead agency in partnership with the CDSS and the Tolowa Dee-ni' Nation. Because the grant requires that the first year be devoted to planning and strengthening relationships, the application proposes to build on the forum's success by establishing an ICWA Implementation Partnership that will serve to steer the proposed projects. This partnership will include, at a minimum, a representative of the CDSS, Child Welfare Director's Association, California Indian Court Judges Association, Forum, Pacific Regional BIA, Statewide ICWA Workgroup, and Tolowa Dee-ni' Nation.

This partnership will, directly or indirectly, serve all of the American Indian populations in California. Some of the project's goals and objectives will have statewide impact. These include:
(1) Policies: legislative, rule, and regulatory changes consistent with the new BIA Guidelines and regulations will be written, coordinated, and implemented;
(2) Education: national judicial curriculum will be adapted for California consistent with new federal ICWA regulations and case law and judicial training will be offered;
(3) Technology: improved data systems within the California child welfare case management system and court case management systems will result in more accurate and complete information concerning ICWA compliance and the outcomes for Indian children and families.

Other projects will have local impact because they will be piloted by partnership courts. The ICWA Implementation Partnership will identify promising practices to pilots. Written into the proposal is piloting appointment of attorneys for tribes. Other promising practice models are suggested, such as (1) replicating the joint jurisdictional court, developing memoranda of understanding, and protocols for transfer between state and tribal courts; (2) consolidating resources in specialty ICWA courts and making modifications in court calendaring systems to better accommodate participation by tribal representatives; and (3) establishment of local dedicated ICWA units within specific county child welfare agencies. All models will be evaluated with ICWA compliance and other child welfare measures. We expect that as a result of the activities under the grant we will see greater ICWA compliance including early identification of Indian children; early notice to tribes; fewer placements outside the ICWA placement preferences and fewer appeals. Results will be measured by pre- and post-intervention file review assessments and surveys as well as data analysis.

ADJOURNMENT

There being no further business, the meeting was adjourned at 5:00 p.m.

Pending approval by the advisory body on October 6, 2016.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue
San Francisco, CA 94102-3688
Tel 415-865-4200
TDD 415-865-4272
Fax 415-865-4205
www.courts.ca.gov

HON. TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MR. MARTIN HOSHINO
Administrative Director,
Judicial Council

TRIBAL COURT–STATE COURT FORUM

HON. ABBY ABINANTI
HON. DENNIS M. PERLUSS
Co-chairs

Hon. April E. Attebury
Ms. Jacqueline Davenport
Hon. Gail Dekreon
Hon. Leonard P. Edwards (Ret.)
Hon. Kimberly A. Gaab
Hon. Michael Golden
Hon. Cynthia Gomez
Mr. Olin Jones
Hon. Mark A. Juhas
Hon. Suzanne N. Kingsbury
Hon. William Kockenmeister
Hon. Anthony Lee
Hon. Patricia Lenzi
Hon. John Madigan
Hon. Lester J. Marston
Hon. David E. Nelson
Hon. Mark Radoff
Hon. John H. Sugiyama
Hon. Allen H. Summer
Hon. Sunshine S. Sykes
Hon. Juan Ulloa
Hon. Claudette C. White
Hon. Christine Williams
Hon. Christopher G. Wilson
Hon. Joseph J. Wiseman
Hon. Sarah S. Works
Hon. Daniel Zeke Zeidler

COMMITTEE STAFF
Ms. Jennifer Walter
Tel 415-865-7687

August 22, 2016

Hon. Senator Dianne Feinstein
One Post Street
Suite 2450
San Francisco, CA 94104

Fax: (415) 393-0710

Re. California Tribal Court Funding

Dear Senator Feinstein:

We write concerning the proposed allocation of $10,000,000.00 in funding to "…assess needs, consider options, and design, develop, and pilot tribal court systems for tribal communities…" in Public Law 83-280 (PL-280) states, and to urge you to advocate for an allocation of that funding that recognizes both the size of California's Indian population and its historic underfunding.[1]

As you are no doubt aware, California Indian tribes have not historically received their fair share of federal Indian program dollars.[2] This includes failure to provide adequate and equitable funding to California tribes for tribal court development.[3]

The Judicial Council of California supports the development of tribal justice systems in California and urges you to ensure that California tribes receive appropriate consideration when allocating funds for tribal court development in PL-280 states.

California Indians have been uniquely historically underserved and disadvantaged by federal formulas used to allocate funds to Indian tribes. A 1996 report to the Advisory Council on California Indian Policy "A Second Century of Dishonor: Federal Inequities and California Tribes,"

[1] The appropriations are discussed here on December 17, 2015, at page H10218 https://www.congress.gov/crec/2015/12/17/CREC-2015-12-17-bk3.pdf
[2] Final Report: Advisory Council on California Indian Policy (1997) "Community Services Report: A Second Century of Dishonor – Federal Inequities and California Tribes" Summary at page 1. Available at http://www.aisc.ucla.edu/ca/tribes1.htm
[3] Available at http://www.tribal-institute.org/download/BIATribalCourtsCostEstimatesPL-280States.pdf

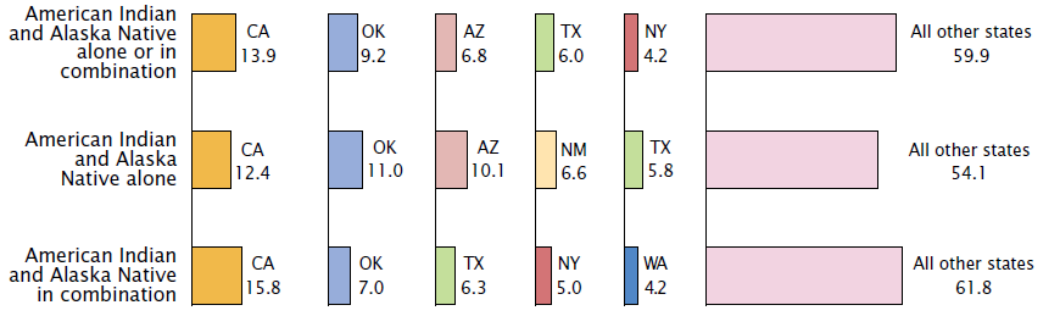
exhaustively documents these inequities in funding.[4] Specifically the chapter on "Funding Inequity and California's Special Legal Status" details the devastating effects that the withdrawal of federal funding for tribal justice systems has had in California. The final report from the Indian Law and Order Commission, "A Roadmap for Making Native America Safer," confirms the continuing negative effects of that withdrawal of federal support under PL-280. The report recommends the provision of base funding to allow the development of more robust tribal courts.[5] Recent court decisions have commented on the problems associated with the lack of federal funding for law enforcement and justice services in California as a result of its status as a PL-280 state.[6]

California currently has 23 tribal courts serving approximately 40 of its 109 tribes. California has close to twenty percent of all federally recognized tribes in the United States. The 2013 American Indian Population report, published January 16, 2014, establishes that California is the state with the second highest number of Native Americans living in or near the areas of federally recognized tribes, second only to Oklahoma. [7] According to the latest census data, California is home to close to 14% of the entire American Indian/Alaska Native population in the United States, more than any other state. [8]

California has almost seven times the number of AI/AN individuals than Alaska (723,225 to 138,312) and almost twice as many as all the other five PL-280 states combined.[9] Figure 3 on page 8 of the 2010 Census Brief "The American Indian and Alaska Native Population: 2010" amply demonstrates the justification for allocating the bulk of this funding to California tribes.[10]

[4] Available at http://www.aisc.ucla.edu/ca/Tribes.htm
[5] http://www.aisc.ucla.edu/iloc/report/files/Chapter_3_STJ.pdf at page 89.
[6] *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell* (2013) 729 F 3d 1025 (9th Cir.)
[7] See page 16, http://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf
[8] http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf. 5,220,579 people identify as American Indian / Alaska Native alone or in combination. Of those 723,225 or 13.8% live in California.
[9] Alaska has 138,312, Minnesota has 101,900, Nebraska has 29,816, Oregon has 109,223 and Wisconsin has 86,228for a total of 465,479.
[10] http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf

Figure 3.
Percentage Distribution of the American Indian and Alaska Native Population by State: 2010
(For information on confidentiality protection, nonsampling error, and definitions, see *www.census.gov/prod/cen2010/doc/pl94-171.pdf*)



Note: Percentages may not add to 100.0 due to rounding.
Source: U.S. Census Bureau, *2010 Census Redistricting Data (Public Law 94-171) Summary File*, Table P1.

Not only do California tribes have a unique and pressing need for increased levels of funding, but they are also uniquely well positioned to take full advantage of that funding. California has a robust Tribal Court – State Court Forum (forum) established as an advisory committee to the Judicial Council of California that brings together as equal partners California tribal court and state court judges to consider issues of mutual concern including addressing cross jurisdictional issues between state and tribal justice systems.[11]

We trust that the allocation of the $10,000,000.00 in funding will reflect the unique history, needs and importance of California's Indian population. Thank you for your consideration.

Yours truly,

Hon. Abby Abinanti, Cochair

Hon. Dennis Perluss, Cochair

c.c. Senate Committee on Indian Affairs
Senate Committee on Appropriations
House Committee on Appropriations
Laura Speed

[11] http://www.courts.ca.gov/3065.htm

SAVE THE DATE

PRE–INSTITUTE: JUDICIAL ROUNDTABLE ON THE INDIAN CHILD WELFARE ACT, A COMPLEMENT TO THE ICWA WORKSHOP AT THE INSTITUTE

DECEMBER 5, 2016
8:30 A.M. – 1:00 P.M.
GARDEN GROVE

Tribal and state court judges are cordially invited to participate in this Roundtable which will be held in conjunction with the Center for Judicial Education and Research (CJER) Juvenile Law Institute. The roundtable will cover legal topics such as new federal mandates under ICWA, recent case law developments, and how to avoid reversals in these cases. Participants will have an opportunity to discuss case scenarios, learn about emerging practices that improve outcomes for American Indian and Alaska Native children and their families, and address cross-jurisdictional challenges in implementing ICWA.

The online registration form will be available:

October 14, 2016

For more information, call 415-865-7459

casey family programs

NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

JUDICIAL COUNCIL OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

Sponsored by the Casey Family Programs-Indian Child Welfare Programs, the National American Indian Court Judges Association and the California Judicial Council's Tribal Court-State Court Forum.

JUDICIAL COUNCIL OF CALIFORNIA
TRIBAL COURT–STATE COURT FORUM

Pre-institute Judicial Roundtable on the Indian Child Welfare Act (ICWA)

Agenda | Monday, December 5, 2016

Location: Hyatt Regency Orange County, Garden Grove, CA Room: TBD
The goal of this Roundtable is to draw from the experiences of the participants and share information on new and emerging developments of the Indian Child Welfare Act and to continue the dialogue at the Juvenile Law Institute.

Welcome and Introductory Remarks

8:30 AM
Presenters:
Ms. A. Nikki Borchardt Campbell, Executive Director, NAICJA (confirmed)
Mr. Sheldon Spotted Elk, Director, Casey Family Programs (confirmed)
Hon. Abby Abinanti, Tribal Court State Court Forum Cochair & Chief Judge of the Yurok Tribal Court
Hon. Dennis M. Perluss, Tribal Court-State Court Forum Co-Chair, Presiding Justice of the Court of Appeal Second Appellate District (confirmed)

9:00 AM **History and Context: ICWA and Historical Trauma**
Presenters:
Hon. William A. Thorne, Utah Court of Appeals (ret.) (confirmed)
Mr. Seprieono Locario, Director, SAMHSA Tribal Teaching and Technical Assistance Center (to be confirmed)

10:00 AM **Networking Break**

10:15 AM **Case Scenarios Illustrating New ICWA Regulations and Recent California Caselaw**
Presenters:
Tribal Court Judges and State Court Judges
Judge Wiseman and Judge Edwards; Judge Christine Williams and Judge Suzanne Kingsbury; Judge Ulloa and Judge White (to be confirmed)

Moderator: Mr. Jack Trope, Executive Director Association on American Indian Affairs

11:45 AM **Wrap-up, Evaluations**

12:00 PM **Networking Lunch Hosted by Casey Family Programs And**
12:30 PM **Presentation on National Context and Introduction of Juvenile Law Institute Workshop on ICWA**

1:15 PM **Juvenile Law Institute**

Tribal Court-State Court Collaboration

Hon. Dennis M. Perluss, Forum Cochair

Hon. Christine Williams, Chairperson,
California Tribal Court Judges Association and
Forum Member

September 13, 2016

1

Agenda

- California's Tribal Communities
- Principles of Tribal Sovereignty
- California's Tribal Courts
- Overview of Jurisdiction
- Tribal Court-State Court Forum
- Access to Justice—Tribal Justice
- Conclusion

2

California's Tribal Communities

- 110 federally recognized tribes
- 78 groups petitioning for federal recognition
- 723,225 California citizens identify as American Indian or Alaska Native (AI/AN)
- Represents 14% of all AI/AN population in the U.S., more than in any other State
- Tribes as small as 5 members and as large as 7000 members

3

Federal Law: Principles of Tribal Sovereignty

- Tribes are separate sovereign governments
- Tribal sovereignty generally extends over tribal territory
- Tribal sovereignty is inherent but subject to limitation by Congress

Why is This Important?

- Tribes have the power and authority to:
  - Establish their own form of tribal government
  - Determine their own membership
  - Enact laws regulating their territory
  - Charge taxes
  - Establish and administer justice systems

California Tribal Courts

- California has 23 tribal courts
- More than doubled since 2003
- Courts serve 40 Tribes
- Exercise various types of jurisdictions
- Over a range of case types (administrative, civil, family, juvenile, probate; several tribes are planning to exercise criminal jurisdiction under the Tribal Law and Order Act)

6

California Tribal Courts

- California Tribal Courts Directory at http://www.courts.ca.gov/14400.htm
- Google Map of Tribal Courts at http://g.co/maps/cvdq8

7

Jurisdiction in Indian Country

- Starting point –
  - Tribes have plenary & exclusive jurisdiction over their members and their territory
  - BUT no criminal jurisdiction over non-Indians except in special domestic violence cases

Public Law 280

- Enacted in 1953
- 28 USC § 1360; 18 USC § 1162
- Grants California criminal jurisdiction in Indian Country concurrent with tribes
- Also grants limited civil jurisdiction:
  - Civil adjudicatory, *Bryan v. Itasca County*, 426 U.S. 373 (1976)
  - Not civil regulatory

What Jurisdiction Looks Like in California?

- Criminal—Felony and misdemeanors concurrent state and tribal. Tribal jurisdiction is subject to the same federal court limitations as in non-P.L. 280 states-*Oliphant* no jurisdiction over non-Indians (exception VAWA) and Indian Civil Rights Act $5,000 and one year (Tribal Law & Order Act amended to $15,000 & 3 years).
- Civil—concurrent state and tribal (limited to private causes of actions between individuals)
- Regulatory—remains exclusively tribal

Illustration

Tribal Protective Order, Street

11

Tribal Court-State Court Forum

- Established May 2010
- Membership
- Values and Principles
- Purpose

12

Tribal Court-State Court Forum

- Composition
- Common ground
- Focus
  - Problem-solve
  - Communicate quickly achievable solutions
- Staff support

13

Accomplishments—Generally

- Forging Tribal/State Judicial Relationships
- Finding Local Solutions
- Implementing Solutions Statewide: Government-to-Government
- Sharing Educational and Other Resources to Support Tribal Justice Development

14

Accomplishments—Partnership

Shingle Springs Band of Miwok Indians &
El Dorado County, California

Family Wellness Court: Collaboration for Better Outcomes

Technical Assistance Grant

This project was supported by Grant No. 2012-IC-BX-K003 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

16

Joint Jurisdiction Concept

- First-of-its-kind in California
- Collaborative court hears juvenile and family cases
- Judges are cross sworn in to both courts as pro tems.
- If either Judge is unavailable the case can proceed with only one Judge or a pro tem can be appointed.

17

Tribal Youth

- Historically, conflicts between Tribe and County.
- Created distrust of each other's government systems.
- Tribal Youth getting lost in the system.
  - Charter School
  - Juvenile Records

18

Target Population

- Who:
  - Tribal members,
  - Juveniles and "transitional youth" up to age 24
  - Adults if there is a minor involved
- What: Not limited to drug offenses and no offense restrictions—case by case screening

19

Wrap-around

- Our wellness plan includes the entire family in every case, not just the youth.
- Could mean having a youth who has a "dependency" case where we are providing services across several generations.

20

Referrals

- By almost any agency:
  - Tribal services
  - District Attorney, Public Defender, County Counsel
  - SARB
  - County Social Services and Probation
- State court notifies Tribal Members about the Family Wellness Court using a "script."

21

Family Wellness Team

- A team of Tribal and County professionals help create a wellness plan for each family.
- Each team member has a role in encouraging success with the wellness plan.
- Team members are determined by case

(for example, Truancy Case—Tribal services, County Education, County Probation, Tribal Behavioral health and Judges)

22

Joint Staffing

- Wellness Team meets before the hearings and updates the judges on progress of the participating family with their Wellness Plan.
- Wellness Team and Judges then make a plan for appropriate orders to encourage progress.
- Sanctions and Incentives are discussed as a team.

23

4 Phases of Wellness Plan

- Each phase has requirements for:
  - Court Attendance
  - Drug Screening/Testing
  - Service/Treatment
  - Education (attendance, behavior, and academic progress)
- Recently revised the 4 phases

24

Graduation and Termination

- Participants move at their own pace
- Average time: 12 - 24 months
- If a participant is not successful he or she is terminated.
- All the sanctions available to both courts had the case not "transferred" to Family Wellness Court are still available.

25

Other Innovations: Sharing Jurisdiction

- Pre-Filing/Diversion for Juvenile Offenders in Tribal Court
- Post-Filing/Pre-adjudication/Diversion for Adult Offenders in Tribal Court
- Post-Plea Deferred Entry of Judgment

26

Accomplishments—Other Partnerships

- Tribal/State/Federal Court Administrator Toolkit
- ICWA and Other Roundtables
- STEPS to Justice—Child Welfare and Domestic Violence

27

Accomplishments—Policy Highlights

- Child Welfare—legislation to share confidential juvenile records, comments to federal guidelines
- Domestic Violence—sharing orders through statewide court database
- Civil Money Judgments—legislation

28

Accomplishments- Education Highlights

- ICWA Trainings
- Judicial Online Toolkits
- Documentary

  http://makepeaceproductions.com/TJ/
- Cross Court Educational Exchanges

29

Access to Justice Means Access to Tribal and State Justice

- Tribal Capacity Building Efforts
  - Forms
  - Publications
  - Judicial Education
  - Funding
    - Letters to Federal Representatives
    - Letters of Support for Grants & Grant Opportunities

30

How Can the Forum and Commission Work Together?

31

Conclusion- Questions

- Contact Information
  - Hon. Dennis M. Perluss, dennis.perluss@jud.ca.gov
  - Hon. Christine Williams, cwilliams@ssband.org
- Resources in California
  - http://www.courts.ca.gov/programs-tribal.htm

32

Item 5 Report on Tribal Access to Title IVE Background Checks

GUIDELINES FOR USE AND COMPLETION OF THE CHILD ABUSE OR SEVERE NEGLECT INDEXING FORM (BCIA 8583)

For specific legal requirements regarding reporting abuse or severe neglect, refer to California Penal Code sections 11164 through 11174.3.

REPORTING CHILD ABUSE OR SEVERE NEGLECT TO THE DEPARTMENT OF JUSTICE (DOJ)

An agency subject to the requirements of Penal Code sections 11165.9 and 11169(a) must report to the DOJ every incident of suspected child abuse or severe neglect for which it conducts an investigation and for which it determines that the allegations of abuse or severe neglect is substantiated. The agency must report on the Child Abuse or Severe Neglect Indexing Form (BCIA 8583), indicating the agency's finding of possible child abuse or severe neglect.

The completed BCIA 8583 should be submitted to the DOJ as soon as possible after completion of the investigation as the information may contribute to the success of another investigation. It is essential that the information on the form be complete, accurate, and timely to provide maximum benefit in protecting children and identifying instances of suspected abuse or severe neglect.

WHAT INCIDENTS MUST BE REPORTED

Abuse of a minor child, i.e., a person under the age of 18 years, involving any one of the below abuse types: *(Refer to Penal Code sections 11165.1 through 11165.6 for definitions.)*

- Physical injury
- Mental/emotional suffering
- Sexual (abuse, assault, and exploitation)
- Severe neglect
- Willful harming/endangerment
- Unlawful corporal punishment/injury
- Death

GENERAL INSTRUCTIONS

- Indicate whether you are submitting an INITIAL REPORT or an AMENDED REPORT by checking the appropriate box at the top of the form.
- All information blocks contained on the BCIA 8583 should be completed and substantiated by the submitting authorized agencies. The exact month, day, and year is required for entering into the CACI. If not known, please provide approximate date. Reports containing multiple dates will be returned.
- **Section B** - INCIDENT INFORMATION - The finding that allegations of child abuse or severe neglect is:
  - SUBSTANTIATED - defined by Penal Code section 11165.12(b) and 11169(a) to mean circumstances where the evidence makes it more likely than not that child abuse or severe neglect, as defined, occurred.
- **Section C** - AMENDED REPORT INFORMATION - Only use this section to update information previously submitted on form BCIA 8583. Attach a copy of the original BCIA 8583 and complete sections A, C, and all other applicable fields.
  - NOW UNFOUNDED OR INCONCLUSIVE - a previously submitted BCIA 8583 indicated as substantiated is being reclassified to unfounded or inconclusive.
  - ADDED ADDITIONAL INFORMATION - supplementary information is being provided for a previously submitted BCIA 8583. (Cases in which subsequent child death has resulted must be reported.)
  - CORRECTED REPORT INFORMATION - Information submitted on an initial BCIA 8583 is being corrected.
  - UNDERLYING INVESTIGATIVE FILE NO LONGER AVAILABLE - Your agency no longer retains the underlying investigative file that supports a previously submitted BCIA 8583.
  - COMMENT - use this area only if 1) you are reporting amended information that relates to one victim or suspect, and/or 2) there is a need to clarify which victim or suspect the amended information applies to, as the initial report contained multiple victims and/or suspects.
- **Section D** - VICTIM (S) and SUSPECT INFORMATION - Victim(s) and Suspect information pertaining to allegations of child abuse or severe neglect.
  - VICTIM (S) - All information is required. Multiple victims are allowed on one form BCIA 8583.
  - SUSPECT - All information is required, it is mandated by CACI regulations to identify if the suspect is age 17 or younger.
  - ONE SUSPECT - One suspect per form BCIA 8583. All forms submitted with more than one suspect will be returned.
  - OTHER - Other interested party.

WHERE TO SEND FORM BCIA 8583 (*For DOJ reporting only*)

Department of Justice
Bureau of Criminal Information and Analysis
P.O. Box 903387
Sacramento, CA 94203-3870
ATTENTION: Child Abuse Central Index (CACI)

STATE OF CALIFORNIA
LEGISLATIVE COUNSEL BUREAU
AUTHENTICATED
ELECTRONIC LEGAL MATERIAL

State of California

PENAL CODE

Section 11165.9

11165.9. Reports of suspected child abuse or neglect shall be made by mandated reporters, or in the case of reports pursuant to Section 11166.05, may be made, to any police department or sheriff's department, not including a school district police or security department, county probation department, if designated by the county to receive mandated reports, or the county welfare department. Any of those agencies shall accept a report of suspected child abuse or neglect whether offered by a mandated reporter or another person, or referred by another agency, even if the agency to whom the report is being made lacks subject matter or geographical jurisdiction to investigate the reported case, unless the agency can immediately electronically transfer the call to an agency with proper jurisdiction. When an agency takes a report about a case of suspected child abuse or neglect in which that agency lacks jurisdiction, the agency shall immediately refer the case by telephone, fax, or electronic transmission to an agency with proper jurisdiction. Agencies that are required to receive reports of suspected child abuse or neglect may not refuse to accept a report of suspected child abuse or neglect from a mandated reporter or another person unless otherwise authorized pursuant to this section, and shall maintain a record of all reports received.

(Amended by Stats. 2006, Ch. 701, Sec. 2. Effective January 1, 2007.)

STATE OF CALIFORNIA
LEGISLATIVE COUNSEL BUREAU
AUTHENTICATED
ELECTRONIC LEGAL MATERIAL

State of California

PENAL CODE

Section 11169

11169. (a) An agency specified in Section 11165.9 shall forward to the Department of Justice a report in writing of every case it investigates of known or suspected child abuse or severe neglect that is determined to be substantiated, other than cases coming within subdivision (b) of Section 11165.2. An agency shall not forward a report to the Department of Justice unless it has conducted an active investigation and determined that the report is substantiated, as defined in Section 11165.12. If a report has previously been filed which subsequently proves to be not substantiated, the Department of Justice shall be notified in writing of that fact and shall not retain the report. The reports required by this section shall be in a form approved by the Department of Justice and may be sent by fax or electronic transmission. An agency specified in Section 11165.9 receiving a written report from another agency specified in Section 11165.9 shall not send that report to the Department of Justice.

(b) On and after January 1, 2012, a police department or sheriff's department specified in Section 11165.9 shall no longer forward to the Department of Justice a report in writing of any case it investigates of known or suspected child abuse or severe neglect.

(c) At the time an agency specified in Section 11165.9 forwards a report in writing to the Department of Justice pursuant to subdivision (a), the agency shall also notify in writing the known or suspected child abuser that he or she has been reported to the Child Abuse Central Index (CACI).The notice required by this section shall be in a form approved by the Department of Justice. The requirements of this subdivision shall apply with respect to reports forwarded to the department on or after the date on which this subdivision becomes operative.

(d) Subject to subdivision (e), any person who is listed on the CACI has the right to a hearing before the agency that requested his or her inclusion in the CACI to challenge his or her listing on the CACI. The hearing shall satisfy due process requirements. It is the intent of the Legislature that the hearing provided for by this subdivision shall not be construed to be inconsistent with hearing proceedings available to persons who have been listed on the CACI prior to the enactment of the act that added this subdivision.

(e) A hearing requested pursuant to subdivision (d) shall be denied when a court of competent jurisdiction has determined that suspected child abuse or neglect has occurred, or when the allegation of child abuse or neglect resulting in the referral to the CACI is pending before the court. A person who is listed on the CACI and has been denied a hearing pursuant to this subdivision has a right to a hearing pursuant to subdivision (d) only if the court's jurisdiction has terminated, the court has not

made a finding concerning whether the suspected child abuse or neglect was substantiated, and a hearing has not previously been provided to the listed person pursuant to subdivision (d).

(f) Any person listed in the CACI who has reached 100 years of age shall have his or her listing removed from the CACI.

(g) Any person listed in the CACI as of January 1, 2013, who was listed prior to reaching 18 years of age, and who is listed once in CACI with no subsequent listings, shall be removed from the CACI 10 years from the date of the incident resulting in the CACI listing.

(h) If, after a hearing pursuant to subdivision (d) or a court proceeding described in subdivision (e), it is determined the person's CACI listing was based on a report that was not substantiated, the agency shall notify the Department of Justice of that result and the department shall remove that person's name from the CACI.

(i) Agencies, including police departments and sheriff's departments, shall retain child abuse or neglect investigative reports that result or resulted in a report filed with the Department of Justice pursuant to subdivision (a) for the same period of time that the information is required to be maintained on the CACI pursuant to this section and subdivision (a) of Section 11170. Nothing in this section precludes an agency from retaining the reports for a longer period of time if required by law.

(j) The immunity provisions of Section 11172 shall not apply to the submission of a report by an agency pursuant to this section. However, nothing in this section shall be construed to alter or diminish any other immunity provisions of state or federal law.

(Amended by Stats. 2012, Ch. 848, Sec. 1. (AB 1707) Effective January 1, 2013.)

Study D-1200 September 12, 2016

Memorandum 2016-44

Recognition of Tribal and Foreign Court Money Judgments (Draft Recommendation)

In this study, the Commission[1] is responsible for reviewing "the standards of recognition of a tribal court or foreign court judgment" under:

(1) California's enactment of the 2005 Uniform Foreign-Country Money Judgments Recognition Act (hereafter, "California's Uniform Act"),[2] and

(2) The Tribal Court Civil Money Judgment Act (hereafter, "Tribal Court Judgment Act").[3]

For both foreign and tribal court judgments, California's recognition standards are derived from the 2005 Uniform Foreign-Country Money Judgments Recognition Act (hereafter, "Uniform Act" or "2005 Uniform Act").[4] The Commission is to report its findings by January 1, 2017, along with any recommendations for improvement of California's standards.[5]

To meet that deadline, the Commission approved a tentative recommendation in June, which has since been circulated for public comment. There was only one comment on the tentative recommendation,[6] from James Acres of Acres Bonusing. This memorandum discusses his comment, which is attached as an Exhibit.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Code Civ. Proc. §§ 1713-1724.

3. Code Civ. Proc. §§ 1730-1742.

4. The 2005 Uniform Act is a revision of the earlier 1962 Uniform Foreign Money-Judgments Recognition Act (hereafter, "1962 Uniform Act"). In general, the relevant provisions of the 2005 and 1962 Acts are quite similar. The text of the Acts and the associated commentary is available on the Uniform Law Commission's website: http://uniformlaws.org/.

5. 2014 Cal. Stat. ch. 243, § 1 (SB 406 (Evans)).

6. The staff has also responded to inquiries about the proposal from the California Newspaper Publishers Association and the Judicial Council's Tribal Court-State Court Forum.

The memorandum also discusses two minor follow-up issues. One concerns declaratory relief from a foreign defamation judgment; the other concerns a recent United States Supreme Court decision on tribal court jurisdiction.

A draft of a final recommendation is attached for the Commission's review. **The Commission will need to decide whether to approve the attached draft as a final recommendation, either as is or with revisions, for printing and submission to the Governor and the Legislature.**

COMMENTS OF JAMES ACRES

James Acres is currently involved in litigation in the tribal court of the Blue Lake Rancheria. This litigation relates to a dispute about an experimental gaming platform that Mr. Acres' company provided to the Tribe's casino.

Mr. Acres' comment on the tentative recommendation provides a detailed account of his experience responding to the litigation and interacting with the tribal court.[7] In addition, he presents several concerns and suggestions pertaining to the Tribal Court Judgment Act. Those points are discussed below. In considering them, **the Commission should be mindful of the pending litigation.**

Preserving an Objection to Judgment Recognition

Mr. Acres suggests that the Tribal Court Judgment Act essentially compels a defendant in a tribal court proceeding to participate and litigate in the tribal court, in order to preserve a challenge to recognition of the tribal court judgment in a subsequent state court proceeding. Specifically, Mr. Acres states:

> I do believe that ultimately the mandatory non-recognition factors in 1737(b)(1)+(2) [lack of personal and subject matter jurisdiction] will apply in my case. I also think that 1737(b)(3) [systemic failure of due process or impartiality] probably applies…
>
> But I'll face tens of thousands to hundreds of thousands of dollars in legal fees to argue those points, with the burden of proof against me, to defend an action that would, in state court, be defeated on demurrer. This is especially true since, *in the practical nature of things*, it seems I must co-operate with the tribal court proceedings to whatever extent is necessary to create a record to challenge enforcement under 1737(b) or 1737(c).[8]

7. See generally Exhibit pp. 1-5.
8. *Id.* at 3 (emphasis added).

Mr. Acres appears to acknowledge that nothing in California's Uniform Act or the Tribal Court Judgment Act *expressly* compels a litigant to participate in a foreign or tribal court proceeding to preserve objections to judgment recognition. To the contrary, several of the exceptions to recognition could be established and serve as grounds for nonrecognition, regardless of whether the defendant participated in the foreign or tribal court proceeding.[9] However, other exceptions might be difficult to establish unless the defendant participated in the foreign or tribal court proceeding to some degree.[10] In either of these situations, if there were any doubt about the applicability of an exception, it would be risky as a practical matter for a defendant to decline to participate in a foreign or tribal court proceeding, while planning on contesting recognition of the judgment. That appears to be the point that Mr. Acres is making.

Setting aside Mr. Acres' concerns about the court's jurisdiction, his reluctance to participate in the tribal court proceeding seems to reflect a distrust of the tribal court forum.[11] If he had confidence in that forum, the practical pressure to participate in the tribal court proceeding probably would not be of concern to him.

Rather than reflecting distrust of foreign and tribal courts, both the Uniform Act and Tribal Court Judgment Act codify principles of comity.[12] They are based on a fundamental policy judgment that California courts should generally respect the rulings of a foreign or tribal court. Thus, these Acts are structured to create a presumption in favor of recognition, absent a demonstrated reason *not* to recognize a judgment.[13] Further, the opponent to recognition has the burden of establishing that an exception applies.[14]

Reversing the existing burdens would seem to require a significant departure from California's current law and policy governing judgment recognition. There is no indication that the Legislature wanted the Commission to reexamine the fundamental policy of comity when it tasked the Commission with this study.

---

9. A number of cases under the Uniform Act involve a foreign judgment that was issued in default. See, e.g., Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995).
10. This seems particularly true of the discretionary exceptions for lack of due process in the individual proceeding and lack of court integrity with respect to the individual judgment. See Code Civ. Proc. §§ 1716(c)(7), (c)(8); 1737(c)(7), (c)(8).
11. See Exhibit, pp. 3, 4.
12. See generally Memorandum 2015-17.
13. See Code Civ. Proc. §§ 1716(d), 1737(d).
14. *Id*.

The Commission's work thus far has been consistent with that longstanding policy choice. **It seems wise to stick to that approach.**

Additional Mandatory Exception

Mr. Acres suggests that the Tribal Court Judgment Act should contain an "explicit bar against a tribe from using its own court to sue others."[15] In particular, Mr. Acres proposes the following language creating an additional mandatory exception to recognition of a tribal court judgment:

> The judgment was rendered in an action in which the plaintiff was either the tribe [that established] the tribal court, or an entity controlled by the tribe that established the tribal court.[16]

Under this proposed exception, California would be precluded from recognizing any tribal court judgment where the tribe is itself a plaintiff.[17] Mr. Acres contends that this exception is needed because the relatively small populations of the individual tribes in California could lead to "abuse of a self-interested polity prosecuting non-members for personal gain."[18]

As a general matter, it may well be the case that smaller population sizes pose a challenge with regard to ensuring separation of government functions. However, codifying the proposed rule presumes that tribes are unable to achieve the necessary separation of functions for governance, a principle that seems counter to state[19] and federal[20] policy that encourages tribal self-government.

Regardless, if the type of abuse that Mr. Acres is concerned about were to occur, it seems likely that an affected litigant could demonstrate that the judicial system either "does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[21] In such a case, the Act already mandates nonrecognition.[22] **Thus, the staff believes that an additional exception is not necessary.**

---

15. Exhibit, p. 3.
16. *Id.* at 4.
17. Mr. Acres indicates that the Navajo Nation could perhaps, due to its size, be excepted from such a rule. See *id.* at 4, n. 8.
18. *Id*. at 4.
19. See generally, e.g., Cal. Exec. Order No. B-10-11 (Sept. 19, 2011).
20. See generally, e.g., Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).
21. See Code Civ. Proc. §§ 1716(b)(1), 1737(b)(3).
22. Code Civ. Proc. § 1737(b)(3).

Appropriateness and Purpose of Discretion

Mr. Acres also indicates that "it would be a tremendous comfort if 1737(c)(7) [lack of integrity of the rendering court] and 1737(c)(8) [proceeding not compatible with due process] were mandatory reasons to deny recognition."[23] Mr. Acres expresses concern that, even if one of these exceptions applies, the resulting judgment "might be enforced anyway if I fail to avail myself of the tribal appeals process."[24] Mr. Acres' recommended change and concern about failure to appeal are addressed separately below.

Eliminating Discretion for Certain Exceptions

Mr. Acres specifically suggests that the discretionary exceptions for lack of due process or court integrity in the individual proceeding be made mandatory.

Similarly, concerns about whether these exceptions should be mandatory were raised in the legislative process for the bill enacting the Tribal Court Judgment Act.[25] These concerns seem related to the somewhat barebones nature of the Act, which lists these exceptions as discretionary without any explanation as to why the court has discretion or how the court should exercise its discretion.

In Memorandum 2015-38, the Commission considered these issues in detail.[26] The conclusion in that memorandum was that the discretionary character of these exceptions "allows a court to evaluate the level of harm, the parties' conduct in the foreign [or tribal] court system, and any other factors the court deems relevant in determining whether recognition of an individual foreign [or tribal court] judgment is appropriate."[27] In conjunction with its consideration of Memorandum 2015-38, the Commission declined to make changes to the discretionary character of these exceptions.[28]

Does the Commission want to revisit that decision?

Considerations for Recognition Notwithstanding Applicable Discretionary Exception

Mr. Acres is especially concerned that if a defendant fails to appeal in the tribal court system, a California court might recognize a tribal court judgment notwithstanding the existence of grounds for nonrecognition under an applicable

23. Exhibit, p. 4.
24. *Id.*
25. See, e.g., Assembly Committee on Judiciary Analysis of SB 406 (June 13, 2014), p. 7.
26. See Memorandum 2015-38, pp. 4-8.
27. Memorandum 2015-38, p. 7.
28. Minutes (Oct. 2015), p. 3; see also Memorandum 2015-38, pp. 9-12.

discretionary exception.[29] Although he is particularly concerned about the consequences of failing to appeal, it is worth discussing more generally when recognition of a judgment might be appropriate despite an applicable discretionary exception.

The tentative recommendation addresses that matter. In particular, the Commission's proposed Comment to the Tribal Court Judgment Act explains:

> Subdivision (c) of Section 1737 lists grounds on which the court may decline to recognize a tribal court money judgment. … [T]he court has discretion to recognize the tribal court judgment in the *unusual case where countervailing considerations outweigh the seriousness of the defect* underlying the applicable ground for nonrecognition. Such countervailing considerations could include, for instance, situations in which the opponent failed to raise an objection in the tribal court or the opponent's own misconduct was the primary cause of the harm suffered.[30]

The tentative recommendation also reproduces relevant commentary from the Uniform Law Commission, which says:

> [Paragraphs (c)(7) and (8) of Section 1737] both are discretionary grounds for denying recognition, while [paragraph (b)(3) of Section 1737] is mandatory. Obviously, if the [tribe's] entire judicial system … fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that [judicial system] would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the [tribal court] judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the [tribal court] judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the [tribal court] judgment …, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

The Uniform Law Commission's commentary specifies that failure to appeal, *where appeal would have been an adequate mechanism for correcting the error*, could be

29. Exhibit, p. 4. ("The way the law stands now, California is explicitly telling me that if a tribal court judgment is rendered against me by an admittedly corrupt or biased tribal court, then that judgment might be enforced anyway if I fail to avail myself of the tribal appeals process.")
30. Emphasis added.

a reason that the court would decide to recognize a judgment in spite of a defect. The caveat is important — if the circumstances demonstrate that appeal would, for instance, be futile, then appeal presumably would not be an adequate mechanism for correcting the error.

As a general matter, it seems reasonable to expect a party to pursue available remedies to correct an error. Broadly, this will promote finality, judicial economy, and the orderly administration of justice.[31] Simply seeking to defeat a judgment in an ancillary recognition proceeding, rather than get the error corrected, could require the entire matter to be relitigated in a different court system.

In a judgment recognition proceeding, a California court is not in a position to correct the error of a foreign or tribal court. Instead, the California court has a binary decision — recognition or not. Presumably, when such a proceeding is contested, one party is contending that it would be harmed by recognition, while the other party is contending that it would be harmed by nonrecognition. Faced with such a situation, a California court might conclude that, on balance, a party who claims a defect in the prior proceeding, but never sought to correct that defect, sat on its rights and that nonrecognition would now harm the rights of the other party. It seems appropriate for the California court to consider the different harms of recognition and nonrecognition and seek to do justice on the facts before it.

For the foregoing reasons, the staff recommends no change to the Commission's commentary on matters a court should to take into account in deciding whether to recognize a judgment when a discretionary exception applies.

MINOR FOLLOW-UP ISSUES

In addition the comments from Mr. Acres, the Commission needs to consider the following minor follow-up issues:

- Whether third parties should be authorized to seek declaratory relief from foreign defamation judgments.

31. See generally, e.g., Tory Weigand, *Raise or Lose: Appellate Discretion and Principled Decision Making*, 17 Suffolk J. Trial & App. Adv. 179, 182-87 (2012) (discussing waiver of arguments not raised before the trial court); Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984) (discussing exhaustion of administrative remedies).

- Whether to make any revisions in response to the U.S. Supreme Court's decision in *Dollar General v. Mississippi Band of Choctaw Indians*.

These issues are discussed in order below.

Persons Authorized to Seek Declaratory Relief Regarding Foreign Defamation Judgment

As discussed in a previous memorandum,[32] California's Uniform Act contains a provision — Code of Civil Procedure Section 1717(c) — that authorizes a California court to issue declaratory relief in specified circumstances where a foreign defamation judgment is *not* recognizable in California. Currently, the provision grants such authority where "declaratory relief … is sought."[33] The provision does not specify *who* is authorized to seek declaratory relief.

The tentative recommendation proposes to clarify this point. It would revise the law to specify that the person against whom the foreign defamation judgment was rendered can seek such declaratory relief.[34]

The tentative recommendation requested comment on whether interested third parties should also be permitted to seek this relief.[35] The Commission received no comment on this issue.

In the absence of comment on this proposed provision, the staff conducted some additional research into whether third parties are authorized to seek declaratory relief under California law more generally. Significantly, Code of Civil Procedure Section 1060 contains a general authorization for declaratory relief:

> Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the

32. See Memorandum 2015-50, pp. 11-13.
33. Code Civ. Proc. § 1717(c).
34. See proposed Code Civ. Proc. § 1725.
35. See Note to Proposed Code Civ. Proc. § 1725 in Tentative Recommendation on *Recognition of Tribal and Foreign Court Money Judgments* (June 2016).

> premises, including a determination of any question of construction or validity arising under the instrument or contract. …

While this provision does not clearly specify whether a third party may seek declaratory relief, case law interpreting it suggests that a party must have a direct or legal interest in the issue to seek relief under this provision.[36]

For instance, a recent appellate case involved a request by a parent company, controlling shareholder, and subsidiary corporation for declaratory relief regarding an insurance company's duty to defend the subsidiary. The court concluded that, while the parent company may have a "practical interest" or "indirect interest" in the litigation, the parent company lacked sufficient interest to seek declaratory relief.

In reaching that conclusion, the court of appeal reviewed the case law offered for the proposition that a party can have a sufficient interest in a matter to seek declaratory relief, even though the party is not directly affected. The court was not persuaded; it concluded that all the cases involved parties who "*had a legal interest in, or would be directly affected by*, any interpretation of the terms of the insurance policies or regulation in question."[37]

Thus, it appears that third parties would largely be foreclosed from seeking declaratory relief under Section 1060. It seems appropriate to include a similar limit in Section 1717(c) — i.e., the only persons authorized to seek declaratory relief from a foreign defamation judgment should be the parties to that judgment.

Accordingly, the staff recommends **no change to the proposed provision on declaratory relief from foreign defamation judgments.**

United States Supreme Court Decision in *Dollar General v. Mississippi Band of Choctaw Indians*

Earlier in this study, the staff noted that a case on tribal court jurisdiction was pending in the United States Supreme Court.[38] At the time, the staff was unsure whether the decision in this case might modify or supplement the law on tribal court jurisdiction in a way that would require additional analysis or discussion in this study.

---

36. See, e.g., D. Cummins Corp. v. U.S. Fidelity and Guaranty Co., 2016 DJDAR 4132 (2016) (order certifying opinion for publication and reproducing the opinion).
37. *Id.* at 4135 (emphasis added).
38. First Supplement to Memorandum 2016-6, p. 4.

That case, *Dollar General v. Mississippi Band of Choctaw Indians*, has been decided. The Supreme Court issued a 4-4 per curiam decision, affirming the Fifth Circuit's judgment by an equally divided court.[39]

Given this result, the Court's decision does not require any additional analysis, nor does it change staff's earlier assessment of the judgment recognition exceptions pertaining to jurisdiction in the Tribal Court Judgment Act.[40] **There is no need to revise the Commission's proposal in response to *Dollar General*.**

CONCLUSION

The attached staff draft recommendation is largely the same as the tentative recommendation, with a few minor wording changes and corrections.

The Commission needs to decide whether to approve the attached draft as a final recommendation, either as is or with revisions, for printing and submission to the Governor and the Legislature.

Respectfully submitted,

Kristin Burford
Staff Counsel

---

39. See 579 U.S. ___ (2016).
Regarding the legal effect of such a decision,"when the justices evenly divide, the resulting decision ("affirmed by an equally divided Court"):
- affirms the decision of the court below;
- binds the parties under the principle of res judicata; and
- carries no precedential weight."

Ryan Black & Lee Epstein, Recusal on Appeal: Recusals and the "Problem" of an Equally Divided Supreme Court, 7 J. App. Prac. & Process 75, 81 (2005).

40. See generally First Supplement to Memorandum 2016-6.

Commissioners,

I write you today in order to share my experiences in the Blue Lake Rancheria Tribal Court. These experiences have practical relevance to the Tribal Court Civil Money Judgment Act.

In my specific instance, the Blue Lake Rancheria is acting as plaintiff against me in its own tribal court. When one considers that the Blue Lake Rancheria comprises 72 acres and fifty-odd members, it seems unreasonable to believe Blue Lake can simultaneously act as plaintiff and impartial arbiter.

Below I'll share with you the details of my tribal court experience.

But first, my main point is to suggest that the State of California forbid recognition of judgments from tribal court actions in which the tribe itself was the plaintiff, or controlled the plaintiff.

Absent such a rule, an aggressive and unscrupulous tribe is able to use the federal tribal exhaustion doctrine, combined tribal sovereign immunity from counter-suit, and the deference given to the tribal court proceeding itself in evaluating whether or not a judgment is unenforceable under the discretionary grounds in 1737(c),[1] to derive advantageous settlements from bogus claims.

I want to stress that this is not a hypothetical fear on my part, but is in fact what I am experiencing now as a business-person and as an individual. And with that I'll begin to share my story.

Back in 2010, my company entered into an agreement to distribute an experimental gaming platform to the Blue Lake Rancheria's Casino. This was a high-risk project that involved allowing patrons in the casino to gamble on (then new) iPads connected via wifi to a server. The agreement provided that Blue Lake would pay $250k, and that the money would be refundable "if and only if" the product wasn't delivered by Oct 1st of 2010.

The product was delivered in a timely fashion to Blue Lake and several other tribal casinos. Ultimately, the product was not commercially successful, and I do believe everyone, including my company, lost money on the project.

Fast-forward to January of 2016, and Blue Lake filed suit in their tribal court naming both my company and myself as defendants. The company was sued under various breach of contract theories, and I personally was sued for fraudulent inducement. The fraudulent inducement tort contained none of the specificity required under federal or state law, and was simply a recitation of the elements of that tort.

[1] For instance, in the Staff's Tentative Recommendation at pp 20-21 suggests that the failure of a party to avail itself a tribal court appeals process might be grounds to enforce a judgment rendered without due process.

The tribal summons itself required that an answer be made within five days, under pain of default judgment.

My initial instinct was simply to ignore the suit. Were it filed in state court, I felt it would certainly be thrown out, and possibly open plaintiff's counsel to sanctions for frivolity. And I felt the extremely short timeline was further evidence that the tribe knew its case was non-existent, and that it hoped to intimidate me into a settlement. However some quick research introduced me to the Tribal Court Civil Money Judgment Act.

Reading the act for the first time as a non-lawyer, unacquainted with the *Montana* rule, or *Wilson v Marchington*, was frankly terrifying. It seemed to me that the legal system had somehow been hacked, that Blue Lake could manufacture a fraudulent judgment against me for its own benefit, and then I would have to fight uphill to block the tribe from using the state's justice system to take my home and everything else I'd built for my family.

The stress of this was so intense in fact, that it caused such extreme chest pain that I had to spend a night in the hospital. I have actually suffered a heart attack in my past, and I know from personal experience what a heart attack feels like. Fortunately, I was not in fact having a heart attack, and the pains were simply the interaction of the injury I'd suffered before and the extreme stress of the tribal lawsuit.

After leaving my hospital bed, I devoted the remainder of the week to making a response to the tribal complaint. Specifically filing special appearance motions to dismiss for lack of jurisdiction. I filed these without benefit of counsel because of the sheer impossibility of finding an attorney within the time frame allotted, and a suspicion that the tribe would simply use my hiring of an attorney to inflict legal fees upon me through its control of its court.[2]

The tribal court clerk summarily rejected these initial filings for formatting errors. I fixed what I could and resubmitted. The tribal court was then silent for about a month, refusing to acknowledge receipt of my submissions, and refusing to indicate if default judgment had been entered against me.

The tribal court judge ultimately rejected my filings and threatened me with sanctions for failing to comply with tribal court rules. Ironically, the same order bade me the impossible task of answering the tribal complaint in compliance with tribal rules about plaintiff dismissals.

I decided to seek federal relief from tribal jurisdiction, and filed suit in federal court. While federal courts are the ultimate arbiters of tribal jurisdiction over non-members, tribal courts are generally given first crack at determining their

[2] The preceding three paragraphs comprise a very emotional argument against the act as written today. While perhaps improper to raise as an argument in court, descriptions of the human misery inflicted by an act seem properly addressed to the legislature during its deliberations about the act.

own jurisdiction. Exceptions exist to this "tribal exhaustion doctrine," but they are difficult to obtain. And while the federal court sympathized with my frustration, it found I could not be excused from needing to exhaust tribal remedies.[3]

There have been similar actions involving Blue Lake Tribal Court. *Admiral Insurance v Blue Lake Tribal Court* details a chaotic tribal court process in which the court refused to acknowledge filings or resolve questions of its jurisdiction.[4] And in *UCIC v Blue Lake Tribal Court*, UCIC's complaint detailed how the tribal court's clerk issued a default judgment against UCIC, despite UCIC's counsel's timely service of a motion to dismiss.[5]

In both UCIC and Admiral's case, the ultimate plaintiff in the tribal action was Mainstay Business Solutions, which was a Blue Lake tribal company dedicated to circumventing state employment insurance laws.[6]

My case along with these two others establishes a pattern by Blue Lake of using its tribal court to inflict disproportionate legal expenses on defendants in order to drive settlements.

I do believe that ultimately the mandatory non-recognition factors in 1737(b)(1)+(2) will apply in my case. I also think that 1737(b)(3) probably applies, since Blue Lake's executive government dominates its tribal court.

But I'll face tens of thousands to hundreds of thousands of dollars in legal fees to argue those points, with the burden of proof against me, to defend an action that would, in state court, be defeated on demurrer.[7] This is especially true since, in the practical nature of things, it seems I must co-operate with the tribal court proceedings to whatever extent is necessary to create a record to challenge enforcement under 1737(b) or 1737(c).

All this because under the Tribal Court Civil Money Judgment Act, there is no explicit bar against a tribe from using its own court to sue others. It seems a fundament of our sense of justice that no single party should be allowed to be plaintiff, judge, and jury in a single action . . . but my experience shows that the Tribal Court Civil Money Judgment Act allows for exactly this to happen.

This problem could be fixed by adding another mandatory non-recognition element to 1737(b) providing that no judgment shall be recognized from a tribal court where the tribe itself, or entities controlled by it, act as plaintiff. Such a

---

[3] A*cres v Blue Lake Rancheria Tribal Court*, 3:16-cv-02622-WHO, (ND Cal 2016)
[4] *Admiral Insurance v Blue Lake Tribal Court*, (5:12-cv-01266-LHK (ND Cal, 2012))
[5] *UCIC v Blue Lake Tribal Court*, (LA CV11-10161 JHK (CD Cal, 2012)
[6] See http://www.northcoastjournal.com/humboldt/mainstay-unraveled/Content?oid=2132755 for a general news piece on Mainstay.
[7] Being that this is public record, and being that Blue Lake sponsored the Tribal Court Civil Money Judgment Act and will probably review this record, I feel constrained to point out that I bear my burdens cheerfully.

provision might simply read:

> 1737(b)(4): The judgment was rendered in an action in which the plaintiff was either the tribe established which the tribal court, or an entity controlled by the tribe that established the tribal court.

While a counter argument might be made that California can act as plaintiff in state courts, this is ultimately unpersuasive. Scale matters, and California is a polity of nearly 40,000,000 people. California tribes number in the thousands, or the hundreds, or the dozens. The scale of California prevents the abuse of a self-interested polity prosecuting non-members for personal gain, but scale allows such self-interested prosecution in the case of tribes.[8]

This difference in scale is also apparent when considering the difference between enforcements of tribal judgments and foreign judgments. Blue Lake Rancheria is a tribe of fifty-odd individuals. There is no comparably sized foreign government.

There is little danger that refusing to enforce monetary judgments a tribe awards itself in its own court will deprive tribes of a remedy against wrongdoers. In the case of actions by a tribe against non-members, state courts or federal courts will have concurrent jurisdiction. In the case of actions by a tribe against its own members, the tribal government should have sufficient means to enforce its own judgments within its own jurisdiction, without needing the assistance of another sovereign.

Additionally, I can testify from personal experience that it would be a tremendous comfort if 1737(c)(7) and 1737(c)(8) were mandatory reasons to deny recognition. The way the law stands now, California is explicitly telling me that if a tribal court judgment is rendered against me by an admittedly corrupt or biased tribal court, then that judgment might be enforced anyway if I fail to avail myself of the tribal appeals process.

But of course if the tribe dominates the trial court to a sufficient degree to warp due process, then there is every reason to believe it also dominates any tribal appellate court. And then specifically, in Blue Lake's instance, recourse to the appellate court requires posting of security sufficient to satisfy judgment. This, combined with the doctrine of tribal sovereign immunity from suit, means that one might be compelled to irrevocably pay a tribal judgment before challenging that judgment in the tribal appellate court. Since you can't sue a tribe for restitution of funds, once you pay a security for appeal, the tribe has no need to seek enforcement in state court.

---

[8] Similar arguments of scale apply to other states and tribes. The sole exception would seem to be the Navajo Nation, whose reservation numbers 300,000 residents and is of a similar scale to say, the state of Vermont. However the Navajo Nation is entirely without California, and it would seem to have little need to have its judgments enforced here. However if this remains a concern, an exception could certainly be made to specifically allow for the enforcement of judgments from Navajo Nation courts in actions where the Navajo Nation itself is plaintiff.

Again, because of the scale involved, these considerations apply to tribal judgments in a way they don't apply to foreign judgments.

I plan to attend September 22nd Commission meeting, and hope to share my experiences with you in person then.

Sincerely,

James Acres

1106 2nd #123
Encinitas, CA 92024

#D-1200

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Recognition of Tribal and Foreign Court Money Judgments

September 2016

California Law Revision Commission
c/o King Hall Law School
Davis, CA 95616
650-494-1335
<commission@clrc.ca.gov>

SUMMARY OF RECOMMENDATION

California law includes substantive standards governing the recognition of foreign country and tribal court money judgments. These substantive standards are derived from the 2005 Uniform Foreign-Country Money Judgments Recognition Act. The Legislature directed the Commission to study these standards and report its findings and any recommendations for improvement to the standards.

As discussed in this recommendation, the Commission has reviewed the individual, substantive standards of recognition in detail. For the most part, the Commission found that the standards are operating appropriately in practice. Where the Commission identified the potential for confusion, the recommendation proposes minor reforms or commentary to provide clarification. The Commission's proposed reforms and commentary provide clarification on the following issues:

- Exercises of discretion to recognize a foreign or tribal court judgment in spite of a defect in the foreign or tribal court proceeding.
- Assessment of whether a foreign or tribal court lacked personal jurisdiction over the defendant.
- Defects in notice that could lead to nonrecognition of a foreign or tribal court judgment.
- Types of fraud that could lead to nonrecognition of a foreign or tribal court judgment.
- Resolving a situation of conflicting judgments.
- Recognition of foreign defamation judgments.

This recommendation was prepared pursuant to Section 1 of Chapter 243 of the Statutes of 2014.

RECOGNITION OF TRIBAL AND FOREIGN COURT MONEY JUDGMENTS

In 2014, the Legislature enacted Senate Bill 406, establishing the Tribal Court Civil Money Judgment Act (hereafter, "Tribal Court Judgment Act") and directing the Commission to study "the standards for recognition of a tribal court or a foreign court judgment, under the Tribal Court Civil Money Judgment Act (Title 11.5 (commencing with Section 1730) of Part 3 of the Code of Civil Procedure) and the Uniform Foreign-Country Money Judgments Recognition Act (Chapter 2 (commencing with Section 1713) of Title 11 of Part 3 of the Code of Civil Procedure)."[1]

The substantive rules governing the recognition of judgments under the Tribal Court Judgment Act and California's Uniform Foreign-Country Money Judgments Recognition Act (hereafter, "California's Uniform Act") are fundamentally the same. Under either Act, a judgment that falls within the scope of the Act is entitled to recognition, unless an exception to recognition applies. The Acts, collectively referred to hereafter as "Judgment Recognition Acts," each list essentially the same set of exceptions to recognition.[2]

As the Legislature considered Senate Bill 406, interested persons raised concerns about the exceptions to recognition in the Judgment Recognition Acts. Presented with these concerns, the Legislature chose to amend the bill, adding an automatic repeal (i.e, "sunset") provision and directing the Commission to study the exceptions to recognition in advance of the law's repeal.[3]

The Commission has reviewed the exceptions to recognition in the Judgment Recognition Acts in detail. For the most part, the Commission did not find problems with the operation of the exceptions. However, the Commission found that certain exceptions could benefit from clarifying amendments or commentary. This recommendation includes proposed legislation that would provide additional clarity as to how these exceptions are intended to operate in practice.

As noted above, the lists of exceptions to recognition in the Judgment Recognition Acts are largely the same. For that reason, the discussion generally focuses on the Judgment Recognition Acts collectively. In some instances, the California Uniform Act and Tribal Court Judgment Act are discussed separately to identify differences between the Acts or differences in other laws that would affect the interpretation and understanding of the Acts.

---

1. 2014 Cal. Stat. ch. 243.

2. Compare Code Civ. Proc. § 1716(b), (c) with Code Civ. Proc. § 1737(b), (c).

3. See Assembly Committee on Judiciary Analysis of Senate Bill 406 (June 13, 2014), p. 8 (hereafter, "SB 406 Assembly Judiciary Analysis").

BACKGROUND

In order to understand the Judgment Recognition Acts, it is helpful to briefly consider the history of judgment recognition law, the policy rationale underlying judgment recognition law, and how judgment recognition law operates generally. Each of these issues is discussed briefly, in turn, below.

History of Judgment Recognition Law

In California, most of the statutory exceptions to recognition applicable to tribal and foreign court money judgments have been largely unchanged since 1967, when California adopted the 1962 Uniform Foreign Money-Judgments Recognition Act (hereafter, "1962 Uniform Act").[4]

The 1962 Uniform Act set forth substantive standards governing the recognition of both foreign country and tribal court civil money judgments.[5] The 1962 Uniform Act codified "the most prevalent common law rules with regard to the recognition of money judgments rendered in other countries."[6] Thus, the exceptions to recognition, although newly codified, had previously been recognized under the common law.[7]

In 2005, the Uniform Law Commission revised the 1962 Uniform Act, preparing the Uniform Foreign-Country Money Judgments Recognition Act (hereafter, "2005 Uniform Act"). The 2005 Uniform Act:

> continues the basic policies and approach of the 1962 Act. Its purpose is not to depart from the basic rules or approach of the 1962 Act, which have withstood well the test of time, but rather to update the 1962 Act, to clarify its provisions, and to correct problems created by the interpretation of the provisions of that Act by the courts over the years since its promulgation.[8]

California enacted the 2005 Uniform Act in 2007.[9] From that time until the Tribal Court Judgment Act took effect, the recognition of both tribal and foreign court money judgments was governed by California's enactment of the 2005 Uniform Act.[10]

---

4. 1967 Cal. Stat. ch. 503, § 1.

5. See 1962 Uniform Act §§ 1 (defining "foreign state" and "foreign judgment"), 3 (default rule of recognition for foreign judgments), and 4 (grounds for nonrecognition).

6. Uniform Foreign-Country Money Judgments Recognition Act (2005) Prefatory Note.

7. See generally Hilton v. Guyot, 159 U.S. 113 (1895).

8. 2005 Uniform Act Prefatory Note. Given the relationship between the Acts, the Commission's study included case law arising under the 1962 Uniform Act. See *infra* note 21.

9. 2007 Cal. Stat. ch. 212, § 2.

10. See former Code Civ. Proc. § 1714, as enacted by 2007 Cal. Stat. ch. 212, § 2 (defining "foreign country" and "foreign-country judgment"); see also Code Civ. Proc. § 1741.

In 2014, the Tribal Court Judgment Act was enacted to specify a detailed procedure for seeking recognition of a tribal court judgment, while retaining the substantive rules that already governed the recognition of tribal court money judgments.[11]

Policy Rationale for Judgment Recognition

As a general matter, there are a number of policy rationales supporting recognition of judgments from other jurisdictions. These rationales include respecting state sovereignty, promoting international relations (between sovereigns), avoiding international conflicts, facilitating the transnational operations of businesses and individuals, promoting judicial efficiency, providing predictability, providing finality, and avoiding the intra-jurisdictional conflicts and inconsistencies that would invariably crop up in the absence of judgment recognition.[12]

Operation of Judgment Recognition Law

Under the Judgment Recognition Acts, a foreign or tribal court judgment is entitled to recognition unless an exception applies.[13]

The Acts have two different categories of exceptions: mandatory exceptions (requiring nonrecognition of the judgment) and discretionary exceptions (permitting nonrecognition of the judgment).[14] If a mandatory exception applies, the court *must* deny recognition of the judgment. If a discretionary exception applies, the court *may* deny recognition of the judgment.

The Acts list all of the permissible exceptions to recognition. Unless one of the listed exceptions to recognition applies, the judgment would be entitled to recognition.

COMMISSION'S STUDY

Scope

In Senate Bill 406, the Commission was directed to review only the "standards of recognition" under the Judgment Recognition Acts. The Commission

---

11. See SB 406 Assembly Judiciary Analysis, *supra* note 3, at 6.

12. See generally Donald Earl Childress III, Comity as Conflict: Resituating International Comity as Conflict of Laws, 44 U.C. Davis L. Rev. 11, 14 (2010); Joel R. Paul, Comity in International Law, 32 Harv. Int'l L.J. 1, 54-56 (1991); Alan Reed, A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgement Recognition and Enforcement: Something Old, Something Borrowed, Something New?, 25 Loy. L.A. Int'l & Comp. L. Rev. 243, 274-275 (2003); Kevin J. Christensen, Of Comity: Aerospatiale as Lex Maritima, 2 Loy. Mar. L.J. 1, 2-3, 23 (2003).

13. See Code Civ. Proc. §§ 1716(a); 1736(a); 1737(a), (d).

14. See 2005 Uniform Act § 4 Comment 3.

understood "standards of recognition" to mean the substantive exceptions to recognition contained in the Judgment Recognition Acts.[15] For the most part, the Commission did not examine the definitions[16] or general scope[17] provisions of the Acts.

In conducting this study, the Commission focused on the exceptions to recognition and the related provisions.[18]

The Commission did not assess and takes no position on the procedure for seeking tribal court judgment recognition established by the Tribal Court Judgment Act.

Analytical Approach

In conducting this study, the Commission reviewed each exception to recognition in detail to determine whether the exception has been cause for confusion or has led to problematic results. Further, the Commission considered why, as a general matter, certain exceptions were deemed discretionary (i.e., are there justifications for recognizing a judgment when these exceptions apply?).

The Commission paid particular attention to the specific concerns discussed in the analysis of Senate Bill 406 prepared by the Assembly Committee on the Judiciary.[19]

This research included a close review of the language of the Uniform Acts, the associated commentary of the Uniform Law Commission, relevant Restatements of Law,[20] judgment recognition case law,[21] and, as needed, other legal analysis and commentary.

---

15. The 2005 Uniform Act refers to the exceptions to recognition as "standards of recognition." See 2005 Uniform Act § 4.

16. See Code Civ. Proc. §§ 1714, 1732. The Commission did review the definition of "due process" in the Tribal Court Judgment Act, as that definition pertains to the substance of the standards of recognition. See Code Civ. Proc. §§ 1732(c) (defining "due process"); 1737(b)(3), (c)(8) (exceptions pertaining to due process).

17. See Code Civ. Proc. §§ 1715, 1731.

18. Code Civ. Proc. §§ 1716, 1717, 1732(c) and 1737.

19. See SB 406 Assembly Judiciary Analysis, *supra* note 3.

20. See, e.g., Restatement (Third) of Foreign Relations Law of the United States §§ 421, 482 (1987) (hereafter, "Third Restatement"); Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction §§ 403, 404 (Tentative Draft No. 1, April 1, 2014) (hereafter, "Draft Fourth Restatement").

21. This case law includes cases arising under both the 1962 and 2005 Uniform Acts.

Twenty-two jurisdictions, including California, are currently operating under an enactment of the 2005 Uniform Act, while fourteen jurisdictions are currently operating under an enactment of the 1962 Uniform Act. See Uniform Foreign-Country Money Judgments Recognition Act (2005), 13, pt. II U.L.A. 2015 Cumulative Annual Pocket Part p. 19 (Arizona and Georgia, which are not listed, have also enacted the 2005 Uniform Act); Uniform Foreign Money-Judgments Recognition Act (1962), 13, pt. II U.L.A. 2015 Cumulative Annual Pocket Part p. 43. (Delaware,

Unless otherwise noted, the analysis and recommendations that follow apply to both foreign and tribal court judgment recognition proceedings.

Recommendations

The Commission largely concluded that the exceptions were working well in practice.

In a few cases, the Commission identified possibilities for confusion. To address those issues, the Commission proposes legislative changes to clarify the statutory language[22] and, where appropriate, comments to provide additional guidance about the law.[23]

Given that the exceptions to recognition in both of California's Judgment Recognition Acts derive from the 2005 Uniform Act, the Commission's proposed legislation includes relevant commentary from the Uniform Law Commission that provides additional explanation about the operation and effect of the exceptions to recognition.[24]

DISCRETION TO RECOGNIZE

As discussed previously, the Judgment Recognition Acts each contain a set of discretionary exceptions to recognition. When a discretionary exception applies, the court must decide whether or not to recognize the judgment.

Many of the discretionary exceptions relate to issues of due process or fairness in the foreign or tribal court proceeding.[25] The fairness-related exceptions from California's Uniform Act are reproduced below:

> A court of this state is not required to recognize a foreign-country judgment if any of the following apply:
>
> (1) The defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend.
>
> (2) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case.

Georgia, and Illinois, which are listed as jurisdictions that have adopted the 1962 Act, have all enacted the 2005 Uniform Act); see also Ariz. Rev. Stat. §§ 12-3251 to 12-3254; Ga. Code Ann. §§ 9-12-110 to 9-12-119.

22. See, e.g., discussion of "Personal Jurisdiction under California's Uniform Act" *infra*; see also proposed Code Civ. Proc. § 1717 *infra*.

23. See, e.g., proposed Code Civ. Proc. § 1716 Comment *infra*.

24. See, e.g., proposed Code Civ. Proc. § 1716 Comment (Background from the 2005 Uniform Act) *infra*.

25. See Code Civ. Proc. §§ 1716(c)(1), 1737(c)(1) (lack of notice to defendant); 1716(c)(2), 1737(c)(2) (fraud); 1716(c)(5), 1737(c)(5) (contrary to parties' dispute resolution agreement); 1716(c)(6), 1737(c)(6) (seriously inconvenient forum); 1716(c)(7), 1737(c)(7) (lack of court integrity); 1716(c)(8), 1737(c)(8) (due process failure); but see, e.g., Code Civ. Proc. §§ 1716(c)(4), 1737(c)(4) (conflicting judgments).

> …
> (5) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court.
> (6) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.
> (7) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment.
> (8) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.
> …[26]

In some cases, the phrasing of the exception seems to require that the defect be prejudicial (e.g., the defendant "did not receive notice of the proceeding in sufficient time to enable the defendant to defend"[27]).

A committee analysis of Senate Bill 406 questions whether recognition would ever be appropriate when one of these exceptions applies. The analysis calls for further study of this issue:

> Even a cursory review of the grounds for discretionary nonrecognition raise legitimate questions as to the fairness and due process provided in the underlying action and what should the appropriate standard be for recognition in state court. For example, the bill (and [California's Uniform Act]) allows a court, in its discretion, to recognize and enforce a tribal court money judgment even when the specific proceedings in the tribal court leading to the judgment were not compatible with due process of law. Currently the bill – and [California's Uniform Act] – require mandatory nonrecognition of a tribal order if it was rendered under a judicial system that does not provide procedures compatible with the requirements of due process. However, if the system provides procedures that, at least on paper, provide due process of law, but the actual procedures used in a particular case do not, the defendant has not been afforded due process of the law and thus, the proceeding would not, under the Ninth Circuit decision in *Wilson v. Marchington* [127 F.3d 805 (9th Cir. 1997)], be entitled to recognition in federal court. Is it reasonable policy – under both this bill and [California's Uniform Act] – to permit such an order to be enforced by a California court? This is obviously a very important question calling for further study.[28]

The Commission reviewed the Uniform Law Commission's commentary for the rationales for discretionary recognition. The commentary suggests one situation in which it might be proper to recognize a foreign or tribal court judgment when a discretionary exception applies.

---

26. Code Civ. Proc. § 1716(c); see also *id.* § 1737(c).

27. Code Civ. Proc. §§ 1716(c)(1), 1737(c)(1).

28. SB 406 Assembly Judiciary Analysis, *supra* note 3, at 7.

> For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.[29]

The Commission identified other equitable issues that might similarly justify recognition of a judgment despite unfairness in the foreign or tribal court proceeding. For example, the court could conclude that recognition was appropriate if the party opposing recognition was somehow responsible for bringing about the problem in the foreign or tribal court (i.e., had unclean hands). Or, the court might find that the defendant had effectively waived the right that is the basis for the objection. In practice, the Commission expects that instances where equitable considerations will warrant recognition in spite of an applicable exception will be rare, but a court should not be precluded from recognizing a judgment when those circumstances exist.

Treating the fairness-related exceptions as discretionary allows a court to evaluate the level of harm, the parties' conduct in the foreign or tribal court system, and any other factors the court deems relevant in determining whether an individual foreign or tribal court judgment should be recognized.

The Commission concludes that the statutory language, permitting discretionary recognition for specified exceptions, is appropriate as drafted. However, the Commission believes it would be helpful to provide guidance on when a court might exercise its discretion to recognize a judgment, consistent with the discussion above. The proposed legislation includes a comment providing such guidance.[30]

MANDATORY EXCEPTIONS TO RECOGNITION

The Judgment Recognition Acts each include three mandatory exceptions to recognition. These exceptions require that a judgment be denied recognition in situations where:

- The foreign or tribal judicial system, as a whole, does not provide impartial tribunals or procedures compatible with due process.
- The foreign or tribal court lacked subject matter jurisdiction.
- The foreign or tribal court lacked personal jurisdiction over the defendant.

Each of these mandatory exceptions is discussed, in turn, below.

---

29. 2005 Uniform Act § 4 Comment 12.

30. See proposed Code Civ. Proc. § 1716 Comment *infra*.

Systemic Lack of Due Process

Under the Judgment Recognition Acts, a court must decline to recognize a foreign or tribal court judgment that "was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[31]

> Obviously, if the entire judicial system in the foreign country fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that foreign country would be so compromised that the forum court should refuse to recognize it as a matter of course.[32]

During the legislative process for Senate Bill 406, a tribe raised concerns that this exception has "the potential to negate a tribal judgment simply because a superior court judge finds the judgment incongruous with the State's idea of due process or impartiality, without regard for the basic tenants of Tribal Sovereignty."[33]

That concern may be partially addressed by the fact that this exception does not require strict compliance with U.S. constitutional due process. The Uniform Law Commission's commentary on the 2005 Uniform Act makes that point clear.

> [A] mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved. The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure. Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under [this provision], so long as the essential elements of impartial administration and basic procedural fairness have been provided in the foreign proceeding.[34]

Further, the commentary describes this provision as requiring procedures compatible with "fundamental fairness,"[35] suggesting that the reference to "due process" is not intended to invoke the full panoply of due process rights and obligations afforded under the United States Constitution.

Although the Tribal Court Judgment Act was not intended to change the legal standards that apply to judgment recognition, the Act adds clarification as to some of the due process requirements for the recognition of tribal court judgments. The

---

31. Code Civ. Proc. §§ 1716(b)(1), 1737(b)(3).

32. See 2005 Uniform Act § 4 Comment 12.

33. See SB 406 Assembly Judiciary Analysis, *supra* note 3, at 7, *quoting* comments of the Habematolel Pomo of Upper Lake. The analysis suggests that the tribe may have broader concerns about the mandatory exceptions. Lacking additional detail on the nature of any broader concerns, the Commission was not able to evaluate those concerns.

34. 2005 Uniform Act § 4 Comment 5 (citations omitted).

35. *Id.* at Comment 12.

Tribal Court Judgment Act defines "due process" as including, but not limited to "the right to be represented by legal counsel, to receive reasonable notice and an opportunity for a hearing, to call and cross-examine witnesses, and to present evidence and argument to an impartial decisionmaker."[36] This definition effectively establishes certain minimal requirements that must be satisfied in all cases. In other words, the Act would preclude recognition of a judgment from a tribal court system unless that system provides all of the listed due process rights. However, the list of due process rights is not exhaustive. A court could thus find that a tribal court system failed to provide due process on some other grounds.

The Commission has not identified problems with how the systemic due process exception has been applied in practice, nor do the court decisions suggest confusion about how this exception is intended to operate.[37]

The Commission concludes that this exception is appropriate and sufficiently clear as drafted.

Lack of Subject Matter Jurisdiction

Under the Judgment Recognition Acts, a court must decline to recognize a foreign or tribal court judgment if the rendering court "did not have jurisdiction over the subject matter."[38]

This seems proper. Generally, where a court lacks subject matter jurisdiction over a case, the resulting judgment would be invalid and should not be recognized.[39]

---

36. Code Civ. Proc. § 1732(c).

37. See, e.g., Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1413 (9th Cir. 1995) (applying this exception to deny recognition to an Iranian judgment against the former shah's sister on the grounds that she "could not expect fair treatment from the courts of Iran, could not personally appear before those courts, could not obtain proper legal representation in Iran, and could not even obtain local witnesses on her behalf.").

38. Code Civ. Proc. §§ 1716(b)(3), 1737(b)(2).

39. See generally 46 Am. Jur. 2d. Judgments § 22 ("In order for a judgment to be valid and enforceable, the court which renders it must have jurisdiction of the parties, as well as jurisdiction of the subject matter. A judgment rendered without jurisdiction may be attacked and vacated at any time, either directly or collaterally.") (citations omitted); see also Carr v. Kamins, 151 Cal. App. 4th 929, 933, 60 Cal. Rptr. 3d 196 (2007) ("'A judgment is void on its face if the court which rendered the judgment lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief which the court had no power to grant.' An order after judgment that gives effect to a judgment that is void on its face is itself void and subject to appeal even if the judgment itself is not appealed.") (citations omitted); but see Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd., 181 Cal. App. 4th 752, 767, 104 Cal. Rptr. 3d 641 (2010) ("However, a court does not necessarily act without subject matter jurisdiction merely by issuing a judgment going beyond the sphere of action prescribed by law. Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction … . The distinction is critical, because action

For foreign country judgments, subject matter jurisdiction would be governed by the foreign country's own law.[40] For tribal court judgments, subject matter jurisdiction would be governed by the tribe's own law and, where the matter involves persons who are not tribe members, federal law.[41]

The Commission concludes that this exception to recognition is appropriate and sufficiently clear as drafted.

Lack of Personal Jurisdiction

Under the Judgment Recognition Acts, a court must decline to recognize a foreign or tribal court judgment if the rendering court "did not have personal jurisdiction over the defendant."[42]

The provisions governing personal jurisdiction in California's Uniform Act and the Tribal Court Judgment Act are materially different. For that reason, the Acts are discussed separately below.

Personal Jurisdiction under California's Uniform Act

As noted above, California's Uniform Act provides for mandatory nonrecognition of a judgment where the foreign court lacked personal jurisdiction over the defendant.[43]

---

in excess of jurisdiction by a court that has jurisdiction in the fundamental sense (i.e., jurisdiction over the subject matter and the parties) is not void, but only voidable. Errors of substantive law are within the jurisdiction of a court and are not typically acts beyond the court's fundamental authority to act. For example, a failure to state a cause of action, insufficiency of evidence, abuse of discretion, and mistake of law, have been held nonjurisdictional errors for which collateral attack will not lie.") (citations, emphasis, and quotation marks omitted).

40. See Draft Fourth Restatement, *supra* note 20, § 403 Comment g ("A court in the United States will not recognize a judgment of a court of a foreign state if the court that rendered the judgment did not have jurisdiction over the subject matter of the dispute. A court that lacked the capacity under its national law to render a judgment cannot expect that judgment to gain recognition elsewhere. The assignment of designated subjects to the jurisdiction of particular foreign courts is, however, solely a matter of foreign law, and the consequences of a mistaken assertion of subject-matter jurisdiction also must depend on foreign law."); see also Third Restatement, *supra* note 20, § 482 Comment a ("[J]urisdiction of the rendering court over the subject matter is normally presumed…").

41. See Cohen's Handbook of Federal Indian Law § 7.02[1][a] (Nell Jessup Newton Editor-in-Chief, Lexis Nexis 2012) (hereafter, "Cohen's Handbook").

> Tribal court subject matter jurisdiction over tribal members is first and foremost a matter of internal tribal law. There is no general federal statute limiting tribal jurisdiction over tribal members, and federal law acknowledges this jurisdiction.
>
> A tribe's exercise of adjudicative jurisdiction over non-Indians or nonmembers does raise questions of federal law, however, reviewable in federal court.

Id. (citations omitted).

42. Code Civ. Proc. § 1716(b)(2); see also *id*. § 1737(b)(1) (same with minor differences in phrasing).

When considering a foreign court's exercise of personal jurisdiction, a court in this state may have two separate and distinct concerns:

(1) Whether the foreign court's basis for personal jurisdiction over the defendant is consistent with principles of personal jurisdiction in this state.

(2) Whether the foreign court's exercise of personal jurisdiction was permitted under its own law.

Each of these concerns is discussed, in turn, below.

California Principles of Personal Jurisdiction

If a foreign court's exercise of personal jurisdiction over the defendant offends California's principles of personal jurisdiction, then, as a matter of policy, California may want to decline to recognize the resulting judgment.

For the most part, the judgment recognition case law on personal jurisdiction addresses whether the foreign court's exercise of personal jurisdiction is consistent with principles of personal jurisdiction where recognition is sought.[44] This result seems to be suggested by a separate section of California's Uniform Act, Code of Civil Procedure Section 1717, which provides a list of bases for personal jurisdiction that are sufficient for the purposes of the Act. That section is reproduced in relevant part below:

> (a) A foreign-country judgment shall not be refused recognition for lack of personal jurisdiction if any of the following apply:
>
> (1) The defendant was served with process personally in the foreign country.
>
> (2) The defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant.
>
> (3) The defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved.
>
> (4) The defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country.
>
> (5) The defendant had a business office in the foreign country and the proceeding in the foreign court involved a cause of action or claim for relief arising out of business done by the defendant through that office in the foreign country.

---

43. Code Civ. Proc. § 1716(b)(2).

44. See generally Draft Fourth Restatement, *supra* note 20, § 403 Reporters' Note 5 ("U.S. courts will not enforce a foreign judgment if the court rendering the judgment would have lacked personal jurisdiction over the person opposing recognition of the judgment under the minimum requirements of due process imposed by the U.S. Constitution."); see also *id*. § 403 Comment f; Commission Staff Memorandum 2016-6, pp. 14-16.

> (6) The defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a cause of action or claim for relief arising out of that operation.
>
> (b) The list of bases for personal jurisdiction in subdivision (a) is not exclusive. The courts of this state may recognize bases of personal jurisdiction other than those listed in subdivision (a) as sufficient to support a foreign-country judgment.
>
> …

In drafting this list of bases for personal jurisdiction, the Uniform Law Commission "adopt[ed] the policy of listing bases accepted generally today and preserv[ed] for the courts the right to recognize still other bases."[45]

Generally, the personal jurisdiction provisions of the Uniform Act have been understood to permit a court to recognize bases of personal jurisdiction that are consistent with the U.S. Constitution or, in states with additional restrictions on personal jurisdiction, the state's own standards.[46] For instance, in a Ninth Circuit case, the court concluded that the personal jurisdiction provisions of California's Uniform Act "seem[] to us intended to leave the door open for the recognition by California courts of foreign judgments rendered in accordance with American principles of jurisdictional due process."[47]

With respect to ensuring that a foreign court's exercise of personal jurisdiction is consistent with California's jurisdictional principles, the Commission concluded the personal jurisdiction provisions of California's Uniform Act are operating appropriately in practice.

Foreign Law

If a foreign court lacks personal jurisdiction under its own laws, then the foreign court would have no legal authority to assert jurisdiction over the defendant. The resulting foreign court judgment would presumably be invalid.[48]

The Commission found some authority suggesting that, in a judgment recognition proceeding, a court may consider whether the foreign court lacked personal jurisdiction under foreign law.[49] However, the existing language of

---

45. 1962 Uniform Act Prefatory Note.

46. See Commission Staff Memorandum 2016-6, pp. 13-16.

47. Bank of Montreal v. Kough, 612 F.2d 467, 471 (9th Cir. 1980). California's long-arm jurisdiction statute extends the jurisdictional reach of the California courts to the limits of the state and federal Constitutions. See Code Civ. Proc. § 410.10.

48. See *supra* note 39.

49. See, e.g., Monks Own, Ltd. v. Christ in the Desert, 168 P.3d 121, 125-27 (N.M. 2007) (finding that personal jurisdiction under foreign law was not in dispute); Dart v. Balaam, 953 S.W.2d 478, 481-82 (Tex. App. 1997) (discussing appearance as a waiver of jurisdictional objections under both Texas and Australia law); Sung Hwan Co., Ltd. v. Rite Aid Corp., 850 N.E.2d 647, 651 (N.Y. 2006) ("Thus, the inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares

California's Uniform Act appears to preclude an objection to personal jurisdiction under foreign law in certain cases. In particular, Code of Civil Procedure Section 1717, reproduced above, provides that a judgment "shall not be refused recognition for lack of personal jurisdiction" if any of the listed bases apply, without permitting any assessment of whether jurisdiction is adequate under foreign law.

The Commission notes that, in most cases, objections to personal jurisdiction would likely have been resolved in the foreign court proceeding, either by the foreign court deciding the issue or through waiver where the defendant appears without raising a jurisdictional objection. In such cases, a California court should not permit re-litigation of the issue.[50] As a general matter, the Commission believes that objections to personal jurisdiction under foreign law would likely only arise in the context of a default judgment where the defendant did not appear at all before the foreign court.

The Commission concluded that permitting objections to personal jurisdiction under foreign law seems to reflect the predominant practice under the Uniform Act, as well as the best policy result (i.e., avoiding recognition of invalid foreign court judgments).[51] To that end, the Commission concluded that minor reforms are needed to make clear that, in appropriate circumstances, a court is not precluded from considering whether the foreign court's exercise of personal jurisdiction was authorized by foreign law.

Conclusion

In accordance with the foregoing discussion, the Commission recommends amendments to Code of Civil Procedure Section 1717 making clear that a foreign court lacks personal jurisdiction if either (1) the foreign court's basis for personal jurisdiction violates California's jurisdictional principles or (2) the foreign court's exercise of personal jurisdiction was not permitted under foreign law.[52]

---

our notions of procedure and due process of law."); Canadian Imperial Bank of Commerce v. Saxony Carpet Co., 899 F. Supp. 1248, 1253 (S.D.N.Y. 1995) ("According to the standards articulated in both New York law and the proof of Quebec law offered by Plaintiff CIBC, the Canadian court obtained valid in personam jurisdiction over Defendant Saxony."); see also Draft Fourth Restatement, *supra* note 20, § 403 Reporters' Note 7.

50. Draft Fourth Restatement, *supra* note 20, § 403 Reporters' Note 7 ("There is authority, however, for the proposition that a U.S. court generally will not look behind a foreign court's finding of personal jurisdiction under its own law.").

51. See Commission Staff Memorandum 2016-6, pp. 11-13.

52. The Commission's commentary also specifies that a defect in the service of process could support a finding that the foreign court lacks personal jurisdiction, where that defect is sufficient to defeat personal jurisdiction under foreign law. See proposed Code Civ. Proc. § 1717 Comment *infra*. Where defective service of process does not defeat jurisdiction, the defective service may nonetheless be grounds for nonrecognition under other exceptions. See, e.g., Code. Civ. Proc. § 1716(c)(1) (defendant did not receive sufficient notice).

Personal Jurisdiction under Tribal Court Judgment Act

The Tribal Court Judgment Act states the general rule that a court must decline recognition of a tribal court judgment where the tribal court lacked personal jurisdiction over the defendant.[53] The Tribal Court Judgment Act differs from California's Uniform Act in that the Tribal Court Judgment Act does not include an analog to Code of Civil Procedure Section 1717, listing sufficient bases for personal jurisdiction.[54]

The omission of such a provision is reasonable. There are significant, material differences in the jurisdictional laws governing states and tribes. In particular, the federal case law assessing tribal court jurisdiction combines concepts that are traditionally associated with both subject matter jurisdiction (a court's authority to hear a matter) and personal jurisdiction (a court's ability to adjudicate as to a particular party).[55] The federal case law describes a test for tribal court subject matter jurisdiction that focuses on the status of the party (i.e., a nonmember) and that party's connections with the tribe (i.e, requiring either a consensual relationship with the tribe or its members or conduct threatening or directly affecting the tribe as a whole).[56] Given these differences, the Commission concluded that, at a minimum, the list of sufficient bases for personal jurisdiction in Code of Civil Procedure Section 1717 could be confusing when applied to a tribal court's exercise of personal jurisdiction over a non-tribe member. Thus, the Commission concludes that the omission of an analogous provision in the Tribal Court Judgment Act was appropriate.

---

53. Code Civ. Proc. § 1737(b)(1).

54. See generally discussion of "California Principles of Personal Jurisdiction" *supra*.

55. See, e.g., Smith v. Salish Kootenai College, 434 F.3d 1127, 1136-40 (9th Cir. 2006) (en banc) (acknowledging general characterization of tribal civil jurisdiction as subject matter jurisdiction in case law, while noting that aspects of tribal adjudicatory jurisdiction resemble personal jurisdiction). See also Katherine Florey, Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction, 101 Cal. L. Rev. 1499, 1536-40 (December 2013) (discussing *Smith v. Salish Kootenai College*); *id*. at 1504-05 ("In keeping with this supposed tribal uniqueness, the Supreme Court has developed the jurisdictional doctrines that govern tribes on an entirely clean slate. In other words, the Court has never seriously examined the field of personal jurisdiction, or related doctrines like conflict of laws, when discussing Indian country — despite the fact that these doctrines are, by their nature, designed to accommodate different legal values and contexts in multi-jurisdictional disputes. Instead, the Court has developed new doctrines and categories, presumably rooted in federal common law, that bear little relation to jurisdictional concepts as applied in any other context. For example, the Court speaks of 'legislative,' 'adjudicative,' and, in some cases, 'subject matter' jurisdiction in scenarios that would ordinarily be conceptualized as ones involving personal jurisdiction.") (citations omitted).

56. See Montana v. United States, 450 U.S. 544, 565-66 (1981) (setting forth a test describing limits on tribe's civil regulatory authority); Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (concluding that tribe's "adjudicative jurisdiction does not exceed its legislative jurisdiction," thereby applying *Montana* test to tribal court jurisdiction).

The Commission further concludes, that the omission of such a provision was not intended to change the scope of the personal jurisdiction inquiry for the recognition of tribal court judgments.[57] The Tribal Court Judgment Act, as drafted, does not preclude a court from finding that a tribal court lacked personal jurisdiction over the defendant if either (1) the tribal court's exercise of personal jurisdiction was not authorized by tribal law or (2) the tribal court's basis for personal jurisdiction violates California's jurisdictional principles.

Therefore, the Commission concludes that the Tribal Court Judgment Act is appropriate as drafted, but proposes commentary clarifying the scope of the personal jurisdiction inquiry.[58]

DISCRETIONARY EXCEPTIONS TO RECOGNITION

The Judgment Recognition Acts each include nine discretionary exceptions to recognition. These exceptions permit a court to deny recognition of a judgment in situations where:

- The defendant did not receive timely notice.
- The judgment was procured by fraud that precluded the defendant from defending the case.
- California public policy would be offended by recognition of the judgment.
- The judgment conflicts with another final judgment.
- The proceeding was contrary to the parties' dispute resolution agreement.
- The court was a seriously inconvenient forum.
- The court rendering the judgment appears to have lacked integrity with respect to the judgment.
- The proceeding was incompatible with due process.
- The judgment was for defamation and failed to provide free speech and press protections.

Each of these discretionary exceptions is discussed, in turn, below.

---

57. See, e.g., SB 406 Assembly Judiciary Analysis, *supra* note 3, at 1 ("While, this bill establishes a new procedural framework for seeking recognition of tribal court money judgments in California courts, it does not significantly change the legal grounds for recognition or nonrecognition of these judgments."); see also Assembly Floor Analysis of SB 406, p. 3 (Aug. 6, 2014) ("Any money judgment that is non-enforceable under existing law would continue to be non-enforceable under this legislation — this bill just simplifies the procedures for seeking enforcement of a tribal court judgment."); Senate Floor Analysis of SB 406, p. 7 (Aug. 8, 2014) (according to Judicial Council (source of SB 406), bill would "continu[e] to apply the principles of comity appropriate to judgments of sovereign tribes.").

58. See proposed Heading of Chapter 3 (commencing with Section 1730) of the Code of Civil Procedure Comment *infra*.

Lack of Notice

Under the Judgment Recognition Acts, a court may decline to recognize a foreign or tribal court judgment if "[t]he defendant in the proceeding in the foreign [or tribal] court did not receive notice of the proceeding in sufficient time to enable the defendant to defend."[59]

As a general matter, it seems unfair to hold a defendant responsible for a judgment where the defendant was precluded from putting on a defense due to a failure to receive timely notice.

The terms of this provision seem to emphasize the *timing* of the notice. Nonetheless, the Commission concludes that this provision, as drafted, would permit an objection to notice where the *content* of the notice is defective.

The Commission concluded that the lack of notice exception is appropriate, as drafted. To alleviate any possible confusion on whether this exception permits objections to defects in the content of the notice, the Commission provides clarifying commentary on that issue.[60]

Fraud

Under the Judgment Recognition Acts, a court may decline to recognize a foreign or tribal court judgment if "[t]he judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case."[61]

The Uniform Law Commission's commentary specifies that this provision only permits nonrecognition in cases of "extrinsic fraud—conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case."[62] The reference to "extrinsic fraud" may be cause for confusion, as it may suggest a categorical test for the applicability of this provision.[63] However, the language of the exception itself establishes a functional test, focusing on whether the fraud deprived the party of an adequate opportunity to present its case.

Commentary on judgment recognition suggests that modern case law focuses on "whether the injured party had any opportunity to address the alleged misconduct during the original proceeding."[64]

Standing alone, the Uniform Law Commission's comment, which is reproduced in the Commission's commentary,[65] might suggest a limitation on type of fraud

---

59. Code Civ. Proc. §§ 1716(c)(1), 1737(c)(1).

60. See proposed Code Civ. Proc. § 1716 Comment; proposed Heading of Chapter 3 (commencing with Section 1730) of the Code of Civil Procedure Comment *infra*.

61. Code Civ. Proc. §§ 1716(c)(2), 1737(c)(2).

62. 2005 Uniform Act § 4 Comment 7.

63. Draft Fourth Restatement, *supra* note 20, § 404 Reporters' Note 3.

64. *Id*.

that could serve as grounds for nonrecognition. For that reason, the Commission provides supplemental commentary clarifying that the Uniform Law Commission's reference to extrinsic fraud should not be construed as limiting the application of the fraud exception.

The Commission concludes that the fraud exception, as drafted, is appropriate.

Repugnant to Public Policy

Under the Judgment Recognition Acts, a court may decline to recognize a foreign or tribal court judgment if "[t]he judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state or of the United States."[66]

The Uniform Act's commentary explains the scope of this provision:

> [A] difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."[67]

As indicated, this provision establishes a "stringent test for finding a public policy violation."[68]

Under the 1962 Uniform Act, this exception referred only to the cause of action or claim for relief. In 2005, the Uniform Law Commission revised this provision to also apply to the judgment itself. This amendment addressed confusion in the case law about whether the provision applies where the specific judgment is repugnant to public policy, but the underlying cause of action or claim for relief is not.[69]

With the 2005 amendment, the Commission concludes that this exception is appropriate and sufficiently clear as drafted. Therefore, the Commission recommends no change to this provision.

---

65. See proposed Code Civ. Proc. § 1716 Comment; proposed Heading of Chapter 3 (commencing with Section 1730) of the Code of Civil Procedure Comment *infra*.

66. Code Civ. Proc. § 1716(c)(3); see also *id*. § 1737(c)(3) (same with minor differences in phrasing).

67. See 2005 Uniform Act § 4 Comment 8 (citation omitted).

68. *Id*.

69. See *id*.

Conflicting Judgments

Under the Judgment Recognition Acts, a court may decline to recognize a foreign or tribal court judgment if "[t]he judgment conflicts with another final and conclusive judgment."[70]

The Commission concludes that this exception is appropriate and sufficiently clear as drafted.

Nonetheless, the Commission provides comments offering guidance to a court asked to resolve a situation of conflicting judgments. Absent other law requiring the recognition of a particular judgment,[71] a court may be unsure how to resolve a conflict between multiple judgments, each otherwise eligible for recognition.

Neither the Judgment Recognition Acts, nor the Uniform Law Commission's commentary, provide guidance on this point. The Draft *Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction* suggests that:

> If the court rendering the later judgment fairly considered the earlier judgment and declined to recognize the earlier judgment under standards comparable to those set forth in this Restatement, a U.S. court should ordinarily recognize the later judgment.[72]

The Commission provides that guidance in its comments.

Contrary to Parties' Dispute Resolution Agreement

Under the Judgment Recognition Acts, a court may decline to recognize a foreign or tribal court judgment if "[t]he proceeding in the foreign [or tribal] court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that [] court."[73]

By its terms, this provision applies to a dispute resolution agreement that identifies a particular forum for litigation or alternative dispute resolution (i.e., arbitration or mediation).[74]

---

70. Code Civ. Proc. §§ 1716(c)(4), 1737(c)(4).

71. For example, a court may be required to decline recognition of a foreign or tribal court judgment that conflicts with a sister-state judgment that is entitled to full faith and credit under the U.S. Constitution. See U.S. Const. art. IV, § 1.

72. Draft Fourth Restatement, *supra* note 20, § 404 Comment f. The standards in the Restatement are largely the same as those in the Uniform Act. Compare 2005 Uniform Act § 4 with Draft Fourth Restatement §§ 403, 404.

73. Code Civ. Proc. §§ 1716(c)(5), 1737(c)(5).

74. See 2005 Uniform Act § 4 Comment 9 (This provision "allows the forum court to refuse recognition of a foreign-country judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the forum issuing the foreign-country judgment.").

Generally, "[w]here a valid choice-of-forum agreement governs a dispute, a U.S. court will refuse to recognize a foreign judgment resulting from a breach of that agreement in the absence of a waiver of rights under that agreement."[75]

The Commission concludes that this provision is appropriate and sufficiently clear as drafted.

Seriously Inconvenient Forum

Under the Judgment Recognition Acts, a court may decline to recognize a foreign or tribal court judgment if "jurisdiction [is] based only on personal service [and] the foreign [or tribal] court was a seriously inconvenient forum for the trial of the action."[76]

By its terms, this provision is limited to situations in which personal jurisdiction is premised *solely* on personal service. In practice, this significantly limits the application of the exception.[77] It will be rare that personal jurisdiction is premised solely on personal service. Typically, the defendant will have had other contacts with the foreign or tribal jurisdiction that would support the exercise of personal jurisdiction.[78]

---

75. Draft Fourth Restatement, *supra* note 20, § 404 Reporters' Note 7.

Courts have declined to recognize foreign court judgments on the basis of this provision. See, e.g., Diamond Offshore (Bermuda), Ltd. v. Haaksman, 355 S.W.3d 842 (Tex. App. 2011); Montebueno Mktg. v. Del Monte Foods Corp.-USA, 2012 U.S. Dist. LEXIS 39372 (N.D. Cal. 2012), *aff'd* 570 Fed. Appx. 675 (9th Cir. 2014).

However, the courts have recognized foreign court judgments that are contrary to a dispute resolution agreement where the person raising the objection effectively waived that objection by participating in the foreign court proceedings. See, e.g., *Dart*, 953 S.W.2d at 482 ("While the contract between Appellant and Appellee specified that disputes would be submitted to the courts of Vanuatu, neither party sought to enforce that right. Appellee waived his right by filing suit in Australia. Appellant in turn elected to waive his right by making an unconditional appearance and by filing a counter-claim seeking affirmative relief in the Australian court. Having failed to contest the issue in the Australian court, Appellant cannot now assert it as a basis for nonrecognition.").

76. Code Civ. Proc. § 1716(c)(6); see also *id*. § 1737(c)(6) (same with minor differences in phrasing).

77. See Third Restatement, *supra* note 20, § 421 Reporter's Note 5 ("Jurisdiction based on service of process on one only transitorily present in a state is no longer acceptable under international law if that is the only basis for jurisdiction and the action in question is unrelated to that state.")

78. See, e.g., Bank of Nova Scotia v. Tschabold Equip., 754 P.2d 1290, 1295 (Wash. Ct. App. 1988) ("The Canadian court's jurisdiction over Pacific Western was based upon its long-arm rule, a court order, and Pacific Western's voluntary appearance, as well as upon personal service. Refusing recognition of ScotiaBank's Canadian judgment is therefore not warranted on [the inconvenient forum] basis.").

Although the practical effect of this provision may be limited, given its narrow application, the Commission concludes that this provision is appropriate and sufficiently clear as drafted.

Lack of Integrity of Rendering Court

Under the Judgment Recognition Acts, a court may decline to recognize a foreign or tribal court judgment if "[t]he judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment."[79]

The Uniform Law Commission added this provision to the 2005 Uniform Act to complement the mandatory exception to recognition applicable in situations where the judicial system as a whole fails to provide impartial tribunals. The Uniform Law Commission's commentary describes the difference between the showings required under this discretionary exception and the corresponding mandatory exception:

> Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular foreign-country judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.[80]

This provision is relatively new, so there is little commentary or case law discussing its application. However, the rationale for declining to recognize a judgment when this provision applies is sound.

The Uniform Law Commission commentary also suggests a situation where *recognition* of the judgment might be appropriate, even if this exception is established.[81] The commentary suggests that a party's failure to appeal the foreign court judgment could serve as a reason for a court to recognize the foreign court judgment when this exception applies.[82] Although a court could conclude that nonrecognition is nonetheless the appropriate result in such a situation, the comment suggests potentially relevant considerations that might bear on a court's decision whether or not to recognize the judgment.[83]

The Commission concludes that this provision is appropriate and sufficiently clear as drafted.

---

79. Code Civ. Proc. § 1716(c)(7); see also *id.* § 1737(c)(7) (same with minor differences in phrasing).

80. 2005 Uniform Act § 4 Comment 11.

81. See discussion of "Discretion to Recognize" *supra*.

82. 2005 Uniform Act § 4 Comment 12.

83. See discussion of "Discretion to Recognize" *supra*.

Incompatible with Due Process

Under the Judgment Recognition Acts, a court may decline to recognize a foreign or tribal court judgment if "[t]he specific proceeding … leading to the judgment was not compatible with the requirements of due process of law."[84]

This provision was also new to the 2005 Uniform Act and was added to complement the mandatory exception for systemic due process failures. The reasons for the addition are similar to those discussed above.[85]

As with the previous exception, the explanation provided by the Uniform Law Commission as to the scope of this provision, the rationale for nonrecognition, and the possibility that countervailing considerations could support recognition in spite of the exception seems sound.[86]

The Commission notes that the Tribal Court Judgment Act's definition of "due process,"[87] discussed *supra*,[88] would apply to tribal court judgment recognition proceedings. As indicated previously, the definition would effectively establish a list of categorical violations of due process, without preventing a court from finding that the violation of other, non-listed due process rights warrants nonrecognition under this provision.

The Commission concludes that this provision is appropriate and sufficiently clear as drafted.

Defamation

Originally, the Uniform Act did not include a specific exception targeted at foreign or tribal defamation judgments. Courts applying the Uniform Act would, however, decline to recognize foreign defamation judgments that were inconsistent with the free speech protections in the United States under the exception for "repugnan[cy] to public policy."[89]

In 2009, in response to increasing concern about defamation plaintiffs filing suits in foreign countries with plaintiff-friendly libel laws and a relatively low bar for personal jurisdiction (a phenomenon known as "libel tourism"),[90] the California Legislature enacted Senate Bill 320.[91] This bill supplemented

---

84. Code Civ. Proc. §§ 1716(c)(8), 1737(c)(8).

85. See discussion of "Lack of Integrity of Rendering Court" *supra*.

86. *Id*.

87. Code Civ. Proc. § 1732(c).

88. See discussion of "Systemic Lack of Due Process" *supra*.

89. See Anna C. Henning & Vivian S. Chu, Congressional Research Service, Rpt. No. R40497, "Libel Tourism": Background and Legal Issues 8 (Mar. 5, 2010).

90. See generally *id*. at 2-6.

91. 2009 Cal. Stat. ch. 579 (SB 320 (Corbett)).

California's Uniform Act with an exception permitting nonrecognition of a foreign-country judgment if "[t]he judgment includes recovery for a claim of defamation unless the court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions."[92] This exception is also included in the Tribal Court Judgment Act.[93]

In 2010, the federal government, responding to libel tourism concerns, enacted the SPEECH Act.[94] The SPEECH Act prohibits any domestic court[95] from recognizing a foreign defamation judgment unless that judgment meets specified standards for free speech protection and personal jurisdiction.[96] The SPEECH Act also places an affirmative burden on the party seeking recognition to show that the foreign court judgment meets these standards before the judgment can be recognized.[97]

For foreign defamation judgments that are not sufficiently protective of free speech, the Commission concluded that California's discretionary nonrecognition provision might cause confusion in light of the federal prohibition on recognition. Therefore, the Commission recommends amending California's Uniform Act to replace the existing discretionary defamation provision with an express incorporation of the standards for foreign defamation judgments contained in the federal SPEECH Act.[98]

By its terms, the federal SPEECH Act does not appear to apply to tribal court judgments.[99] Therefore, the Commission recommends continuing California's

---

92. Code Civ. Proc. § 1716(c)(9); see also 2009 Cal. Stat. ch. 579, § 1.

93. See Code Civ. Proc. § 1737(c)(9).

94. See generally Emily C. Barbour, Congressional Research Service, Rpt. No. R41417, The SPEECH Act: The Federal Response to "Libel Tourism" (Sept. 16, 2010).

The full name of the federal act is the "Securing the Protection of our Enduring and Established Constitutional Heritage Act." See Pub. L. No. 111-223 (2010).

95. The SPEECH Act defines "domestic court" to include "a court of any State." 28 U.S.C. § 4101(2).

96. 28 U.S.C. § 4102.

97. See *id.*

98. See proposed Code Civ. Proc. § 1716 *infra*.

99. The SPEECH Act defines "foreign court" as "a court, administrative body, or other tribunal of a *foreign country*," without defining foreign country. 28 U.S.C. § 4101(3). As a general matter, under American law, the federal government "has broad powers and responsibilities in Indian affairs." Cohen's Handbook, *supra* note 41, at p. 2. Tribes are more aptly characterized as "domestic" as opposed to "foreign" nations. See, e.g., Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) ("[Tribes] may, more correctly, perhaps, be denominated domestic dependent nations [as opposed to foreign nations]."); see also U.S. Const. art. I, § 8, cl. 3 (listing foreign nations, states and tribes separately).

current discretionary exception for defamation judgments in the Tribal Court Judgment Act.[100]

RECIPROCITY

Neither of the Judgment Recognition Acts conditions recognition of a foreign or tribal court judgment on whether the foreign country or tribe would reciprocally recognize California judgments.

The legislative history for Senate Bill 406 indicates that a member of the public raised concerns about the lack of a reciprocity requirement in the Tribal Court Judgment Act. In particular, the commenter noted the difficulties she has faced in getting a California court order recognized by tribal courts.[101]

The Uniform Act commentary indicates that the Uniform Law Commission considered the inclusion of a reciprocity requirement both when originally developing the 1962 Uniform Act and when revising the Uniform Act in 2005.[102] In 2005, the Uniform Law Commission noted:

> In the course of drafting this Act, the drafters revisited the decision made in the 1962 Act not to require reciprocity as a condition to recognition of the foreign-country money judgments covered by the Act. After much discussion, the drafters decided that the approach of the 1962 Act continues to be the wisest course with regard to this issue. While recognition of U.S. judgments continues to be problematic in a number of foreign countries, there was insufficient evidence to establish that a reciprocity requirement would have a greater effect on encouraging foreign recognition of U.S. judgments than does the approach taken by the Act. At the same time, the certainty and uniformity provided by the approach of the 1962 Act, and continued in this Act, creates a stability in this area that facilitates international commercial transactions.[103]

---

100. To the extent that the SPEECH Act does apply to tribal court judgments and preempts California law to the contrary, the SPEECH Act will continue to operate, independent of California's provision. See generally Barbour, *supra* note 94, at 11-13 (discussing the preemptive effect of the SPEECH Act).

101. See SB 406 Assembly Judiciary Analysis, *supra* note 3, at 7-8. The commenter was seeking tribal court recognition of a California child support order. The Commission notes that child support orders are expressly excluded from the Tribal Court Judgment Act. See Code Civ. Proc. § 1731(b)(2).

102. Some states permit the extension of full faith and credit to tribal judgments, conditioned on reciprocal treatment by the tribe of state judgments. See, e.g., Okla. Stat. tit. 12, § 728; Wis. Stat. § 806.245. Although, absent reciprocity, a tribal court judgment might not be afforded full faith and credit in these states, it is not clear whether a tribal court judgment could nonetheless be recognized and enforced under other state laws (e.g., an enactment of either the 1962 or 2005 Uniform Act).

103. 2005 Uniform Act Prefatory Note.

The Uniform Law Commission identifies general benefits (stability and certainty for litigants) for not requiring reciprocity that would seem to apply to both foreign and tribal court judgments.

A reciprocity requirement seems fundamentally different than the other exceptions. Such a requirement does not concern the quality of justice in the individual foreign or tribal court proceeding.[104] Instead, a reciprocity requirement for judgment recognition addresses a political question, involving the degree of comity to extend to other sovereign entities.

As a general matter, the Commission concludes that a lack of reciprocity requirement in California law is not legally problematic, nor is out of step with the current policy direction of the majority of states.[105] Therefore, the Commission does not recommend any change to California law.

SUNSET CLAUSE

When Senate Bill 406 was amended to assign the Commission this study, the bill was also amended to provide for the repeal of the Tribal Court Judgment Act on January 1, 2018.[106] The analysis discussing the assignment of this study to the Commission states:

> Given the concerns raised on all sides, the Committee may want to consider passing the measure, but requiring that the California Law Revisions Commission (CLRC) look at the due process requirements of both [the Tribal Court Judgment Act and the Uniform Act], using existing resources, and sunset the bill in three years, after the study is complete, to allow the Legislature, with a thoughtful and thorough review by the CLRC, to more thoroughly and knowledgably consider the concerns that have been raised on all sides.[107]

With the changes discussed above, the Commission concludes that the standards of recognition in the Judgment Recognition Acts are sound. Further, the Commission concludes that the Tribal Court Judgment Act makes helpful refinements to the standards tailored to recognition of tribal court judgments.

With the caveat that the Commission did not evaluate the *procedural* elements of the Tribal Court Judgment Act, due to the limited scope of the Commission's assignment, the Commission recommends repealing the provisions that would automatically repeal the Tribal Court Judgment Act.[108]

---

104. See generally Commission Staff Memorandum 2016-13, p. 20.

105. See *id*. at 19.

106. See Code Civ. Proc. §§ 1714, as amended by 2014 Cal. Stat. ch. 243, § 2; 1714, as added by 2014 Cal. Stat. ch. 243, § 3; 1742.

107. SB 406 Assembly Judiciary Analysis, *supra* note 3, at 1-2.

108. See, e.g., proposed repeal of Code Civ. Proc. § 1742 *infra*.

TECHNICAL AND ORGANIZATIONAL CHANGES

The Commission recommends a few technical and organizational changes to achieve the following:

- Relocating the provision authorizing declaratory relief for foreign defamation judgments and making clarifying changes.[109]
- Relocating the Tribal Court Judgment Act to the same title as other California laws governing judgments from other jurisdictions.[110]
- Clarifying that the Tribal Court Judgment Act, not California's Uniform Act, governs the recognition of tribal court judgments.[111]
- Stylistic consistency.[112]

---

109. See proposed amendment to Code Civ. Proc. § 1717; proposed Code Civ. Proc. § 1725 *infra*.

110. See proposed repeal of Heading of Title 11.5 (commencing with Code Civ. Proc. § 1730); proposed addition of Heading of Chapter 3 (commencing with Code Civ. Proc. § 1730) *infra*.

111. See proposed amendment to Code Civ. Proc. § 1714 (as amended by Section 2 of Chapter 243 of the Statutes of 2014) *infra*.

112. See, e.g., proposed amendment to Heading of Chapter 1 (commencing with Code Civ. Proc. § 1710.10) *infra*.

Contents

PROPOSED LEGISLATION

Code Civ. Proc. § 1716 (amended). Standards for recognition [UFCMJRA § 4]

SEC. ___. Section 1716 of the Code of Civil Procedure is amended to read:

1716. (a) Except as otherwise provided in subdivisions ~~(b) and (c)~~ (b), (c), and (e), a court of this state shall recognize a foreign-country judgment to which this chapter applies.

(b) A court of this state shall not recognize a foreign-country judgment if any of the following apply:

(1) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.

(2) The foreign court did not have personal jurisdiction over the defendant.

(3) The foreign court did not have jurisdiction over the subject matter.

(c) A court of this state is not required to recognize a foreign-country judgment if any of the following apply:

(1) The defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend.

(2) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case.

(3) The judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state or of the United States.

(4) The judgment conflicts with another final and conclusive judgment.

(5) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court.

(6) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

(7) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment.

(8) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

~~(9) The judgment includes recovery for a claim of defamation unless the court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions.~~

(d) If the party seeking recognition of a foreign-country judgment has met its burden of establishing recognition of the foreign-country judgment pursuant to subdivision (c) of Section 1715, a party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subdivision (b) or (c) exists.

(e) A court of this state shall not recognize a foreign-country judgment for defamation if that judgment is not recognizable under Section 4102 of Title 28 of the United States Code.

Comment. Section 1716 is similar to Section 4 of the Uniform Foreign-Country Money Judgments Recognition Act (2005) ("2005 Uniform Act").

Paragraphs (b)(1) and (c)(8) state exceptions to recognition of a foreign-country judgment related to the due process offered in the foreign proceeding. Under both paragraphs (b)(1) and (c)(8), the focus of the inquiry "is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure." See Background from the 2005 Uniform Act *infra*. Unlike the Tribal Court Civil Money Judgment Act, this Act does not attempt to define "due process." *Compare* Code Civ. Proc. § 1732(c) *with* Code Civ. Proc. § 1714.

Paragraph (b)(2) provides that a foreign-country judgment shall not be recognized if the foreign court did not have personal jurisdiction over the defendant. Section 1717 makes clear that a foreign court lacks personal jurisdiction if either of the following applies:

(1) The foreign court lacks a basis for exercising personal jurisdiction that would be sufficient according to the standards governing personal jurisdiction in this state.

(2) The foreign court lacks personal jurisdiction under its own law.

Subdivision (c) lists grounds on which the court may decline to recognize a foreign-country judgment. With the exception of paragraphs (c)(3) and (c)(4), these grounds generally involve the fairness of the foreign proceeding. When the fairness-related grounds apply, the court has discretion to recognize the foreign-country judgment in the unusual case where countervailing considerations outweigh the seriousness of the defect underlying the applicable ground for nonrecognition. Such countervailing considerations could include, for instance, situations in which the opponent failed to raise an objection in the foreign court or the opponent's own misconduct was the primary cause of the harm suffered.

Paragraph (c)(1) provides that a court may decline to recognize a foreign-country judgment if the defendant did not receive notice of the foreign proceeding in sufficient time to enable the defendant to defend. Under this paragraph, a defect in either the timing or the content of the notice could be grounds for nonrecognition if that defect precluded the defendant from defending in the foreign court proceeding.

Paragraph (c)(2) provides that a court may decline to recognize a foreign-country judgment if fraud deprived the losing party of an adequate opportunity to present its case. The Uniform Law Commission's commentary on this provision indicates that the type of fraud that can serve as grounds for nonrecognition is limited to "extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case." See Background from the 2005 Uniform Act *infra*. The reference to "extrinsic fraud" suggests that the test established by the exception is categorical, permitting nonrecognition in cases of extrinsic, but not intrinsic, fraud. However, the language of the exception establishes a functional test, whether the fraud deprived the party of an adequate opportunity to present its case. Recent judgment recognition case law evaluates fraud by assessing "whether the injured party had any opportunity to address the alleged misconduct during the original proceeding." See Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction § 404 Reporters' Note 3 (Tentative Draft No. 1, April 1, 2014). This case law suggests that a key consideration for a court deciding whether alleged fraud could be a ground for nonrecognition is whether there was "a reasonable opportunity for the person victimized by fraud to uncover the misconduct and bring it to the [rendering] court's attention." *Id*.

Paragraph (c)(4) provides that a court may decline to recognize a foreign-country judgment if it conflicts with another final and conclusive judgment. Some commentators suggest that, where the foreign court rendering the later judgment fairly considered the earlier judgment and declined to recognize it under standards similar to those set forth in this Uniform Act, a court should

ordinarily recognize the later foreign-country judgment. However, in some situations, other law may require the recognition of one of the conflicting judgments (e.g., where one of the conflicting judgments is entitled to full faith and credit). See *id*. § 404 Comment f, Reporters' Note 6.

Former paragraph (c)(9) is not continued. Federal law includes specific standards governing the recognition of foreign-country defamation judgments. See subdivision (e) (referring to the federal SPEECH Act standards for recognition of defamation judgments).

Subdivision (e) is added to make clear that judgments that are not eligible for recognition under the federal SPEECH Act (codified at 28 U.S.C. §§ 4101-4105) shall not be recognized under this chapter.

The commentary for Section 4 of the 2005 Uniform Act is set out, in relevant part, below. The Law Revision Commission's recommendation (*Recognition of Tribal and Foreign Court Money Judgments*, __ Cal. L. Revision Comm'n Reports __ (2016)) does not reproduce all parts of the Uniform Law Commission's commentary. The omission of any part of the Uniform Law Commission commentary does not necessarily imply disapproval of the omitted commentary.

Background from the 2005 Uniform Act

Source: This section is based on Section 4 of the 1962 [Uniform Foreign Money Judgments Recognition] Act [hereafter, "1962 Act"].

1. This Section provides the standards for recognition of a foreign-country money judgment. Section [1719] sets out the effect of recognition of a foreign-country money judgment under this Act.

2. Recognition of a judgment means that the forum court accepts the determination of legal rights and obligations made by the rendering court in the foreign country. *See*, *e.g*. Restatement (Second) of Conflicts of Laws, Ch. 5, Topic 3, Introductory Note (recognition of foreign judgment occurs to the extent the forum court gives the judgment "the same effect with respect to the parties, the subject matter of the action and the issues involved that it has in the state where it was rendered.") Recognition of a foreign-country judgment must be distinguished from enforcement of that judgment. Enforcement of the foreign-country judgment involves the application of the legal procedures of the state to ensure that the judgment debtor obeys the foreign-country judgment. Recognition of a foreign-country money judgment often is associated with enforcement of the judgment, as the judgment creditor usually seeks recognition of the foreign-country judgment primarily for the purpose of invoking the enforcement procedures of the forum state to assist the judgment creditor's collection of the judgment from the judgment debtor. Because the forum court cannot enforce the foreign-country judgment until it has determined that the judgment will be given effect, recognition is a prerequisite to enforcement of the foreign-country judgment. Recognition, however, also has significance outside the enforcement context because a foreign-country judgment also must be recognized before it can be given preclusive effect under res judicata and collateral estoppel principles. The issue of whether a foreign-country judgment will be recognized is distinct from both the issue of whether the judgment will be enforced, and the issue of the extent to which it will be given preclusive effect.

3. [Subdivision (a) of Section 1716] places an affirmative duty on the forum court to recognize a foreign-country money judgment unless one of the grounds for nonrecognition stated in [subdivision (b), (c), or (e)] applies. [Subdivision] (b) states three mandatory grounds for denying recognition to a foreign-country money judgment. If the forum court finds that one of the grounds listed in [subdivision] (b) exists, then it must deny recognition to the foreign-country money judgment. [Subdivision] (c) states eight nonmandatory grounds for denying recognition. The forum court has discretion to decide whether or not to refuse recognition based on one of these grounds. [Subdivision] (d) places the burden of proof on the party resisting recognition of the foreign-country judgment to establish that one of the grounds for nonrecognition [stated in subdivision (b) or (c)] exists.

4. The mandatory grounds for nonrecognition stated in [subdivision (b) of Section 1716] are identical to the mandatory grounds stated in Section 4 of the 1962 Act. The discretionary grounds stated in [paragraphs] (c)(1) through (6) are based on subsection 4(b)(1) through (6) of the 1962

Act. The discretionary grounds stated in [paragraphs] (c)(7) and (8) are new [to the 2005 Uniform Act].

5. Under [paragraph (b)(1) of Section 1716], the forum court must deny recognition to the foreign-country money judgment if that judgment was "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." The standard for this ground for nonrecognition "has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S.113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved." Cmt §4, Uniform Foreign Money-Judgment Recognition Act (1962). The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure. Kam-Tech Systems, Ltd. v. Yardeni, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act); *accord*, Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (procedures need not meet all the intricacies of the complex concept of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962 Act). Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under [paragraph] (b)(1), so long as the essential elements of impartial administration and basic procedural fairness have been provided in the foreign proceeding. As the U.S. Supreme Court stated in *Hilton*:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect then a foreign-country judgment should be recognized. *Hilton*, 159 U.S. at 202.

6. [Omitted]

7. [Paragraph (c)(2) of Section 1716] limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case — is sufficient under the 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprives the defendant of an adequate opportunity to present its case, then it provides grounds for denying recognition of the foreign-country judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding. Intrinsic fraud does not provide a basis for denying recognition under [paragraph] (c)(2), as the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.

8. The public policy exception in [paragraph (c)(3) of Section 1716] is based on the public policy exception in subsection 4(b)(3) of the 1962 Act, with one difference. The public policy exception in the 1962 Act states that the relevant inquiry is whether "the [cause of action] [claim for relief] on which the judgment is based" is repugnant to public policy. Based on this "cause of action" language, some courts interpreting the 1962 Act have refused to find that a public policy challenge based on something other than repugnancy of the foreign cause of action comes within this exception. *E.g.*, Southwest Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317 (5th Cir. 1999) (refusing to deny recognition to Mexican judgment on promissory note with interest rate of 48% because cause of action to collect on promissory note does not violate public policy);

Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); The Society of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002) (rejecting argument legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not contrary to state public policy); *cf.* Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (judgment creditor argued British libel judgment should be recognized despite argument it violated First Amendment because New York recognizes a cause of action for libel). [Paragraph] (c)(3) rejects this narrow focus by providing that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(d) (1986) (containing a similarly-worded public policy exception to recognition).

Although [paragraph] (c)(3) of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980).

The language "or of the United States" in [paragraph] (c)(3), which does not appear in the 1962 Act provision, makes it clear that the relevant public policy is that of both the State in which recognition is sought and that of the United States. This is the position taken by the vast majority of cases interpreting the 1962 public policy provision. *E.g.*, Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment denied recognition because it violates First Amendment).

9. [Paragraph (c)(5) of Section 1716] allows the forum court to refuse recognition of a foreign-country judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the forum issuing the foreign-country judgment. Under this provision, the forum court must find both the existence of a valid agreement and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

10. [Paragraph (c)(6) of Section 1716] authorizes the forum court to refuse recognition of a foreign-country judgment that was rendered in the foreign country solely on the basis of personal service when the forum court believes the original action should have been dismissed by the court in the foreign country on grounds of *forum non conveniens*.

11. [Paragraph (c)(7) of Section 1716] is new. Under this [paragraph], the forum court may deny recognition to a foreign-country judgment if there are circumstances that raise substantial doubt about the integrity of the rendering court with respect to that judgment. It requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with [paragraph] (b)(1), which requires that the forum court refuse recognition to the foreign-country judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in subsection 4(a)(1) of the 1962 Act, [paragraph] (b)(1) focuses on the judicial system of the foreign country as a whole, rather than on whether the particular judicial proceeding leading to the foreign-country judgment was impartial and fair. *See, e.g.*, The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (interpreting the 1962 Act); CIBC Mellon Trust Co. v. Mora Hotel Corp,. N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002) (interpreting the 1962 Act); Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (interpreting the 1962 Act). On the other hand, [paragraph] (c)(7) allows the court to deny recognition to the foreign-country judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the foreign-country judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals versus showing that

bribery of the judge in the proceeding that resulted in the particular foreign-country judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.

12. [Paragraph (c)(8) of Section 1716] also is new. It allows the forum court to deny recognition to the foreign-country judgment if the court finds that the specific proceeding in the foreign court was not compatible with the requirements of fundamental fairness. Like [paragraph] (c)(7), it can be contrasted with [paragraph] (b)(1), which requires the forum court to deny recognition to the foreign-country judgment if the forum court finds that the entire judicial system in the foreign country where the foreign-country judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness. While the focus of [paragraph] (b)(1) is on the foreign country's judicial system as a whole, the focus of [paragraph] (c)(8) is on the particular proceeding that resulted in the specific foreign-country judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment.

[Paragraphs (c)(7) and (8) of Section 1716] both are discretionary grounds for denying recognition, while [paragraph] (b)(1) is mandatory. Obviously, if the entire judicial system in the foreign country fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that foreign country would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the foreign-country judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

13. Under [subdivision (d) of Section 1716], the party opposing recognition of the foreign-country judgment has the burden of establishing that one of the grounds for nonrecognition set out in [subdivision] (b) or (c) applies. The 1962 Act was silent as to who had the burden of proof to establish a ground for nonrecognition and courts applying the 1962 Act took different positions on the issue. *Compare* Bridgeway Corp. v. Citibank, 45 F.Supp. 2d 276, 285 (S.D.N.Y. 1999) (plaintiff has burden to show no mandatory basis under 4(a) for nonrecognition exists; defendant has burden regarding discretionary bases) *with* The Courage Co. LLC v. The ChemShare Corp., 93 S.W.3d 323, 331 (Tex. App. 2002) (party seeking to avoid recognition has burden to prove ground for nonrecognition). Because the grounds for nonrecognition in Section [1716] are in the nature of defenses to recognition, the burden of proof is most appropriately allocated to the party opposing recognition of the foreign-country judgment.

[Adapted from the Uniform Law Commission's Comment to the 2005 Uniform Act § 4.]

Code Civ. Proc. § 1717 (amended). Personal jurisdiction [UFCMJRA §5]

SEC. ___. Section 1717 of the Code of Civil Procedure is amended to read:

1717. (a) For the purposes of paragraph (2) of subdivision (b) of Section 1716, a foreign court lacks personal jurisdiction over the defendant if either of the following conditions is met:

(1) The foreign court lacks a basis for exercising personal jurisdiction that would be sufficient according to the standards governing personal jurisdiction in this state.

(2) The foreign court lacks personal jurisdiction under its own law.

(b) A foreign-country judgment shall not be refused recognition for lack of personal jurisdiction under paragraph (1) of subdivision (a) if any of the following apply:

(1) The defendant was served with process personally in the foreign country.

(2) The defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant.

(3) The defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved.

(4) The defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country.

(5) The defendant had a business office in the foreign country and the proceeding in the foreign court involved a cause of action or claim for relief arising out of business done by the defendant through that office in the foreign country.

(6) The defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a cause of action or claim for relief arising out of that operation.

~~(b)~~ (c) The list of bases for personal jurisdiction in subdivision ~~(a)~~ (b) is not exclusive. The courts of this state may recognize bases of personal jurisdiction other than those listed in subdivision ~~(a)~~ (b) as sufficient ~~to support a foreign-country judgment~~ for the purposes of paragraph (1) of subdivision (a).

~~(c) If a judgment was rendered in an action for defamation in a foreign country against a person who is a resident of California or a person or entity amenable to jurisdiction in California, and declaratory relief with respect to liability for the judgment or a determination that the judgment is not recognizable in California under Section 1716 is sought, a court has jurisdiction to determine the declaratory relief action as well as personal jurisdiction over the person or entity who obtained the foreign country judgment if both of the following apply:~~

~~(1) The publication at issue was published in California.~~

~~(2) The person who is a resident, or the person or entity who is amenable to jurisdiction in California, either (A) has assets in California that might be subject to an enforcement proceeding to satisfy the foreign country defamation judgment, or (B) may have to take actions in California to comply with the foreign country defamation judgment.~~

~~This subdivision shall apply to persons who obtained judgments in defamation proceedings in a foreign country both prior to and after January 1, 2010.~~

Comment. Section 1717 is similar to Section 5 of the Uniform Foreign-Country Money Judgments Recognition Act (2005).

Subdivision (a) is added to make clear that a foreign court lacks personal jurisdiction if either of the following applies:

(1) The foreign court lacks a basis for exercising personal jurisdiction that would be sufficient according to the standards governing personal jurisdiction in this state.

(2) The foreign court lacks personal jurisdiction under its own law.

The need to evaluate personal jurisdiction under the foreign court's own law should be rare. In most cases, objections to personal jurisdiction will have been litigated or waived in the foreign court proceeding. "There is authority … for the proposition that a U.S. court generally will not look behind a foreign court's finding of personal jurisdiction under its own law." See Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction § 403 Reporters' Note 7 (Tentative Draft No. 1, April 1, 2014). Generally, the mere fact that a judgment was rendered by a foreign court suggests that personal jurisdiction was proper under foreign law. However, a California court may need to evaluate personal jurisdiction under foreign law when the issue of personal jurisdiction was neither litigated nor waived in the foreign proceeding (e.g., the defendant never appeared and a default judgment was entered).

Where a defect in the service of process would defeat personal jurisdiction under foreign law, a court may find that the foreign court lacked personal jurisdiction under foreign law on the basis of that service defect. However, where the service defect is not jurisdictional, the service defect could still lead to nonrecognition under other provisions. E.g., Section 1716(c)(1).

Subdivision (b) provides a list of bases of personal jurisdiction that are consistent with the standards governing personal jurisdiction in this state.

Subdivision (c) makes clear that the bases listed in subdivision (b) are not the exclusive bases for personal jurisdiction consistent with the standards governing personal jurisdiction in this state.

The substance of former subdivision (c) is continued in Section 1725.

Code Civ. Proc. § 1725 (added). Declaratory relief for foreign-country defamation judgments

1725. (a) If all of the following conditions are satisfied, a person against whom a foreign-country defamation judgment was rendered may seek declaratory relief with respect to liability for the judgment or a determination that the judgment is not recognizable under Section 1716:

(1) The person is a resident or other person or entity amenable to jurisdiction in this state.

(2) The person either has assets in this state that may be subject to an enforcement proceeding to satisfy the foreign-country defamation judgment or may have to take actions in this state to comply with the foreign-country defamation judgment.

(3) The publication at issue was published in this state.

(b) A court of this state has jurisdiction to determine a declaratory relief action or issue a determination pursuant to this section and has personal jurisdiction over the person or entity who obtained the foreign-country defamation judgment.

(c) This section shall apply to a foreign-country defamation judgment regardless of when it was rendered.

Comment. Section 1725 continues the substance of former Section 1717(c).

TECHNICAL AND ORGANIZATIONAL REVISIONS

Heading of Title 11 (commencing with Section 1710.10) (amended).

SEC. ___. The heading of Title 11 (commencing with Section 1710.10) of Part 3 of the Code of Civil Procedure is amended to read:

TITLE 11: ~~SISTER STATE AND FOREIGN MONEY JUDGMENTS~~ MONEY JUDGMENTS OF OTHER JURISDICTIONS

Comment. The heading of Title 11 (commencing with Section 1710.10) is revised to reflect the addition of the Tribal Court Civil Money Judgment Act (Chapter 3) to this Title.

Heading of Chapter 1 (commencing with Section 1710.10) (amended).

SEC. ___. The heading of Chapter 1 (commencing with Section 1710.10) of Title 11 of Part 3 of the Code of Civil Procedure is amended to read:

Chapter 1: Sister State ~~Money Judgments~~ Money Judgments

Comment. The heading of Chapter 1 (commencing with Section 1710.10) is revised for consistency with the hyphenation used within the Chapter.

Code Civ. Proc. § 1714, as amended by Section 2 of Chapter 243 of the Statutes of 2014 (amended). Definitions [UFCMJRA §2]

SEC. ___. Section 1714 of the Code of Civil Procedure, as amended by Section 2 of Chapter 243 of the Statutes of 2014, is amended to read:

1714. As used in this chapter:

(a) "Foreign country" means a government other than any of the following:

(1) The United States.

(2) A state, district, commonwealth, territory, or insular possession of the United States.

(3) A federally recognized Indian nation, tribe, pueblo, band, or Alaska Native village.

(4) Any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the United States Constitution.

(b) "Foreign-country judgment" means a judgment of a court of a foreign country.

~~(c) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.~~

Comment. Section 1714, as amended by Section 2 of Chapter 243 of the Statutes of 2014, is drawn from Section 2 of the Uniform Foreign-Country Money Judgments Recognition Act (2005).

Section 1714 is amended to make clear that the recognition of a tribal court civil money judgment is not governed by this chapter. See Section 1732(f) (defining "tribal court"). For the rules governing recognition of a tribal court civil money judgment, see Chapter 3.

Former subdivision (c) is not continued. This reflects the repeal of former Section 1742.

Code Civ. Proc. § 1714, as added by Section 3 of Chapter 243 of the Statutes of 2014 (repealed). Definitions

SEC. ___. Section 1714 of the Code of Civil Procedure, as added by Section 3 of Chapter 243 of the Statutes of 2014, is repealed.

Comment. Section 1714 Procedure, as added by Section 3 of Chapter 243 of the Statutes of 2014, is repealed. This reflects the repeal of former Section 1742.

☞ **Note.** The text of the repealed section is set out below.

1714. (a) "Foreign country" means a government other than any of the following:

(1) The United States.

(2) A state, district, commonwealth, territory, or insular possession of the United States.

(3) Any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the United States Constitution.

(b) "Foreign-country judgment" means a judgment of a court of a foreign country. "Foreign-country judgment" includes a judgment by any Indian tribe recognized by the government of the United States.

(c) This section is operative on and after January 1, 2018.

Heading of Title 11.5 (commencing with Section 1730) (repealed).

SEC. ___. The heading of Title 11.5 (commencing with Section 1730) of Part 3 of the Code of Civil Procedure is repealed.

Comment. The heading of Title 11.5 (commencing with Section 1730) is repealed. It is continued as the heading of Chapter 3 (commencing with Section 1730).

Heading of Chapter 3 (commencing with Section 1730) (added).

SEC. ___. A heading is added as Chapter 3 (commencing with Section 1730) of Title 11 of Part 3 of the Code of Civil Procedure, immediately preceding Section 1730, to read:

CHAPTER 3: TRIBAL COURT CIVIL MONEY JUDGMENT ACT

Comment. The heading of Chapter 3 (commencing with Section 1730) is added to locate the Tribal Court Civil Money Judgment Act within Title 11.

The standards of recognition for tribal court civil money judgments set forth in Section 1737 of this Act are derived from Section 4 of the Uniform Foreign-Country Money Judgments Recognition Act (2005) (hereafter, "2005 Uniform Act"). See also Section 1716.

Paragraph (b)(1) of Section 1737 provides that a tribal court money judgment shall not be recognized if the tribal court did not have personal jurisdiction over the respondent. Under this paragraph, a tribal court can lack personal jurisdiction if either of the following applies:

(1) The tribal court lacks a basis for exercising personal jurisdiction that would be sufficient according to the standards governing personal jurisdiction in this state.

(2) The tribal court lacks personal jurisdiction under its own law.

The need to evaluate personal jurisdiction under the tribal court's own law should be rare. In most cases, objections to personal jurisdiction will have been litigated or waived in the tribal court proceeding. "There is authority … for the proposition that a U.S. court generally will not look behind a foreign court's finding of personal jurisdiction under its own law." See Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction § 403 Reporters' Note 7 (Tentative Draft No. 1, April 1, 2014). Generally, the mere fact that a judgment was rendered by a tribal court suggests that personal jurisdiction was proper under tribal law. However, a California court may need to evaluate personal jurisdiction under tribal law when the issue of personal jurisdiction was neither litigated nor waived in the tribal court proceeding (e.g., the defendant never appeared and a default judgment was entered).

Where a defect in the service of process would defeat personal jurisdiction under tribal law, a court may find that the tribal court lacked personal jurisdiction under tribal law on the basis of that service defect. However, where the service defect is not jurisdictional, the service defect could still lead to nonrecognition under other provisions. E.g., Section 1737(c)(1).

Subdivision (c) of Section 1737 lists grounds on which the court may decline to recognize a tribal court money judgment. With the exception of paragraphs (c)(3) and (c)(4) of Section 1737, these grounds generally involve the fairness of the tribal court proceeding. When the fairness-related grounds apply, the court has discretion to recognize the tribal court judgment in the unusual case where countervailing considerations outweigh the seriousness of the defect underlying the applicable ground for nonrecognition. Such countervailing considerations could include, for instance, situations in which the opponent failed to raise an objection in the tribal court or the opponent's own misconduct was the primary cause of the harm suffered.

Section 1737(c)(1) provides that a court may decline to recognize a tribal court money judgment if the defendant did not receive notice of the tribal court proceeding in sufficient time to enable the defendant to defend. Under this paragraph, a defect in either the timing or the content of the notice could be grounds for nonrecognition if that defect precluded the defendant from defending in the tribal court proceeding.

Section 1737(c)(2) provides that a court may decline to recognize a tribal court money judgment if fraud deprived the losing party of an adequate opportunity to present its case. The Uniform Law Commission's commentary on this provision indicates that the type of fraud that can serve as grounds for nonrecognition is limited to "extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case." See Background from the 2005 Uniform Act *infra*. The reference to "extrinsic fraud" suggests that the test established by the exception is categorical, permitting nonrecognition in cases of extrinsic, but not intrinsic, fraud. However, the language of the exception establishes a functional test, whether the fraud deprived the party of an adequate opportunity to present its case. Recent judgment recognition case law evaluates fraud by assessing "whether the injured party had any opportunity to address the alleged misconduct during the original proceeding." See Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction § 404 Reporters' Note 3 (Tentative Draft No. 1, April 1, 2014). This case law suggests that a key consideration for a court deciding whether alleged fraud could be a ground for nonrecognition is whether there was "a reasonable opportunity for the person victimized by fraud to uncover the misconduct and bring it to the [rendering] court's attention." *Id*.

Section 1737(c)(4) provides that a court may decline to recognize a tribal court money judgment if it conflicts with another final and conclusive judgment. Some commentators suggest that, where the tribal court rendering the later judgment fairly considered the earlier judgment and declined to recognize it under standards similar to those set forth in this Act, a court should ordinarily recognize the later tribal court money judgment. However, in some situations, other law may require the recognition of one of the conflicting judgments (e.g., where one of the conflicting judgments is entitled to full faith and credit). See *id*. § 404 Comment f, Reporters' Note 6.

The commentary for Section 4 of the 2005 Uniform Act is set out, in relevant part, below. The Law Revision Commission's recommendation (*Recognition of Tribal and Foreign Court Money Judgments*, __ Cal. L. Revision Comm'n Reports __ (2016)) does not reproduce all parts of the

Uniform Law Commission's commentary. The omission of any part of the Uniform Law Commission commentary does not necessarily imply disapproval of the omitted commentary.

Background from the 2005 Uniform Act

Source: [Section 1737] is based on Section 4 of the 1962 [Uniform Foreign Money Judgments Recognition] Act [hereafter, "1962 Act"].

1. [Section 1737] provides the standards for recognition of a [tribal court] money judgment. …

2. [Omitted]

3. … [Subdivision (b) of Section 1737] states three mandatory grounds for denying recognition to a [tribal court] money judgment. If the forum court finds that one of the grounds listed in [subdivision (b) of Section 1737] exists, then it must deny recognition to the [tribal court] money judgment. [Subdivision (c) of Section 1737] states [nine] nonmandatory grounds for denying recognition. The forum court has discretion to decide whether or not to refuse recognition based on one of these grounds. [Subdivision (d) of Section 1737] places the burden of proof on the party resisting recognition of the [tribal court] judgment to establish that one of the grounds for nonrecognition exists.

4. [Omitted]

5. Under [paragraph (b)(3) of Section 1737], the forum court must deny recognition to the [tribal court] money judgment if that judgment was "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." The standard for this ground for nonrecognition "has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S.113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved." Cmt §4, Uniform Foreign Money-Judgment Recognition Act (1962). The focus of inquiry is not whether the procedure … is similar to U.S. procedure, but rather on the basic fairness of the [tribal court] procedure. Kam-Tech Systems, Ltd. v. Yardeni, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act); *accord*, Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (procedures need not meet all the intricacies of the complex concept of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962 Act). Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under [paragraph (b)(3) of Section 1737], so long as the essential elements of impartial administration and basic procedural fairness have been provided in the [tribal court] proceeding. As the U.S. Supreme Court stated in *Hilton*:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect then a foreign-country judgment should be recognized. *Hilton*, 159 U.S. at 202.

6. [Omitted]

7. [Paragraph (c)(2) of Section 1737] limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case — is sufficient under the 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprives the defendant of an

adequate opportunity to present its case, then it provides grounds for denying recognition of the [tribal court] judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the [tribal court] proceeding. Intrinsic fraud does not provide a basis for denying recognition under [paragraph (c)(2) of Section 1737], as the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.

8. The public policy exception in [paragraph (c)(3) of Section 1737] is based on the public policy exception in subsection 4(b)(3) of the 1962 Act, with one difference. The public policy exception in the 1962 Act states that the relevant inquiry is whether "the [cause of action] [claim for relief] on which the judgment is based" is repugnant to public policy. Based on this "cause of action" language, some courts interpreting the 1962 Act have refused to find that a public policy challenge based on something other than repugnancy of the … cause of action comes within this exception. *E.g.*, Southwest Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317 (5th Cir. 1999) (refusing to deny recognition to Mexican judgment on promissory note with interest rate of 48% because cause of action to collect on promissory note does not violate public policy); Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); The Society of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002) (rejecting argument legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not contrary to state public policy); *cf.* Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (judgment creditor argued British libel judgment should be recognized despite argument it violated First Amendment because New York recognizes a cause of action for libel). [Paragraph (c)(3) of Section 1737] rejects this narrow focus by providing that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(d) (1986) (containing a similarly-worded public policy exception to recognition).

Although [paragraph (c)(3) of Section 1737] of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the [tribe's] law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the [tribal court] judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980).

The language "or of the United States" in [paragraph (c)(3) of Section 1737], which does not appear in the 1962 Act provision, makes it clear that the relevant public policy is that of both the State in which recognition is sought and that of the United States. This is the position taken by the vast majority of cases interpreting the 1962 public policy provision. *E.g.*, Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment denied recognition because it violates First Amendment).

9. [Paragraph (c)(5) of Section 1737] allows the forum court to refuse recognition of a [tribal court] judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the [tribal court] issuing the … judgment. Under this provision, the forum court must find both the existence of a valid agreement and that the agreement covered the subject matter involved in the … litigation resulting in the [tribal court] judgment.

10. [Paragraph (c)(6) of Section 1737] authorizes the forum court to refuse recognition of a [tribal court] judgment that was rendered … solely on the basis of personal service when the forum court believes the original action should have been dismissed by the [tribal] court … on grounds of *forum non conveniens*.

11. … Under [paragraph (c)(7) of Section 1737], the forum court may deny recognition to a [tribal court] judgment if there are circumstances that raise substantial doubt about the integrity of the rendering court with respect to that judgment. It requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with [paragraph (b)(3) of Section 1737], which requires that the forum court refuse recognition to the [tribal court] judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in subsection 4(a)(1) of the 1962 Act, [paragraph (b)(3) of Section 1737] focuses on the [tribe's] judicial system … as a whole, rather than on whether the particular judicial proceeding leading to the [tribal court] judgment was impartial and fair. *See, e.g.*, The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (interpreting the 1962 Act); CIBC Mellon Trust Co. v. Mora Hotel Corp,. N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002) (interpreting the 1962 Act); Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (interpreting the 1962 Act). On the other hand, [paragraph (c)(7) of Section 1737] allows the court to deny recognition to the [tribal court] judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the [tribal court] judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the [tribe's] judicial system … as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular [tribal court] judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.

12. [Paragraph (c)(8) of Section 1737] … allows the forum court to deny recognition to the [tribal court] judgment if the court finds that the specific proceeding in the [tribal] court was not compatible with the requirements of fundamental fairness. Like [paragraph (c)(7) of Section 1737], it can be contrasted with [paragraph (b)(3) of Section 1737], which requires the forum court to deny recognition to the [tribal court] judgment if the forum court finds that the entire judicial system … where the [tribal court] judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness. While the focus of [paragraph (b)(3) of Section 1737] is on the [tribal] judicial system as a whole, the focus of [paragraph (c)(8) of Section 1737] is on the particular proceeding that resulted in the specific [tribal court] judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular [tribe] that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the [tribal court] judgment was entered was denied fundamental fairness in the particular proceedings leading to the [tribal court] judgment.

[Paragraphs (c)(7) and (8) of Section 1737] both are discretionary grounds for denying recognition, while [paragraph (b)(3) of Section 1737] is mandatory. Obviously, if the [tribe's] entire judicial system … fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that [judicial system] would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the [tribal court] judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the [tribal court] judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the [tribal court] judgment …, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

13. [Omitted]

[Adapted from the Uniform Law Commission's Comment to the 2005 Uniform Act § 4.]

Code Civ. Proc. § 1730 (amended). Short title

SEC. ___. Section 1730 of the Code of Civil Procedure is amended to read:

1730. This ~~title~~ chapter shall be known and may be cited as the Tribal Court Civil Money Judgment Act.

Comment. Section 1730 is amended to update a cross-reference.

Code Civ. Proc. § 1731 (amended). Scope

SEC. ___. Section 1731 of the Code of Civil Procedure is amended to read:

1731. (a) This ~~title~~ chapter governs the procedures by which the superior courts of the State of California recognize and enter tribal court money judgments of any federally recognized Indian tribe. Determinations regarding recognition and entry of a tribal court money judgment pursuant to state law shall have no effect upon the independent authority of that judgment. To the extent not inconsistent with this ~~title~~ chapter, the Code of Civil Procedure shall apply.

(b) This ~~title~~ chapter does not apply to any of the following tribal court money judgments:

(1) For taxes, fines, or other penalties.

(2) For which federal law requires that states grant full faith and credit recognition, including child support orders under the Full Faith and Credit for Child Support Orders Act (28 U.S.C. Sec. 1738B).

(3) For which state law provides for recognition, including child support orders recognized under the Uniform Child Custody Jurisdiction and Enforcement Act (Part 3 (commencing with Section 3400) of Division 8 of the Family Code), other forms of family support orders under the Uniform Interstate Family Support Act (Part 6 (commencing with Section 5700.101) of Division 9 of the Family Code).

(4) For decedents' estates, guardianships, conservatorships, internal affairs of trusts, powers of attorney, or other tribal court money judgments that arise in proceedings that are or would be governed by the Probate Code.

(c) Nothing in this ~~title~~ chapter shall be deemed or construed to expand or limit the jurisdiction of either the state or any Indian tribe.

Comment. Section 1731 is amended to update cross-references.

Code Civ. Proc. § 1732 (amended). Definitions

SEC. ___. Section 1732 of the Code of Civil Procedure is amended to read:

1732. For purposes of this ~~title~~ chapter:

(a) "Applicant" means the person or persons who can bring an action to enforce a tribal court money judgment.

(b) "Civil action or proceeding" means any action or proceeding that is not criminal, except for those actions or proceedings expressly excluded by subdivision (b) of Section 1731.

(c) "Due process" includes, but is not limited to, the right to be represented by legal counsel, to receive reasonable notice and an opportunity for a hearing, to call and cross-examine witnesses, and to present evidence and argument to an impartial decisionmaker.

(d) "Good cause" means a substantial reason, taking into account the prejudice or irreparable harm a party will suffer if a hearing is not held on an objection or not held within the time periods established by this ~~title~~ chapter.

(e) "Respondent" means the person or persons against whom an action to enforce a tribal court money judgment can be brought.

(f) "Tribal court" means any court or other tribunal of any federally recognized Indian nation, tribe, pueblo, band, or Alaska Native village, duly established under tribal or federal law, including Courts of Indian Offenses organized pursuant to Part 11 of Title 25 of the Code of Federal Regulations.

(g) "Tribal court money judgment" means any written judgment, decree, or order of a tribal court for a specified amount of money that was issued in a civil action or proceeding that is final, conclusive, and enforceable by the tribal court in which it was issued and is duly authenticated in accordance with the laws and procedures of the tribe or tribal court.

Comment. Section 1732 is amended to update cross-references.

Code Civ. Proc. § 1733 (amended). Location for filing

SEC. ___. Section 1733 of the Code of Civil Procedure is amended to read:

1733. (a) An application for entry of a judgment under this ~~title~~ chapter shall be filed in a superior court.

(b) Subject to the power of the court to transfer proceedings under this ~~title~~ chapter pursuant to Title 4 (commencing with Section 392) of Part 2, the proper county for the filing of an application is either of the following:

(1) The county in which any respondent resides or owns property.

(2) If no respondent is a resident, any county in this state.

(c) A case in which the tribal court money judgment amounts to twenty-five thousand dollars ($25,000) or less is a limited civil case.

Comment. Section 1733 is amended to update cross-references.

Code Civ. Proc. § 1741 (amended). Application of chapter

SEC. ___. Section 1741 of the Code of Civil Procedure is amended to read:

1741. (a) The Uniform Foreign-Country Money Judgments Recognition Act (Chapter 2 (commencing with Section 1713) of Title 11 of Part 3) applies to all actions commenced in superior court before ~~the effective date of this title~~ January 1, 2015, in which the issue of recognition of a tribal court money judgment is raised.

(b) This ~~title~~ chapter applies to all actions to enforce tribal court money judgments as defined herein commenced in superior court on or after ~~the effective date of this title~~ January 1, 2015. A judgment entered under this title shall not limit the right of a party to seek enforcement of any part of a judgment, order, or decree entered by a tribal court that is not encompassed by the judgment entered under this ~~title~~ chapter.

Comment. Section 1741 is amended to update cross-references and to specify the effective date of the Act.

Code Civ. Proc. § 1742 (repealed). Repeal of title

SEC. ___. Section 1742 of the Code of Civil Procedure is repealed.

Comment. Section 1742, which would have automatically repealed the Tribal Court Civil Money Judgment Act on January 1, 2018, is repealed. Conforming changes to reflect this repeal are made to Section 1714, as amended by Section 2 of Chapter 243 of the Statutes of 2014, and Section 1714, as amended by Section 3 of Chapter 243 of the Statutes of 2014.

☞ **Note.** The text of the repealed section is set out below.

1742. This title shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

New Federal ICWA Regulations & California law and practice

The new federal ICWA regulations which become effective December 12, 2016 have implications for California law and practice. In many respects the requirements of the new regulations are consistent with California law, or California law has set a higher standard. In some areas, however, California law and practice deviate from the requirements of the federal regulations in a way that may require changes in California law and practice.

Below is an overview chart of the basic ICWA topic areas and an analysis of consistency between the new federal regulations and California law and practice. The nature of these inconsistencies is set out in more detail in the lengthy chart attached:

Subject Area	Analysis
Active efforts	Some inconsistencies with existing California law and practice.
Application	Some inconsistencies with existing California law and practice.
Consent	Not inconsistent – but California law does not cover all documentation and withdrawal of consent contained in the new regulations
Delinquency	No inconsistency
Determination of Indian status	Consistent
Eligible in more than one tribe	Consistent
Emergency proceedings	Major inconsistencies with existing California law and practice.
Inquiry	No real conflict, however the regulations do not discuss an agency or petitioner's pre-filing inquiry obligations. It is expected that new Guidelines will address this.
Jurisdiction	Consistent
Notice	General consistency in content of notice. Maybe differences in when and how often notices must be sent.
Placement preferences	Some inconsistencies with existing California law and practice, specifically around what provides a basis for making a "good cause" determination to deviate from the placement preferences.
Qualified Expert Witness	Consistent (California has a higher standard)
Transfer	Major inconsistencies
Voluntary proceedings	Major potential inconsistencies with existing California law and practice

Chart Summarizing California Implementation requirements for new BIA ICWA Regulations

Prepared by Ann Gilmour

Regulation	Subject area(s)	Equivalent California law	Nature of difference	Implementation Recommendation
23.2 – Definitions. *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	Active Efforts	WIC 361.7 (b) (b) What constitutes active efforts shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.	New definition in 23.2 clarifies the level of effort that an agency must make to meet active efforts requirement and sets out a list of 11 examples of active efforts that are not included in the California definition, although they are not inconsistent with the California definition. **Other issues re active efforts**: The definition of "active efforts" was included in WIC 361.7(b) in 2006 as part of Senate Bill 678 (Ducheny; Stats. 2006, ch. 838). Notwithstanding this, some California case law has continued to hold that there is no significant difference between "active efforts" and "reasonable services". (*C.F. v. Superior Court* (2014), 230 Cal. App. 4th 227 at 238). This takes no account of the requirement in WIC 361.7(b) that active efforts take into account he prevailing social and cultural values or make use of available resources of the Indian child's extended family, tribe and other service providers.	Consider a statutory revision to more closely match definition in regulations. Consider statutory revision to clarify that active efforts are distinct from reasonable services.

DRAFT

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;				

DRAFT

(11) Providing post-reunification services and monitoring.				
23.2 – Definitions *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	Application / Notice	WIC 224.1(d) - (d) “Indian child custody proceeding” means a “child custody proceeding” within the meaning of Section 1903 of the Indian Child Welfare Act, including a proceeding for temporary or long-term foster care or guardianship placement, termination of parental rights, preadoptive placement after termination of parental rights, or adoptive placement. “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.	The new regulation clarifies that there may be multiple “proceedings” for ICWA purposes within a single action. So the stage which may culminate in a “foster-care placement” is considered a separate “proceeding” from the stage which may culminate in “termination of parental rights”. There may be several hearings within each of these separate “proceedings”. This new provision is significant for ICWA notice purposes because under new regulations formal ICWA notice would only be required for each separate “proceeding”. California law currently requires formal ICWA notice for each “hearing”.	Consider whether to revise California statutes to require formal ICWA notice only once per “proceeding” rather than for every hearing.

DRAFT

foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child custody proceeding.				
23.2 Definitions *Continued Custody* means physical custody of legal custody or both, under any applicable ribal 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.	Application	There is no equivalent California provision.	This is a new definition, likely to clarify parents' rights to claim ICWA protections following the Supreme Court's decision in *Adoptive Couple v. Baby Girl* (2013) 133 S. Ct. 2552 which held that the heightened evidentiary standards in 25 U.S.C. 1912(f); the active efforts requirement in 25 U.S.C. 1912(d) and the adoption placement preferences found in 25 U.S.C. 1915(a) did not apply when a parent has never had prior legal or physical custody of a child and where no party within the placement preferences had sought to adopt the child.	Consider a statutory revision to include definition of "continued custody".
23.2 Definitions *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.	Application	There is no equivalent California provision.	Again it is likely that this new definition is in response to the U.S. Supreme Court decision in Adoptive Couple v. Baby Girl and seeks to clarify that a parent's right to custody may be defined in relation to tribal law and not only in relation to state law.	
23.2 Definitions *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	Jurisdiction	WIC 305.5 (d) An Indian child's domicile or place of residence is determined by that of the parent, guardian, or Indian custodian with whom the child maintained his or her primary place of	The definition is slightly different.	Consider amending definition to conform to new regulation

DRAFT

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.		abode at the time the Indian child custody proceedings were initiated.		
23.2 Definitions *Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.	Emergency Removal	California law does not contain a definition of "emergency proceeding"	The new regulations contain more details regarding use of emergency removal authority provided by ICWA. The regulations limit the scope of the use of the emergency removal authority and also limit the time that such a removal can last without an ICWA compliant hearing.	Consider revisions to California statutes to clarify use of emergency removal authority in ICWA cases to conform to the requirements of the new regulations.
23.2 Definitions *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.	Placement Preferences	WIC 224.1(c) states that the term "extended family member" shall be defined as provided in section 1903 of the Indian Child Welfare Act.	There is no conflict.	No revisions necessary
23.2 Definitions *Hearing* means a judicial session held for the purpose of deciding issues of fact, of law, or both.	Notice	California law has no equivalent definition for ICWA purposes.	California law currently treats each hearing within an Indian Child Custody action as a "proceeding", requiring formal ICWA Notice for each hearing.	Consider whether California law should be revised to require formal ICWA notice only for each proceeding rather than for each hearing.
23.2 Definitions *Indian child* means any unmarried person who is under age 18 and either: (1) Is a member or citizen of an Indian tribe; or	Application	WIC 224.1 defines "Indian child" as defined in 25 U.S.C. 1903(4):	There is no conflict between existing California law and the new regulations. However the regulation clarifies that	

DRAFT

(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" 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.	membership is equivalent to citizenship.	
23.2 Definitions *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.	Jurisdiction	California law does not contain a definition of the term "Indian child's Tribe". However WIC 224.1 (e) sets out the procedure and factors that should be considered in determining which tribe to recognize if a child is a member or eligible for membership in more than one tribe. This corresponds to		
23.2 Definitions *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 Custodian	WIC 224.1 defines Indian Custodian" as it is defined in ICWA. 25 U.S.C.A. 1903(6) defines Indian custodian as "…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."	The new regulation specifies that the Indian custodianship may be demonstrated by looking to Tribal law or Tribal custom or to State law.	
23.2 Definitions *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).	Placement Preferences	There is no definition for Indian foster home in California law, although drawing upon ICWA at 25 USC 1915 (b)(iii), the term is used in WIC 361.31 (b)(3) regarding placement preferences.	Under current California law it would be possible for a home to be considered an "Indian foster home" if the home was licensed or approved by a tribe, without having one foster parent who is an Indian. This restricts the definition.	Consider adopting a definition of Indian foster home into California law.
23.2 Definitions *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	Application	There is no equivalent definition in California law.	It appears that the purpose of this definition is to clarify that the requirements of ICWA cannot be circumvented by an agency demanding that a parent agree to	Consider adding a definition to California law

DRAFT

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.			a "voluntary" placement under threat of the child being removed.	
23.2 Definitions *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.	Application	WIC 224.1 (c) incorporates the definition of "parent" found in section 1903 of ICWA.	The regulation adds "or parents" and the term "biological father" to the definition but is otherwise identical with the definition of "parent" found in 25 USC 1903 (g)	
23.2 Definitions *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.	Jurisdiction	WIC 224.1 (a) adopts the definition of reservation found in 25 USC 1903, which is very similar, but not identical in wording to the definition in the regulations.	There is no real conflict, although there are some minor technical differences between the language in the statute itself and the new regulations.	
23.2 Definitions *Secretary* means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.	Misc.	California law has no definition of Secretary, but does reference the Secretary of the Interior.	There is no real conflict. The regulation adds to the definition in ICWA itself, by referencing an authorized representative acting under delegated authority.	
23.2 Definitions *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).	Application / delinquency	California law has no definition of "status offense". However the California Supreme Court in In re. W.B. (2012) 55 Cal. 4th 30 the court addressed application of ICWA to delinquency cases under federal and state law.	No inconsistency	
23.2 Definitions *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	Jurisdiction	WIC 224.1 adopts the definition in 25 USC 1903 (12).	No inconsistency	

DRAFT

custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.		This new definition in the regulations is (almost) verbatim the wording in 25 U.S.C. 1903 (12)		
23.2 Definitions *Upon demand* means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.	Voluntary proceedings	California law contains no definition of "upon demand" but does reference it in WIC 224.1 (d), and Probate Code 1459.5(a)(1).	There is no inconsistency with the law, but in practice I believe there is an inconsistency as applied in some cases. In that a guardianship or other placement which might have been understood by the parents to be voluntary, but the child is not in fact returned to them upon their request.	
23.2 Definitions *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.	Application / Voluntary proceeding	California law contains no definition of "voluntary proceeding".	There is no conflict in law, but there may be a conflict with accepted practice, that if parents can be persuaded by an agency to agree to family maintenance or guardianship or other placement then ICWA does not apply, even if the agreement might have been obtained after threats of removal.	Consider amendments to limit what is considered "voluntary".
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	Notice	WIC § 224.2. **Matters involving a child of Indian ancestry; notice to interested parties; time to notify; proof** (a) If the court, a social worker, or probation officer knows or has reason to know that an Indian child is involved, any notice sent in an Indian child custody proceeding under this code shall be sent to the minor's parents or legal guardian, Indian custodian, if any, and the minor's tribe and comply with all of the following requirements: (1) Notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-	Regulation only requires notice in "involuntary proceeding". Wording and requirements are slightly different specifically new regulation states: "Where the identity and location of the child's parent or Indian custodian or Tribe is known…" then notice must be sent. California law may be seen as setting a higher standard. Notice	

DRAFT

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. (Designation of BIA regional offices for service by state omitted)		class mail is recommended, but not required. (2) Notice to the tribe shall be to the tribal chairperson, unless the tribe has designated another agent for service. (3) Notice shall be sent 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 in accordance with subdivision (d) of Section 224.1, after which notice need only be sent to the tribe determined to be the Indian child's tribe. (4) Notice, to the extent required by federal law, shall be sent to the Secretary of the Interior's designated agent, the Sacramento Area Director, Bureau of Indian Affairs. If the identity or location of the parents, Indian custodians, or the minor's tribe is known, a copy of the notice shall also be sent directly to the Secretary of the Interior, unless the Secretary of the Interior has waived the notice in writing and the person responsible for giving notice under this section has filed proof of the waiver with the court. (5) In addition to the information specified in other sections of this article, notice shall include all of the following information: (A) The name, birthdate, 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 greatgrandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if	is required in both voluntary and involuntary proceedings involving and Indian child and must be sent to potentially affiliated tribes even if the identity of a child's tribe is not known but there is information connecting the child with a particular tribe or tribe(s).	

DRAFT

		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) A statement of the following: (i) The absolute right of the child's parents, Indian custodians, and tribe to intervene in the proceeding. (ii) 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. (iii) 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. (iv) The potential legal consequences of the proceedings on the future custodial and parental rights of the child's parents or Indian custodians. (v) 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 Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.). (vi) That the information contained in the notice, petition, pleading, and other court documents is confidential, so any person or entity notified shall maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.). (b) Notice shall be sent whenever it is		

DRAFT

		known or there is reason to know that an Indian child is involved, and for every hearing thereafter, including, but not limited to, the hearing at which a final adoption order is to be granted, unless it is determined that the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) does not apply to the case in accordance with Section 224.3. After a tribe acknowledges that the child is a member or eligible for membership in that tribe, or after a tribe intervenes in a proceeding, the information set out in subparagraphs (C), (D), (E), and (G) of paragraph (5) of subdivision (a) need not be included with the notice. (c) Proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing except as permitted under subdivision (d). (d) No proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs, except for the detention hearing, provided that notice of the detention hearing shall be given as soon as possible after the filing of the petition initiating the proceeding and proof of the notice is filed with the court within 10 days after the filing of the petition. With the exception of the detention hearing, the parent, Indian custodian, or the tribe shall, upon request, be granted up to 20 additional days to prepare for that proceeding. Nothing herein shall be construed as limiting the rights of the parent, Indian custodian, or tribe to more than 10 days notice when a lengthier notice period is required by statute. (e) With respect to giving notice to Indian		

DRAFT

		tribes, a party shall be subject to court sanctions if that person knowingly and willfully falsifies or conceals a material fact concerning whether the child is an Indian child, or counsels a party to do so. (f) The inclusion of contact information of any adult or child that would otherwise be required to be included in the notification pursuant to this section, shall not be required if that person is at risk of harm as a result of domestic violence, child abuse, sexual abuse, or stalking.		
23.71 – re recordkeeping responsibilities of BIA ommitted				
§ 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.	Purpose	No equivalent in CA law	No conflict.	
§ 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	Definitions	There are no equivalent CA definitions		Consider adding.

DRAFT

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	Application	California statutes do not have a specific provision regarding application. Instead WIC 224 includes various relevant legislative findings and declarations, including WIC 224 (b) which states: (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, and seek to protect the best interest of the child. Whenever an Indian child is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of further foster care, guardianship, or adoptive placement, placement of the child shall be in accordance with the Indian Child Welfare Act. Then the definitions in WIC 224.1 includes at subsection (d) a definition of "Indian child custody Proceedings": (d) "Indian child custody proceeding" means a "child custody proceeding" within the meaning of Section 1903 of the Indian Child Welfare Act, including a proceeding for temporary or long-term foster care or guardianship placement, termination of parental rights, preadoptive placement after termination of parental rights, or adoptive placement. "Indian	California law does not directly address how ICWA applies in "emergency proceedings". In practice few of the requirements of ICWA (active efforts; placement preferences, etc) are applied at detention. For the most part ICWA requirements (other than inquiry and notice) are not considered to apply until disposition. This seems inconsistent with the general requirements of the new regulations which set out detailed limitations on the use of "emergency proceedings". Another area that may need to be looked at is the relationship between ICWA and delinquency proceedings.	Consider amendments

DRAFT

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.		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. CRC Rule 5.480, however does speak specifically about application: **Rule 5.480. Application** This chapter addressing the Indian Child Welfare Act (25 United States Code section 1901 et seq.) as codified in various sections of the California Family, Probate, 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; 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;		

DRAFT

		(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.		
§ 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): (Table not included)	Application			
§ 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	Inquiry/Notice	WIC 224.3 details ICWA inquiry obligations and WIC 224.2 details ICWA Notice Requirements. These are then further elaborated in California Rule of Court 5.481 (a) and (b), for Inquiry and Notice respectively. Each of the issues of Inquiry and Notice are discussed separately below.	There is no real conflict, however, California law does not really envision or provide for or govern less formal interactions between the agency or court and a Tribe, other than formal ICWA notice sent by registered mail return receipt requested. There	

DRAFT

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*).		CRC Rule 5.481 governs Inquiry and Notice as follows: **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, 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) 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, or adoption must ask the child, if the child is old enough, and the parents, Indian custodian, or legal guardians 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 unless the party is filing a	are some places where the statutes discuss the need for "consultation" between the agency and the tribe on placement, permanency planning, etc. but what is required and how it is to be accomplished is not discussed in any detail. The regulations clearly envision some sorts of contact and interaction between the state agency and court and tribes beyond just formal ICWA Notice.	

DRAFT

		subsequent petition, and there is no new information. (2) At the first appearance by a parent, Indian custodian, or guardian 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, or adoption proceeding; the court must 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 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 sections 1901 and 1903(2), to gather the information listed in		

DRAFT

		Welfare and Institutions Code section 224.2(a)(5), Family Code section 180(b)(5), or Probate Code section 1460.2(b)(5), which is required to complete the *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030); (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 that reasonably can be expected to have information regarding the child's membership status or eligibility. (5) The circumstances that may provide reason to know the child is an Indian child include the following: (A) The child or a 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, the county welfare agency, the probation department, the licensed adoption agency or adoption service provider, the investigator, the petitioner, or any appointed guardian or conservator; (B) The residence or domicile of the child, the child's parents, or an Indian custodian is or was 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		

DRAFT

		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 (a) amended effective January 1, 2013.)* **(b) Notice** (1) If it is known or there is reason to know that 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 224.2, Family Law Code section 180, and Probate Code section 1460.2. (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 (a)(5).		

DRAFT

		(4) Notice to an Indian child's tribe must be sent to the tribal chairperson unless the tribe has designated another agent for service.		
§ 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.	Standards	WIC 224 (d): (d) In any case in which this code or other applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided under the Indian Child Welfare Act, the court shall apply the higher standard.	No inconsistency.	No changes required
§ 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	Inquiry	WIC § 224.3. Determination whether child is an Indian child; considerations; scope of inquiry (a) The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care. (b) The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, the following: (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 provides information suggesting the child is a member of a tribe or eligible for membership in a tribe	There is no real conflict, however, there are some significant differences between the new regulations and California statutes which are worthy of note. The new regulations focus on the court’s obligations rather than what an agency or petitioner must do. California statutes place an inquiry duty jointly on the court, and agency or petitioner. It is likely that the new Guidelines which are expected to be issued before December will address agency/petitioner prefiling inquiry duties. In any	

DRAFT

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		or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe. (2) The residence or domicile of the child, the child's parents, or Indian custodian is in a predominantly Indian community. (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. (c) If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation officer is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.2, contacting the Bureau of Indian Affairs and the State 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 in and contacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility. (d) If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation officer shall provide notice in accordance with paragraph (5) of subdivision (a) of Section 224.2. (e)(1) 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	case to the extent that California law imposes such duties they set a “higher” standard which is compatible with ICWA.	

DRAFT

(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.		to that status by a person authorized by the tribe to provide that determination, shall be conclusive. Information that the child is not enrolled or 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. (2) In the absence of a contrary determination by the tribe, a determination by the Bureau of Indian Affairs that a child is or is not a member of or eligible for membership in that tribe is conclusive. (3) If proper and adequate notice has been provided pursuant to Section 224.2, and neither a tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, the court may determine that the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) does not apply to the proceedings, provided that the court shall reverse its determination of the inapplicability of the Indian Child Welfare Act and apply the act prospectively if a tribe or the Bureau of Indian Affairs subsequently confirms that the child is an Indian child. (f) Notwithstanding a determination that the Indian Child Welfare Act does not apply to the proceedings made in accordance with subdivision (e), if the court, social worker, or probation officer subsequently receives any information required under paragraph (5) of subdivision (a) of Section 224.2 that was not previously available or included in the notice issued under Section 224.2, the social worker or probation officer shall provide the additional information to any tribes entitled to notice		

DRAFT

		under paragraph (3) of subdivision (a) of Section 224.2 and the Bureau of Indian Affairs		
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.	Determination of ICWA status	WIC 224 (c) (c) A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings. WIC 224.3 (e): (e)(1) 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, shall be conclusive. Information that the child is not enrolled or 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.		
§ 23.109 How should a State court determine an Indian child's Tribe when the child may	Eligible in more than one tribe	WIC 224.3 (e):		

DRAFT

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;		(1) If the Indian child is or becomes a member of only one tribe, that tribe shall be designated as the Indian child's tribe, even though the child is eligible for membership in another tribe. (2) If an Indian child is or becomes a member of more than one tribe, or is not a member of any tribe but is eligible for membership in more than one tribe, the tribe with which the child has the more significant contacts shall be designated as the Indian child's tribe. In determining which tribe the child has the more significant contacts with, the court shall consider, among other things, the following factors: (A) The length of residence on or near the reservation of each tribe and frequency of contact with each tribe. (B) The child's participation in activities of each tribe. (C) The child's fluency in the language of each tribe. (D) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes. (E) Residence on or near one of the tribes' reservations by the child parents, Indian custodian or extended family members. (F) Tribal membership of custodial parent or Indian custodian. (G) Interest asserted by each tribe in response to the notice specified in Section 224.2. (H) The child's self-identification. (3) If an Indian child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe under paragraph (2), actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.		

DRAFT

(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	Jurisdiction			

DRAFT

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.	Notice	WIC 224.2 details ICWA Notice requirements. § 224.2. Matters involving a child of Indian ancestry; notice to interested parties; time to notify; proof (a) If the court, a social worker, or probation officer knows or has reason to know that an Indian child is involved, any notice sent in an Indian child custody proceeding under this code shall be sent to the minor's parents or legal guardian, Indian custodian, if any, and the minor's tribe and comply with all of the following requirements: (1) Notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended, but not required. (2) Notice to the tribe shall be to the tribal chairperson, unless the tribe has designated another agent for service. (3) Notice shall be sent 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 in accordance with subdivision (d) of Section 224.1, after which notice need only be sent to the tribe determined to be the Indian child's tribe. (4) Notice, to the extent required by federal law, shall be sent to the Secretary of the Interior's designated agent, the Sacramento Area Director, Bureau of Indian Affairs. If the identity or location of the parents, Indian custodians, or the minor's tribe is known, a copy of the notice shall also be sent directly to	23.111(d)(3) requires inclusion of information concerning "…direct lineal ancestors of the child, such as grandparents." It does not limit it to great-grandparents as under California law. So California law provides greater protections. Still send notice when you "know or have reason to know". So does not need to be certain. Notice need only be sent to BIA regional office when identity of parents or tribe is not known. No obligation to send to secretary of Interior.	

DRAFT

(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.		the Secretary of the Interior, unless the Secretary of the Interior has waived the notice in writing and the person responsible for giving notice under this section has filed proof of the waiver with the court. (5) In addition to the information specified in other sections of this article, notice shall include all of the following information: (A) The name, birthdate, 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 greatgrandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, 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) A statement of the following: (i) The absolute right of the child's parents, Indian custodians, and tribe to intervene in the proceeding. (ii) 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. (iii) 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		

DRAFT

(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		prepare for the proceeding. (iv) The potential legal consequences of the proceedings on the future custodial and parental rights of the child's parents or Indian custodians. (v) 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 Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.). (vi) That the information contained in the notice, petition, pleading, and other court documents is confidential, so any person or entity notified shall maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.). (b) Notice shall be sent whenever it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter, including, but not limited to, the hearing at which a final adoption order is to be granted, unless it is determined that the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) does not apply to the case in accordance with Section 224.3. After a tribe acknowledges that the child is a member or eligible for membership in that tribe, or after a tribe intervenes in a proceeding, the information set out in subparagraphs (C), (D), (E), and (G) of paragraph (5) of subdivision (a) need not be included with the notice. (c) Proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing		

DRAFT

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.		except as permitted under subdivision (d). (d) No proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs, except for the detention hearing, provided that notice of the detention hearing shall be given as soon as possible after the filing of the petition initiating the proceeding and proof of the notice is filed with the court within 10 days after the filing of the petition. With the exception of the detention hearing, the parent, Indian custodian, or the tribe shall, upon request, be granted up to 20 additional days to prepare for that proceeding. Nothing herein shall be construed as limiting the rights of the parent, Indian custodian, or tribe to more than 10 days notice when a lengthier notice period is required by statute. (e) With respect to giving notice to Indian tribes, a party shall be subject to court sanctions if that person knowingly and willfully falsifies or conceals a material fact concerning whether the child is an Indian child, or counsels a party to do so. (f) The inclusion of contact information of any adult or child that would otherwise be required to be included in the notification pursuant to this section, shall not be required if that person is at risk of harm as a result of domestic violence, child abuse, sexual abuse, or stalking.		
§ 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	Timing	WIC 224.2 (d) (d) No proceeding shall be held until at least 10 **days** after receipt of notice by the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs, except for the detention	California law envisions right to notice for every hearing rather than each "proceeding" as defined in the regulations. The regulations speak of separate "proceedings" for foster care	

DRAFT

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		hearing, provided that notice of the detention hearing shall be given as soon as possible after the filing of the petition initiating the proceeding and proof of the notice is filed with the court within 10 **days** after the filing of the petition. With the exception of the detention hearing, the parent, Indian custodian, or the tribe shall, upon request, be granted up to **20 additional days** to prepare for that proceeding. Nothing herein shall be construed as limiting the rights of the parent, Indian custodian, or tribe to more than 10 **days** notice when a lengthier notice period is required by statute.	placement and termination of parental rights, but there may be several hearings within each proceeding. Consider whether we need to revise WIC 224.2 (d) so that there is greater clarity that this is only for each "proceeding". Also consider whether the detention is a foster care placement "proceeding". California practice has always been to treat disposition as the time when ICWA requirements kick in.	

DRAFT

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.	Emergency proceeding	WIC 305.5 (f) (f) Nothing in this section shall be construed to prevent the emergency removal of an Indian child who is a ward of a tribal court or resides or is domiciled within a reservation of an Indian tribe, but is temporarily located off the reservation, from a parent or Indian custodian or the emergency placement of the child in a foster home or institution in order to prevent imminent physical damage or harm to the child. The state or local authority shall ensure that the emergency removal or placement terminates immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate an Indian child custody proceeding, transfer the child to the jurisdiction of the Indian child's tribe, or restore the child to the parent or Indian custodian, as may be appropriate. **WIC 361.31.** (a) In any case in which an Indian child is removed from the physical custody of his or her parents or Indian custodian pursuant to Section 361, the child’s placement shall comply with this section. (b) Any foster care or guardianship placement of an Indian child, or any **emergency removal** of a child who is	The new regulations have much more detailed provisions aimed at limiting use of emergency removals as a basis to detain Indian children without full ICWA compliance. California law does not currently require the kind of detailed reporting and evidentiary requirements. Further the new regulations require that an emergency removal cannot normally last more than 30 days without initiating fully ICWA compliant proceedings.	

DRAFT

(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;		known to be, or there is reason to know that the child is, an Indian child shall be in the least restrictive setting which most approximates a family situation and in which the child's special needs, if any, may be met. The child shall also be placed within reasonable proximity to the child's home, taking into account any special needs of the child. Preference shall be given to the child's placement with one of the following, in descending priority order: [list of placement preferences, etc. omitted]		

DRAFT

(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?	Improper removal/	WIC 305.5 (e):	This issue arises most often in the case of a voluntary	

DRAFT

(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.	termination of proceeding	(e) If any petitioner in an Indian child custody proceeding has **improperly removed** the child from the 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 the petition and shall immediately return the child to his or her parent or Indian custodian, unless returning the child to the parent or Indian custodian would subject the child to a substantial and immediate danger or threat of danger.	placement or voluntary guardianship when the parent seeks return of the child. If the agency or temporary guardian refuses, this becomes an issue. Current practice would be to allow an ordinary petition for dependency or guardianship to be filed. The new regulations suggest that more is required.	
§ 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.	Transfer	WIC 305.5 (b) In the case of an Indian child who is not domiciled or residing within a reservation of an Indian tribe or who resides or is domiciled within a reservation of an Indian tribe that does not have exclusive jurisdiction over child custody proceedings pursuant to Section 1911 or 1918 of Title 25 of the United States Code, the court shall transfer the proceeding to the jurisdiction of the child's tribe upon petition of either parent, the Indian custodian, if any, or the child's tribe, unless the court finds good cause not to transfer. The court shall dismiss the proceeding or terminate jurisdiction only after receiving proof that the tribal court has accepted the transfer of jurisdiction. At the time that the court dismisses the proceeding or		

DRAFT

		terminates jurisdiction, the court shall also make an order transferring the physical custody of the child to the tribal court.		
§ 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.	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.	Transfer	WIC 305.5 (c) (1) If a petition to transfer proceedings as described in subdivision (b) is filed, the court shall find good cause to deny the petition if one or more of the following circumstances are shown to exist: (A) One or both of the child's parents object to the transfer. (B) The child's tribe does not have a "tribal court" as defined in Section 1910 of Title 25 of the United States Code. (C) The tribal court of the child's tribe declines the transfer. CRC 5.483 **Rule 5.483. Transfer of case** **(a) Mandatory transfer of case to tribal court with exclusive jurisdiction** The court must order transfer of a case to the tribal court of the child's tribe if: (1) The Indian child is a ward of the tribal court; or (2) The Indian child is domiciled or resides within a reservation of an Indian tribe that has exclusive jurisdiction over Indian child custody		

DRAFT

		proceedings under section 1911 or 1918 of title 25 of the United States Code. **(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** 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. **(d) Cause to deny a request to transfer to tribal court with concurrent state and tribal jurisdiction** (1) One or more 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; (B) The child's tribe does not have a "tribal court" or any other administrative body as defined in section 1903 of the Indian Child Welfare Act: "a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established		

DRAFT

		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;" or (C) The tribal court of the child's tribe declines the transfer. (2) One or more of the following circumstances may constitute discretionary good cause to deny a request to transfer: (A) The evidence necessary to decide the case cannot be presented in the tribal court without undue hardship to the parties or the witnesses, and the tribal court is unable to mitigate the hardship by making arrangements to receive and consider the evidence or testimony by use of remote communication, by hearing the evidence or testimony at a location convenient to the parties or witnesses, or by use of other means permitted in the tribal court's rules of evidence or discovery; (B) The proceeding was at an advanced stage when the request to transfer was received and the petitioner did not make the request within a reasonable time after receiving notice of the proceeding, provided the notice complied with statutory requirements. Waiting until reunification efforts have failed and reunification services have been terminated before filing a request to transfer may not, by itself, be considered an unreasonable delay; (C) The Indian child is over 12 years of age and objects to the transfer; or (D) The parents of a child over five years of age are not available and the child has had little or no contact with his or her tribe or members of the child's tribe.		

DRAFT

		(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.		
§ 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.	Transfer	WIC 305.5 (c) (2) Good cause not to transfer the proceeding may exist if: (A) The evidence necessary to decide the case cannot be presented in the tribal court without undue hardship to the parties or the witnesses, and the tribal court is unable to mitigate the hardship by making arrangements to receive and consider the evidence or testimony by use of remote communication, by hearing the evidence or testimony at a location convenient to the parties or witnesses, or by use of other means permitted in the tribal court’s rules of evidence or discovery. (B) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition within a reasonable time after receiving notice of the proceeding, provided the notice complied with Section 224.2. It shall 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) The Indian child is over 12 years of age and objects to the transfer. (D) The parents of the child over five years of age are not available and the child has had little or no contact with the child’s tribe or members of the child’s tribe. (3) Socioeconomic conditions and the perceived adequacy of tribal		

DRAFT

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.		social services or judicial systems may not be considered in a determination that good cause exists. (4) The burden of establishing good cause to the contrary shall be on the party opposing the transfer. If the court believes, or any party asserts, that good cause to the contrary exists, the reasons for that belief or assertion shall be stated in writing and made available to all parties who are petitioning for the transfer, and the petitioner shall have the opportunity to provide information or evidence in rebuttal of the belief or assertion. CRC 5.483 **(e) Evidentiary considerations** The court may not consider socioeconomic conditions and the perceived adequacy of tribal social services, tribal probation, or the tribal judicial systems in its determination that good cause exists to deny a request to transfer to tribal court with concurrent state and tribal jurisdiction. **(f) 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 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.		

DRAFT

§ 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.	Transfer	CRC 5.483 **(g) 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.		
§ 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.	Active Efforts	WIC 361 (d) The court shall make a determination as to whether reasonable **efforts** were made to prevent or to eliminate the need for removal of the minor from his or her home or, if the minor is removed for one of the reasons stated in paragraph (5) of subdivision (c), whether it was reasonable under the circumstances not to make any of those **efforts**, or, in the case of an		

DRAFT

(b) Active efforts must be documented in detail in the record.		Indian child custody proceeding, whether **active efforts** as required in Section 361.7 were made and that these **efforts** have proved unsuccessful. The court shall state the facts on which the decision to remove the minor is based. **WIC 361.7.** (a) Notwithstanding Section 361.5, a party seeking an involuntary foster care placement of, or termination of parental rights over, an Indian child shall 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** have proved unsuccessful. (b) What constitutes **active efforts** shall be assessed on a case-by-case basis. The **active efforts** shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. **Active efforts** shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers. (c) No foster care placement or guardianship may be ordered in the proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, as defined in Section 224.6, 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.		

DRAFT

§ 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	Evidence	WIC 361.7 (c) (c) No foster care placement or guardianship may be ordered in the proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, as defined in Section 224.6, 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.		

DRAFT

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.	Qualified Expert Witness	WIC 361.7 (c) (c) No foster care placement or guardianship may be ordered in the proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, as defined in Section 224.6, 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. WIC 224.6 **224.6.** (a) When testimony of a "qualified expert witness" is required in an Indian child custody proceeding, a "qualified expert witness" may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, tribal historian, or tribal elder, provided the individual is not an employee of the person or agency recommending foster care placement or termination of parental rights. (b) In considering whether to involuntarily place an Indian child in foster care or to terminate the parental rights of the parent of an Indian child, the court shall: (1) Require that a qualified expert witness 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.		

DRAFT

		(2) Consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices. (c) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings: (1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices. (2) Any 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 childrearing practices within the Indian child's tribe. (3) A professional person having substantial education and experience in the area of his or her specialty. (d) 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. (e) 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.		
§ 23.124 What actions must a State court undertake in voluntary proceedings? (a) The State court must require the	Voluntary proceedings		California law does not have anything similar to regulation 23.124. So long as the parent or	

DRAFT

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.			Indian custodian retains the right to have the child returned upon demand, according to WIC 224.1 (d) that proceeding would not fall under definition of "Indian child custody proceeding." If the parent does not retain the right to have the child returned upon demand, then normal ICWA requirements apply.	
§ 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	Consent	WIC 16507.4 (b) In the case of an Indian child, in accordance with Section 1913 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), the following criteria are met: (A) The parent or Indian custodian's consent to the voluntary out-of-home placement is executed in writing at least 10 days after the child's birth and recorded before a judge. (B) The judge certifies that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood. (C) A parent of an Indian child may withdraw his or her consent for any reason		

DRAFT

(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.		at any time and the child shall be returned to the parent. Family Code § 8606.5. Consent to adoption of Indian children (a) Notwithstanding any other section in this part, and in accordance with Section 1913 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), consent to adoption given by an Indian child's parent is not valid unless both of the following occur: (1) The consent is executed in writing at least 10 days after the child's birth and recorded before a judge. (2) The judge certifies that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood. (b) The parent of an Indian child may withdraw his or her consent to adoption for any reason at any time prior to the entry of a final decree of adoption and the child shall be returned to the parent. Probate Code § 1500.1. Consent by Indian child's parent; requirements (a) Notwithstanding any other section in this part, and in accordance with Section 1913 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), consent to nomination of a guardian of the person or of a guardian of the person and the estate given by an Indian child's parent is not valid unless both of the following occur: (1) The consent is executed in writing at least 10 days after the child's birth and recorded before a judge. (2)		

DRAFT

		The judge certifies that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood. (b) The parent of an Indian child may withdraw his or her consent to guardianship for any reason at any time prior to the issuance of letters of guardianship and the child shall be returned to the parent.		
§ 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.	Consent	There is no California equivalent		
§ 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	Consent	There is no equivalent California provision		

DRAFT

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.	Consent	There is no equivalent California provision		
§ 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.	Placement preferences	WIC 361.31 **361.31.** (a) In any case in which an Indian child is removed from the physical custody of his or her parents or Indian custodian pursuant to		

DRAFT

(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.		Section 361, the child's **placement** shall comply with this section. . (d) Notwithstanding the **placement preferences** listed in subdivisions (b) and (c), if a different order of **placement** preference is established by the child's tribe, the court or agency effecting the **placement** shall follow the order of preference established by the tribe, so long as the **placement** is the least restrictive setting appropriate to the particular needs of the child as provided in subdivision (b). (e) Where appropriate, the **placement** preference of the Indian child, when of sufficient age, or parent shall be considered. In applying the **preferences**, a consenting parent's request for anonymity shall also be given weight by the court or agency effecting the **placement**.		
§ 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	Placement preferences	WIC 361.31 (c) In any adoptive **placement** of an Indian child, preference shall be given to a **placement** with one of the following, in descending priority order: (1) A member of the child's extended family, as defined in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.). (2) Other members of the child's tribe. (3) Another Indian family		

DRAFT

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 fostercare 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.		WIC 361.31 (b) Any foster care or guardianship **placement** of an Indian child, or any emergency removal of a child who is known to be, or there is reason to know that the child is, an Indian child shall be in the least restrictive setting which most approximates a family situation and in which the child's special needs, if any, may be met. The child shall also be placed within reasonable proximity to the child's home, taking into account any special needs of the child. Preference shall be given to the child's **placement** with one of the following, in descending priority order: (1) A member of the child's extended family, as defined in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.). (2) A foster home licensed, approved, or specified by the child's tribe. (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority. (4) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.		

DRAFT

(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;	Placement preferences	WIC 361.31 (h) The court may determine that **good cause** exists not to follow placement preferences applicable under subdivision (b), (c), or (d) in accordance with subdivision (e). (i) When no preferred placement under subdivision (b), (c), or (d) 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. (j) The burden of establishing the existence of **good cause** not to follow placement preferences applicable under subdivision (b), (c), or (d) shall be on the party requesting that the preferences not be followed. CRC 5.484 **(b) Standards and preferences in placement of an Indian child** (1) Unless the court finds good cause to the contrary, all placements of Indian children in any proceeding listed in rule 5.480 must follow	The new regulations more closely regulation and limit the basis for a finding of good cause to deviate from the placement preferences. The limitation on considering socioeconomic circumstances is new and not contained in California law. The limitation on considering bonding which occurs while child is in a non-compliance placement is also new and is not reflected in California law.	

DRAFT

(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.		the specified placement preferences in Family Code section 177(a), Probate Code section 1459(b), and Welfare and Institutions Code section 361.31. (2) 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; (B) The requests 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 a documented diligent effort to identify families meeting the preference criteria. (3) 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. (4) The tribe, by resolution, may establish a different preference order, which must be followed if it provides for the least restrictive setting. (5) 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. (6) 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		

DRAFT

		5.481(a)(4)(A), and participation in the cultural and ceremonial events of the child's tribe.		
§ 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.	Misc.	No equivalent California provisions		
§ 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.	Access to records			
§ 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.	Vacating adoption	Family Code 8606.5 (c) After the entry of a final decree of adoption of an Indian child, the Indian child's parent may withdraw consent to the adoption 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, provided that no adoption that has been effective for at least 2 years may be invalidated unless otherwise permitted under state law.		

DRAFT

(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.	Invalidation	Family Code 175 (e) Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care, guardianship placement, or termination of parental rights if the action violated Sections 1911, 1912, and 1913 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.). Nothing in this section is intended to prohibit, restrict, or otherwise limit any rights under Section 1914 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.). Probate Code 1459: (e) Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care or guardianship placement or termination of parental rights if the action violated Sections 1911, 1912, and 1913 of the Indian Child Welfare Act. WIC 224		

DRAFT

		(e) Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care or guardianship placement or termination of parental rights if the action violated Sections 1911, 1912, and 1913 of the Indian Child Welfare Act.		
§ 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.	Misc.	No equivalent California legislation		
§ 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				

DRAFT

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.				
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				

DRAFT

Human Services, 1849 C Street NW., Mail Stop 4513 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.				
23.141 What records must the State maintain? (a) The State must maintain a record of every voluntary or involuntary fostercare, 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				

DRAFT

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.				
Sections 23.142, 23.143 and 23.144 regarding paperwork reduction; effective date and severability omitted.				

DRAFT