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:	April 13, 2017
Time:	12:15 p.m –1:15 p.m.
Location:	Conference Call
Public Call-In Number	1-877-820-7831 and enter Listen Only 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: Ann Gilmour. Only written comments received by 12:15 p.m. on April 12, 2017 will be provided to advisory body members.

III. Discussion and Possible Action Items (Items 1-6)

Item 1
Approval of Minutes for February 16, 2017 Meeting

Item 2
Cochairs Report

- Annual Agenda
- Letter to Tribal Leaders on Tribal Judge Vacancies

Item 2
Update Status of AB905
Presenter: Dan Pone

Item 3
California ICWA Compliance Task Force Report
Presenter: Abby Abinanti

Item 4
Traffic or Civil Harassment
Presenter: Judge Christine Williams

Item 5
ICWA Regulation Implementation
Presenter: Ann Gilmour

Item 6
Beyond the Bench Planning
Presenter: Ann Gilmour

IV. Adjournment

Adjourn

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MINUTES OF OPEN MEETING

February 16, 2017
9:30am -4:30pm
In Person

Advisory Body Members Present:	*Hon. Abby Abinanti, Co-chair, and Hon. Dennis M. Perluss, Co-chair*, Hon. April Attebury (by phone), Ms. Jacqueline Davenport, Hon. Leonard Edwards, Hon. Cynthia Gomez (by phone), Mr. Olin Jones, Hon. Mark Juhas, Hon. Lawrence King, Hon. Anthony Lee, Hon. Patricia Lenzi, Hon. Lester Marston, Hon. Mark Radoff, Hon. David Riemenschneider, Hon. John Sugiyama, Hon. Sunshine Sykes, Hon. Juan Ulloa, Hon. Claudette White, Hon. Christine Williams, Hon. Christopher Wilson, Hon. Joseph Wiseman, and Hon. Zeke Zeidler
Advisory Body Members Absent:	Hon. Richard Blake, Hon. Hilary Chittick, Hon. Gail Dekreon, Hon. Kimberly Gaab, Hon. Michael Golden, Hon. Suzanne Kingsbury, Hon. William Kockenmeister, Hon. Allen Sumner.
Others Present:	Mr. James Acres, Ms. Carolynn Bernabe, Ms. Vida Castaneda, Ms. Ann Gilmour, Mr. Anthony Hakl, Ms. Karen Hanna, Ms. Bonnie Hough, Ms. Kathleen Kenealy, Hon. Steff Padilla, Ms. Natasha Payes, Ms. Michelle Rainer, Ms. Mary Jane Risling, Ms. Virginia Rondero-Hernandez, Mr. Amit Rai, Ms. Elena Valdivia-Fortuna, and Ms. Jennifer Walter.

OPEN MEETING

Call to Order and Roll Call

The co-chairs called the meeting to order at 9:30 am

Approval of Minutes

The committee approved the December 12, 2016 minutes.

DISCUSSION AND ACTION ITEMS (ITEMS 1–8)

Invocation

Judge Abby Abinanti began the meeting with an invocation.

Welcome and Introductions

Justice Dennis Perluss and Judge Abby Abinanti welcomed participants. Justice Perluss welcomed the forum's newest member, Judge David Riemenschneider, and invited public comment.

Public Comment

Mr. James Acres submitted written comments and spoke about his experience as a litigant with the Tribal Civil Money Judgment Act. Mr. Acres shared that he appreciates the Act because it puts the public on notice that tribal court judgments are enforceable in state court. However, he described not having "a safe harbor" in state court to raise due process concerns in tribal court. He also expressed concern that the Act provides a 10-year period in which enforcement of tribal court judgments may be sought in state court.

SESSION 1: FORUM MEMBER PROJECT UPDATES

Educational Projects

Judge Abinanti described the California Civic Learning Summit convened by the California Chief Justice in Sacramento. The event brought together law, education, labor, business, community leaders, elected officials, and students to celebrate the civic learning and engagement projects in California. Judge Abinanti attended the Summit with forum staff to explore piloting a forum project related to civic engagement and laying the foundation for a truth and reconciliation project. The pilot team is comprised of Judge Abinanti, Judge Joyce Hinrichs, Superior Court of Humboldt County, and Mr. Colby Smart, County Office of Education. The project will use family engagement and voter registration at monthly maker faires (these are family-friendly gatherings that bring together tech enthusiasts, crafters, educators, tinkerers to showcase invention, creativity, and resourcefulness) and other local events to teach Native American history with the goal of eventually establishing a truth and reconciliation project related to California American Indian history and a statewide proposal to replace the 4th grade curriculum module on California missions. The pilot team will include youth representatives.

Partnerships—Enforcement of Tribal Protection Orders - Making Full Faith and Credit a Reality

Mr. Olin Jones and Ms. Kate Kenealy described the diverse leadership group, comprised of representatives from this forum, the U.S. Department of Justice, the California Department of Justice, the Office of Tribal Justice, tribal leaders, and tribal advocates, which came together to address a serious safety gap. Since its inception the forum has been working on ensuring that, consistent with the requirements of federal and state law, protection orders issued by tribal courts are fully recognized and enforced in California. Past initiatives have included education, promotion of cooperative arrangements between state and tribal courts and law enforcement agencies to have tribal orders entered into statewide databases, the adoption of rule 5.386, amendment of DV-600 form, and tribal court access to the California Courts Protective Order Registry. Despite these initiatives, there were still concerns that law enforcement officers on the ground were confused about their obligation to enforce tribal court protection orders. In response to this concern and as a result of this leadership group, in November 2016, the Attorney General's Division of Law Enforcement issued Information Bulletin DLE-2016-03 to all state and local law enforcement agencies concerning their obligations with respect to enforcement of tribal court protection orders.

Policies

- Child Welfare: Protecting Children and Tribal Access to the Child Abuse Central Index

- Child Welfare: Tribal Access to Juvenile Court File - Rule 5.552
- Child Support: Transfer Between Tribal and State Courts - Rule 5.372
- Civil Money Judgments: Lifting the Sunset on SB 406

Justice Perluss directed members to their ebinders to view the forum's pending policy recommendations.

SESSION 2: PARTNERSHIP WITH THE CALIFORNIA SOCIAL WORK EDUCATION CENTER (CALSWEC)

Ms. Rondero-Hernandez, Executive Director, California Social Work Education Center (CalSWEC), provided an overview of the CalSWEC, its purpose, and goals for the future. Ms. Rondero-Hernandez emphasized the need to collaborate and build stronger partnerships between CalSWEC, tribal communities. and the courts. Ms. Michelle Rainer, Coordinator, SERVE, described the SERVE program (formerly the American Indian Recruitment Program), which supports the Title IV-E schools of social work in CalSWEC's consortium. Its goal is to support the Title IV-E graduate and undergraduate social work programs currently operating within the CalSWEC consortium by assisting with capacity and relationship building with tribal entities and organizations within each region. Eligible American Indian students can receive financial support as full- or part-time social work students with an emphasis on children and families in the Title IV-E Stipend Program. Ms. Rainer and Ms. Rondero-Hernandez requested assistance in encouraging Native American students to apply to bachelors and masters social work programs and offered their assistance in aligning social work education and practice with what judges need to know to make informed decisions in juvenile dependency cases.

SESSION 3: INDIAN CHILD WELFARE ACT (ICWA) LEGISLATIVE AND RULE DISCUSSION

Judge Leonard Edwards and Judge Pat Lenzi facilitated a discussion on the procedural and substantive requirements of the Indian Child Welfare Act (ICWA) as interpreted by the new federal ICWA regulations (effective December 12, 2016). Members reviewed the highlighted topics and issues prepared by staff and agreed on several areas where current California law and practice may not be consistent with the requirements of the new regulations. The forum acknowledged there was extensive work to be done with justice partners, and agreed to collaborate with the California Indian Court Judges Association, the California Department of Social Services, and other Judicial Council advisory committees and divisions, including the Family and Juvenile Law Advisory Committee and the Center for Judicial Education and Research. The forum decided to form a working group to determine those areas where implementation of the new regulations may require either legislative changes, rules and forms changes, or education and training to align California law and practice with the federal requirements.

Action Item: The following forum members volunteered to form an ad hoc ICWA working group: Judge Leonard Edwards, Judge Mark Juhas, Judge Pat Lenzi, and Judge Claudette White.

WORKING LUNCH: TRIBAL JUSTICE DOCUMENTARY AND PANEL DISCUSSION

- What State Court Can Learn from Tribal Courts
- Developing Curriculum to Complement the Documentary

- Educating Foundations

Jenny Walter introduced the film by thanking Judge Abinanti and Judge White and their tribal communities for allowing such an intimate glimpse into the workings of two tribal justice systems in California. She provided background on how the film came about. Early in the forum's history, members recognized that judicial education on tribal/state concerns could not be achieved without raising visibility of tribal justice systems and the inter-dependence and inter-jurisdictional issues faced by tribal and state justice systems. As a result, the forum initiated the idea for a documentary on tribal justice. Ms. Walter assisted in obtaining funding, identified a filmmaker, a producer, and several tribal advisors. She consulted on the film's production and sought funding that would help with distribution and education. One of the funders is the Corporation for Public Broadcasting, which will air the film on POV and develop companion materials to complement the film. There will be an opportunity for the forum to provide input into these materials.

Participants viewed the Tribal Justice documentary and discussed how the film can be used to promote understanding of tribal justice systems and the need for cross-system collaboration. Judge Sunshine Sykes and Judge Christopher Wilson shared their perspectives on what state courts can learn from tribal courts and explored with forum members whether state courts can incorporate aspects of tribal justice and tap the strengths of the community when it hears cases involving tribal members.

Members also discussed using the film to educate foundations about tribal courts and brainstormed ideas for screening the film.

Action Item: To screen the film, contact the filmmaker, Anne Makepeace, at makepeace.anne@gmail.com. Tribal/State Programs will also have a copy of the film, as will Judge Abinanti and Judge White.

SESSION 4: TRIBAL/STATE/COURT DATA EXCHANGES IN CHILD WELFARE CASES

Ms. Karen Hanna, County Consultant (Los Angeles), Mr. Amit Rai, Interfaces Lead, Child Welfare Digital Services, and Ms. Mary Jane Risling, Tribal Consultant, with Child Welfare Digital Services gave an overview of the new case management system in development by California Child Welfare Digital Services to replace the legacy system, CWSCMS (Child Welfare System Case Management System). The new system will include a number of portals by which courts and other system users will be able to interface with the new system. Currently, staff of California Child Welfare Digital Services is working with eight local courts on specifications for the court interface and interoperability between the new system and the various electronic court case management systems, which have been adopted by the California courts. The federal government has released new Adoption and Foster Care Analysis and Reporting System (AFCARS) requirements that include data elements related to ICWA. Many of the required data elements will be contained in court orders. Child Welfare Digital Services staff hope that court forms can be created in such a way that these required data elements can be extracted by the new system. Forum members expressed some concern that the new system is

being designed for social services with little consideration of system accessibility by other case participants, such as tribes. The presenters addressed these concerns by describing that the new system envisions that parties and other justice partners would have access through secure portals that would permit different levels of access depending on their role in the case. Forum members appreciated having an opportunity to give input into the new system.

Partnership With California Attorney General's Office

Judge Abinanti and Justice Perluss presented Mr. Anthony Hakle, Deputy Attorney General, Mr. Olin Jones, Director, Native American Affairs Office, and Kate Kenealy, Chief Deputy Attorney General, of the California Department of Justice with certificates honoring them for their leadership and contribution to improving the enforcement of tribal protection orders in California.

SESSION 5: JUDGE TO JUDGE COMMUNICATIONS IN NON-MONEY JUDGMENT CASES

Hon. Joseph Wiseman, Chief Judge, Northern California Intertribal Court System

Judge Joseph Wiseman facilitated a discussion on the value of judge-to-judge communications in non-money judgment cases and explored whether such communications were ethical. Several forum members reported that in cases where state and tribal courts have concurrent jurisdiction, it is sometimes necessary to exchange information. There is statutory authority for court-to-court communication in a number of case types including the Uniform Child Custody Jurisdiction Enforcement Act and the Tribal Court Civil Money Judgment Act. Judge Wiseman suggested that it would be useful to have wider authority to permit judge-to-judge communication. Forum members discussed the limits that the canons of Judicial Ethics place on judges' ex parte communications, specifically canon 3B(7). Forum members did not endorse a general policy (legislative or rule) going beyond what is currently permitted by statute or canon concerning communication between state and tribal court judges. Forum members did support exploring methods to clarify the extent to which of judge-to-judge communications were permissible in juvenile and family cases.

Action Item: Staff to explore legislative proposals for juvenile and family cases, the text of which was provided in the ebinder. Forum staff will work with staff of the Family and Juvenile Law Advisory Committee to explore these policy recommendations.

SESSION 6: INCREMENTAL APPROACH TO RECOGNITION AND ENFORCEMENT OF NON-MONEY JUDGMENTS - WHICH CASE TYPES?

[Note: SB 406 survey respondents recommended the following case types: probate case, trespass cases, conservatorship cases, contract cases, and family law cases.]

Judge Lester Marston and Judge Mark Radoff facilitated a discussion on the forum's incremental strategy to recommend legislation that would build on the approach taken in SB 406. After discussion, the forum agreed to explore seeking a legislative recommendation to establish a streamlined procedure for recognition of either civil harassment or traffic tribal cases in state court. Staff requested that the tribal court judges on the forum provide relevant tribal codes, data and case examples to illustrate the need.

Action Item: Tribal Court forum members agreed to forward to staff tribal codes, the number of traffic and civil harassment cases heard annually, and case summaries to illustrate the need.

SESSION 7: ENHANCING TRIBAL-STATE COLLABORATION

Due to weather and flight delays, Mr. Jerry Gardner, Director, Tribal Policy Institute, was unable to attend. He shared materials.

SESSION 8: FORUM PRIORITIES 2017-2018 AND ANNUAL AGENDA/WORK PLAN

The forum reviewed the annual agenda, which will be presented to the Executive and Planning Committee for approval at its meeting on March 23, 2017.

ADJOURNMENT

There being no further business, the meeting was adjourned at 4:20 p.m.

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

Tribal Court–State Court Forum (forum)
Annual Agenda—2017
Approved by E&P: March 23, 2017

I. ADVISORY BODY INFORMATION

Chair:	Hon. Abby Abinanti, Chief Judge, Yurok Tribal Court and Hon. Dennis M. Perluss, Presiding Justice, Court of Appeal, Second Appellate District, Division Seven
Staff:	Ms. Ann Gilmour, Attorney II, Center for Families, Children & the Courts

Advisory Body's Charge:

The forum makes recommendations to the Judicial Council for improving the administration of justice in all proceedings in which the authority to exercise jurisdiction by the state judicial branch and the tribal justice systems overlaps.

In addition to the general duties and responsibilities applicable to all advisory committees as described in rule 10.34, the forum must:

1. Identify issues of mutual importance to tribal and state justice systems, including those concerning the working relationship between tribal and state courts in California;
2. Make recommendations relating to the recognition and enforcement of court orders that cross jurisdictional lines, the determination of jurisdiction for cases, and the sharing of services among jurisdictions;
3. Identify, develop, and share with tribal and state courts local rules of court, protocols, standing orders, and other agreements that promote tribal court–state court coordination and cooperation, the use of concurrent jurisdiction, and the transfer of cases between jurisdictions;
4. Recommend appropriate activities needed to support local tribal court–state court collaborations; and
5. Make proposals to the Governing Committee of the Center for Judicial Education and Research on educational publications and programming for judges and judicial support staff.

[Excerpted from California Rules of Court, rule 10.60]

Advisory Body's Membership:

Twenty-nine positions—29 members representing the following categories:

- Thirteen tribal court judges (nominated by their tribal leadership, representing 13 of the 23 tribal courts currently operating in California; these courts serve approximately 39 tribes)
- Director of the California Attorney General's Office of Native American Affairs (ex officio)
- Tribal Advisor to the California Governor (ex officio)
- One appellate justice
- Seven chairs or their designees of the following Judicial Council advisory committees:
    - Access and Fairness Advisory Committee
    - Governing Committee of the Center for Judicial Education and Research (CJER)
    - Civil and Small Claims Advisory Committee
    - Criminal Law Advisory Committee
    - Family and Juvenile Law Advisory Committee
    - Probate and Mental Health Advisory Committee
    - Traffic Advisory Committee
- Five trial court judicial officers (selected from local courts in counties where tribal courts are situated and one from Los Angeles*)
- One retired judge (advisory)

*Judge D. Zeke Zeidler, who was originally appointed as the designee of the Access and Fairness Advisory Committee, is finishing out his term, which expires on September 14, 2017.

Subgroups/Working Groups: None

Advisory Body's Key Objectives for 2017:

1. Make policy recommendations that enable tribal and state courts to improve access to justice, to issue orders, and to enforce orders to the fullest extent allowed by law.
2. Increase Tribal/State partnerships that identify issues of mutual concern and proposed solutions.
3. Make recommendations to committees developing judicial education institutes, multi-disciplinary symposia, distance learning, and other educational materials to include content on federal Indian law and its impact on state courts, including interjurisdictional issues.

II. ADVISORY BODY PROJECTS

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1.	**Policy Recommendations:** **A. Legislation** *Major Tasks:* (i) Indian Child Welfare Act (ICWA): Review newly adopted *Regulations for State Courts and Agencies in Indian Child Custody Proceedings* (as published in the Federal Register on March 20, 2015 (Vol. 80 FR No. 54 14880) approved Bureau of Indian Affairs Guidelines (as published in the Federal Register on December, 30, 2016 (Vol. 81 FR No. 251 96476), and statewide Indian Child Welfare Task Force Report on the Indian Child Welfare for possible recommendations to the Judicial Council for sponsored legislation or legislative positions on bills	1(a)	Judicial Council Direction: Strategic Plan Goal I: Access, Fairness, and Diversity Operational Plan Objective 2: Identify and eliminate barriers to court access at all levels of service; ensure interactions with the court are understandable, convenient, and perceived as fair. Strategic Plan Goal II: Independence and Accountability. Operational Plan Objective 3 Strategic Plan Goal III: Modernization of Management and Administration Operational Plan Objective 5	January 1, 2019	Recommendations submitted to the Judicial Council for consideration by the Legislature and the Governor.

[1] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.
[2] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	that will be introduced to comply with the federal law. (ii) Judge-to-Judge Communications: Develop legislative proposal modeled after California Code of Civil Procedure section 1740, which authorizes a state court, after notice to all parties, to attempt to resolve any issues raised regarding a tribal court judgment by contacting the tribal court judge who issued the judgment. The proposal would also require a court to permit the parties to participate in the judge-to-judge communication and to prepare a record of any communication with the tribal court. (iii) Make recommendation to implement a streamlined process to recognize and enforce non-money judgments issued by a tribal court (incremental strategy building on the success of council-sponsored legislation, SB 406, see page 16 for status of project). (iv) Explore use of state funding in connection with the service of process or notices for state court domestic violence restraining	2	Strategic Plan Goal VI: Branchwide Infrastructure for Service Excellence Operational Plan Objective 4 Origin of Project: Forum Resources: Forum and Policy Coordination and Liaison Committee (PCLC) Judicial Council Staffing: Center for Families, Children & the Courts (CFCC) and Governmental Affairs Key Objective Supported: 1		

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	orders to pay for service of tribal protection orders.				
2.	**Policy Recommendation:** **B. Rules and Forms – ICWA** Review newly adopted *Regulations for State Courts and Agencies in Indian Child Custody Proceedings* (as published in the Federal Register on March 20, 2015, (Vol. 80 FR No. 54 14880) and approved Bureau of Indian Affairs Guidelines (as published in the Federal Register on December, 30, 2016, (Vol. 81 FR No. 251 96476) for possible amendments to Title 5. Family and Juvenile rules relating to the ICWA.	1(a)	Judicial Council Direction: Strategic Plan Goal II: Operational Plan Objective 3 Strategic Plan Goal III: Operational Plan Objective 5 Strategic Plan Goal VI: Operational Plan Objective 4 Origin of Project: Federal Law Resources: Family and Juvenile Law Advisory Committee and Forum Judicial Council Staffing: CFCC and LS Key Objective Supported: 1	January 1, 2018	Rule and form recommendations that comply with federal rules and guidelines implementing ICWA
3.	**Policy Recommendation:** **C. Rule and Forms – Juvenile Records** Revise California Rules of Court, rule 5.552 to conform to the requirements of subdivision (f) of section 827 of the Welfare and Institutions Code, which was added effective January 1, 2015, to clarify the right of an Indian child's tribe to have access to the	1(a)	Judicial Council Direction: Strategic Plan Goal II: Operational Plan Objective 3 Strategic Plan Goal III: Operational Plan Objective 5 Strategic Plan Goal VI: Operational Plan Objective 4 Origin of Project: Justice partners have commented that the rule is	January 1, 2018	Rule recommendations that comply with statute.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	juvenile court file of a case involving that child. At that time, no changes were made to California Rules of Court, rule 5.552, which implements section 827 of the Welfare and Institutions Code. Contrary to section 827 as amended, rule 5.552, continues to require that representatives of an Indian child's tribe petition the juvenile court if the tribe wants access to the juvenile court file. This inconsistency has created confusion.		contrary to statute and has created confusion. Resources: Family and Juvenile Law Advisory Committee and Forum Judicial Council Staffing: CFCC and LS Key Objective Supported: 1		
4.	**Policy Recommendation:** **D. Rule and Forms – Child Support** Revise California Rule of Court, rule 5.372 in response to the need for consistent procedures for determining the orderly transfer of title IV-D child support cases from the state court to the tribal court when there is concurrent subject matter jurisdiction. Since implementation of the rule of court, over 40 cases have been considered for transfer between the state courts in Humboldt and Del Norte counties and the Yurok Tribal Court. The Yurok Tribe intends to seek transfer of cases currently under the jurisdiction of state court in the	1(a)	Judicial Council Direction: Strategic Plan Goal II: Operational Plan Objective 3 Strategic Plan Goal III: Operational Plan Objective 5 Strategic Plan Goal VI: Operational Plan Objective 4 Origin of Project: This proposal grew out of the cross-court educational exchange convened by Judge Abinanti and Judge Wilson. Representatives of the State Department of Child Support Services, local county child support agencies, the tribal child support program, the tribal court, the state	January 1, 2018	Rule recommendations that implement federal law.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	following counties: Lake, Mendocino, Shasta, Siskiyou, and Trinity. In addition, at least one other tribe located in Southern California is expected to soon begin handling title IV-D child support cases. Based on the experience with the transfers that have taken place so far, the participants of a cross-court educational exchange have suggested amendments to rule 5.732 to streamline the process, reduce confusion, and ensure consistency and efficient use of court resources.		courts, and Judicial Council staff met to review the case transfer procedures; and justice partners proposed a number of revisions to improve the transfer process. Resources: Family and Juvenile Law Advisory Committee and Forum Judicial Council Staffing: CFCC and LS Key Objective Supported: 1		
5.	**Policy Recommendation:** **E. Tribal Access to the Child Abuse Central Index (Index)** The Index is used to aid law enforcement investigations and prosecutions, and to provide notification of new child abuse investigation reports involving the same suspects and/or victims. Information is also used to help screen applicants for licensing or employment in child care facilities, foster homes, and adoptive homes. The purpose of allowing access to this information on a statewide basis is to quickly provide authorized agencies, including tribal agencies, with relevant information	2	Judicial Council Direction: Strategic Plan Goal II: Operational Plan Objective 3 Strategic Plan Goal III: Operational Plan Objective 5 Strategic Plan Goal VI: Operational Plan Objective 4 Origin of Project: California Indian Legal Services brought this topic of mutual concern to tribal and state courts to the forum's attention at one of its meetings. Resources: Forum and California Department of Justice	2017	California Department of Justice to give tribal access to the Index and local tribal and county child welfare agencies to share relevant information from the Index.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	regarding individuals with a known or suspected history of abuse or neglect. While tribal agencies can obtain information from the Index, they cannot readily submit information to the Index. This practice poses several problems: (1) suspected or known abusers may remain in the home of a child posing safety risks; (2) unnecessary duplication of effort by agencies; (3) delays in entry into the Index due to double investigations; and (4) barriers to sharing information among tribal and nontribal agencies that should be working together to protect children. The forum recommends exploring executive branch action to permit tribal access to the Index.		Judicial Council Staffing: CFCC Key Objective Supported: 1		
6.	**Policy Recommendations:** **F. Technological Initiatives** *Major Tasks:* (i) Recommend Judicial Council continue giving tribal courts access to the California Courts Protective Order Registry (CCPOR). (ii) Explore development of an electronic application to improve inquiry and notice under ICWA.	2	Judicial Council Direction: Strategic Plan Goal II: Operational Plan Objective 3 Strategic Plan Goal III: Operational Plan Objective 5: Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases.	Ongoing	(i) State and tribal courts will be able to see each other's protective orders, to avoid conflicting orders, and to promote enforcement of these orders. (ii) Application will be developed and will improve inquiry and notice practices under ICWA.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Strategic Plan Goal VI: Operational Plan Objective 4: Implement new tools to support the electronic exchange of court information while balancing privacy and security. Origin of Project: Forum Resources: Forum Judicial Council Staffing: CFCC and Information Technology Collaborations: Stanford Design Center Key Objective Supported: 1		
7.	**Policy Recommendation:** **G. Other** *Major Tasks:* (i) Prepare a request to the California Supreme Court's Advisory Committee on the Code of Judicial Ethics to amend the canons to permit with appropriate safeguards a judge who sits concurrently on a tribal court and a state court to fundraise on behalf of a tribal court.	2	Judicial Council Direction: Strategic Plan Goal II Operational Plan Objective 3 Origin of Project: Forum cochair Resources: Forum and California Supreme Court's Advisory Committee on the Code of Judicial Ethics Judicial Council Staffing: CFCC	2017	Request prepared and submitted. Amended canon permitting judges who sit concurrently on tribal court and a state court to fundraise on behalf of a tribal court.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	(ii) Make recommendation to the California State Bar Association to waive pro hac vice fees for out-of-state counsel representing tribes in ICWA cases.		Collaborations: Key Objective Supported: 2 Increase Tribal/State partnerships that identify issues of mutual concern and proposed solutions.		
8.	**Increase Tribal/State Partnerships: A. Sharing Resources and Communicating Information About Partnerships** *Major Tasks:* (i) Identify Judicial Council and other resources that may be appropriate to share with tribal courts. (ii) Identify tribal justice resources that may be appropriate to share with state courts. (iii)Identify grants for tribal/state court collaboration. (iv)Share resources and information about partnerships through Forum E-Update, a monthly electronic newsletter. (v) Publicize these partnerships at conferences, on the Innovation Knowledge Center (IKC), and at other in-person or online venues.	2	Judicial Council Direction: Strategic Plan Goal I: Access, Fairness, and Diversity Operational Plan Objectives 1, 2, 4: • Ensure that all court users are treated with dignity, respect, and concern for their rights and cultural backgrounds, without bias or appearance of bias, and are given an opportunity to be heard. • Expand the availability of legal assistance, advice and representation for litigants with limited financial resources. Strategic Plan Goal IV: Quality of Justice and Service to the Public. Operational Plan Objectives 1, 3: • Foster excellence in public service to ensure that all court users receive satisfactory services and outcomes.	Ongoing	Increased Tribal/State partnerships for sharing resources and communicating information.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			• Develop and support collaborations to improve court practices to leverage and share resources and to create tools to educate court stakeholders and the public. Origin of Projects: Forum and California State-Federal Judicial Council Resources: Forum Judicial Council Staffing: CFCC Collaborations: Local tribal and state courts Key Objective Supported: 2		
9.	**Increase Tribal/State Partnerships:** **B. Education and technical assistance to promote partnerships and understanding of tribal justice systems** *Major Tasks:* (i) Make recommendation to Judicial Council staff to continue providing educational and technical assistance to local tribal and state courts to address	2	Judicial Council Direction: Strategic Plan Goal I Operational Plan Objectives 1, 2, 4 Strategic Plan Goal IV Operational Plan Objectives 1, 3 Origin of Projects: Forum and California State-Federal Judicial Council Resources: Forum	Ongoing	Increased Tribal/State partnerships for educational and technical assistance.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	domestic violence and child custody issues in Indian country. (ii) Make recommendation to Judicial Council staff to provide technical assistance to evaluate the joint jurisdictional court and to courts wishing to replicate the model. (iii) Make recommendation to the Judicial Council staff to continue developing civic learning opportunities for youth that exposes them to opportunities and careers in tribal and state courts. (iv) Make recommendation to explore, at the option of tribes, opportunities for state and federal court judges to serve as a tribal court judge.		Judicial Council Staffing: CFCC Collaborations: Local tribal and state courts Key Objective Supported: 2		
10.	**Increase Tribal/State Partnerships:** **C. Tribal/State collaborations that increase resources for courts** Develop and implement strategy to seek resources for tribal/state collaborations.	2	Judicial Council Direction: Strategic Plan Goal IV Operational Plan Objectives 1, 3 Origin of Projects: Forum Resources: Forum Judicial Council Staffing: CFCC Collaborations: Local tribal and state courts Key Objective Supported: 2	Ongoing	Tribal/State collaborations that increase resources for courts.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
11.	**Education:** **A. Judicial Education** *Major Tasks:* (i) In collaboration with the CJER Curriculum Committees, consult on and participate in making recommendations to revise the CJER online toolkits so that they integrate resources and educational materials from the forum's online federal Indian law toolkit. Forum judges are working together with committee representatives from the following curriculum committees: (1) Access, Ethics, and Fairness, (2) Civil, (3) Criminal, (4) Family, (5) Juvenile Dependency and Delinquency, and (6) Probate. (ii) Develop a ten-minute mentor video on the Information Bulletin relating to the recognition and enforcement of tribal protection orders, issued by the California Office of the Attorney General. This Information Bulletin was the culmination of work by the forum in partnership with the California Department of Justice (DOJ), the California State Sheriffs' Association, the U.S. Attorney	2	Judicial Council Direction: Strategic Plan Goal V Operational Plan Objective 1: Provide relevant and accessible education and professional development opportunities for all judicial officers (including court-appointed temporary judges) and court staff. Origin of Projects: Forum and California State-Federal Judicial Council Resolution (June 1, 2012) Resources: CJER, Forum, and DOJ Judicial Council Staffing: CFCC and CJER Key Objective Supported: 3	Ongoing, completion date depends on funding.	CJER toolkits, located on the Judicial Resources Network, will be updated to include federal Indian law. Ten-minute educational video to be posted online and shared statewide with justice partners.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	General's Office, and other justice partners.				
12.	**Education:** **B. Education –Documentary** Having consulted on and participated in the production of a documentary about tribal justice systems in California, the forum will be exploring ways to use the film to educate judges and justice partners on tribal justice systems. The forum will consider consulting on the development of online curriculum to complement the film.	2	Judicial Council Direction: Strategic Plan Goal V Operational Plan Objective 1 Origin of Projects: Forum and California State-Federal Judicial Council Resolution (June 1, 2012) Resources: Forum Judicial Council Staffing: CFCC Key Objective Supported: 3	2017	Wide distribution of the film and use of training materials that complement the film.
13.	**Education** **C. Truth and Reconciliation** Consider collaboration among the three branches of state government in partnership with tribal governments to promote a truth and reconciliation project that acknowledges California's history, as described in Professor Benjamin Madley's book, An American Genocide: The United States and the California Indian Catastrophe, with respect to indigenous peoples, fosters an understanding of our shared history, and lays a foundation	2	Judicial Council Direction: Strategic Plan Goal I Operational Plan Objectives 1, 2, 4 Strategic Plan Goal IV Operational Plan Objectives 1, 3 Judicial Council Direction: Strategic Plan Goal V Operational Plan Objective 1 Origin of Projects: Forum Resources: Forum Judicial Council Staffing: CFCC		

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	for reconciliation, which promotes a call to action.		Collaborations: Tribal Governments and State Government Key Objective Supported: 2		

III. STATUS OF 2016 PROJECTS:

[List each of the projects that were included in the 2016 Annual Agenda and provide the status for the project.]

#	Project	Completion Date/Status
1.	**Policy Recommendations:** **A. Legislative Study** SB 406, Judicial Council-sponsored legislation, included a "sunset" provision (Code of Civ. Proc. § 1742) providing that the legislation will expire on January 1, 2018, unless legislative action is taken to extend it. **B. Promote Policy** The California Department of Public Health would not issue a birth certificate based on a tribal parentage order. The forum worked with the executive branch to issue an agency directive that would recognize tribal parentage orders.	A. October 6, 2016/Study completed and upon recommendation by the California Law Review Commission, Legislature is likely to remove the sunset provision. B. February 9, 2016/California Department of Public Health – Vital Records (CDPH-VR) issued an All County Letter clarifying its policy regarding the acceptance of Tribal Court Orders relating to adjudications of facts of parentage.
2.	**Policy Recommendation:** **C. Rules and Forms–Indian Child Welfare Act (ICWA)** 1. In response to the California Supreme Court decision in *In re Abbigail A.* (2016) (Cal.5th 83), the forum recommend amending California Rules of Court, rule 5.482, by deleting subdivision (c) of that rule, which the Supreme Court held is invalid. The Family and Juvenile Law Advisory Committee and Probate and Mental Health Advisory Committee joined in this recommendation, and on July 29, 2016, the Judicial Council adopted this recommendation. 2. Forum reviewed pending *Regulations for State Courts and Agencies in Indian Child Custody Proceedings* (as published in the Federal Register on March 20, 2015, (Vol. 80 FR No. 54 14880) and approved Bureau of Indian Affairs Guidelines (as published in the Federal Register on December 30, 2016, (Vol. 81 FR No. 251 96476) for possible amendments to Title 5. Family and Juvenile rules relating to ICWA.	1. July 29, 2016/Effective date of August 15, 2016 2. Ongoing

3.	**Policy Recommendations:** **D. Technological Initiatives** 1. Consulted with the California Attorney General's Office regarding access to California Law Enforcement Telecommunications System (CLETS) by tribal courts. This consultation, which included federal and other state justice partners, resulted in an Informational Bulletin issued by the California Department of Justice. This Information Bulletin clarifies that verification of a tribal protection order in any statewide database (e.g., CLETS) is not a precondition to recognition and enforcement of these orders. 2. Recommended Judicial Council staff continue giving tribal courts access to the California Courts Protective Order Registry (CCPOR). 3. Due to lack of staffing resources, the forum did not explore the development of an electronic application to improve inquiry and notice under ICWA.	1. November 29, 2016/Information Bulletin issued by the California Department of Justice. 2. Ongoing 3. Project will be undertaken next year if prioritized by the forum.
4.	**Policy Recommendation:** **E. Other** Due to lack of staffing resources and competing priorities, the forum did not prepare a request to the California Supreme Court's Advisory Committee on the Code of Judicial Ethics to amend the canons to permit a judge who sits concurrently on a tribal court and a state court to fundraise on behalf of a tribal court.	Project will be undertaken next year if prioritized by the forum.
5.	**Increase Tribal/State Partnerships:** **A. Sharing Resources and Communicating Information About Partnerships** 1. Disseminated information to tribal court judges and state court judges on a monthly basis through the Forum E-Update, a monthly electronic newsletter with information on the following: • Grant opportunities; • Publications;	Ongoing

	• News stories; and • Educational events. 2. Fostered tribal court/state court partnerships, such as the Superior Court of Los Angeles County's Indian Child Welfare Act Roundtable and the Bay Area Collaborative of American Indian Resources—court-coordinated community response to ICWA cases in urban areas.	
6.	**Increase Tribal/State Partnerships:** **B. Education and Technical Assistance to Promote Partnerships and Understanding of Tribal Justice Systems** 1. Continue to provide the **S**tate/**T**ribal **E**ducation, **P**artnerships, and **S**ervices (S.T.E.P.S.) to Justice—Domestic Violence and Child Welfare programs and provide local educational and technical assistance services. 2. Continue the first joint jurisdictional court in California. The Superior Court of El Dorado County, in partnership with the Shingle Springs Band of Miwok Indians, is operating a family wellness court. Next year, will provide technical assistance to evaluate the joint jurisdictional court. (See Court Manual). 3. Establish partnership between the Superior Court of Humboldt County and the Yurok Tribal Court to develop a civics learning opportunity for youth in the region.	Ongoing
7.	**Increase Tribal/State Partnerships:** **C. Tribal/State Collaborations that Increase Resources for Courts** Obtained funding from the U.S. Department of Justice, Office on Violence Against Women, which is administered through the California Office of Emergency Services (Cal OES). This funding pays for the S.T.E.P.S. to Justice—Domestic Violence and associated travel expenses for judges to participate in cross-court educational exchanges. These exchanges are judicially led and shaped by the host judges (one tribal court judge and one state court judge) and enable the judges to continue the dialogue on	Ongoing

	domestic violence and elder abuse in tribal communities, which began as part of a statewide needs assessment. At these exchanges, judges utilize a checklist of problems and solutions identified through the needs assessment to determine how they can work together to address these issues locally. Obtained funding from the California Department of Social Services. This funding pays for the associated travel expenses for forum members to improve compliance with ICWA.	
8.	**Education** **A. Judicial Education** 1. Made recommendations to CJER to incorporate federal Indian law into all appropriate educational publications and programming for state court judges and advise on content; revisions to include federal Indian law; and the inter-jurisdictional issues that face tribal and state courts. 2. Convened a cross-court educational exchange at Hopland for over 60 participants on behalf of the Superior Court of Mendocino County and the Northern California Intertribal Court System. The focus was domestic violence prevention and child welfare. 3. Participated in a meeting convened by the National Council of Juvenile and Family Court Judges to develop resources to address ICWA and domestic violence cross-over issues in Indian country. 4. Hosted a national gathering of tribal/state court forums at the Second Appellate District of the Court of Appeal in Los Angeles. 5. Held annual in-person meeting, which also serves as an educational program. 6. Presented to the California Commission on Access to Justice. 7. Convened a cross-court educational exchange in Klamath on child support.	1. Ongoing, completion date depends on resources to incorporate recommendations. 2. December 2016 3. April 2016 4. June 2016 5. June 2016 6. September 2016 7. October 2016

	8. Prepared a judicial job aid on the new federal regulations and guidelines on ICWA. 9. Sponsored two judicial educational programs: (1) Pre-Institute ICWA Roundtable This roundtable brought together California tribal and state court judges as well as nationally known experts to explore, through interactive case scenarios, legal topics such as new federal mandates under ICWA, recent case law developments, and how to avoid reversals in these cases. The focus was on practical implications of recent development to juvenile child welfare courts in California. The roundtable complemented the Juvenile Law Institute workshop on ICWA (2) Juvenile Law Institute Workshop on ICWA This workshop covered the new comprehensive federal ICWA regulations, which became effective December 12, 2016. In addition, the workshop discussed significant recent cases, including two important California Supreme Court cases, and highlighted important practice changes as a result of the new federal requirements.	8. November 2016 9. December 5, 2016
9.	**Education** **D. Documentary** Consult on and participate in the production of a documentary describing tribal justice systems and highlighting collaboration between these systems and the state justice system.	February 2017/Documentary is completed. Accepted for distribution through Corporation for Public Broadcasting, Point of View series. Submission to film festivals pending.
10.	**Education** **E. ICWA Roundtable** Cosponsored the Pre-Institute ICWA Roundtable (see item 8 above) in collaboration with CASEY Family Programs and the National American Indian Judges Association.	December 5, 2016

IV. Subgroups/Working Groups - Detail

Subgroups/Working Groups: *None*

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
March 21, 2017

To
Tribal Leaders

From
Hon. Abby Abinanti, Cochair Tribal Court–State Court Forum
Chief Judge of the Yurok Tribal Court

Hon. Dennis M. Perluss, Cochair
Tribal Court–State Court Forum
Presiding Justice of the Court of Appeal, Second Appellate District, Division Seven

Subject
Tribal Court–State Court Forum: Four Tribal Court Judge Vacancies

Action Requested
Please Review

Deadline
May 12, 2017

Contact
Ann Gilmour, Attorney
Tribal Court–State Court Forum
415-865-4207 phone
415-865-7217 fax
ann.gilmour@jud.ca.gov

As cochairs of the Tribal Court–State Court Forum (forum), we are writing to notify you of four tribal court judge vacancies and describe the selection and appointment process.

Established in May 2010, the forum is a coalition of the various tribal court and state court leaders who come together as equal partners to address areas of mutual concern. In October 2013, the Judicial Council adopted rule 10.60 of the California Rules of Court establishing the forum as a formal advisory committee. In adopting this rule, the council added a comment acknowledging that tribes are sovereign and citing statutory and case law recognizing tribes as distinct, independent political nations that retain inherent authority to establish their own form of government, including tribal justice systems.

Under rule 10.60, the forum's composition must have an equal or a close-to-equal number of judges or justices from tribal courts and state courts. Forum members are appointed for three-year terms, and every year approximately one third of our members' terms expire.

If your tribe has a tribal court and there is not already a judge from your court serving on the forum, we invite you to submit the name of one of your tribal court judges to serve on the forum by completing the form at this link http://www.courts.ca.gov/4650.htm. If your judge has been serving on the forum and his or her term is expiring, we encourage you to consider reappointment. Should we receive more than four names for the four vacancies, then consistent with rule 10.60(d), the forum cochairs will confer and decide which tribal court judges should be appointed. Their decision will be based on the diverse background and experience of the tribal court judges whose names are submitted, as well as the geographic location of the current membership.

Should you have any questions, please do not hesitate to contact either one of us or Ms. Ann Gilmour. We look forward to continuing our collaboration with your court either through your tribe's continued participation on the forum or through our many forum projects.

AA/DMP/AG/cb

JUDICIAL COUNCIL OF CALIFORNIA

2017 Tribal Court-State Court Forum (forum)

There are four (4) tribal court judge vacancies on the forum. Please submit this form by May 12, 2017.

Tribal Court Judge Information

Name of Tribal Court Judge:_____

Name of Tribal Court:_____

Mailing address: _____

City:_____ Zip:_____

Phone:_____ Fax: _____

E-mail:_____

Tribal Leader Information

Name:_____ Title: _____

Name of Tribe: _____

Mailing address: _____

City:_____ Zip:_____

Phone:_____ Fax: _____

E-mail:_____

☐ Please check here to confirm that the tribal judge has been contacted and indicated a willingness to serve if appointed.

☐ Tribal Judge's bio or curriculum vitae is attached.

PLEASE RETURN POSTMARKED OR BY FAX OR E-MAIL NO LATER THAN MAY 12, 2017

Please return by mail, fax or e-mail
Attention: Carolynn Bernabe
Fax: 415-865-7217 or e-mail: carolynn.bernabe@jud.ca.gov or mail to:
Judicial Council of California, Center for Families Children & the Courts
Attention: Carolynn Bernabe
455 Golden Gate Avenue, 6th Floor
San Francisco, CA 94102

Rule 10.60. Tribal Court-State Court Forum

(a) Area of focus

The forum makes recommendations to the council for improving the administration of justice in all proceedings in which the authority to exercise jurisdiction by the state judicial branch and the tribal justice systems overlaps.

(b) Additional duties

In addition to the duties described in rule 10.34, the forum must:

(1) Identify issues of mutual importance to tribal and state justice systems, including those concerning the working relationship between tribal and state courts in California;

(2) Make recommendations relating to the recognition and enforcement of court orders that cross jurisdictional lines, the determination of jurisdiction for cases that might appear in either court system, and the sharing of services between jurisdictions;

(3) Identify, develop, and share with tribal and state courts local rules of court, protocols, standing orders, and other agreements that promote tribal court-state court coordination and cooperation, the use of concurrent jurisdiction, and the transfer of cases between jurisdictions;

(4) Recommend appropriate activities needed to support local tribal court-state court collaborations; and

(5) Make proposals to the Governing Committee of the Center for Judicial Education and Research on educational publications and programming for judges and judicial support staff.

(c) Membership

The forum must include the following members:

(1) Tribal court judges or justices selected by tribes in California, as described in (d), but no more than one tribal court judge or justice from each tribe;

(2) At least three trial court judges from counties in which a tribal court is located;

(3) At least one appellate justice of the California Courts of Appeal;

(4) At least one member from each of the following committees: the Access and Fairness Advisory Committee, Civil and Small Claims Advisory Committee, Criminal Law Advisory Committee, Family and Juvenile Law Advisory Committee, Governing Committee of the Center for Judicial Education and Research, Probate and Mental Health Advisory Committee, and Traffic Advisory Committee; and

(5) As ex officio members, the Director of the California Attorney General's Office of Native American Affairs and the Governor's Tribal Advisor.

The composition of the forum must have an equal or a close-to-equal number of judges or justices from tribal courts and state courts.

(d) Member Selection

(1) The Chief Justice appoints all forum members, except tribal court judges and tribal court justices, who are appointed as described in (2).

(2) For each tribe in California with a tribal court, the tribal leadership will appoint the tribal court judge or justice member to the forum consistent with the following selection and appointment process.

(A) The forum cochairs will notify the tribal leadership of a vacancy for a tribal court judge or justice and request that they submit names of tribal court judges or justices to serve on the forum.

(B) A vacancy for a tribal court judge or justice will be filled as it occurs either on the expiration of a member's term or when the member has left the position that qualified the member for the forum.

(C) If there are more names of tribal court judges and justices submitted by the tribal leadership than vacancies, then the forum cochairs will confer and decide which tribal court judges or justices should be appointed. Their decision will be based on the diverse background and experience, as well as the geographic location, of the current membership.

(e) Cochairs

The Chief Justice appoints a state appellate justice or trial court judge and a tribal court appellate justice or judge to serve as cochairs, consistent with rule 10.31(c).

Rule 10.60 adopted effective October 25, 2013.

Judicial Council Comment

Tribes are recognized as distinct, independent political nations (see *Worcester v. Georgia* (1832) 31 U.S. 515, 559, and *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 55, citing *Worcester*), which retain inherent authority to establish their own form of government, including tribal justice systems. (25 U.S.C.A. § 3601(4).) Tribal justice systems are an essential part of tribal governments and serve to ensure the public health and safety and the political integrity of tribal governments. (25 U.S.C.A. § 3601(5).) Traditional tribal justice practices are essential to the maintenance of the culture and identity of tribes. (25 U.S.C.A. § 3601(7).)

The constitutional recognition of tribes as sovereigns in a government-to-government relationship with all other sovereigns is a well-established principle of federal Indian law. (See *Cohen's Handbook of Federal Indian Law* (2005) p. 207.) In recognition of this sovereignty, the council's oversight of the forum, through an internal committee under rule 10.30(d), is limited to oversight of the forum's work and activities and does not include oversight of any tribe or tribal court.

PUBLIC

Tribal Court-State Court Forum

As of March 2017

Hon. Dennis M. Perluss, Co-Chair
Presiding Justice of the Court of Appeal
Second Appellate District, Division Seven

Hon. Abby Abinanti, Co-Chair
(Yurok)
Chief Judge of the Yurok Tribal Court
Klamath, California

Hon. April E. Attebury
(Karuk)
Chief Judge of the Karuk Tribal Court
Yreka, California

Hon. Richard C. Blake
(Tolowa Dee-Ni', Hoopa and Redding Rancheria)
Chief Judge of the Tolowa Dee-Ni' Nation,
Hoopa and Redding Rancheria Tribal Court
Hoopa, Redding, and Smith River,
California

Hon. Hilary A. Chittick
Judge of the Superior Court of California,
County of Fresno

Ms. Jacqueline Davenport
Assistant Court Executive Officer
Superior Court of California,
County of El Dorado

Hon. Gail Dekreon
Judge of the Superior Court of California,
County of San Francisco

Hon. Leonard P. Edwards (Ret.)
Volunteer Mentor Judge of the
Center for Families, Children & the Courts
Judicial Council of California

Hon. Kimberly A. Gaab
Assistant Presiding Judge of the Superior Court of California,
County of Fresno

Hon. Michael Golden
Chief Judge of the Morongo Tribal Court
Banning, California

Hon. Cynthia Gomez
(Tule River Yokut Tribe)
Tribal Advisor of the Office of Governor
Edmund G. Brown, Jr.
Sacramento, California

Mr. Olin Jones
(The Chickasaw Nation of Oklahoma)
Director of the Office of Native American
Affairs, California Attorney General's Office
Sacramento, California

Hon. Mark A. Juhas
Judge of the Superior Court of California,
County of Los Angeles

Hon. Lawrence C. King
Chief Judge of the Colorado River Indian Tribes
Parker, Arizona

Tribal Court-State Court Forum

As of February 2017

Hon. Suzanne N. Kingsbury
Presiding Judge of the Superior Court of California,
County of El Dorado

Hon. William Kockenmeister
Chief Judge of the Bishop Paiute Indian
Tribal Court
Bishop, California

Chief Judge of the Washoe Tribal Court
Gardnerville, California

Hon. Anthony Lee
(St. Regis Mohawk Tribe)
Chief Judge of the San Manuel Tribal Court
Highland, California

Hon. Patricia Lenzi
Chief Judge of the Cedarville Rancheria of Northern
Paiute Indians Tribal Court
Alturas, California

Hon. Lester J. Marston
(Chiricahua and Cahuilla)
Chief Judge of the Blue Lake
Rancheria Tribal Court
Blue Lake, California

Hon. Mark Radoff
Chief Judge of the Chemehuevi Tribal Court
Havasu Lake, California

Hon. David A. Riemenschneider
Judge of the Superior Court of California,
County of Mendocino

Hon. John H. Sugiyama
Judge of the Superior Court of California,
County of Contra Costa

Hon. Allen H. Sumner
Judge of the Superior Court of California,
County of Sacramento

Hon. Sunshine S. Sykes
Judge of the Superior Court of California,
County of Riverside

Hon. Juan Ulloa
Judge of the Superior Court of California,
County of Imperial

Hon. Claudette C. White
(Quechan)
Chief Judge of the Quechan Tribal Court
Winterhaven, California

Hon. Christine Williams
(Yurok)
Chief Judge of the Shingle Springs Tribal Court
Shingle Springs, California

Hon. Christopher G. Wilson
Assistant Presiding Judge of the Superior Court of
California,
County of Humboldt

Tribal Court-State Court Forum

As of February 2017

Hon. Joseph J. Wiseman
Chief Judge of the Dry Creek Rancheria Band of Pomo Indians
Santa Rosa, California

Chief Judge of the Northern California Intertribal Court System
Hopland, California

Hon. Daniel Zeke Zeidler
Judge of the Superior Court of California,
County of Los Angeles

INFORMATION TECHNOLOGY ADVISORY COMMITTEE LIAISON

Hon. Joseph J. Wiseman
Chief Judge of the Dry Creek Rancheria Band
Chief Judge of the Northern California Intertribal Court System

TRIAL COURT PRESIDING JUDGES AND COURT EXECUTIVES ADVISORY COMMITTEES LIAISON

Hon. Suzanne N. Kingsbury
Presiding Judge of the Superior Court of California, County of El Dorado

JUDICIAL COUNCIL STAFF TO THE COMMITTEE

Ms. Ann Gilmour
Attorney
Center for Families, Children & the Courts
Operations and Programs Division
Judicial Council of California

Ms. Carolynn Bernabe
Administrative Coordinator
Center for Families, Children & the Courts
Operations and Programs Division
Judicial Council of California

CALIFORNIA
TRIBAL COURT–STATE COURT
FORUM

January 2017

Accomplishments—Highlights (2010-2016)

Below are some of the key accomplishments of the forum:

1. Sharing of Resources: judicial education and technical assistance to support each other's court capacity to meet the needs of its citizens. Resources have extended to areas of court forms, collaborative justice, court security, grants, human resources, protective order database information, supervised visitation, self-help, and other areas.
   - *Forum E-Update*
     This monthly electronic newsletter disseminates information to forum members (tribal court judge and state court judges) and forum friends (any interested person) on grant opportunities, publications, news stories, and educational events. (*http://www.courts.ca.gov/3065.htm*)
   - *Tribal/State/Federal Court Administrator Toolkit*
     This toolkit encourages cross-court site visits and to facilitate shared learning among local tribal, state, and federal courts in California. The toolkit is endorsed by the following groups: California Court Clerks Association, California State-Federal Judicial Council, the California Tribal Court Clerks Association, the California Court Executives Advisory Committee, the National Judicial College, and the Tribal Court–State Court Forum.
     (http://www.courts.ca.gov/documents/courttoolkit-tribalstatefederal-adminclerks.pdf)

2. Developing New Resources: curriculum on civil and criminal jurisdiction in a Public Law 280 state, educational offerings at tribal and state court sponsored trainings, updates to existing judicial curriculum and benchguides, and creation of a website to serve as a clearinghouse of resources.

3. Collection of Tribe-Specific Data and Information
   - population characteristics (*http://www.courts.ca.gov/documents/Tribal-ResearchUpdate-NAStats.pdf*)
   - domestic and other violence and victimization statistics (*www.courts.ca.gov/documents/NatAmStatsAbUpdate.pdf*)
   - tribal court directory (*www.courts.ca.gov/14400.htm*) and map (*http://g.co/maps/cvdq8*)
   - tribal justice systems *(http://www.courts.ca.gov/documents/TribalJusticeSystemRU.pdf)*

4. Focus on Innovation and Collaboration Through Judicial Leadership
   - Cross-Cultural Court Exchanges
     These exchanges both 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. Since no court order is self-executing, these exchanges serve to support both state and tribal courts by ensuring that those who are providing court-connected services are working together to meet the needs of their tribal communities regardless of whether citizens walk through the tribal or state courthouse doors. To date, the Tribal/State Programs staff has assisted tribal and state court judges in convening nine exchanges on the following tribal lands: Bishop Paiute, Hopland, Hoopa, Karuk, Quechan, and Yurok.
   - *Documentary on Tribal Justice*
     The forum has consulted on and participated in the production of this film, which premiered at the Santa Barbara Film Festival in 2017. This film follows two forum members: Judge Abby Abinanti, Chief Judge of the Yurok Tribe, and Judge Claudette White, Chief Judge of the Quechan Tribe. It shows how they are creating innovative justice systems that focus on restoring rather than punishing offenders in order to keep tribal members out of prison, prevent children from being taken from their communities, and stop the school-to-prison pipeline that plagues their young people. (To learn more about the film and watch a 4 minute trailer, http://www.makepeaceproductions.com/tribaljustice/spotlight/)
   - *Joint Jurisdictional Court- Family Wellness Court*
     The forum, at its first meeting, made it a priority to learn about and replicate the first joint jurisdiction tribal-state court in the nation, the Leech Lake-Cass County Wellness Court. Thanks to a technical assistance grant obtained from the Bureau of Justice Assistance of the Federal Department of Justice and the mentorship of Judge Korey Wahwassuck and Judge John Smith, who started the first joint jurisdictional court in the country, the forum was able to launch a joint jurisdictional court in California. Forum members, Judge Christine Williams, Chief Judge of the Shingle Springs Tribal Court, and Judge Suzanne N. Kingsbury, Presiding Judge of the Superior Court El Dorado County, created the Family Wellness Court. (*http://www.wellnesscourts.org/files/Shingle%20Springs%20El%20Dorado%20Family%20Wellness%20Court%20Manual.pdf*)
   - Local Tribal/State Partnerships
     The forum fosters tribal court/state court partnerships, such as the Los Angeles Superior Court's Indian Child Welfare Act Roundtable and the Bay Area Collaborative of American Indian Resources— court-coordinated community response to Indian Child Welfare Act (ICWA) cases in urban areas.

5. Focus on Child Support: rule governing title IV-D case transfers to tribal court
Developed a rule proposal, which provides a consistent procedure for the discretionary transfer of Title IV-D child support cases from the state superior courts to tribal courts where there is concurrent jurisdiction over the matter in controversy. The Judicial Council adopted the rule proposal, effective January 1, 2014. (*www.courts.ca.gov/documents/ChildSupportProposalSPR13-17.pdf*)

6. Focus on Civil Money Judgments
SB 406: Tribal Court Civil Money Judgment Act, which will simplify and clarify the process by which tribal court civil money judgments are recognized and enforced in California. For Judicial Council reports, see Invitation to Comment 2011: http://www.courts.ca.gov/documents/LEG11-03.pdf; Invitation to Comment 2012: http://www.courts.ca.gov/documents/LEG11-04.pdf; and Final Report: *www.courts.ca.gov/documents/jc-20121214-itemG.pdf*. For chaptered bill, see http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0401-0450/sb_406_bill_20140822_chaptered.pdf. In collaboration with Professor Katherine Florey at the U.C. Davis School of Law, the forum conducted a study on the impact of SB 406 that surveyed state court judges, tribal court judges, and tribal practitioners:
https://www.surveymonkey.com/r/tribalpractitioners
https://www.surveymonkey.com/r/statecourts
https://www.surveymonkey.com/r/tribalcourts
Because of this study and the recommendation by the California Law Review Commission, the California Legislature will be considering removing the sunset provision in SB 406.

7. Focus on Domestic Violence: recognition and enforcement of protective orders
    - *Statewide Needs Assessment.* This assessment informs the work of the forum as it implements solutions identified in the California reports relating to domestic violence, sexual assault, stalking, and teen dating violence in Native American communities (*www.courts.ca.gov/8117.htm*)
    - *California Courts Protective Order Registry.* By sharing information on restraining and protective orders, state courts and tribal courts are better able to protect the public, particularly victims of domestic violence, and avoid conflicting orders. (*www.courts.ca.gov/15574.htm*)
    - *Domestic Abuse Self-Help Tribal Project.* Assistance for litigants with obtaining restraining orders in tribal courts and state courts. In this project, a nonlawyer works under the supervision of a reviewing attorney to assist the litigant. The attorney can supervise from any location with technology, training, and review of the nonlawyer's work. (*www.courts.ca.gov/documents/FactSheetDASH.pdf*)
    - *Efficient and Consistent Process.* Following effective local tribal and state court protocols, the Judicial Council adopted rule 5.386, which provides that state courts, when requested by a tribal court, must adopt a written procedure or local rule to permit the fax or electronic filing of any tribal court protective order that is

entitled to be registered under Family Code section 6404. (*www.courts.ca.gov/documents/SPR11-53.pdf*)

- *Jurisdictional Tools for Law Enforcement and Judges*
  These educational tools facilitate collaboration among tribal police and county law enforcement. They were developed in collaboration with the following groups: California Department of Justice, California Peace Officers Standards and Training, California Indian Legal Services, California State Sheriff's Association, and the Tribal Police Chief's Association in California. (*http://www.courts.ca.gov/documents/Tribal-Law-enforcment-tools.pdf*)
- *Information Bulletin on Recognition and Enforcement of Tribal Protection Orders*
  Consulted with the California Attorney General's Office regarding access to California Law Enforcement Telecommunications System (CLETS) by tribal courts. This consultation, which included federal and other state justice partners, resulted in an Informational Bulletin issued by the California Department of Justice. This Information Bulletin clarifies that verification of a tribal protection order in any statewide database (for example, the California Law Enforcement Telecommunications System (CLETS)) is not a precondition to recognition and enforcement of these orders. *(http://www.courts.ca.gov/documents/tribal_bulletin-court-protection-orders.pdf)*
- *Judicial Toolkit on Federal Indian Law* (*http://www.courts.ca.gov/27002.htm*)
- *Public Law 280 and Family Violence Curriculum for Judges* (*www.courts.ca.gov/documents/Tribal-FamViolenceCurriculum.pdf*)
- *Recognition and Enforcement of Tribal Protective Orders (Informational Brochure)* (*http://www.courts.ca.gov/documents/Tribal-DVProtectiveOrders.pdf*)
- *Tribal Advocates Curriculum* (*www.courts.ca.gov/documents/TribalAdvocacyCurriculum.pdf*)
- *Tribal Communities and Domestic Violence Judicial Benchguide* *(http://www.courts.ca.gov/documents/Tribal-DVBenchguide.pdf)*

8. Focus on Elder Abuse and Protection Proceedings
   - *SB 940: California Conservatorship Jurisdiction Act*, which will address issues involving conservatorships for members of Indian tribes located in California. The forum initiated a joint working group with the California Judicial Council's Probate and Mental Health Advisory Committee to identify tribal/state issues relating to elder abuse and protective proceedings. This working group reviewed the California Law Revision Commission's (CLRC) recommendation that California adopt a modified version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). Working in coordination with the Policy and Coordination Liaison Committee and the Office of Governmental Affairs, the forum submitted legislative language to CLRC to address issues involving conservatorships for members of Indian tribes located

California. As a result, the CLRC-sponsored legislation, the California Conservatorship Jurisdiction Act (SB 940), incorporates the forum's recommended revisions. http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0901-0950/sb_940_bill_20140925_chaptered.pdf

- *Published Tribal Elder Abuse Benchguide* and incorporated into California Judge's Guide: Abuse Later in Life. http://www.courts.ca.gov/documents/Elder_Abuse_Tribal_Communities.pdf

9. Focus on Juvenile Cases: rule proposals, legislative proposals, and legislative reports
   - *Appeals:* developed a rule proposal to revise the rule governing sending the record in juvenile appeals to clarify that, if an Indian tribe has intervened in a case, a copy of the record of that case must be sent to that tribe. The Judicial Council adopted the rule proposal, effective January 1, 2013. (*www.courts.ca.gov/documents/SPR11-12.pdf*)
   - *Access to Records (AB 1618):* developed a legislative proposal to amend Welfare and Institutions Code section 827 to share juvenile records between tribal and state courts. This proposal was adopted by the Judicial Council and introduced by Assemblymember Wesley Chesbro. Chaptered as Stats. 2014, Ch. 37, effective January 1, 2015. (*www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1601-1650/ab_1618_bill_20140625_chaptered.pdf*)
   - *Comments in support of the proposed regulations:* Indian Child Welfare Act (ICWA) Integration throughout Division 31, ORD No. 0614-05 issued by the California Department of Social Services (CDSS). (*www.courts.ca.gov/documents/Tribal_JC_Comments_CDSS.pdf*)
   - *Comments in support of proposed rule:* Regulations for State Courts and Agencies in Indian Child Custody Proceedings (as published in the Federal Register on March 20, 2015 (Vol. 80 FR No. 54 14880) (*www.courts.ca.gov/documents/Comments_by_JC_to_BIA.pdf*)
   - *Indian Child Welfare Act rule change:* In response to the California Supreme Court decision in *In re Abbigail A.* (2016) (Cal.5th 83), the forum recommend amending California Rules of Court, rule 5.482, by deleting subdivision (c) of that rule, which the Supreme Court held is invalid. The Family and Juvenile Law Advisory Committee and Probate and Mental Health Advisory Committee joined in this recommendation, and on July 29, 2016, the Judicial Council adopted this recommendation.
   - *Psychotropic medication:* recommended a rule proposal to provide notice to tribes in juvenile cases where psychotropic medication is being considered. (*www.courts.ca.gov/documents/SPR13-18.pdf*)
   - *Transfers:* recommended a rule and form proposal to improve the procedure for the transfer of court proceedings involving an Indian child from the jurisdiction of the state court to a tribal court. These changes were in response to provisions of Senate Bill 1460 (Stats. 2014, ch. 772) (SB 1460) and the Court of Appeal

decision in *In re. M.M.* (2007) 154 Cal.App.4th 897. SB 1460 requires the state juvenile court to give the tribal court specific information and documentation when a case, governed by the *Indian Child Welfare Act*, is transferred. The *In re M.M.* decision implicates an objecting party's right to appeal a decision granting a transfer to a tribal court. (*www.courts.ca.gov/documents/SPR15-27.pdf*)

- *Tribal Customary Adoption:* Provided expertise in the preparation of the statutorily mandated report on tribal customary adoption from the Judicial Council to the State Legislature. (*www.courts.ca.gov/documents/lr-Tribal-Customary-Adoption-Report_123112.pdf*)

10. Focus on Parentage
    In partnership with the California Department of Public Health-Vital Records, an All County Letter was issued in February 2016 clarifying the statewide policy that all tribal court orders relating to adjudications of facts of parentage would be accepted.

AB-905 Money judgments of other jurisdictions. (2017-2018)

Date Published: 03/13/2017 09:00 PM

AMENDED IN ASSEMBLY MARCH 13, 2017

CALIFORNIA LEGISLATURE— 2017–2018 REGULAR SESSION

ASSEMBLY BILL No. 905

Introduced by Assembly Member Maienschein

February 16, 2017

An act to amend Sections 1714, 1716, 1717, 1730, 1731, 1732, 1733, *1737,* and 1741 of, to amend the heading of Title 11 (commencing with Section 1710.10) of Part 3 of, to amend the heading of Chapter 1 (commencing with Section 1710.10) of Title 11 of Part 3 of, to add Section 1725 to, to add the heading of Chapter 3 (commencing with Section 1730) of Title 11 of Part 3 to, and to repeal Sections 1714 and 1742 of, and to repeal the heading of Title 11.5 (commencing with Section 1730) of Part 3 of, the Code of Civil Procedure, relating to civil procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 905, as amended, Maienschein. Money judgments of other jurisdictions.

Existing law establishes procedures for California courts to recognize money judgments of courts from other states, foreign countries, and tribal courts.

This bill would revise and recast these provisions.

Existing law, the Uniform Foreign-Country Money Judgments Recognition Act, requires a California court to recognize a foreign-country judgment unless a specified exception applies, including instances in which the foreign court lacks personal jurisdiction over the defendant.

This bill would specify that a foreign court lacks personal jurisdiction over a defendant if the court lacks personal jurisdiction under its own laws or California’s laws.

Existing law, the Tribal Court Civil Money Judgment Act, provides for the enforceability of tribal court money judgments in California, except as specified. That act, among other things, prescribes the procedure for applying for recognition and entry of a judgment based on a tribal court money judgment, and requires this application to be executed under penalty of perjury. The act provides that it will remain in effect until January 1, 2018. After that date, tribal court money judgments will be governed by the above-described Uniform Foreign-Country Money Judgments Recognition Act.

This bill would eliminate the Tribal Court Civil Money Judgment Act's sunset date. By extending the provisions of the act, this bill would expand the scope of the crime of perjury and thus impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. 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. MONEY JUDGMENTS OF OTHER JURISDICTIONS

SEC. 2. 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

SEC. 3. 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.

SEC. 4. Section 1714 of the Code of Civil Procedure, as added by Section 3 of Chapter 243 of the Statutes of 2014, is repealed.

SEC. 5. Section 1716 of the Code of Civil Procedure is amended to read:

1716. (a) Except as otherwise provided in subdivisions (b), (c), *(d),* and ~~(e)~~ *(f),* 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) *(1)* A court of this state ~~is not required to~~ *shall not* recognize a foreign-country judgment if any of the following apply:

~~(1)~~

(A) 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)~~

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

~~(3)~~

(C) 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)~~

(D) 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)~~

(E) 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)~~

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

~~(8)~~

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

(2) Notwithstanding an applicable ground for nonrecognition under paragraph (1), the court may nonetheless recognize a foreign-country judgment if the party seeking recognition of the judgment demonstrates good reason to recognize the judgment that outweighs the ground for nonrecognition.

(d) A court of this state is not required to recognize a foreign-country judgment if the judgment conflicts with another final and conclusive judgment.

~~(d)~~

(e) 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)~~ *(b), (c), or (d)* exists.

~~(e)~~

(f) 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.

SEC. 6. Section 1717 of the Code of Civil Procedure is amended to read:

1717. (a) For the purpose of paragraph (2) of subdivision (b) of Section 1716, a foreign court lacks personal jurisdiction over a 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.

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

SEC. 7. Section 1725 is added to the Code of Civil Procedure, to read:

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 amendable 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 regardless of when it was rendered.~~ *judgment.*

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

SEC. 8. The heading of Title 11.5 (commencing with Section 1730) of Part 3 of the Code of Civil Procedure is repealed.

SEC. 9. The heading of Chapter 3 (commencing with Section 1730) is added to Title 11 of Part 3 of the Code of Civil Procedure, to read:

CHAPTER 3. Tribal Court Civil Money Judgment Act

SEC. 10. Section 1730 of the Code of Civil Procedure is amended to read:

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

SEC. 11. Section 1731 of the Code of Civil Procedure is amended to read:

1731. (a) This 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 chapter, the Code of Civil Procedure shall apply.

(b) This 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 chapter shall be deemed or construed to expand or limit the jurisdiction of either the state or any Indian tribe.

SEC. 12. Section 1732 of the Code of Civil Procedure is amended to read:

1732. For purposes of this 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 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.

SEC. 13. Section 1733 of the Code of Civil Procedure is amended to read:

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

(b) Subject to the power of the court to transfer proceedings under this 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.

SEC. 14. *Section 1737 of the Code of Civil Procedure is amended to read:*

1737. (a) Any objection to the recognition and entry of the tribal court money judgment shall be served and filed within 30 days of service of the notice of filing. If any objection is filed within this time period, the superior court shall set a time period for replies and set the matter for a hearing. The hearing shall be held by the superior court within 45 days from the date the objection is filed unless good cause exists for a later hearing. The only grounds for objecting to the recognition or enforcement of a tribal court money judgment are the grounds set forth in subdivisions ~~(b)~~ *(b), (c),* and ~~(c).~~ *(d).*

(b) A tribal court money judgment shall not be recognized and entered if the respondent demonstrates to the superior court that at least one of the following occurred:

(1) The tribal court did not have personal jurisdiction over the respondent.

(2) The tribal court did not have jurisdiction over the subject matter.

(3) 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.

(c) *(1)* The superior court ~~may, in its discretion,~~ *shall* decline to recognize and enter a tribal court money judgment ~~on~~ *if* any one of the following ~~grounds:~~ *grounds applies:*

~~(1)~~

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

~~(2)~~

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

~~(3)~~

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

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

~~(5)~~

(D) The proceeding in the 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 tribal court.

~~(6)~~

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

~~(7)~~

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

~~(8)~~

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

~~(9)~~

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

(2) Notwithstanding an applicable ground for nonrecognition under paragraph (1), the court may nonetheless recognize a tribal court money judgment if the applicant demonstrates good reason to recognize the judgment that outweighs the ground for nonrecognition.

(d) The superior court may, in its discretion, decline to recognize and enter a tribal court money judgment if the judgment conflicts with another final and conclusive judgment.

~~(d)~~

(e) If objections have been timely filed, the applicant has the burden of establishing that the tribal court money judgment is entitled to recognition. If the applicant has met its burden, a party resisting recognition of the tribal court money judgment has the burden of establishing that a ground for nonrecognition exists pursuant to subdivision ~~(b)~~ *(b), (c),* or ~~(c).~~ *(d).*

~~**SEC. 14.**~~***SEC. 15.*** 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)) applies to all actions commenced in superior court before January 1, 2015, in which the issue of recognition of a tribal court money judgment is raised.

(b) This chapter applies to all actions to enforce tribal court money judgments as defined herein commenced in superior court on or after January 1, 2015. A judgment entered under this chapter 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 chapter.

~~**SEC. 15.**~~***SEC. 16.*** Section 1742 of the Code of Civil Procedure is repealed.

~~**SEC. 16.**~~***SEC. 17.*** No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

California ICWA Compliance Task Force

Report to the
California Attorney General's
Bureau of Children's Justice
2017

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Acknowledgments

The ICWA Compliance Task Force Co-Chairs would like to acknowledge and thank tribal leaders throughout California and other states for their dedication, support and encouragement of this Report. We would also like to express our deep gratitude to all the tribal ICWA representatives and ICWA advocates for their assistance, wisdom and guidance in the development of this Task Force Report. Thank you for sharing your stories, concerns and hopes with us. We would also like to acknowledge and thank Delia Sharpe, Directing Attorney, California Indian Legal Services' Eureka Office; Kimberly Cluff, In-House General Counsel, Morongo Band of Mission Indians; and Maureen Geary, Attorney, Maier Pfeffer Kim Geary & Cohen LLP. It is because of their efforts in supporting this work that the ICWA Compliance Task Force Report has become a reality.

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Executive Summary

At the time of its passage in 1978, the Indian Child Welfare Act, 25 U.S.C. §1901 et seq., (ICWA) was considered landmark civil rights legislation. When California passed what has become known as Cal-ICWA, legislation to adopt many of the protections of the federal ICWA into state law, it was again a landmark moment for the American Indian community. Unfortunately, the promise and potential of the federal ICWA and the Cal-ICWA have not been realized, as neither the letter nor the spirit of the law has been fully implemented.

In 2015, the California ICWA Compliance Task Force came together, after meetings with the Bureau of Children's Justice (BCJ), a newly created Bureau of the California Department of Justice, Office of the Attorney General, to gather narratives and data regarding the failure of ICWA implementation. The goal was that the narratives and data be used in a concerted effort to target reform at non-compliant entities within the dependency system. The intended audience for this work began as the BCJ but has grown to include many branches of state government and other stakeholders.

This Report is the culmination of the Task Force effort thus far, but it is not the end of the effort. This Report is an essential first step, an attempt to examine the issues and frame solutions. As an epicenter of ICWA cases (with more ICWA appeals than any other state), as the home of some of the most divisive and controversial cases involving the ICWA and as a state at the cutting edge of innovation and reform, California has a monumental task ahead to fulfill the promises made to Indian tribes, Indian communities and Indian families in 1978. We, as the Co-Chairs of the Task Force, believe the important work has started with the presentation of this Report but we, as tribal leaders, must ensure that the work continues with our partners in the Governor's office, the Office of the Attorney General, the Judicial Council, the California Bar Association and the California Department of Social Services.

It is essential to make clear that this Report and the Task Force itself do not state or hold as true that there has been no effort or progress in ICWA implementation over the last decades; there has been incremental progress with sincere and innovative efforts to address concerns that tribal leaders and stakeholders have brought forward.

The work of the Tribal-State Workgroup, the passage of several new statutes, and the growing use of Tribal Customary Adoption as a culturally appropriate plan are all exceptional examples of innovation. But, as we near the 40th anniversary of the ICWA, we must hold ourselves to a higher standard so we do not look back on only incremental progress, but look forward to achieve the articulated national and state policies to protect Indian children and preserve Indian tribes through compliance with this landmark legislation.

From the work of the Task Force there are specific areas of ICWA violations that emerged as the most frequent, pointing to where the system is most critically flawed: lack of funding which created an unfunded mandate of ICWA compliance for under-resourced tribes, lack of pre-removal remedial services, lack of robust active reunification efforts, failure to complete diligent inquiry and notice, resistance to tribal court jurisdiction, barriers to tribal participation in court processes, lack of competency within court systems, and deviation from or violation of placement preferences. Tribal leaders, tribal social workers and tribal attorneys disclosed instances all over the state and at all stages of cases where non-compliance with the ICWA had devastating effects on tribes and tribal families.

Tribal representatives shared many profound and deeply troubling stories on a private basis with the Task Force; however, those stories are not included here because the Native American community is effectively silenced by cultural custom. Tribes have shared that it is not appropriate to include a family's tragedy in a public document. In addition, tribes and Task Force participants feared retaliation for divulging ICWA violations and therefore requested privacy. The Task Force also vigilantly protected the confidentiality of children.

Beyond the individual instances of non-compliance, what emerged is a narrative that is no less than a denial of the civil rights that the ICWA and Cal-ICWA were meant to safeguard. Unfortunately, the civil rights violations visited upon California Indians in the dependency system are a small microcosm of a fundamental breakdown of the systems that are failing tribal families and children across the country; one need only

look at the underfunding of legal counsel for indigent tribal families, mental health crises with native youth,[1] the epidemic of sex trafficking of native girls,[2] and the federal court litigation in Pennington County, South Dakota,[3] which could be replicated in California.

As a result of the work of the Task Force, the Co-Chairs are requesting immediate action on the following issues, to be augmented by additional findings and recommendations as this process moves forward:

A) Reframe and reconsider ICWA compliance as a civil rights mandate. The California legislature has repeatedly declared there is no resource more vital to the continued existence and integrity of Indian tribes than their children, and the State has an interest in protecting Indian children in accordance with the Indian Child Welfare Act. The failure to fulfill this mandate is not simply a failure of statutory compliance, it is a systemic and ongoing civil rights violation. It is incumbent on the State to enforce its legislative mandate and require equitable compliance with ICWA, with the same resources and accountability as any other civil rights mandate.

B) Seek legislation to obtain positions and funding to address and develop a concrete action plan for investigating ICWA compliance and to consistently bring to bear the power of the Office of the Attorney General where ICWA compliance is failing.

C) Secure resources to build tracking and data systems that accurately account for tribes and tribal families, ICWA compliance and case outcomes.

[1] Anna Almendrala, *Native American Youth Suicide Rates Are at Crisis Levels*, Huffington Post (October 2, 2015) available at: http://www.huffingtonpost.com/entry/native-american-youth-suicide-rates-are-at-crisis-levels_us_560c3084e4b0768127005591 (last visited May 31, 2016).
[2] Victoria Sweet, *Trafficking in Native Communities*, Indian Country Today (May 25, 2015) available at: http://indiancountrytodaymedianetwork.com/2015/05/24/trafficking-native-communities-160475 (last visited May 31, 2016).
[3] *Oglala Sioux Tribe v. Luann Van Hunnik*, United States District Court, District of South Dakota, Western Division, Case 13-cv-05020-JLV

D) Fund authentic and robust tribal consultation consistent with Executive Order B-10-11, and utilize the information and data gathered through consultation to inform policies and processes for meeting, and exceeding, the civil rights mandate of ICWA.

It is the goal of the Task Force that this Report be a call to action for the BCJ and that it starts a conversation examining the civil rights protected by ICWA. The rights to due process, to political and cultural connections and religious freedoms, and to remain in one's community of origin are routinely under attack. To achieve the promise of the ICWA, there must be more than episodic rallying cries and well-meaning grant cycle initiatives; there must be a vigilant force that demands more than mere lip service to compliance. We thank you for joining us as we address ICWA compliance and protection of the civil rights of our most vulnerable population.

I. Task Force Creation and Process

In November 2015, the California Department of Justice, by and through the Bureau of Children's Justice (BCJ), invited the creation of the first Indian Child Welfare Act Compliance Task Force (Task Force) in California.

The Task Force operates under the direction of seven tribal co-chairs: Maryann McGovran, Treasurer, North Fork Rancheria of Mono Indians of California; Robert Smith, Chairperson, Pala Band of Mission Indians; Angelina Arroyo, Vice-Chairperson, Habematolel Pomo of Upper Lake; Mary Ann Andreas, Vice-Chairperson, Morongo Band of Mission Indians; Aaron Dixon, Secretary/Treasurer, Susanville Indian Rancheria; Barry Bernard, Chairperson, Bear River Band of Rohnerville Rancheria; and the Honorable Abby Abinanti, Chief Judge, Yurok Tribal Court. The Task Force is comprised of tribal representatives and advocates.

The purpose of the Task Force is to gather information and data to inform the BCJ of the status of compliance with California laws related to Native American children in California, and provide recommendations regarding changes necessary to decrease violations of these laws across the many state and county systems that impact tribal families in the dependency system.

The Task Force is an independent, tribally led entity. Various methods were used to gather information, including: testimony and feedback from the community of stakeholders, multiple listening sessions, surveys from tribes across the United States and many follow-up individual interviews with stakeholders to gather more specific information. Email notices of each listening session and information regarding the survey were distributed utilizing contacts listed in the Federal Register, well-known websites and blogs and a concerted effort of outreach by individual Task Force participants.

Despite efforts to gain broad participation in the process and gather a wide spectrum of input, this Report is not comprehensive. For example, the data system utilized to gather and analyze the California Child Welfare System is fundamentally flawed in many ways, e.g., it is unable to produce ICWA-specific information at many levels and the Task Force had neither the authority, time or resources to investigate individual cases brought to the Task Force's attention by and through the information gathering that was completed. Further, the condensed timeframe of the Task Force's mandate required some limitations on information gathering. However, the Report does reflect a robust cross-section of input, experiences and information, which the Co-Chairs hope sheds light on the barriers, systemic failures and possible solutions to California's ongoing failure to live up to the mandates of state laws affecting tribal families and tribal governments navigating the juvenile dependency system.

SUMMARY OF SURVEY DATA GATHERED

STAGE OF CASE WHERE MOST NON-COMPLIANCE*: Pre-removal, Active Efforts, Jurisdiction and Placement*

MOST COMMON COMPLIANCE FAILURES*: Notice and Inquiry, Active Efforts, Placement and use of Qualified Expert Witnesses*

MOST COMMON SUGGESTED SOLUTIONS*: In addition to training and collaboration, tribes seek equitable enforcement of ICWA, consistent with any other law. A lack of funding does not and cannot excuse compliance.*

II. Introduction

A. California's Unique Native American Population

Nearly one-fifth of all federally-recognized Native American tribes in the country are in California.[4] Per the 2010 Census, California is home to approximately 723,000 persons identifying as Native Americans, more than any other state.[5] This concentrated population makes it essential that state laws designed to protect Native American families, children and tribes be properly and fully implemented.

For the purposes of understanding the Indian Child Welfare Act, 25 U.S.C. §1901 et seq., (ICWA) and Cal-ICWA, the legislation known as SB 678, certain historical facts must be emphasized. First, a great many California tribes are relatively small, are located on reservations or Rancherias in remote areas, and lack significant economic opportunities or resources. Second, a large percentage of Native Americans in California is from out-of-state tribes.[6,7] The sheer distance between the courthouse venue and the location of tribal representatives, attorneys, experts and social workers often poses a significant monetary burden. Thus, both in-state and out-of-state tribes find it financially impossible to intervene in every ICWA case involving their children. ICWA applies and must be enforced regardless of tribal intervention and there must be a universal understanding that it is the Native American child that triggers ICWA. This is a critical factor which is often ignored.

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[4] 81 Fed. Reg. 26826 (May 4, 2016) (110 of 566 tribes).

[5] Tina Norris, Paula L. Vines, and Elizabeth M. Hoeffel, U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010 (C2010BR-10)*, Table 2 (January 2012), available at http://tinyurl.com/7h6apt8.

[6] Stella Ogunwole, *We the People: American Indians and Alaska Natives in the United States*, U.S. Census Bureau (February 2006) http://www.census.gov/prod/2006pubs/censr-28.pdf (last visited May 31, 2016), and U.S. Census Bureau, *Census 2000 PHC-T-18: American Indian and Alaska Native Tribes in California: 2000* (June 2004) http://www.census.gov/population/www/cen2000/briefs/phc-t18/tables/tab019.pdf (last visited May 31, 2016).

[7] When termination and assimilation were regarded as appropriate federal policies during the 1950s and 1960s, many Indian families were moved to California via a "voluntary" program, ostensibly for their financial benefit. (See Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416, "The ACCIP Historical Overview Report: The Special Circumstances of California Indians," p. 15 (September 1997).) The Urban Indian Relocation Program transported thousands away from reservations to designated relocation cities, such as Los Angeles, San Francisco, Oakland and San Jose. In an ironic twist, the program was headed by Dillon S. Myer, who had previously overseen the program under which Japanese-Americans were moved to internment camps during World War II.

While legislatures have recognized the importance of compliance with the ICWA and of protecting children's rights as Native Americans,[8] in practice the entity most concerned with seeing that these laws are followed – the tribe – is frequently precluded from participation. As is evident from numerous California appellate decisions year after year,[9] without some other enforcement mechanism or incentive for compliance, the ICWA and the complementary state laws discussed herein may be little more than paper tigers.

All statutory references are to California state law unless otherwise noted. References to "§" are to the California Welfare and Institutions Code. References to "Rule" are to the California Rules of Court.

B. The Passage of the Federal ICWA

Congressional hearings in the mid-1970s revealed a pattern of wholesale public and private removal of Native American children from their homes, undermining Native American families and threatening the survival of Native American tribes and tribal cultures.[10] At the national level, studies in the years leading up to the passage of the ICWA found that:

- Native American children were approximately six to seven times as likely as non-native children to be placed in foster care or adoptive homes;[11] and,

[8] Welf. & Inst. Code §224. All statutory references are to California state law except where noted.
[9] In 2016, there were 175 ICWA cases appealed. California again took the lead with 114 cases; 10 cases were reported. The second highest count is Michigan with 13 cases, 2 reported. Turtle Talk also tracked California cases by appellate district: 37 in the 4th Appellate District, 33 in the 2nd, 24 in the 1st, 9 in the 5th, 6 in the 3rd, and 3 in the 6th. https://turtletalk.wordpress.com/2017/01/04/2016-icwa-appellate-cases-by-the-numbers/ There were 201 ICWA cases in 2015; 35 of them were reported. As usual, California has the most cases, with 156 (146 unreported). The next highest state was Michigan, with 7 cases (3 unreported). https://turtletalk.wordpress.com/2016/01/06/2015-icwa-appellate-cases-by-the-numbers/ (last visited March 6, 2017)).
[10] *Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs* (1974) 93rd Cong., 2d Sess. 3 (statement of William Byler) (http://narf.org/icwa/federal/lh/hear040874/, last visited May 15, 2012).
[11] Sherwin Broadhead et al., *Report on Federal, State, and Tribal Jurisdiction: Final Report to the American Indian Policy Review Commission* 81-85 (U.S. Gov't Printing Office 1976).

- Approximately 25%-35% of all Native American children were removed from their homes and placed in foster care or adoptive homes, or institutions such as boarding schools.[12]

In California, specifically:

- Native American children were more than eight times as likely as non-native children to be placed in adoptive homes;
- Over 90% of California Native American children subject to adoption were placed in non-native homes; and,
- One of every 124 Indian children in California was in a foster care home, compared to a rate of 1 in 367 for non-Indian children.[13]

Congress determined that Native American children who are placed for adoption into non-native homes frequently encounter problems in adjusting to cultural environments much different from their own.[14] Such problems include being stereotyped into social and cultural identities which they know little about, and a corresponding lack of acceptance into non-Native American society.[15] Due in large part to states' failures to recognize the different cultural standards of Native American tribes and the tribal relations of Native American people, Congress concluded that the Native American child welfare crisis was of massive proportions and that Native American families faced vastly greater risks of involuntary separation than are typical for our society as a whole.[16] These involuntary separations created social chaos within tribal communities. The emotional problems embedded in Native American children hampered their ability as adults to positively contribute to tribal communities and left families in extended mourning mode, which significantly impaired their ability to meet their tribal citizenship responsibilities.

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[12] H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531.
[13] Sherwin Broadhead et al., *Report on Federal, State, and Tribal Jurisdiction: Final Report to the American Indian Policy Review Commission* 81-82 (U.S. Gov't Printing Office 1976).
[14] See H.R. Rep. No. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531-7532.
[15] Dr. Joseph Westermeyer, *Cross-Racial Foster Home Placement Among Native American Psychiatric Patients*, 69 Journal of the Nat'l Medical Assoc. 231, 231-232 (1977); *Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs,* 93rd Cong., 2d Sess. 46-50 (1974) (testimony of Dr. Westermeyer).
[16] See H.R. Rep. No. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531-7532.

Congress passed the ICWA to remedy the above.[17] The ICWA is meant to fulfill an important aspect of the federal government's trust responsibility to tribes by protecting the significant political, cultural and social bonds between Native American children and their tribes. In doing so, the ICWA ultimately is civil rights legislation which protects the interests of Native American children and the existence of Native American tribes and families.[18],[19] Because the ICWA serves Native American children as well as parents, Indian custodians and Native American tribes, the ICWA must be applied regardless of whether a child's tribe is involved in the case.

Further, what was not accomplished by Congress and still plagues the system today is the lack of funding for the mandates of the ICWA. Fulfilling the promise of ICWA requires resources, but ICWA remains an "unfunded mandate" and the cost is borne by tribes and Native American families.

C. California Codifies ICWA via Senate Bill 678 and Other Laws

In 2006, Senate Bill 678 (referred to herein as the Cal-ICWA) was passed with the aim of harmonizing federal legislation and intent with state law.[20] Before it took effect, the ICWA had inconsistently been applied through Rules of Court, case law and the BIA Guidelines, but had not been codified for implementation on a state level. Cal-ICWA remains the most comprehensive ICWA-related legislation adopted by any state. The final legislation was the culmination of efforts by State Senator Denise Moreno Ducheny, its sponsor, on behalf of the Pala Band of Mission Indians, California Indian Legal Services and a host of others.

Cal-ICWA codified the federal ICWA's requirements into California Welfare & Institutions code, Probate code and Family code. This legislation specifically declared that a Native American child's best interests are served by protecting and encouraging a

[17] 25 U.S.C. §1901.
[18] 25 U.S.C. §1902.
[19] See, The Department of the Interior, Bureau of Indian Affairs adopted final regulations for implementation of the ICWA, which were published June 14, 2016, effective December 12, 2016. 81 Fed. Reg. 38778; codified at 25 CFR Part 23; www.indianaffairs.gov/cs/groups/public/documents/text/idc1-034238.pdf; ("ICWA Regulations"); the Bureau of Indian Affairs also published Guidelines for Implementing the Indian Child Welfare Act on December 13, 2016. 81 Fed. Reg. 96476 (December 30, 2016). www.indianaffairs.gov/cs/groups/public/documents/text/idc2-056831.pdf ("BIA Guidelines").
[20] Ducheny, Denise M., Senate Daily Journal for the 2005-2006 Regular Session, pp. 5606–5607 (August 31, 2006).

connection to his or her tribal community.[21] In addition, this legislation built upon the ICWA's foundation by creating further safeguards, such as:

(1) Clarifying that the ICWA applies to probate guardianships and conservatorships;[22,23]

(2) Imposing an ongoing and affirmative duty to inquire whether a child in a child-custody proceeding may be a Native American child;[24]

(3) Requiring documentation of the active efforts made to place a Native American child within the ICWA's order of preference;[25]

(4) If no preferred placement is available, requiring active efforts to place a Native American 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;"[26]

(5) Requiring expert witness testimony to be live, rather than by declaration, unless all parties agree otherwise;[27]

(6) Prohibiting the party seeking foster care placement or termination of parental rights from using its own employee as the required expert witness;[28]

(7) Providing that a tribe wait until reunification services have been terminated before requesting a transfer to tribal court does not constitute good cause to deny such a request;[29]

(8) Requiring that available tribal resources be used when making active efforts to keep the Native American family intact;[30]

(9) Requiring that available tribal resources be used when trying to meet the ICWA's placement preferences;[31]

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[21] Welf. & Inst. Code §224(a)(2).
[22] Prob. Code §1459.5.
[23] Prior to SB 678, a question existed whether a non-social services petitioner could circumvent the ICWA by filing for guardianship or conservatorship letters for an Indian child while not following state or federal law requiring active efforts be made to prevent the breakup of the family.
[24] Welf. & Inst. Code §224.3(a).
[25] Welf. & Inst. Code §361.31(k).
[26] Welf. & Inst. Code §361.31(i).
[27] Welf. & Inst. Code §224.6(e).
[28] Welf. & Inst. Code §224.6(a).
[29] Welf. & Inst. Code §305.5(c)(2)(B).
[30] Welf. & Inst. Code §361.7(b).
[31] Welf. & Inst. Code §361.31(g).

(10) Acknowledging that the Interstate Compact on the Placement of Children does not apply to any placement sending or bringing a Native American child into another state pursuant to a transfer to tribal court under 25 U.S.C. §1911;[32] and, Applying sanctions of $10,000 for the first offense and $20,000 for the second if a person knowingly and willfully falsifies or conceals a material fact concerning whether a child is an Indian child or the parent is an Indian. [33]

SB 678 Includes Non-Federally Recognized Tribes

Non-federally recognized tribes ("N-FR tribes") are disadvantaged when ICWA is triggered in a child custody proceeding. Many N-FR tribes have organized as non-profits or are state-recognized tribes. Often, individuals who are affiliated with a N-FR tribe or are a member of a N-FR tribe reside on or near the reservation of a federally recognized tribe or within that federally recognized tribe's service area. Indians from N-FR tribes may therefore be eligible for services and programs from those federally recognized tribes and their affiliated programs. In addition, N-FR tribes may receive federal funding as a non-profit or state-recognized tribe, which may include funding for housing, employment and education. See United States Government Accountability Office, Report to the Honorable Dan Boren, House of Representatives; Indian Issues: Federal Funding for Non-Federally Recognized Tribes. April 2012.

To address and ease the impact of child custody proceedings on N-FR tribes, SB 678 embraced the spirit and intent of the ICWA with the inclusion of Indian children from non-federally recognized tribes by adding Section 306.6 to the Welfare & Institutions Code. With the court's discretion, this section allows a non-federally recognized tribe to:

1. be present at a hearing

2. address the court

3. request & receive notice of the hearings

4. request to examine court documents relating to the proceeding

5. present information to the court that is relevant

6. submit written reports and recommendations to the court

7. perform other duties & responsibilities as requested or approved by the court

While the ICWA and Cal-ICWA apply only to those tribes that meet the federal definition set forth in 25 U.S.C. §1903(8), the State of California made clear that Sec. 306.6 is "intended to assist the court in making decisions that are in the best interest of the child." This includes allowing the tribe to inform the court regarding placement options within the family and tribal community and provide information regarding services and programs that serve the parents and child as Indians. By including Sec. 306.6 in Cal-ICWA, the Legislature extended the state and federal interest to protect the best interests of Indian children to all Indian children in California.

Indian children from non-federally recognized tribes suffer similar hardships to other children, and counties must work to place these Indian children in their tribal communities and with tribal relatives. Counties must also work to provide culturally appropriate services and programs to Indian children and parents.

[32] Fam. Code §7907.3.
[33] Fam. Code §8620(g); see also Welf. & Inst. Code §224.2(e).

In addition to the Cal-ICWA, the California Legislature passed AB 1325 in 2009 to allow dependent tribal children in need of a long-term placement plan to be adopted without the necessary precursor of termination of parental rights. California's Tribal Customary Adoption bill has been utilized in California courts by both California and non-California tribes to have a culturally consistent permanency option for tribal children. As discussed below, Tribal Customary Adoption is, however, unfortunately still underutilized, despite being found to be the most culturally appropriate permanency option for many tribal children.[34]

D. Compliance Remains a Problem

Despite ICWA's federal mandate, and despite the Cal-ICWA's passage in 2006, systemic problems with compliance persist. Tribal attorneys and representatives experience frequent resistance and dismissiveness from child welfare agencies,[35] county attorneys and even courts when appearing in dependency cases. Procedural requirements designed to protect the connection between Indian children and their tribes[36] are too often viewed as requiring onerous paperwork, contributing to additional delays and creating impediments to permanence. The perception that Indian tribes, parents and children receive unnecessary special treatment persists—even though such treatment is entirely congruent with federal law recognizing the unique political status of tribes—and continues to be an underlying theme of many cases. The protections provided through the statutes are also part of the federal government's trust responsibility to tribes and Indian persons.[37]

The lack of ICWA-specific competence standards and training exacerbates this problem. Absence of true understanding of the ICWA's purpose leads to perfunctory compliance or complete violations of the law. For example, a recent report describes the right to legal counsel for children and families as "on the brink" because of budget cuts

[34] *In re H.R.* (2012) 208 Cal.App.4th 751,759.
[35] For purposes of this report, County Child Welfare Agencies are referred to as "the Agency" and "the County" interchangeably.
[36] Welf. & Inst. Code §224; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 37.
[37] 25 U.S.C. §1901.

and rising caseloads.[38] As the population that is repeatedly documented as the most disproportionally represented in the child welfare system - coupled with a system in collapse to provide adequate legal counsel - tribal families and tribes are forced to pick up where the system falls short.[39] Added to the diminishing ability of appointed counsel to represent their clients is the reality that ICWA cases take additional competencies, training and resources. These two factors combined means that it is a near impossibility that the civil rights promised by the ICWA and Cal-ICWA can be protected.

This Report documents that almost 40 years after ICWA's passage, compliance with basic, fundamental aspects of the law (e.g., efforts to prevent the need for removal, notice and inquiry, providing appropriate reunification services, and meeting the placement preferences) remain a significant concern. The problem is further compounded by the fact that there is no reliable way to assess compliance on a systemic basis. There is no readily available data on how many cases the ICWA is or ought to be applied in. The data that does exist is not up to date and is not accurate. Counties routinely fail to keep required records, such as documentation of active efforts to meet the placement preferences[40] -- characterized by the Supreme Court as the ICWA's "most important substantive requirement."[41] As demonstrated in this Report, the lack of meaningful and accurate data is a systemic failure tied to a lack of training, resources and competency.[42]

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[38] American Civil Liberties Union of California, *System on the Brink: How Crushing Caseloads in the California Dependency Courts Undermine the Right to Counsel, Violate the Law and Put Children and Families as Risk*, May 26, 2015.
[39] See, Child Welfare Information Gateway, https://www.childwelfare.gov/pubs/issue-briefs/racial-disproportionality/; racial disproportionality index for American Indian/Alaska Native children increased from 1.5 in 2000 to 2.7 in 2014. Page 3; "Race or ethnicity may be incorrectly assumed by whomever is recording the data. For example, a caseworker may assume a child is not American Indian even though the child may be a Tribal member or is eligible for Tribal membership. This would affect the count of American Indian children involved with child welfare and could affect the services, supports, and jurisdiction of the case." Page 5.
[40] 25 U.S.C. §1915(e); Welf. & Inst. Code §361.31(k).
[41] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.
[42]See, 81 Fed. Reg. 90524 (December 14, 2016) Adoption and Foster Care Analysis and Reporting System (AFCARS) Final Rule. Incorporation of data elements related to the Indian Child Welfare Act (ICWA) are mandatory by 2020. https://federalregister.gov/d/2016-29366

III. Failure to Fully Train Legal Counsel, State Agents, Advocates and Bench Officers Creates Systemic Barriers to ICWA Compliance

Tribal representatives identified an imbalance in training, competence and resources devoted to dependency case participants in relation to Cal-ICWA cases. The absence of training, continuing education, special certification and cultural sensitivity directly impacts the enforcement of the Cal-ICWA. The Task Force's research represents a small sample of the ICWA cases statewide, but a lack of ICWA-specific training appeared across the board, which is a systemic problem.

ISSUES:

1) Rules of Court failed to include CAL-ICWA-related issues and failed to consult with tribes, tribal social workers or tribal attorneys regarding establishing the Rules for competency.

2) Substantive areas of dependency training are incomplete because they fail to account for ICWA cultural competency and the heightened ICWA standards.

3) New social workers are not adequately familiar with ICWA issues when they first handle a case. Seasoned social workers suffer from a lack of ICWA training.

4) Rural tribal communities need to be included in the training process for social workers and CASA volunteers.

A. Legal Counsel

California Rules of Court, rule 5.660 compels each Superior Court to adopt a local rule regarding the representation of parties in dependency proceedings. The Rules direct each county to adopt a local rule on representation of parties in dependency cases *after* consultation with a variety of constituents (i.e., county counsel, district attorneys, public defenders and county welfare departments), but omit including any consultation with tribes, tribal social workers or tribal attorneys.

On its face, the rule is well-intentioned and designed to assure that legal counsel is qualified—but does not apply equally to all participants in dependency cases. More importantly, Rule 5.660 does not include any training, expertise, course work or verification that the participants are versant in

ICWA, Cal-ICWA or cultural issues. The gap, however, is that the rule does not apply to county attorneys or retained attorneys, but has on occasion been used to thwart tribal attorneys from appearing in cases.

Aside from the disparity of application in the competency rule, the substantive areas of expertise only include attorney training on: (i) dependency law, statutes and cases; (ii) information on child development, abuse and neglect, substance abuse, domestic violence, family reunification and preservation, and reasonable efforts; and (iii) instruction on cultural sensitivity and best practices for lesbian, gay, bisexual and transgender youth in out-of-home placement. The rule requires a recertification and eight hours of continuing education related to these areas every three (3) years.

A rule that omits the ICWA and Cal-ICWA in a dependency training dilutes the effectiveness and competency of the entire process, and must be addressed through a statewide rule of court or statute. Non-compliant parties should be identified, to assist in ensuring compliance, to tribal attorneys and representatives. Ultimately the process will improve if the same level of training for generic dependency issues is afforded to ICWA issues.

The rule should be expanded to include all parties and social workers who appear in dependency cases, including county counsel and private attorneys. In addition, the rule should *specifically* include and incorporate training in substantive, procedural and cultural components of the ICWA and Cal-ICWA.

RECOMMENDATIONS:

1) Revise the Rules of Court to effectively mandate ICWA competency for legal counsel, social workers, CASAs, bench officers and others. Expand the Rule to require specific substantive, procedural and cultural components of the ICWA and CAL ICWA.

*2) Hold attorneys to the appropriate standards for compliance with **all** laws including ICWA and Cal-ICWA.*

3) New and seasoned social workers should receive both on the job and non-adversarial training regarding ICWA compliance.

4) Establish a Tribal/Cal-ICWA CASA program with funding for recruitment, training and support for CASA volunteers.

(continued)

Notably, the rule includes training on *reasonable efforts*, but is silent on the higher ICWA standard of *active* efforts. Cultural sensitivity training, already required specifically for LGBT children, should be expanded to include specific training for Indian children.

B. Social Workers, CASAs and CAPTA Guardians

County social workers, CASAs and CAPTA guardians are not adequately trained in Cal-ICWA requirements or cultural competency. New social workers are not adequately familiar with ICWA issues when they first handle a case. Seasoned social workers also suffer from a lack of ongoing CAL-ICWA training and are often the most challenging to work with, given their number of years in the system. In addition, the rotation of case workers in the different phases of dependency was identified as problematic for tribes and tribal representatives, especially in large counties where case assignments are not vertically integrated through the different procedural phases. Tribes are forced to reorient as cases are moved from a *Detention Worker* to a *Placement Worker*, then to a *Case Plan Worker*, and sometimes to various assignments of *Permanency Workers*. To further complicate these cases, counties use various and different labels for each phase of a case, which compounds and frustrates the process for tribes. The fragmentation of assignments means that the newly assigned social workers are not familiar with the tribe or the culture, and often the Cal-ICWA, leaving tribes to start over several times in one case.

Although All County Letters (ACLs), which interpret state and federal law for the county staff, address CAL-ICWA policies and procedures, this is not an adequate

RECOMMENDATIONS *(cont.):*

5) Reduce the rotation of social workers in the different phases of dependency.

6) Consult with tribes regarding appointment/assignment of bench officers.

7) Legislatively mandate training for new judicial officers and seasoned bench officers on tribal child welfare, ICWA and CAL-ICWA.

8) Delays in holding hearings and filing reports should trigger sanctions against the agency and or their counsel.

9) Bench officers must not allow the social service workers to submit generic, conclusory findings of compliance with CAL-ICWA.

substitute for training on an ongoing basis. The CDSS has issued ACLs on Changes in State Law, SB 678 (ACL 8-02); ICWA Adoption Forms, Process and Standards (ACL 8-02); Implementation of Tribal Customary Adoption (TCA) (ACL 10-47); and the Requirement of use of Expert Witnesses (ACIN 1-40-10), to name a few, but has overlooked continued training of the line social workers in non-adversarial situations. This lack of training applies to agency section managers, supervisors and directors.

Cultural competency, particularly when it comes to placements, services and being knowledgeable about the specific tribes that have children in the system, is a must for social workers, CASAs (Court Appointed Special Advocates) and CAPTA (Child Abuse Prevention and Termination Act) guardians. The size of California and the diversity of jurisdictions create a regional challenge, particularly for rural communities, and those tribes need to be part of the training process for social workers. The Task Force could find no corresponding training requirements on the Cal-ICWA for CASAs or CAPTA Guardians. Though in some instances the CASA and CAPTA GAL (Guardian ad Litem) may be the same person, the GAL could also be the social worker or minor's counsel, which lends to a confusing overlay of roles, but more importantly invites a discrepancy of training or competency when it comes to Cal-ICWA issues. The increasing roles of CASAs, CAPTAs and caregivers who are granted educational and other rights compels the State to ensure that these stakeholders are properly trained in the full spectrum of ICWA issues. Courts afford great weight to CASAs and others who speak for young children, and to the extent that the representative is ignorant of a tribe's legal and cultural stature, it adversely affects the minor and the tribe, and often contributes to the negative view of Cal-ICWA, the tribe and almost always the Native American parents and/or Indian custodian.

C. Court and Bench Officers

California Rules of Court, rule 5.40(d) delineates training and orientation established by the Presiding Judge of the Juvenile Court to include educational rights, disability accommodation and minimum continuing education requirements for counsel and participants, but does not include Cal-ICWA-related issues. The absence of any

tribal or Cal-ICWA training component in a state with 110 federally recognized tribes almost guarantees that some stakeholders in the system will not view the Cal-ICWA as equally important as other training areas.

California legislatively mandated training for judicial officers regarding domestic violence in recognition of the necessity for education on this particular topic, both because of the importance and the specificity of the issues.[43] Legislatively mandated training - for both new judicial officers and periodically for all bench officers - on tribal child welfare and Cal-ICWA is similarly necessary, as other methodologies such as non-mandated training have not resulted in a decrease in Cal-ICWA appeals nor appear to have increased systemic competency.

A separate issue, and one that is not unique to ICWA cases, is the institutional acceptance of delays in child welfare cases. The Welfare and Institutions Code requires cases to be heard within a strict and short timeframe. A detention hearing must occur within 48 hours of a child being taken into custody,[44] with jurisdiction being heard 15 days thereafter (if the child is detained) or 30 days (if child is not detained).[45] Disposition, which is the linchpin of a dependency case—because it is where the court decides whether to return a child home (family maintenance), or place out of home (family reunification, with a formal case plan) — can only be decided *after* a court takes jurisdiction. The dispositional hearing must also occur within strict time parameters: (i) 10 days if a child is detained;[46] and (ii) no later than 30 days if the child is not detained.[47] In non-reunification cases, a continuance cannot exceed 30 days.[48]

Notice to federally recognized Indian tribes must also be factored into each case, and requires 10 days' notice to the tribe and/or Bureau of Indian Affairs and, if

[43] Gov. Code §68555; 2014 Rule of Court 10.464.
[44] Welf. & Inst. Code §313(a); Rule of Court 5.670(b).
[45] Welf. & Inst. Code §334; Rule of Court 5.670(f).
[46] Welf. & Inst. Code §358; Rule of Court 5.686(a).
[47] Welf. & Inst. Code §358; Rule of Court 5.686(a).
[48] Rule of Court 5.686(b).

requested by a tribe, parent or Indian custodian, a 20-day continuance must be granted after notice is received.[49]

The now-common practice of combining Jurisdiction and Disposition into one hearing, which is contrary to the statutory time scheme, coupled with late or defective notice to tribes, has cultivated systemically sanctioned delays. The logistical difficulties of agency or counsel noticing tribes does not alleviate the public policy requirement of hearing dependency and ICWA cases within the specified and accelerated timetables. In addition, the common practice of filing late reports, and not serving tribes or their representatives with all documents and discovery, is an abuse of process that was identified by the Task Force respondents. The willful disobedience or interference with orders of the Juvenile Court or judge constitutes contempt, and is punishable under §213 in the same manner as regular civil courts under CCP §1218. The Dependency Court's inherent authority to sanction counsel and parties extends to failures to provide discovery and disclosure to tribal attorneys, tribal representatives and Indian tribes.[50]

The delays in holding hearings and filing reports, coupled with delays in providing notice, discovery and disclosure to tribes—despite amendments to §827, and despite tribes being relegated to second-tier parties—is something that can and should trigger sanctions against the agency and/or their counsel. Acquiescence by the court raises a question of collective competence because the court should not condone parties' unfamiliarity with or, worse, disregard of the rules.

Finally, bench officers must not allow social service workers to submit generic, conclusory findings of compliance with Cal-ICWA. Where a finding of good cause to deviate from placement preferences, by way of example, is required, then the court should specify in exacting detail—on the record—what the good cause is, and not allow unsupported findings. Much of the problem identified by Task Force participants stemmed from juvenile courts broad-brushing findings that appear, on paper, to comply with the Cal-ICWA, but in practice exclude tribal input and compliance.

[49] Rule of Court 5.482.
[50] Rules of Court 5.486(j) and (k).

To be clear, not every case involves social workers, legal counsel or judges who are not well-versed in the Cal-ICWA, but the prevalence of untrained participants and the perception by tribes that they must force compliance—especially where tribes do not have lawyers or have not formally intervened—demonstrates that a training and certification component is sorely needed for all counsel and social workers.

Task Force Participants ~

"It appears as though many appointed attorneys and bench officers have a very limited understanding of ICWA, which leads to contentious relationships with tribes and a bare minimum effort at following the law. Thus, training is needed to ensure cases don't become adversarial and lead to more trials and conflicts for Indian families."

***Regarding Orange County**: "Training for the court, attorneys and social workers on ICWA and the importance of ICWA compliant placement."*

***Regarding Nevada County**: "The court and parties need to be trained on ICWA and forced to comply."*

***Regarding Sacramento County**: "Training and clarification on ICWA and the specific requirements of the placement and active efforts. Training on the new guidelines would greatly improve understanding."*

IV. Child Welfare Agencies Fail to Provide Pre-Removal Active Efforts

A. Active Efforts to Prevent Removal

Absent exigent circumstances, active efforts must be provided to an Indian family prior to removing an Indian child.[51] Active efforts are to be assessed on a case-by-case basis and must take into account the "prevailing social and cultural values, conditions, and way of life of the Indian child's tribe."[52] Referrals to and utilization of "available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies and individual Indian caregiver service providers" would be demonstrative evidence.[53] Given the widespread lack of understanding in California of what "active efforts" means and what is required,[54] it is the rare situation when an Indian family has received active efforts before a child welfare agency initiates a removal of an Indian child.[55]

ISSUES:

1) Failure of child welfare agencies to reach out to tribal service providers to secure active efforts for Indian families and children due to specific service contract providers.

2) Failure of child welfare services to file timely reports and serve tribes and their representatives with documents and discovery.

3) Tribal recommendations regarding services are not being honored.

4) Gearing culturally relevant pre-removal services to both the parent and the Indian child.

The goal of pre-removal active efforts is to identify and address the issues impacting the family, which may put an Indian child at risk for removal. Despite the number of Indian Health Services clinics and hospitals in California, as well as tribal organizations providing a myriad of services and tribes with social service programs, child welfare agencies often do not connect and reach out to these

[51] See Welf. & Inst. Code § 361.7(a); Cal. Rules of Ct. 5.484 (c).
[52] See Welf. & Inst. Code §361.7(b).
[53] *Id.*
[54] Counties specifically named as not providing adequate pre-removal services or not disclosing information to tribes regarding pre-removal issues were: Kings, Riverside, Sacramento, Sonoma, San Diego, Napa and Humboldt.
[55] See, ICWA Regulations defining "active efforts" codified at 25 CFR Part 23.2. This provides a higher standard of protection to the parents or Indian custodian and is therefore the applicable standard.

service providers to secure active efforts for Indian families and children because agencies contract with specific service providers to refer parents to prior to removing a child. In addition, whether a matter of ignorance, distrust or a combination of both, social workers all too often reject tribal recommendations regarding the type of services to be provided or service providers to be accessed, in favor of the county's standard case plan and contracted providers. This not only frustrates the relationship between tribes and child welfare agencies, but rejection of these services is in violation of federal and state law and a disservice to Indian children, youth and families. An additional concern at this stage is that services and referrals are almost always geared to the parent, with diminished consideration of services targeted to the Indian child.

ISSUES (cont.):

5) Child welfare investigations are not handled properly.

6) Safety plans are not utilized consistently or properly.

7) Protective custody warrants are not shared with Tribes.

8) PEPS are executed in violation of ICWA and CAL-ICWA.

9) Lack of cross-reporting between the county and tribe. Refusal by the county to provide a copy of protective custody warrants to tribal representatives.

B. Investigation

When a report is made to a child welfare agency, the agency is required to investigate. Tribes report that some child welfare agencies fail to investigate at all when the report comes from an Indian reservation. In those situations, the tribe is told to address the issue or that a worker will be in touch, but there is no follow-through.[56] In the event a child welfare agency does enter an Indian reservation to investigate, the tribe is routinely not notified and not included, even though the investigation is on tribal land. This is true for off-reservation investigations as well. Tribes in California have concurrent jurisdiction over child welfare matters regardless of whether the child is on or off reservation.[57] The counties and State must recognize and respect that jurisdiction. Tribal involvement at the investigation stage is critical for family preservation, active

[56] This specific issue was reported by Tribal Representatives on cases in Lake and Mendocino counties, but other Tribal Representatives agreed that they had this experience in other counties as well.
[57] *Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, 1064.

efforts and CAL-ICWA compliant placement. Some investigations are not conducted within the statutory timeframes and are not fully or competently completed. In addition, and this is evidenced in the social workers' delivered service logs, there is a failure to adequately document the Indian child's tribes, tribal representatives, extended family and identification of the reasons for the investigation. Poor documentation results in a failure to fulfill the agency's duty of inquiry.

C. Safety Plans Are Avoidance Mechanisms to Compliance

A component of service plans is often a safety plan that allows a child to remain in the home with a parent(s) or caregiver(s) when there has been an abuse or neglect referral and an investigation. A safety plan is one method to eliminate conditions or circumstances that could lead to removal, and is a measure of "reasonable efforts." The use of safety plans varies from county to county; however, they appear to be used with regularity to circumvent the minimum federal standards of ICWA. Tribes have seen safety plans used in lieu of a petition, for example, when a child welfare agency receives a referral to investigate an allegation of child abuse/neglect and a TDM (Team Decision Making) is called.

A typical scenario described by Listening Session participants was: A relative is present who agrees to care for the child. A safety plan is created between the relative and the child welfare agency regarding the child's safety and how to keep the child safe from harm. The parent is told to address the issue posing the risk to the child and the child is placed with the relative. This is a violation of state and federal law.

The common refrains in Indian Country are: Who creates the plan, is it in writing, and who gets a copy? Tribes may ask for a copy of the safety plan, but it is not provided, there is no transparency and counties often refuse to release the plans during discovery. This begs the question: Are the plans in writing and are they enforceable? What if the parent fully complies with the plan but the child isn't returned or a petition is filed? Enforcement of the plan is usually detaining the child and filing a petition. However, safety plans differ from voluntary family maintenance and/or temporary removals. Normally, there are statutory timeframes for voluntary family maintenance

and temporary removals. However, in many counties, safety plans are open-ended and have no timeframes.[58] Further, tribal representatives disclosed that, more often than not, the process of using safety plans turns into simply a period of time in which the agency gathers damning information about a parent that is later used as evidence against a parent or caregiver, sometimes to justify bypass under §361.5.

Safety plans are also developed on the spot in the home and there is no tribal input and no active efforts to support the Indian child and family. This is true when a TDM is used and the tribe has not been invited/informed. Safety plans are meant to be used between parents and a child welfare agency. They are sometimes only offered to one parent. Safety plans deprive the parent(s) and/or Indian custodian of reunification services, the right to his/her child upon demand and pre-removal active efforts. They also fail to comply with the requirement for a judicial certification.[59] Use of safety plans circumvents a parent's right to reunify with his/her child and a parent's right to active efforts. [See discussion below on PEPS.] While a safety plan may be used to keep a child out of the child welfare system, it may also be used as a tool to skirt the law.

A similar tactic, veiled as a voluntary placement, is protective emergency placement services (PEPS) or informal supervision (IS). Commonly used in Sacramento County, PEPS are done without court intervention or the filing of a petition. These "voluntary placements" are of an indefinite duration. In addition, they are in violation of ICWA and Cal-ICWA. When a parent or Indian custodian voluntarily consents to a foster care placement, such consent "shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied

RECOMMENDATIONS:

1) Consent to foster care placement should be certified by the presiding judge that all aspects were full explained and fully understood.

2) Guardianship proceedings should not be completed until investigation and reporting is provided to the court. No referral to probate guardianship when dependency is most appropriate.

[58] Kings, Sonoma and Marin Counties specifically reported this issue.
[59] 25 U.S.C. §1913; Welf & Inst. Code §16507.4

by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail, and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood."[60] This consent may be withdrawn at any time and "upon such withdrawal, the child shall be returned to the parent or Indian custodian."[61] The use of PEPS is in violation of the state and federal law.[62]

Task Force Participants ~

"A relative was given the child under a safety plan, the parents could not have the child returned and the social worker referred the parents to the family law court to address custody issues." (Sonoma County)

"The Tribe asked for a copy of the safety plan to support the family and it was not provided based on 'confidentiality requirements.'"

"My report of suspected child abuse was classified as a 'community report' and was not recognized as being from the Tribe, resulting in a slower response."

"Kings County Human Services Agency fail[ed] to notify and work with the Tribe to develop a plan prior to removal."

[60] 25 U.S.C. §1913(a).
[61] §1913(b) Welf. & Inst. Code §16507.4, See also, 25 U.S.C. §1922.
[62] See also, Sacramento County Annual SIP Progress Report 2014, p. 4: "Sacramento County uses Protective Emergency Placements Services (PEPS) placement, which are voluntary placements, primarily utilized in Emergency Response and Informal Supervision Programs. These placements are counted as an entry into placement, therefore, when they end they are also counted as a reunification." It is unknown if Sacramento County is following Welf. & Inst. Code §361.31(k) and keeping a record of these placements in perpetuity or whether any of these placements are ICWA compliant. PEPS are in violation of Welf. & Inst. Code §16507.4.

D. Information Gathering and Sharing

Several common issues were identified during the Listening Sessions where tribal representatives reported not being informed when the County became aware of families in need, either on or off the reservation, even when said families were identified as being tribally affiliated. This issue was often combined with failures to cross report between counties and inter-county agencies, such as CPS and the school district. Further, there were many issues reported relating to Agencies not sharing information necessary for tribes to safely place children in homes, such as access to home studies and criminal histories.

In addition, tribal representatives reported not being contacted in advance or even soon after protective custody warrants were deemed necessary. Temporary custody/removal of a child by a peace officer aside, Welfare and Institutions Code §309(a) requires a social worker who has temporarily removed a child to immediately release the child to the parent, guardian or responsible relative unless one of five conditions exist. These conditions include: if the child has no parent, guardian or responsible relative or they are unable to care for the child; "continued detention of the child is a matter of immediate and urgent necessity" to protect the child and the child cannot be reasonably protected in the home; substantial evidence that the parent, guardian or responsible relative is flight risk; the child left the placement ordered by the juvenile court; or the parent/other relative with lawful custody voluntarily surrendered custody under Health & Safety Code §1255.7 and has not reclaimed the child in 14 days." Tribes reported multiple issues related to detentions without warrants and a refusal to provide a copy of protective custody warrants to tribal representatives.

E. Guardianships Are Used to Circumvent the Law

Probate Code §1513(c) requires the Probate Court to refer a guardianship case to CPS/Social Services whenever it is alleged that a parent is unfit. Further, if dependency proceedings are initiated, the guardianship proceedings must be stayed in accordance with §304. "If the investigation finds that any party to the proposed guardianship alleges the minor's parent is unfit, as defined by §300 of the Welfare and

Institutions Code, the case shall be referred to the county agency designated to investigate potential dependencies. Guardianship proceedings shall not be completed until the investigation required by §§328 and [is] completed and a report is provided to the court in which the guardianship proceeding is pending."[63] If a dependency proceeding is not initiated, the probate court shall retain jurisdiction to hear the guardianship matter.

Listening Session participants reported being told that the family could avoid removal by CPS if it secured a probate guardianship. Unfortunately, while sometimes this recommendation may have been provided with good intentions, there are problems with utilizing probate guardianships in these circumstances. First, probate courts are even less familiar with Cal-ICWA than dependency courts. Also, there is no system for appointing counsel for parents[64] in probate court and parties seeking guardianship are often referred to courthouse-based self-help centers which have little or no training with Cal-ICWA. Therefore, parents, Indian custodians, children and tribes are deprived of their rights under ICWA and Cal-ICWA, and the agency is quietly, with no ramifications to the agency, relieved of its obligations.

Many Listening Session participants reported that families were told to go get a guardianship or the child would be detained, but they had no way of pursuing a guardianship petition and then were accused of not being protective of the child or being uncooperative.

[63] *In re Guardianship of Christian G.* (2011) 195 Cal.App.4th 581, 595.
[64] Probate Code §1460.2 provides for court-appointed counsel to parents and Indian custodians. Courts are unaccustomed to appointing attorneys for parents, let alone Indian custodians in these cases.

V. State Courts and Child Welfare Agencies Are Not Complying with Cal-ICWA Requirements for Notice and Inquiry

Cal-ICWA, like its federal counterpart, requires tribes be noticed of proceedings involving Indian children.[65] Notice is one of the ICWA's most fundamental requirements, as "failure to give proper notice… forecloses participation by the tribe."[66] Failure to notice keeps the party most invested in ICWA compliance out of the picture, and decreases the chances that the stated goals of the ICWA and the Cal-ICWA will be met.

ISSUES:

1) Inadequate notice and inquiry where a child may be an Indian child.

2) ICWA 030 is a Judicial Council form signed under penalty of perjury by the petitioner. Many courts are ordering parents to complete the form, which incorrectly places the burden on them.

3) Counties attempting to make determinations regarding tribal membership.

4) Failure to provide notice in non-dependency ICWA cases.

The notice requirement is as old as the ICWA itself, yet inexplicably continues to be a problem in case after case. Prior to the enactment of the Cal-ICWA, failure to provide proper notice was described by one court as a "virtual epidemic."[67] Even after the notice provisions of the Cal-ICWA were enacted,[68] another court stated that the failure of adequate notice "remains disturbingly high."[69] And notice cases continue to clog the system to this day. The California Dependency Online Guide[70] annual review for 2015 reports that:

> "In reviewing the case law from 2015, it is significant that ICWA compliance continues to be an active appellate issue. In the last six months of 2015, ICWA cases accounted for roughly 30% of all juvenile dependency appeals. Approximately 85% of those appeals were related to inquiry and

[65] 25 U.S.C. §1912; Welf. & Inst. Code § 224.2.
[66] *In re Robert A.* (2007) 147 Cal.App.4th 982, 987.
[67] *In re I.G.* (2005) 133 Cal.App.4th 1246, 1254-1255 (listing 11 published appellate cases requiring reversal between 2003 and 2005, and noting the existence of 72 unpublished cases in 2005 alone which required reversal in whole or in part due to ICWA notice violations).
[68] Welf. & Inst. Code §224.2.
[69] *Justin L. v. Superior Court* (2008) 165 Cal.App.4th 1406, 1410.
[70] Judicial Council of California, *California Dependency Online Guide*, available at: www.courts.ca.gov/dependencyonlineguide.

notice, with 70% resulting in remand for ICWA noticing, and in some instances, reversal of findings and orders in addition to the order to comply with ICWA inquiry and notice requirements."

The Cal-ICWA is clear in requiring notice to be sent prior to every hearing in which the court, a social worker or a probation officer knows or has reason to know that an Indian child is involved.[71] Both the Cal-ICWA and related Rules lay out what information is to be provided in each notice, to whom notice must be provided, and the proper inquiries necessary to determine if a child is or may be an Indian child.[72,73]

The California Rules of Court are also clear that the duty of inquiry is an affirmative and continuing duty, meaning that it violates the Cal-ICWA to rely on the parents to notify the tribe or alert the social services agency that they may have Indian ancestry, or to ask the parents once at the inception of the case without also contacting the extended family and Bureau of Indian Affairs.[74]

How then does notice continue to be such a prevalent issue, squandering such a disproportionate share of judicial resources? There are a variety of ways in which the law is still violated. Tribal representatives explained that they often saw failures to make adequate initial inquiries, to follow up on potential Indian ancestry or alternative sources of information, to provide complete or accurate information to tribes, to provide information to the correct person or address at the tribe, or to contact all of the tribes where a child may possibly be a member or eligible for membership.[75] Further, all too frequently, the agency or Court takes it upon itself to determine whether the child is an "Indian child" as defined, rather than defer to the tribe as the law explicitly provides.[76]

A. Initial Inquiries and Follow-Ups

The threshold question at the start of any child custody proceeding is simply whether there is any reason to believe that the child may be an Indian child. If there is,

[71] Welf. & Inst. Code §224.2(a), (b).
[72] Welf. & Inst. Code §224.2; Rule of Court 5.481 (emphasis added).
[73] ICWA Regulations, 25 CFR Part 23.111; The BIA Guidelines are also instructive on this latter point, at §B.
[74] Welf. & Inst. Code §224.3; Rule of Court 5.481.
[75] Tribal representatives identified inquiry as being nonexistent in Madera County.
[76] Welf. & Inst. Code §224.3(e)(1).

further inquiry is required.[77] The duty of inquiry belongs to the court, court-connected investigator and party seeking the foster-care placement, guardianship, conservatorship, custody placement under Family Code §3041, declaration freeing a child from the custody or control of one or both parents, termination of parental rights, or adoption of the child, which includes the county child welfare agency, probation department, licensed adoption agency, adoption service provider, investigator, petitioner, appointed guardian or conservator, and appointed fiduciary.[78] The statute does not restrict this inquiry to be made solely of the parents,[79,80,81] but the applicable CRC could be interpreted to do so,[82] and to the extent that it has been so interpreted, it should be amended. Welfare and Institutions Code §224.3 lists many persons, entities and other sources who or which might provide information on a child's potential status as an Indian,[83,84] and considering the statutory requirement that inquiry be affirmative and ongoing, this suggests a duty to make reasonable attempts to contact and investigate those persons, entities and sources at the outset. Section 224.3 also states that "reason to know" is not limited to information from those persons, entities and

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[77] Rule of Court 5.481(a)(4).
[78] Rule of Court 5.481(a).
[79] Welf. & Inst. Code §224.3.
[80] It is reported that the parents are frequently the only persons asked, and unfortunately the courts have at times affirmed this approach. (*In re E.H.* (2006) 141 Cal.App.4th 1330 [parent failed to respond affirmatively to court's repeated inquiries when asked about child's possible Indian heritage; incumbent on parent to disclose the child's Indian ancestry or to object to the social worker's reports].
[81] However, other courts have recognized that even a parent's silence on the issue and/or murky information does not waive the juvenile court's affirmative duty to inquire. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414; *In re Samuel P.* (2002) 99 Cal.App.4th 1259; *In re Gabriel G.* (2012) 206 Cal.App.4th 1160.)
[82] Rule of Court 5.481.
[83] Welf. & Inst. Code §224.3(b) states: "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 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.

[84] ICWA Regulations, 25 CFR Part 23.107. BIA Guidelines are again instructive, stating that: "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. This inquiry must be done on the record. At §B.1.

sources, reinforcing the view that initial inquiry should not be made only to the parents. Since notice to tribes "must contain enough identifying information to be meaningful," the party providing notice has a duty to inquire about and obtain, if possible, "all of the information about a child's family history as required under regulations promulgated to enforce [the] ICWA."[85]

The 2016 ICWA Regulations and BIA Guidelines recommend that the court ask each participant in the case (including the guardian ad litem and the agency representative) to certify *on the record* whether they have discovered or know of any information that suggests or indicates the child is an Indian child.[86]

In requiring this certification, the court may require the agency to provide:

> (i) Genograms or ancestry charts for both parents,
> (ii) The addresses for the domicile and residence of the child, his or her parents or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community.[87]

When parents are the sole target of the initial inquiry, it should be understood that there are a variety of reasons why relying on the parents does not necessarily protect the child's best interests, or the rights of the tribe. Parents may simply not have that information, or may possess only vague or ambiguous information.[88]

The parents or Indian custodian may be fearful to self-identify, and social workers are ill-equipped to overcome that by explaining the rights a parent or Indian custodian has under the law. Parents may even wish to avoid the tribe's participation or assumption of jurisdiction.[89]

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[85] *In re Robert A.* (2007) 147 Cal.App.4th 982, 987 (internal citations omitted).
[86] ICW Regulations, 25 CFR Part 23.107. BIA Guidelines at §B.1.
[87] ICWA Regulations, 25 CFR Part 23.108. BIA Guidelines, at §B.7
[88] *In re L.S.* (2014) 230 Cal.App.4th 1183 (parents claimed various Indian heritages, including "Blackfoot" (located in Canada); agency erred in not sending notice to "Blackfeet" (located in Montana)).
[89] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30 (mother gave birth to twins at hospital 150 miles from reservation in express attempt to avoid tribal jurisdiction).

Task Force Participants~

"The Tribe was not notified of a removal at birth, but we were notified at the 366 termination of parental status and move to adopt by the non-native foster family. We intervened at that point. The impact on the Tribe is firstly finding out the child was in the system for 18 months from birth."

"The case was in San Francisco, which is typically known to do a pretty good job…Mother filled out the ICWA-020 form, naming two tribes…the names of her grandfather and great-grandfather. Instead of doing additional inquiry…the court determined ICWA didn't apply [because of an old sibling case]….The Court of Appeal was very clear" and overturned the trial court's determination.

Even when the extended family is contacted and reports possible Indian ancestry, the reports are too-often disregarded as being remote or insignificant. Welfare and Institutions Code §224.3(b) includes as a reason that a child may be an Indian child: "one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." This provision neither limits the generations from which relevant information may be obtained nor creates a general "remoteness" exception to ICWA notice requirements.[90] "The notice requirement

RECOMMENDATIONS:

1) Amend the Rules of Court to support more robust inquiry and notice and include sanctions and penalties for failing to comply.

2) Each party should be required to certify on the record whether they have discovered or know information that indicates the child is an Indian child.

3) Remove reliance on the parents to supply information relevant to inquiry; insist on due diligence of the social worker.

(continued)

[90] *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1387, n. 9.

RECOMMENDATIONS (cont.):

4) Require accurate and complete notice to enable the tribe to determine whether the minor is an Indian child.

5) Require notice to all tribes with which the child may have Indian ancestry.

6) Require notice for voluntary adoption proceedings, probate guardianships and delinquency proceedings.

7) Create a single point of contact within the agency for noticing so training regarding noticing tribes can be concentrated.

8) Create a regional (non-county) clearinghouse to track notices going out and, where counties continually fail, to take over noticing.

applies even if the Indian status of the child is uncertain. The showing required to trigger the statutory notice provisions is minimal.[91] A hint may suffice for this minimal showing."[92]

B. Failure to Provide Complete or Accurate Information

The Cal-ICWA requires that notice include various details regarding the family and a copy of the child's birth certificate, if it is available.[93] Notices must be fully and accurately filled out to enable the tribe to determine whether the minor is an Indian child. Many of the challenges relating to ICWA notice relate to deficiencies in this regard, which include misspellings and/or incomplete names;[94] incomplete identifying information; [95] and/or notice sent for some but not all siblings. Courts have recognized notice is meaningless if the information in it is insufficient to allow for a determination of membership or eligibility.[96]

C. Notice to Incorrect Person/Address or Not to All Tribes

Notice is to be sent to the Tribal Chairperson unless the tribe designates another agent.[97] The BIA maintains a list of persons for each federally-recognized tribe who are

[91] Welf. & Inst. Code §224.3(b).
[92] *In re D. C.* (2015) 243 Cal.App.4th 41, 61, citing *In re Miguel E.* (2004) 120 Cal.App.4th 521, 549 (emphasis added).
[93] Welf. & Inst. Code §224.2(a)(5)(E).
[94] *In re Louis S.* (2004) 117 Cal.App.4th 622 (notice contained misspelled and incomplete names, relevant information in the wrong part of the form, and did not include available birth dates).
[95] *In re Christian P.* (2012) 208 Cal.App.4th 437 (social services agency initially did not provide any information regarding mother's grandparents, nor did it provide the locations of mother's or the children's births, and where it failed to provide any further information, despite its being available, after receiving a letter requesting more information from the Navajo Nation); *In re S.E.* (2013) 217 Cal.App.4th 612.
[96] *In re Louis S., supra; In re S.M.* (2004) 118 Cal.App.4th 1108.
[97] Welf. & Inst. Code §224.2(a)(2); Rule of Court 5.481(b)(4).

authorized to accept ICWA service.[98] Notice is also to be sent to the BIA in all cases subject to the ICWA.[99] This provision, however, is separate and distinct from the requirements for rendering *substituted service*. Substituted service on the BIA occurs if the identity or location of the Indian parents, Indian custodians or tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to believe the child is an Indian child -- notice of the proceeding *must* be sent to the appropriate BIA Regional Director and Secretary of the Interior.[100] This is intended to allow the BIA to use its special expertise with Indian tribes to assist in determining whether the child may be an Indian child. After receiving notice, the BIA has 15 days to notify the parents or custodian and the tribe of the pending action and to send a copy of the notice to the state court.[101]

Several difficulties have emerged regarding this process. First, if the BIA cannot determine whether the child is an Indian child or cannot locate the parents or Indian custodian within the 15-day period, it must notify the state court "prior to the initiation of the proceedings" how much additional time it will need.[102] The challenge, however, is that juvenile proceedings are subject to a statutorily mandated timeline. Second, to be effective, notice to the BIA should contain as much information as possible about the child's Indian ancestry.[103] However, as discussed above, notice is often not accurate or complete.

D. Potential Membership in Multiple Tribes

Notice must be sent to all tribes in 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.[104] If more than one tribe claims the child as a member (or the child is not a member but is eligible for membership in more than one tribe), the state court may

[98] 25 C.F.R. §23.12.
[99] 25 C.F.R. §23.11(a).
[100] 25 U.S.C. §1912(a); 80 Fed. Reg. 10146, 10154 at §B.6(e); 25 C.F.R. §23.11(a); Welf. & Inst. Code §224.2(a)(4); Rule of Court 5.481(b).)
[101] 25 C.F.R. §23.11(f).
[102] 25 C.F.R. §23.11(f).
[103] 25 C.F.R. §23.11(b).
[104] ICWA Regulations, 25 CFR Part 23.109. BIA Guidelines, at §B.5; Welf. & Inst. Code §224.2(a)(3), (b); Rule of Court 5.482(d)(2); Rule of Court 5.481(b)(1).

select the tribe that has "the more significant contacts" with the child.[105] It is reported that often notice is not sent to all of the tribes through which a child may have Indian ancestry. This is particularly common in California, especially where there are multiple tribes on Rancherias in one geographical region. For example, there are three federally recognized Cherokee tribes on the BIA's contact list; there are more than 15 Pomo tribes on the same list.[106]

E. Determining Whether a Child is an "Indian Child" Instead of Deferring to the Tribe

A common mistake by agencies, county counsels, court-appointed attorneys and the courts themselves is to conflate the issues of: (a) whether ICWA applies and (b) whether notice is required under the ICWA. In a recently published opinion, the court reiterated that the relevant question is not whether the evidence currently supports a finding that a minor is Indian; it is whether the evidence triggers the notice requirement so that the tribe itself can make that determination.[107]

This conflation stems in part from ignorance of child welfare agencies and county counsels as to their roles and responsibilities. They often believe it is their role/responsibility to determine if a child is a member or eligible for membership and thus if the ICWA applies. As Task Force respondents shared, too often social workers or county counsel want to make enrollment or eligibility decisions as soon as possible, not understanding that tribal eligibility and membership are only within the tribe's purview. The courts cannot make these determinations either. Every Indian tribe establishes and is knowledgeable of its specific eligibility requirements. The United States Supreme Court has held that "a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."[108] The tribe has the definitive and final word on whether a child is

[105] 25 U.S.C. §1903(5)(b); Welf. & Inst. Code §224.1(e)(2).
[106] 81 Fed. Reg. 26826 (May 4, 2016).
[107] *In re D.C.* (2015) 243 Cal.App.4th 41, 63.
[108] *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1468-1469 (definition of Indian child does not automatically exclude grandchildren by adoption of an ancestor with Indian blood).

or is not a member or is or is not eligible for membership.[109] The tribe's determination is conclusive on the state court.[110]

Often there is a fixation on the issue of enrollment. It is important to remember that while enrollment is a common evidentiary means of establishing Indian status, it is not the only means, nor is it determinative.[111] In fact, Cal-ICWA expressly states that "(i)nformation 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."[112] Enrollment is not required to be considered a member of many tribes, since some tribes do not have written rolls. As noted above, the tribe's determination is conclusive.

F. Voluntary adoptions, guardianships, and delinquency

Notice is required in voluntary adoption proceedings,[113] probate guardianships[114] and delinquency proceedings in which the child is either in foster care or at risk of entering foster care.[115,116] Probate guardianships were an area of concern raised by Task Force respondents. Despite a recent First District Court of Appeal decision holding that the ICWA's requirements, including that of notice, do indeed apply in probate guardianship proceedings,[117] it is reported that the same trial court involved in that case, as well as courts in nearby counties, continues to disregard the ICWA's applicability.

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[109] *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49.
[110] Welf. & Inst. Code §224.3(e)(1); *In re D.N.* (2013) 218 Cal.App.4th 1246.
[111] *In re Jack C* (2011) 192 Cal.App.4th 967.
[112] Welf. & Inst. Code §224.3(e)(1).
[113] 25 U.S.C. §1913; Family Code §180; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30; *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404.
[114] Probate Code §1460.2.
[115] Welf. & Inst. Code §727.4; Rule of Court 5.480(2).
[116] See also, 25 U.S.C. §1913 (judicial certification required for voluntary placements and termination of parental rights).
[117] *Guardianship of D.W.* (2013) 221 Cal.App.4th 242. (In this case, the trial court incorrectly assigned appellant, the party objecting to the guardianship, the responsibility of providing notice to the possible Indian tribes. By the time of the contested hearing on the guardianship petition, appellant had a letter from the Karuk Tribe, indicating that the minor was potentially affiliated with the tribe and that the matter was currently under investigation. Rather than waiting for the results of that investigation for at least 60 days, as required by Rule of Court 7.1015(c)(9), the court proceeded with the guardianship proceeding as if the minor was not an Indian child, granted the guardianship petition, and placed the minor in the guardian's care. On appeal, the guardianship order was reversed. The trial court's failure to apply the ICWA and the appropriate state law and Rules of Court is a familiar scenario throughout California).

Delinquency was also an issue raised by respondents. While a recent California Supreme Court case limited the general application of the ICWA to delinquency proceedings,[118] notice is still useful to tribes, because they often can offer services or the assistance of elder tribal mentors to youth who are wards of the court.[119] And the Act can and does apply to status offenders (such as truancy or possession of alcohol) or probation violations for minors (which are not in and of themselves a criminal act). Without notice, a tribe cannot provide services or placements for the small subset of delinquent minors who are covered by the ICWA.

[118] *In re W.B.* (2012) 55 Cal.4th 30.

[119] The Advisory Committee Comment for Rule of Court 5.481 (governing notice and inquiry) provides insight into this issue, available at: www.courts.ca.gov/5807.htm.

VI. State Courts Fail to Understand and Comply with Jurisdictional Requirements

A. Extended Emergency Jurisdiction

Under Welfare and Institutions Code §305.5(f), an agency can take temporary "emergency jurisdiction" over or make an emergency detention of an Indian Child, and the requirements of the Cal-ICWA do not need to be satisfied prior to such exercise of emergency jurisdiction if doing so is necessary to prevent eminent harm to the Indian child. However, the agency must return the Indian child to tribal jurisdiction or parental custody or initiate an Indian Child Custody proceeding immediately. Unfortunately, tribal representatives identified situations of extended "emergency custody" without notice or other Cal-ICWA compliance. Such emergency detention, though designed to be temporary, can continue well beyond the short term, and become a de facto, permanent placement. Even though removing an Indian child from his/her parent or Indian custodian's care will, for all practical purposes, look the same, if it is labeled as *detention* or *continued detention*, agencies have argued that it is not a *placement* and the ICWA procedural protections do not apply. Simply put, when a *detention* extends past the time for jurisdiction, and in extreme cases exceeds the 60-day requirement for disposition under §361, it is contrary to law and circumvents the ICWA.

ISSUES:

1) Emergency jurisdiction used to thwart ICWA compliance.

2) Available information is not shared pre-removal.

3) Agencies and courts resist transfers to tribal court.

This practice of extended emergency detentions was reported by tribal representatives during the Listening Sessions as widespread, and runs afoul of the clear intent of the Cal-ICWA. Emergency jurisdiction is, and should be treated as, a mechanism to neutralize any dangerous conditions in a minor's home and to identify as suitable a non-offending parent or relative, as required by §§305.5(f) and 306(b). Once

the danger is removed or alleviated, the child must be returned.[120]

Unfortunately, the practice of delaying adjudications and other required hearings has not resulted in greater specificity in identifying Indian children; the delay does not result in greater due diligence and better notice to tribes. Instead, the prolonged delays have created bonding issues and conflicts with placement preferences that are, to an extent, preventable. Were the courts to rigorously enforce the statutory time constraints, either by reinstating custody to Indian parents, imposing monetary sanctions on offending agencies, or outright dismissing cases, then the time limits would be perceived as they were intended—to be mandatory. The ICWA Regulations provide that a court must immediately terminate 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."[121] An emergency proceeding should last no more than 30 days, unless the court returns the child, transfers the proceeding to tribal court, or initiates a child-custody proceeding.[122] Because of the Regulations and Guidelines' recent applicability, we must advocate for compliance with the Regulations to ensure Indian children are returned to their parents.

B. Non-Compliance with Pre-Removal Reporting and Documentation

Not every case is presented to an agency as a clean slate. Many times, the agency has had prior contacts with the Indian parents or Indian custodian, and such history is often included in a narrative supporting detention.

Tribal representatives identified a lack of communication, coordination and sharing of documents as a pre-removal compliance problem. The agency must, at some point, prove that Active Efforts were made to prevent the removal of an Indian child, and the documentation of such will be based on the pre-removal and pre-jurisdictional conduct of the social workers or peace officers involved.

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[120] See discussion on PEPS, above.
[121] ICWA Regulations, 25 CFR Part 23.113. In addition, a petition for an emergency removal/placement must comply with 25 CFR Part 23.113(d) and include all the information outlined in (d)(1)-(10).
[122] ICWA Regulations, 25 CFR Part 23.113(e).

When tribal social service agencies and their representatives, or Indian parents or Indian custodians are precluded from receiving or verifying pre-removal/pre-jurisdictional documentation, the predicates of the ICWA are not being met, and ultimately lead to compliance violations.

C. Agencies and Courts Resist Transfer to Tribal Court

The Cal-ICWA provides the right to transfer an Indian child's case to tribal court.[123] Most, but not all, dependency cases arise where the state and tribe share concurrent jurisdiction, and where the tribe can compel a transfer to tribal court (or tribal jurisdiction, for tribes that do not have courts). The statutory language is compulsory, so that a state court must transfer a case to tribal court, absent a narrow set of circumstances. The narrow circumstances are where one parent objects, where the tribe refuses to accept transfer, or if actual *good cause* exists not to transfer.

"Good cause" is not simply a preference for one forum over another, but rather a requirement that the state court identify—on the record—the specific facts or circumstances that necessitate depriving the tribal court presiding over a child custody and welfare case of one of its members. Factors that include perceptions or grievances over the adequacy of tribal court's procedures or infrastructure are specifically prohibited as good cause factors.[124]

The overwhelming input from tribal representatives identified a reluctance of certain agencies and courts to allow transfer to tribal court. In the instances when there was support for transfer, it was largely to transfer costs to the tribe, or to remove a case from the county's responsibility.

Transfer to tribal court is also sometimes complicated by the fact that tribes often wait to seek transfer until the state court process has reached the permanency determination stage. This means that the most meaningful assessment of transfer merits will be made only after a county has offered, and the parent(s) failed, its efforts to reunify the family, or successfully completed a service plan. Simply put, the tribe's

[123] Welf. & Inst. Code §305.5 and 25 U.S.C. §1911(b).
[124] Rule of Court 5.483.

RECOMMENDATIONS:

1) Courts should rigorously enforce statutory time constraints in emergency removal situations through all means available.

2) Increase awareness and confidence in tribal courts by increasing collaboration between the two types of courts.

3) Replicate the concurrent jurisdiction model developed in some California counties.

4) Include tribal courts and tribal jurisdictions in the decision-making process before placements become permanent or termination of parental rights is contemplated. Create sanctions in the event of a "prohibited" opposition to transfer to tribal court.

5) Look at the 241.1 system of early determination of "best" jurisdiction as a model.

transfer requests are going to be made at the end of a case, when the local options have failed; such "delay" is treated as objectionable, despite there being statutory authority supporting a tribe's right to delay.[125]

Nevertheless, California tribes have experienced a myriad of obstacles from counties when attempting to transfer cases to tribal court, including:

(i) Late and continuing objections or appeals;
(ii) Reluctance to share information or documentation with the tribal court or tribal social services;
(iii) Limited funding for tribal social service agencies, and roadblocks to sharing IV-E funds;
(iv) Treating tribal courts as if they were county courts, and projecting analogous procedural requirements on tribal courts that do not apply;
(v) Refusing to afford full faith and credit or comity to tribal court orders;
(vi) Using tribal court transfers as a dumping ground for problem cases or to dispose of ICWA cases in general.

The shared responsibility of jurisdiction and sovereignty is not diminished when a county juvenile court accedes to a tribe's involvement and transfer of a dependency case. Unfortunately, the choice put to many tribal representatives is to accept a case for transfer with incomplete information and limited

[125] Welf. & Inst. Code §305.5(c)(2)(B); Rule of Court 5.483(d)(2).

funding, oftentimes at the front end of a case when little is known, or at the back end when rebuilding the parent-child relationship is challenging, and tethered to the county's failed plan of reunification.

A better approach, and one more in line with the ICWA, would be for counties to acknowledge, early on, the importance of tribal courts and tribal jurisdictions, and to include them in the decision-making processes before placements become permanent, and before termination of parental rights is even contemplated. One model that has united two seemingly disparate systems is the §241.1 protocol for dual jurisdiction youths straddling between the dependency and delinquency systems. Under the §241.1 process, before a court could take jurisdiction over a dual status minor, the county probation and social services departments were required to meet, confer and follow a county-approved written protocol to determine which system would best serve the minor's needs. This arose from a period when children could not be both a dependent and a delinquent minor; they could only be one, a §300 or a §600 ward.

In the Indian law context, the Rules of Court could compel counties to adopt a similar protocol whenever an Indian child is identified. Instead of waiting for notice to be effected and tribes to intervene or identify placements, when an Indian child comes into the dependency system, the county would be obligated to meet and confer with its tribal counterpart, and adopt a joint case plan—as a prerequisite for maintaining jurisdiction. This would fast-forward the process, encourage collaboration and, most importantly, involve the tribes at a much earlier stage than the current paper chase affords. It would also place a premium on county social services reaching out to tribes in a fashion akin to TDMs, thereby vesting the parties and reducing contests and appeals. A county-tribal §241.1 protocol model would be based on existing law, and a structure that could bring the sides together in a way that courts and litigation cannot.

Task Force Participants~

"The Agencies only agree to transfer cases to Tribal Court when they want to dump a problematic case."

"Kern County routinely asks tribes to transfer ICWA cases to Tribal Court."

VII. Tribal Intervention and Participation in State Court Proceedings Are Thwarted

A. Tribal Intervention and Participation in Proceedings

ISSUES:

1) Tribal intervention is frequently misunderstood and such misunderstanding may result in ICWA violations.

2) Tribes are being denied their right to participate in court. Tribal participation as a non-party is questioned or Tribal representation by a non-attorney advocate is prohibited.

3) Opposition from parties and the court when the tribe exercises the right to a continuance as provided in CAL-ICWA.

4) Court and agency failure to provide resources to allow tribes to participate remotely in court proceedings denies tribes the ability to participate and exercise their rights under the Cal-ICWA.

5) Recognition of and equal protection for Indian custodians.

A tribe's standing to participate and intervene in dependency is recognized by both the federal and state laws.[126] Those laws and rules are uniform, and allow a tribe to intervene *at any stage* of a proceeding, meaning that there is no temporal limitation or ability to time bar a tribe's participation, and tribes may intervene as a matter of right. Again, there is no discretion to deny intervention.

It bears repeating that the only practical limitation on a tribe's right to participate or intervene is notice. When a tribe is not identified, or is not properly noticed, as is frequently the case, the tribe cannot intervene if it is unaware of a proceeding. The state-approved judicial form for intervention, ICWA-040, includes a list of rights that a tribe retains, whether it intervenes or not: (i) to receive notice of hearings; (ii) to be present at hearings; (iii) to address the court; (iv) to examine all court documents relating to the case; (v) to submit written reports and recommendations to the court; (vi) to request transfer of the case to tribal court; and (vii) to intervene at any point in the case.

The mechanics for intervention are somewhat relaxed, and do not require a tribe to "formally intervene" in writing. California Rules of Court, rule 5.482(e) recognizes that intervention can be made

[126] 25 U.S.C. §1911(c); Welf. & Inst. Code §224.4, and Rule of Court 5.482(e).

orally, or even without using the permissive state form.[127]

B. Non-Party Participation or Monitoring

A tribe may choose not to formally intervene to become a party to a case, but instead seek the court's permission to simply "monitor" or participate in the proceedings as a non-participating party. Such non-party participation may include receiving notice of and attending hearings, addressing the court, examining documents, submitting written reports and recommendations, and performing other activities requested or approved by the court.[128]

If the tribe of the Indian child does not intervene as a party, the court *may* permit an individual affiliated with the tribe or, if requested by the tribe, a representative of a program operated by another tribe or Indian organization to: be present at the hearing, address the court, receive notice of hearings, examine all court documents relating to the dependency case, submit written reports and recommendations to the court, and perform other duties and responsibilities as requested or approved by the court.[129]

Whether due to ignorance or indifference or both, this right to participate as a non-participating party is not being recognized by many courts. The denial of this right especially negatively impacts lower-income tribes, as they often do not have resources to retain legal counsel, travel and be present at all hearings or even pay fees associated with telephonic appearances and therefore feel compelled to engage as a non-participating party.

The law does not allow a county or court to disregard the ICWA when a tribe does not intervene, though some county attorneys have advanced this interpretation, and it is an identified compliance problem by Task Force participants. ICWA is triggered by the Indian child in the courtroom, not whether the Indian child's tribe is present or intervenes. Task Force participants expressed concern that if the tribe is not present, there is no watchdog for compliance.

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[127] ICWA-040.
[128] Rule of Court 5.534(i)(2).
[129] 25 U.S.C. §§1911, 1931-1934; Rule of Court 5.534(i).

C. The Tribe, Parent, Indian Custodian and the BIA's Right to a Continuance is Held to Conflict with the Expediency Demanded in Child Custody Proceedings

Cal-ICWA provides that:

> 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.[130]

Although this is a legally mandated right of parents, tribes and Indian custodians, as a practical matter, tribes often face opposition from the court, agency and other parties when trying to exercise this right.

Embedded in the juvenile dependency scheme is the need for expediency and avoiding delay of permanence for the child. Continuances are disfavored and the courts contend that they should be difficult to obtain.[131] For that reason, there are a number of systemic barriers to causing delay in a proceeding. All continuances are governed by §352, which permits a continuance, *but* the delay must be shown not to be contrary to the child's best interest.[132] Additionally, the statute requires written notice of the motion with supporting documents to be filed and served on all parties at least two court days before the hearing unless the court finds good cause for hearing the request orally.[133]

The courts and agencies have no fear of ignoring this provision, as tribes are left with little recourse for the violation. As illustrated above in the Notice section, to the extent that this issue has even reached appellate review, the courts have held the violation as a non-jurisdictional and/or harmless error.

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[130] Welf. & Inst. Code §224.2(d); See also, ICWA Regulations, 25 CFR Part 23.112; BIA Guidelines, at §D.7.
[131] See *In re the David H.* (2008) 165 Cal.App.4th 1626; *Jeff M. v. Superior Court* (1997); 56 Cal.App.4th 1238, 1242.
[132] Rule of Court 5.550.
[133] Rule of Court 5.550(a)(4); Welf. & Inst. Code §352(a); See Fam. Code §§7668, 7871.

D. Additional Considerations Regarding Role of Tribes

As noted above, nothing in the ICWA or Cal-ICWA authorizes a county to limit the ICWA's application to cases where a tribe intervenes. The laws that apply pre-removal and after notice is given when a child is known to be an Indian child (or reason to know), apply independently of whether the tribe intervenes: (i) proof of active efforts; (ii) compliance with placement preferences; (iii) court-appointed counsel; (iv) removal based on detriment, established by a qualified expert witness; (v) consultations with tribes; (vi) mandatory transfer if requested; (vii) elevated burden of proof; (viii) consideration of tribal customary adoption; and (ix) restrictions on terminating parental rights. Even if a tribe never intervenes in a case that has an identified Indian child, the county is obligated to follow the ICWA and Cal-ICWA.

Many tribes attempt to serve as an additional resource for counties, offering culturally sensitive counseling, education opportunities and funding, and health-care services that may not be available through the county. Tribes that participate on a non-adversarial basis still encounter resistance, and complain that they are shut out of the process and discouraged from filing their own reports, case plans or case updates. It cannot be overemphasized that tribal social workers and non-attorney representatives are uniquely positioned to assess tribal services and tribal placements, and advance the common goal of securing safe and culturally appropriate homes for Indian children. This "gap" goes unaddressed because of the pervasive inability of tribes to secure counsel and the "system's" belief that no other party bears the burden of ensuring compliance with the ICWA. To the extent that non-intervening tribes have been relegated to a lesser role, such practices are inapposite to the objectives of the ICWA, and are a compliance violation.

An additional subset of participation issues arises when tribes or their representatives are not allowed to participate in hearings because they are not lawyers. Setting aside the cost and indigence of some tribes that does not allow them to retain private counsel, the intervention rules do not require a tribe to have a lawyer. Still, the

practice of limiting participation of *Pro-Per tribes* remains widespread.[134] Many times tribes are not permitted to address the court, sit at counsel table or examine witnesses. However, even allowing for such practices should not "buy" the notion that non-lawyers performing such professionally skill-based tasks have secured compliance with the ICWA.

The obvious fix would be for juvenile courts to appoint legal counsel for tribes since, as it currently stands, tribes are almost always the only party with no option for appointed counsel in dependency cases.

A separate but related issue is allowing tribal representatives to participate and appear telephonically. Not all dependency cases scheduled are resolved when calendared, and for tribes that are remote, out of state or have travel difficulties, the cost to participate in person is prohibitive—especially if a case is continued. CRC 3.670 implements CCP §367.5 and promotes remote access to courts in all civil cases, including dependency cases. The rule sets up a fee structure that is imposed, largely by a single contract provider, but does not make any special accommodations for tribes in ICWA cases. One recommendation for improving access to courts and participation in routine and uncontested hearings would be for the courts to specifically waive fees for tribal representatives in dependency/ICWA cases. This serves multiple purposes, including demonstrating active efforts by the agency, but also eliminating the disenfranchisement of remote and resource-poor tribes. Some counties have implemented this on a local basis, and a few tribal representatives noted such fee waivers as helpful to their participation in their comments to the Task Force. Improving remote, telephonic and/or Skype access would be a substantial step forward.

Los Angeles County has consolidated all its ICWA cases into one department and court, and while it is not without problems, the idea was to streamline the handling of cases and issues. Currently, the 2nd District Court of Appeal has the second highest

[134] Nearly all tribal representatives shared the common experience of being denied a seat at counsel table, being turned away by court clerks and bailiffs, and shunned by attorneys and department representatives.

number of ICWA appeals in the state. In theory, the Los Angeles County ICWA Unit and ICWA Court were to be the model for the State in ICWA compliance, thus reducing appeals on ICWA issues. Obviously, this is not the case. While replicating this model in other counties might generate more positive results, providing uniform and equal access to the courts is imperative. Use of telephonic appearances is routinely used in other courts and in some dependency courts. However, the excessive time that tribal representatives and tribal attorneys are on hold can exceed two or more hours. This feels punitive to some and offensive to many.

The ICWA extends its protection to Indian custodians as well as Indian parents, and all the protections afforded to parents apply to an Indian custodian, including court appointed counsel. An Indian custodian is akin to an informal guardianship, and is defined in 25 U.S.C. §1911(6) (and is codified in Cal-ICWA) as any Indian person who has legal custody of an Indian child under tribal law or custom or State law, *or* to whom temporary physical custody has been transferred by the parent. No specific type of writing is required to establish an Indian Custodian and, once created, the state court cannot remove custody from the custodian without following the ICWA, including sustaining allegations against the custodian. This is not commonly understood, and receiving equal protection for Indian custodians has been identified as a

RECOMMENDATIONS:

1) Amend the Foster Care Bill of Rights to include the rights of Indian children.

2) Mandatory and meaningful inclusion of tribes, parents, Indian custodians, tribal service providers and Indian children, if of age, in the new 2016 TDMs.

3) All care providers must receive meaningful training on providing foster care to an Indian child, to include facilitating the Indian child's engagement with extended family and participation in tribal events.

4) Require juvenile courts to appoint legal counsel for tribes.

5) Courts should waive fees for tribal representatives appearing remotely in ICWA/dependency cases to improve participation in routine and uncontested hearings.

(continued)

RECOMMENDATIONS: (cont.)

6) Consolidate all ICWA cases into one department at the courthouse or improve remote access to encourage Tribal participation.

7) Use a §241.1-type protocol for identified ICWA cases to allow for a tribe's participation at an earlier stage.

8) Include tribes, parents, Indian custodians, extended family members and tribal service providers in the TDM.

compliance issue in California.

By contrast, the judicially created *de facto parent* is often "granted" greater rights than Indian custodians. A de facto parent can be a non-family member who has been granted foster care placement of an Indian child, but who is not a member of the child's tribe or even related to the child. Nevertheless, California law allows de facto parents to participate and be heard in cases on placement and other case plan issues, and they can have legal counsel appointed at no cost. The knee-jerk reaction to elevate a de facto parent above the Indian custodian is contrary to the law and simply flies in the face of the legislative findings of both Congress and the California Legislature.

Dependency cases are intended to be less adversarial than other court cases and, for that reason, allow a broad spectrum of participants. However, when foster parents or CASAs or non-tribal service providers can address the court and submit recommendations or written statements, but tribal entities or extended relatives cannot, then the integrity of ICWA enforcement is called into question. The manner and breadth of non-tribal participants in dependency cases has been identified as a hindrance and obstacle by tribal representatives who are not afforded the same rights.

By way of recommendation, the use of a §241.1 protocol model for cases identified as ICWA cases would alleviate participation issues at a much earlier stage and give the court a document to rely upon in assessing Cal-ICWA compliance. Effective in 2016, the state adopted legislation to require a form of TDMs for every case before disposition, which could be expanded to include definitive tribal roles and participation, so that tribal concerns and ICWA compliance are addressed at a much earlier stage than at the Court of Appeal. However, to be meaningful, the 2016 version

of TDM must include tribes, parents, Indian custodians, extended family and tribal service providers. They cannot be held in isolation.

Finally, §16001.9 establishes, as state policy, the Foster Care Bill of Rights. While the application of the Cal-ICWA and the obligation to maintain political and cultural ties, tribal placements, enrollment assistance and to assert equivalent rights as non-Indian foster youth can be cobbled together by combining parts of the Foster Care Bill of Rights—nothing in that section specifically requires the agency to recognize an Indian foster child's rights, from the child's perspective. Whether by oversight or intention, this section needs to be amended to clearly and unequivocally recognize an Indian foster child's right to maintain tribal culture and political ties. The Indian child's rights should be expressly recognized.

VIII. Active Efforts Post-Removal Are Not Provided or Reviewed by Courts

A. The Scope of Active Efforts

Any party petitioning a State court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that "active efforts [were] made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts [were] unsuccessful."[135]

ISSUES:

1) Active efforts after removal are rarely evidenced in the record or provided to the family.

2) Tribal services should be viewed as supplemental to compelled services provided by the agency.

3) Counties and courts continue to struggle with the requirement and production of evidence, and the record is sometimes non-existent, yet courts make the active efforts finding.

4) Identifying and defining active efforts in some counties is an overwhelming task.

5) Case plans are mostly boilerplate with little if any consultation with tribes.

A finding that active efforts were made must be supported by clear and convincing evidence.[136]

The challenge is that there is no definition for "active efforts;" the Cal-ICWA states that "active efforts shall be assessed on a case-by-case basis… 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... [and] 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."[137]

The ICWA Regulations and BIA Guidelines confirm that "(a)ctive efforts are affirmative, active, thorough, and timely efforts intended primarily to

[135] 25 U.S.C. §§ 1912(f); ICWA Regulations, 25 CFR Part 23.120; BIA Guidelines, at §E; Welf. & Inst. Code §361.7; Rule of Court 5.484(c).
[136] *In re Michael G.* (1998) 63 Cal.App.4th 700.
[137] Welf. & Inst. Code §361.7(b); Rule of Court 5.484(c)(1)-(2).

maintain or reunite an Indian child with his or her family .[138] The Regulations and Guidelines further provide illustrative examples of "active efforts."[139]

Even with the 2016 ICWA Regulations, the problem of what constitutes "active efforts" remains a fiercely contested issue.[140] The issue of "active efforts" remains the subject of the most ICWA-related appellate disputes, after notice.

B. Active Efforts are Not Reasonable Services

In some counties, the view persists that active efforts are equivalent to the reasonable services provided in non-ICWA cases. This traces back to a pre-SB 678 case where the court remarked that active efforts and reasonable services are "essentially in differentiable" due to the importance that reunification services have in the dependency system as a whole.[141]

At that time, pre-Cal-ICWA, the law did not specify that active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other

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[138] 42 U.S.C. §671(a)(15); ICWA Regulations, 25 CFR Part 23.2..

[139] ICWA Regulations, 25 CFR Part 23.2 provides: Active efforts means affirmative, active, thorough and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example: (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal; (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services; (3) Identifying, notifying and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning and resolution of placement issues; (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents; (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe; (6) Taking steps to keep siblings together whenever possible; (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety and welfare of the child; (8) Identifying community resources, including housing, financial, transportation, mental health, substance abuse and peer support services, and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources; (9) Monitoring progress and participation in services; (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available; (11) Providing post-reunification services and monitoring. See also, BIA Guidelines *at §E.*

[140] See *In re A.L.* (2015) – Cal.App.4th – (filed 12/21/15; pub. 12/31/15 – whereby the court held that the new BIA Guidelines (now ineffective) are consistent with California statutes and Rules of Court, but that the Guidelines are not binding authority and upheld reasonable efforts to assist the parents in areas where compliance proved difficult.)

[141] *In re Michael G.* (1998) 63 Cal.App.4th 700.

Indian social service agencies, and individual Indian caregiver service providers, nor did it include application of the tribe's social and cultural standards. Back then, those were advisory actions, but they are now required by Cal-ICWA.[142] Today, taking the position that there is no difference between the two standards overlooks that fact, as well as the fact that even when reasonable services may be bypassed,[143] active efforts may not be.[144]

Had it wished to declare that active efforts and reasonable efforts/services are identical, Congress had the opportunity to do so approximately 20 years after the ICWA was enacted. When the section of Title IV-E of the Social Security Act requiring reasonable services[145] was revisited by the Adoption and Safe Families Act, however, Congress chose not to do so. Since "[w]e assume that Congress is aware of existing law when it passes legislation,"[146] logic dictates that Congress intended the two standards to remain differentiable. The recently published ICWA Regulations also distinguish the two standards.[147] Taken as a whole, Cal-ICWA, ICWA, California Rules of Court and the ICWA Regulations all recognize and emphasize that active efforts are not the same as reasonable efforts and, thus, courts in California must make two distinct findings based upon credible evidence in a child welfare case involving an Indian child: reasonable efforts and active efforts.

C. Responsibility and Burden Shifting

When a child is removed from his or her parent(s), the agency has a responsibility to provide reunification services.[148] Where a tribe has available services of its own, making use of those services is part of the agency's duty of active efforts at preventing the breakup of the Indian family.[149] Tribal services are an appropriate way to help meet the higher active efforts burden, but they do not supplant the agency's

[142] Welf. & Inst. Code §361.7(b).
[143] Welf. & Inst. Code §361.5.
[144] Welf. & Inst. Code §361.7(a).
[145] 42 U.S.C. §671(a)(15)(A).
[146] *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 32.
[147] See, ICWA Regulations, 81 Fed. Reg. 38791 "ICWA, however, requires "active efforts" prior to foster-care placement of or termination of parental rights to an Indian child, regardless of whether the agency is receiving federal funding".
[148] Welf. & Inst. Code §361.5.
[149] Welf. & Inst. Code §361.7(b).

responsibility for reunification services. A common issue identified by tribes, however, is that where tribes do offer tribal services, agencies tend to rely on those services in lieu of providing their own or assume credit for locating and assisting a parent in obtaining those services when the agency in fact did nothing. This is especially true when a tribe intervenes in a case – as though the tribe's status as a party creates a tribal obligation to provide services when there is no statutory basis for such an obligation. Whenever possible, tribes are generally happy to provide supplemental services, but not to have those services substituted for what the agency is already compelled to provide. As mentioned elsewhere in this report, tribes do not have access to the same funding streams as the counties for such services. Reliance on tribal services to the exclusion of other services creates strain not just between the tribe and county agency, but also between the tribe and the family, as the tribe essentially becomes responsible for the family's progress.

D. Active Efforts – Development

There are problems with the reverse of the above as well – when, rather than rely on tribal services to the exclusion of its own, an agency fails to adequately work with tribes to access such supplemental services. This can include a failure to solicit input from the tribe on the case plan, and a failure to consider the cultural appropriateness of county services (e.g., sending parents to a religion-based recovery center different from their own beliefs). This can also include skepticism of any services the tribe does offer, and a corresponding failure to access such services. A case in point is the use of tribal health services to administer drug tests. Many tribes offer federally funded Indian Health Service clinics with the ability to perform drug testing. Having access to a local clinic can make a huge difference to a parent subject to random drug testing who lives in a rural area, who would otherwise have to appear at a county/contract clinic to test. Transportation to and from such clinics can be a major barrier for indigent parents, causing them often to miss out on employment, educational or child visitation-related duties as a result. However, having drug testing performed at local tribal clinics seems at times to be viewed with suspicion by county agencies, even though tribes have as much of an interest in verifying that parents test clean as those agencies do.

E. Active Efforts – Implementation

Numerous issues also exist when it comes to implementing an active efforts plan to prevent the breakup of the family. Reunification services and active efforts are commonly oriented primarily at the parents,[150] but there are a wide range of other services, often overlooked, which may be necessary to keep or bring the family back together, and which are without question in a child's best interest. Services to the child are paramount among these. Some of these have already been discussed elsewhere in this report – they include services to preserve the child's connection to the tribe (transportation, supervision of visitation, etc.), and services to keep the child in a stable placement while reunification is pending (counseling, addressing educational needs, remedial repairs to a home, etc.). If reunification ultimately fails, providing these services to a child will also assist the child in achieving permanency.

In addition to strengthening the connection to their tribe and their culture, membership protects and secures the Indian child's political rights and opens a variety of tribal benefits to a child, which may include health care, educational assistance, per capita shares of tribal gaming or other revenues,[151] housing assistance, hunting and fishing rights, other land use rights, and so on. Agencies fail to assist parents and

A glaring example of limiting and possibly denying access to the courts is the public parking system at the Sacramento County Superior Court, William R. Ridgeway Family Relations Courthouse, 3341 Power Inn Road. The location makes public transit a poor option; the parking lot outside the courthouse is owned by the City of Sacramento and has limited spaces and parking meter machines to purchase parking time, and has fines of more than $60.

[150] Indian custodians are also entitled to these, but it was reported that many counties do not have a clear understanding of this obligation, nor of Indian custodianship in general. While the ICWA defines the term "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" (25 U.S.C. §1903(6)), there is little guidance in the ICWA or state law.

[151] Often these are placed into a trust or designated account, which is held until (and accumulates until) the minor reaches the age of majority, graduates from high school, or otherwise meets the criteria established by their tribe for accessing the funds.

children by delaying or refusing to share the child's birth certificate and Social Security card, blocking the process of enrollment for that child.

It requires little imagination to see how any number of these benefits have the potential to strengthen the family and therefore come within the scope of active efforts to provide remedial and rehabilitative services to prevent the breakup of the family.[152] Once a child is under the custody and control of a social services agency, that agency is frequently best positioned to provide the necessary documentation for confirming membership. Logically, then, assisting the child with membership is itself part of the duty to make active efforts, which is affirmed in the Rules of Court.[153]

A corollary to assisting with tribal membership is establishing parentage. Tribes almost always require birth certificates connecting the child to an already-enrolled member, and frequently will require DNA confirmation of the child's father. Yet these steps too are often not taken, even though the agency is well suited to assist with establishing paternity.

Other aspects of active efforts reported as problems in tribal listening sessions include

RECOMMENDATIONS:

1) Enact legislation which requires all case plans to include tribal input in the development of each plan which considers cultural appropriateness of county services. Failure to include the tribe should result in sanctions, payable to the tribe.

2) Mandate counties to contract with Indian health clinics and service providers, and develop MOU/MOA with Tribal TANF programs.

3) Courts must read into the record evidence of tribal participation in the case plan, the service providers and the services provided to the parent(s) and child(ren).

4) County agencies should solicit the input of the tribe regarding the cultural appropriateness of the case plan.

(continued)

[152] 25 U.S.C. §1912(d); Welf. & Inst. Code §361.7.
[153] Rule of Court 5.484(c)(2).

the facilitation of the child's participation in tribal events, transportation, supervision for visitation, funding to support additional placement options (e.g., remedial house repairs to make a home safe for the child), and access to foster care/relative caregiver funding.

RECOMMENDATIONS: (cont.)

5) County agencies must assist the child with obtaining and maintaining tribal membership.

6) Improve county planning and resource allocation to impact underserved, remote locations.

Another element of a legally sufficient Active Efforts reunification plan is provision of resources to serve rural communities. Many Indian communities are located well off the beaten path, and transportation can be a considerable burden on both the agency and the parents. Agencies need to decentralize service providers in such a way as to actually benefit rural communities, which are often both economically depressed and disproportionately over-represented in the child welfare system. There are a number of counties which have recently received funding ostensibly for that exact purpose. However, it has been reported that rather than truly decentralize services, some counties have simply moved services to other nearby population hubs. Making them available in more remote locations would mean their impact would be substantially increased considering the higher caseloads in those areas and the otherwise higher burdens (often unmet) involved in providing adequate and appropriate services in those areas.

Another issue identified by tribes regarding successfully providing Active Efforts is the effect of losing or reassigning social workers mid-case. County social service agencies often have high turnover rates. These are likely further pronounced by expecting social workers to overcome the above obstacles when working with Indian clients. Better planning and resource allocation by counties could go a long way to making success more possible, and thus decreasing staff loss or movement attributable, through no fault of their own, to not being miracle workers. The trend in recent years of transferring cases to different units/social workers at the various stages of a case (jurisdiction/disposition) was touted as efficiency/proficiency building, but

instead has promoted a lessening of “bonding” between clients and workers. This is not helpful to a client base that is strongly responsive to relationship-building interventions.

IX. Tribes Are Denied Meaningful Access to Information and Complete Discovery

> ***ISSUES:***
>
> *1) Agencies routinely violate statutory provisions requiring complete/continuing disclosure of information to tribes.*
>
> *2) Tribes face difficulties accessing case records and having timely access to meaningfully review the documents and prepare responses before hearings.*
>
> *3) Full disclosure, early and often, to tribal representatives is essential for tribes to fully realize their rights under Cal-ICWA.*

California law provides that parties to a dependency proceeding involving an Indian child, including the child's parents, the child, the child's Indian custodian and the child's tribe have the right to examine all reports or other documents filed with the court in the proceeding. The Legislature has made it clear that a tribe's right to access the juvenile case file with no court order is required for such disclosure.[154]

The ICWA Regulations and BIA Guidelines provide that "each party to an emergency proceeding or a foster-care placement or termination-of-parental-rights proceeding under State law involving an Indian child of his or her right to *timely* examination of all reports or other documents filed with the court and all files upon which any decision with respect to such action may be based."[155]

Subject to the right of a party to show privilege or other good cause not to disclose specific material or information, the California Rules of Court require that its pre-hearing discovery rules must be liberally construed in favor of informal disclosures. The Rules of Court provide that the agency must disclose any evidence or information within petitioner's possession or control favorable to the child, parent or guardian. Once the petition is filed, the agency must promptly deliver or make accessible for inspection and copying the police, arrest and crime reports relating to the pending matter. Where

[154] See, Welf. & Inst. Code §827(f); Rule of Court 5.552(c).
[155] ICWA Regulations, 25 CFR Part 23.134; BIA Guidelines, at §J.5.

privileged information is being omitted, the notice of the omission must be given simultaneously.[156]

When requested, the agency must, subject to the rules regarding protective orders and excision, upon timely request, disclose substantial categories of information.[157,158]

The duty to disclose is continuing. If, after compliance with the rules or with court orders, a party discovers additional material or information subject to disclosure, the party must promptly notify the child and parent or guardian, or their counsel, of the existence of the additional matter.[159]

Compliance with these provisions is central and critical to a tribe's participation in the child custody proceeding. "Access to the caseworker's notes may be crucial in cross-examining him or her on potential cultural bias, inappropriate conclusions about Indian people, or ICWA requirements."[160]

A. Regardless of the Statutory Requirements, Disclosure to Tribal Representatives is Often Absent or Truncated

Despite state law, Rules of Court and best practice, tribal representatives consistently report difficulties with, or even complete inability to access case records. Most frequently, tribes are facing opposition to the disclosure based on confidentiality grounds.

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[156] Rules of Court 5.546 (b), (c).
[157] Rules of Court 5.546 (d).
[158] (1)Probation reports prepared in connection with the pending matter relating to the child, parent or guardian;(2)Records of statements, admissions or conversations by the child, parent or guardian; (3)Records of statements, admissions or conversations by any alleged co-participant; (4)Names and addresses of witnesses interviewed by an investigating authority in connection with the pending matter; (5)Records of statements or conversations of witnesses or other persons interviewed by an investigating authority in connection with the pending matter; (6)Reports or statements of experts made regarding the pending matter, including results of physical or mental examinations and results of scientific tests, experiments or comparisons; (7)Photographs or physical evidence relating to the pending matter; and (8)Records of prior felony convictions of the witnesses each party intends to call. The parent or guardian must also, after timely request, disclose to petitioner relevant material and information within the parent's or guardian's possession or control.
[159] Rule of Court 5.546 (k).
[160] CEB, California Juvenile Dependency Practice §9.38.

Further, even when tribal representatives get access to necessary information, there are sometimes limitations imposed on the type of records they can access. Welfare and Institutions Code §827(e) provides:

> "for purposes of this section, a 'juvenile case file' means a petition filed in any juvenile court proceeding, reports of the probation officer, and all other documents filed in that case or made available to the probation officer in making his or her report, or to the judge, referee, or other hearing officer, and thereafter retained by the probation officer, judge, referee, or other hearing officer."[161]

Courts have inherent discretionary authority to order whatever discovery is believed to be appropriate. Welfare and Institutions Code §827 specifically states that "(t)his paragraph shall not be construed to limit the ability of the juvenile court to carry out its duties in conducting juvenile court proceedings.[162] The juvenile court has the inherent power to develop rules of procedure and, thus, while discovery procedures generally available in civil proceedings are not available to minors in juvenile court, that court has the same degree of discretion as a court in a criminal case to permit discovery between the parties.[163]

If any party refuses to permit disclosure of information or inspection of materials, the court could and should support the requesting party's motion for an order requiring timely disclosure of the information or materials.[164] The court still can provide whatever safeguards are needed, including but not limited to protective orders, excision and/or in camera review.[165]

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[161] Rule of Court 5.552(a) is more expansive in its definitions.
[162] Welf. & Inst. Code §827(a)(3)(A); See also, *Joe Z. v. Superior Court*, 3 Cal. 3d 797 (1970).)
[163] Welf. & Inst. Code §827(b)(1) also provides a catchall provision: "While the Legislature reaffirms its belief that juvenile court records, in general, should be confidential, it is the intent of the Legislature in enacting this subdivision to provide for a limited exception to juvenile court record confidentiality to promote more effective communication among juvenile courts, family courts, law enforcement agencies, and schools to ensure the rehabilitation of juvenile criminal offenders as well as to lessen the potential for drug use, violence, other forms of delinquency, and child abuse."
[164] Rule of Court 5.546(f).
[165] See Rule of Court 5.546(g); Welf. & Inst. Code §827(a)(3).

Rather than be the source of enforcement for these rights, courts instead often defer the issue and decision to the agency and other parties. Tribal representatives reported that judges have asked the parties whether there is an objection to the production, for the tribe, of the court records. Any refusal, or even hesitance, by the court to require the disclosure of records to a tribe only affirms the agency's non-

Task Force Participants~

"The tribe had intervened and been heavily involved in the case. However, the tribe was not sent a copy of the court report in regards to the permanency hearing and therefore was unable to review the report prior to entering court."
"Kern County routinely asks tribes to transfer ICWA cases to Tribal Court."

"We can't formulate our position without case information/Notice."

"Judge placed hurdle after hurdle in front of Tribes, including barring us from information, limiting our participation without local counsel, etc."

"The parties in this County [Nevada] do not communicate with the tribe and involve them as a party. Multiple times after intervention, the tribe was not called for hearings and has not been invited to any staffing or case planning."

compliance with the Cal-ICWA and Rules of Court. This non-compliance affects all other areas of Cal-ICWA compliance, such as limiting tribes' participation in case staffing, case planning and updated access to case documents.

B. If Disclosure is Made to the Tribe, Disclosure is Not Done in a Timely Fashion to Make Disclosure Meaningful

For various reasons (see Notice and Competence discussion above), tribes often receive information regarding hearings late. For review hearings, the social worker is required to file the hearing report with the court and provide copies to all counsel *at least* 10 calendar days before the hearing.[166,167]

[166] Social worker failure to provide timely reports is endemic in the child welfare system. It is a hardship and of great concern for tribal representatives to receive reports/discovery the day of a hearing because tribal representatives usually

Tribes report, however, that if they even are given the court reports, it is often at or immediately before a court proceeding. This means that tribal representatives do not have an opportunity to meaningfully review documents and/or prepare responses. This is particularly problematic in that the reports often make representations such as the fact that "active efforts" were provided to the family," an assertion that often requires extensive documentation to rebut.

RECOMMENDATIONS:

1) Parties, especially agencies, should be subject to sanctions for not providing timely discovery and information to tribes.

2) Process and protocols, using the Rules of Court, MOUs and MOAs, should be established that set absolute deadlines for distribution of reports to tribes and automatic continuances where such deadlines are violated.

3) Social workers who carry substantial ICWA cases should have reduced caseloads so that reports, information and discovery are produced and provided to parties within the statutory timeframes.

Tribal representatives report that Agencies often do not contact the tribes, do not meet with tribal representatives to develop safety plans, nor solicit input in the case plan provided to the court. Tribal representatives report that they are often not included in Team Decision Meetings (TDMs), which often are meetings at which crucial safety plans, placements plans and other pivotal decisions are discussed and made. Tribal representatives report they are not consulted in the selection of the Indian Expert Witness and are denied access to the criminal background checks needed to assess the protection of the Native families. Tribal representatives report that when they reach out to agencies, they often do not get a response, and if and when there is a response, it is often to inform the tribe that the information is shielded from disclosure to the tribe - in direct violation of California statute and the Rules of Court.

meet with tribal councils and tribal leadership for guidance and authority. Often, courts simply proceed with the hearing even in the face of late reports, which does not allow the tribes to fully participate, if they can participate at all.

[167] Welf. & Inst. Code §366.21(c); Rules of Court 5.708(a) & (c).

Unfortunately, tribal representatives report they are only aware that they have not been provided the discovery they are entitled to until the information is at issue, at which point the tribe's ability to respond has already been impacted. Most concerning to tribes are the reports of children who were subjected to harm and/or risk due to the lack of agency oversight and timely intercession. However, by the time this information is received, the harm has been done and/or the issues are deemed moot by the court. Social workers who carry substantial ICWA cases should have reduced caseloads so that reports, information and discovery can be produced and provided to parties within the statutory timeframes.

A process and protocol is needed to enable tribes to receive full, accurate and timely information so that meaningful outcomes can be achieved in furtherance of ICWA mandates. MOUs and MOAs have and could assist with removals and coordination with tribes to minimize the issues with removal, placement and services toward the reduction of trauma on Indian children and families.

X. Evidentiary Burdens, Including the Requirement for Qualified Expert Witness Testimony, Are Not Being Met

ICWA provides a higher burden of proof than that required in cases involving non-Indian children. There are two different burdens of proof.

To remove an Indian child and place him or her in a foster care placement, there must be a showing by clear and convincing evidence, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[168]

The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, supported by the testimony of one or more qualified expert witnesses that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child harm the child.[169]

ISSUES:

1) Counties fail to understand when the ICWA heightened standards apply.

2) The clear and convincing evidentiary standard for foster care placement and the beyond-a-reasonable-doubt standard for termination of parental rights are often mixed up and/or used interchangeably.

3) Agencies often do not seek input or consider the recommendation of the tribe for experts.

4) Experts often have minimal to no connection to the Indian child's tribe.

The ICWA Regulations define the terms "custody," "continued custody," and "upon demand, among other terms."[170] California has incorporated ICWA's requirements for active efforts and expert witness testimony into state law and Rules of

[168] 25 USC §1912 (e); ICWA Regulations, 25 CFR Part 23.121; BIA Guidelines, at §G.1; Rule of Court 5.484(a); Welf. & Inst. §361(c)(6); compare to grounds for removal in non-Indian child cases, Welf. & Inst. Code §361(c)(1)-(5).
[169] 25 USC §1912(f); ICWA Regulations, 25 CFR Part 23.121; BIA Guidelines, at §G.1; Welf. & Inst. Code §366.26(c)(2)(B); See Rule of Court 5.484(a).
[170] ICWA Regulations, 25 CFR Part 23.2; BIA Guidelines, at §L.

Court addressing involuntary foster care placements, guardianships, custody awards to a non-parent when a parent objects, conservatorships and terminations of parental rights.[171] However, the ICWA Regulations define "active efforts" and since ICWA has protections greater than those in Cal-ICWA, ICWA must be applied over any state law.[172]

Tribes report several problems in this area. As discussed above, for various reasons (i.e., lack of competence and understanding of when ICWA applies), counties fail to understand when the heightened standards apply. The heightened requirements apply whether or not the tribe intervenes in the case.[173] The standards apply to either parent, whether the parent is Indian or non-Indian.[174] Moreover, the two distinct burdens of proof are often mixed up and/or used interchangeably. Tribes report that, in practice, it appears the agency and court are simply checking off the box without ensuring that the adequate and proper evidentiary foundation is provided.

Pursuant to the ICWA Regulations, "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 proceeding. Evidence that shows only the existence of community or family poverty or isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse or nonconforming social behavior *does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt* that continued custody is likely to result in serious emotional or physical damage to the child."[175]

Similarly, California Rules of Court, Rule 5.484(a)(3) provides that:

> "Failure to meet non-Indian family and child-rearing community standards, or the existence of other behavior or conditions that meet the removal standards of Welfare and Institutions Code §361, will not support an order

[171] Fam. Code §§ 177(a), 3041(e), and 7892.5; Prob. Code §1459.5; Welf. & Inst. §§224.6(b), 361(d), 361.7, 366.26(c)(2)(B); Rule of Court 5.484(a).
[172] 25 U.S.C. §1921; ICWA Regulations, 25 CFR Part 23.2.
[173] *In re H.G.*, (2015) 234 Cal.App.4th 906.
[174] *In re Riva M.* (1991) 235 CA3d 403, 411 n6.
[175] ICWA Regulations, 25 CFR Part 23.121; BIA Guidelines, at §G.1.

for placement absent the finding that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage."

ICWA does not identify the particular California hearing at which the determination of beyond a reasonable doubt must be made because ICWA is a federal law. The courts have held, though, that based on the family-protective policies underlying the ICWA, it is reasonable to assume that the determination must be made when, or within a reasonable time before, the termination of parental rights decision is made.[176] State courts have held that this does not mean, however, that the determination must be made simultaneously with the termination decision at the §366.26 hearing. Instead, it makes sense for the court to make the determination at the final review hearing when the court decides on a permanent plan.

Moreover, the court need not then repeat this determination at the section §366.26 hearing, absent a showing by the parent of changed circumstances or that the period between the two hearings was substantially longer than 120 days.[177] Courts have even upheld a finding made substantially outside the 120-day statutory period.[178]

The problem with this approach is, however, that for a variety of reasons, the tribe might not be involved in the case until the §366.26 hearing. By that time, though, these critical findings have already been made by the court, and the tribe has no recourse for any non-compliance because the time for appellate review has likely already passed.[179] In the event the tribe and/or parties believe by the time of the §366.26 hearing that the parent has made enough progress that the burden cannot be met, the court can require the issue be brought by way of a §388 petition.[180] The burden then rests on the requesting party, rather than on the agency.

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[176] *In re Matthew Z.* (2000) 80 Cal.App.4th 545, 552.
[177] *Id.* at 553–555.
[178] See *In re Barbara R.* (2006) 137 Cal.App.4th 941, 949 (an 11-month period between the referral and permanency hearings was substantially longer than the 120-day statutory period. However, reversal is not automatic, the burden remains on the parent to show the finding was stale).
[179] Rule of Court 8.104 (a notice of appeal must be filed within 60-days of the order).
[180] *In re Matthew Z.* (2000) 80 Cal.App.4th 545, 552.

A. The Evidence Establishing Detriment is Not Supported by the Testimony of a "Qualified Expert" Witness

To meet its burden, when seeking an order for foster care placement or termination of parental rights, the petitioner must present the testimony of one or more "qualified experts," demonstrating that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[181]

Several concerns have been raised regarding who and how the experts are obtained. First, agencies often do not seek input or consider the recommendation of the tribe for experts. California law dictates that the expert witness shall not be an employee of the agency recommending foster care placement or termination of parental rights.[182] However, in practice, agencies in large part remain limited to those expert witnesses with whom the county has a contract. Many counties may use a social worker from a neighboring county or contract with individuals. In both instances, it is rare that the individual will have any knowledge of the Indian child's tribe or tribal child-rearing practices. The limited choice of an expert might also be influenced by the control and relationship that the agency has with that person. Consequently, the experts are perceived often as "hired guns" of the agency, rather than neutral arms of the court.

Second, expense is not supposed to be factor in deciding whether to use an expert at a hearing (as the court or any party may request assistance from the BIA or the child's tribe in finding qualified individuals to provide testimony). However, funding is often a significant consideration.

Third, many times the "experts" end up going against the tribe's recommendation. This often wrongly occurs as to ICWA placement and active efforts requirements. The court does not intercede by enforcing ICWA and requiring compliance with those mandates.

Last, experts have demonstrated minimal to no connection to the Indian child's tribe. Often, the "experts" have a mere academic understanding of Native Americans

[181] 25 USC §§1912(e)-(f); Welf. & Inst. Code §224.6(c); Rule of Court 5.484(a)(1).
[182] Welf. & Inst. Code §224.6(6).

who generally reside in California. Tribes also report that the experts are often unprepared. The experts often have not been in communication with the agency that retained them and are often not knowledgeable of the issues and/or particular facts of the case. This is compounded by the fact that they have not reached out to the tribe to discuss the case, resulting in a poorly prepared witness and thus a poor record. Tribes without counsel are ill-prepared to remedy this, or to create a record establishing this failure, and even tribal attorneys cannot "fix" a broken record, particularly in light of the fact that it is not a tribe's burden to produce the witness. Yet courts seem to overlook and even outright excuse the deficiencies.

The tribe's recourse is to then retain its own competing expert, which many tribes lack the resources to do. However, when the tribe has its own recognized expert witnesses, those persons are often not given credence or considered to have credibility. Instead, the agency and court give more weight to the opinions of those persons with only academic knowledge.

The ICWA itself does not establish precise qualifications for an expert witness. However, the ICWA Regulations provide who may serve as a qualified expert witness: "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."[183]

Additionally, California law provides a list of non-exclusive examples of persons who may qualify as expert witnesses. 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.[184]

The Welfare and Institutions Code provides a list of persons who "most likely" meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

[183] ICWA Regulations, 25 CFR Part 23.122. See, BIA Guidelines, at §G.2.
[184] Welf. & Inst. Code §224.6.

(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 child-rearing 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 child-rearing practices within the Indian child's tribe.
(3) A professional person having substantial education and experience in the area of his or her specialty.[185]

California case law holds that "ICWA does not require a person who is qualified to testify as an expert on Indian culture to conduct an independent investigation of the causes of the dependency or the recommendations relating to the permanent plan. Nothing in the Commentary or the specific guideline states that an Indian expert is required to conduct an independent investigation to evaluate the case and reach a conclusion that is qualitatively more reliable than the social services agency's social worker or the tribe's social worker."[186]

The court continued that "the purpose of the Indian expert's testimony is to offer a cultural perspective on a parent's conduct with his or her child, to prevent the unwarranted interference with the parent-child relationship due to cultural bias. The Indian expert's testimony is directed to the question of whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and not because the family did not conform to a decision-maker's stereotype of what a proper family should be."[187] Both state and federal law require the expert witness to testify on the question of 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.[188]

California courts must consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and

[185] Welf. & Inst. Code §224.6(c).
[186] *In re M.B.* (2010) 182 Cal.App.4th 1496.
[187] *Ibid.*, n. 5.
[188] 25 U.S.C. §1912(e), (f); Welf. & Inst. Code §§224.6(b)(1), 361.7(c).

child-rearing practices.[189] However, courts have lessened the impact of this provision. Courts have disregarded deficiencies in the investigation, even disregarding the complete lack of an expert in a case, by holding that "such cultural perspective is not required where the parental behavior at issue does not need to be placed in a cultural context to find a risk of serious harm."[190]

The arguments against the requirement of a qualified expert witness with special knowledge of the Indian child's tribe are often based on the presentation of behavioral deficiencies (such as personality disorders, poor judgment, neglectful living circumstances, poor understanding and awareness, high child abuse potential, or limited parenting skills) as personality or functional problems that have nothing to do with cultural heritage. Similarly, a parent's lack of motivation toward remedial/rehabilitative services and/or negative perception of such services may be identified as problems unrelated to cultural bias. This ignores the fact, however, that "[s]pecific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm."[191]

It cannot be definitively said that characteristics such as personality disorder, poor judgment, neglectful living circumstances, lack of motivation, etc., have nothing to do with cultural heritage. Indeed, these conclusions are often largely driven by the cultural heritage of both the evaluator and the client.[192]

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[189] Welf. & Inst. Code §§224.6(b)(2).

[190] See *In re M.B.* (2010) 182 Cal.App.4th 1496, 1503-1505 (where father's prior conviction for molestation of minor, and mother's subsequent exposure of child to father despite risk of sexual abuse).

[191] *In re Brandon T.* (2008) 164 Cal.App.4th 1400 at p. 1414, referencing former BIA Guidelines, 44 Fed. Reg. 67584 (Nov. 26, 1979), 67593 at §D.4, Commentary; Sen. Com. on Judiciary, com. on Sen. Bill No. 678 (2005-2006 Reg. Sess.) Aug. 23, 2005, pp. 11-12.

[192] See McGoldrick, *Ethnicity and Family Therapy* (6th ed. 1986), 6. ("Problems (whether physical or mental) can be neither diagnosed nor treated without understanding the frame of reference of the person seeking help as well as that of the helper."). See Sue, *Counseling the Culturally Diverse* (1981), 27-28 (Relative to appellant's noted disinterest in insight and unreceptiveness to counseling referrals) "Racial or ethnic factors may act as impediments to counseling. Misunderstandings that arise from cultural variations in communication may lead to alienation and/or inability to develop trust and rapport. . . . This may result in early termination of therapy." Minorities, including Native Americans, have been documented to terminate counseling after only one session at a rate of 50% as compared to a 30% rate for Anglos. "Counselors who believe that having clients obtain insight into their personality dynamics and who value verbal, emotional, and behavioral expressiveness as goals in counseling are transmitting their own cultural values. This generic characteristic of counseling is not only antagonistic to lower-class values, but also to different cultural ones." *Id.* at 38.

This approach also ignores the compelling reasons for the court to ensure that an expert witness does possess knowledge or experience specific to the Indian child's tribe. Foremost is the fact that an Indian child's connection to his or her tribal community and culture is a relationship which the ICWA was intended to protect, and which the State of California has firmly declared its own commitment to protecting.[193,194] The ICWA Regulations, BIA Guidelines and the Cal-ICWA provide that 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.[195] Additionally, use of an expert witness familiar with the Indian child's tribe can provide the court with valuable knowledge about the workings of the tribe, and what present or future losses the child may sustain if parental rights are terminated. An expert witness with knowledge or experience specific to the Indian child's tribe also enables the court to satisfy the requirement of considering evidence of "the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and childrearing practices," which is mandatory in addition to the testimony of an expert witness.[196] Unfamiliarity with culture and community standards can result in misdiagnosis and tragic losses of Indian children from their Indian families and tribes.[197]

Where there is a written stipulation entered knowingly, intelligently and voluntarily, the court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony.[198] For the reasons discussed throughout this Report, given the lack of competency in ICWA and the protections it intends to afford the parties, it is questionable whether the stipulation and/or waiver is, in reality, being entered "knowingly, intelligently and voluntarily." Moreover, such unquestionable acceptance of

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[193] 25 U.S.C. §§1901, 1902; Fam. Code §175(a), (b); Prob. Code §1459(a), (b); Welf. & Inst. Code §224(a), (b)
[194] See *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 37 quoting House Report, at 23, U.S. Code Cong. & Admin. News 1978, at 7546 ("The ICWA thus, in the words of the House Report accompanying it, 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society'").
[195] ICWA Regulations, 25 CFR Part 23.122(b); BIA Guidelines, at §G.2; Welf. & Inst. Code §224.6(d).
[196] Welf. & Inst. Code §224.6(b)(2); Rule of Court 5.484(a).
[197] Jewelle Gibbs, *Children of Color: Psychological Interventions with Culturally Diverse Youth*, 61 (2003) (Studies of American Indian children during diagnostic interviews have identified behaviors that may negatively affect assessment outcome: nonassertive, non-spontaneous and soft-spoken verbal interaction; limited eye contact; discomfort and decreased performance on timed tasks; and selective performance of only those skills that contribute to the betterment of the group).
[198] Welf. & Inst. Code §224.6(e).

the expert's opinion reduces any sense of oversight on what amounts to one of the most critical findings in the case.

After the passage of the Cal-ICWA, CDSS and the Judicial Council posted a list of individuals who considered themselves qualified to serve as expert witnesses, the belief being that these lists would be used to determine whom counties could contract with as an expert. The problem is that the list does not ensure cultural competence for every tribe, nor were these lists vetted by the tribes in California.

B. Agencies Commonly Seek a Waiver of Procedural Rights When the Waivers are Not Understood and/or Executed Properly

For a variety of reasons, namely cost, agencies commonly seek a waiver of the ICWA expert requirement. Since the expert witness requirement is not constitutionally compelled, the requirement can be waived expressly or by failure to object at the trial court level. This is different from the parties entering into a written stipulation agreeing to use the expert witness declaration in lieu of live testimony. A stipulation or failure to object constitutes a waiver only if the court is satisfied that the party has been fully advised of the requirements of the ICWA, and has knowingly, intelligently and voluntarily waived them.[199] However, counsel for the families is not often competent in the ICWA mandates or intent; therefore, waivers can be commonplace and critical rights are lost. For example, a stipulation to give up or waive an expert's live testimony can only be made in writing under §224.6(e), yet the common practice is to take oral waivers.

RECOMMENDATIONS:

1) The heightened evidentiary standard of beyond a reasonable doubt should be met at a reasonable time before parental rights are terminated. If the standard is not met at the §366.26 hearing, then the court can require the issue be brought by way of a §388 petition.

[199] Welf. & Inst. Code §361(c)(6)(A); Rule of Court 5.484(a)(2).

A tribe's rights are independent of the rights of other parties. A parent or Indian custodian cannot waive the tribe's rights.[200] However, as illustrated above (see Notice discussion), courts often allow the rights of tribes to be jeopardized by the conduct of parents. Whether or not the parties stipulate to the expert witness' declaration, the evidentiary requirements remain. Therefore, even the declaration must be able to withstand scrutiny. Too often, reports are lodged with the court and the parties stipulate on the record, not in writing, and the court does not reject the oral stipulations, or make inquiry whether the party has had sufficient legal advice to make a knowing and intelligent waiver, as required by law.

Failing to object to the failure to produce the expert or meet the demands of the statute by the parents and the Indian child will result in a waiver. However, as noted, this cannot be used to bind the tribe to a waiver. Neither the ICWA nor any current California law provides for a waiver of the active efforts requirement.[201]

RECOMMENDATIONS (cont.):

3) Courts must be vigilant that one party is not waiving the rights of another party, namely the tribe.

4) Courts must recognize that an expert witness must actually render an opinion, not simply rubber-stamp the agency's report and recommendations.

5) The BCJ must examine how the expert witness lists and contracts are created.

6) A collaborative approach with tribes must be utilized to ensure the experts will provide appropriate and legally sufficient testimony.

[200] *In re Nikki R.* (2003) 106 Cal.App.4th 844, 849; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 253; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.

[201] See *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 708 (whereby former California Rules of Court, rule 1439 provided conditions for a waiver of the active efforts requirement; that rule (renumbered to 5.664 effective January 1, 2007) was repealed effective January 1, 2008).

XI. Placement

Indian children in child custody proceedings must be placed within a mandatory order of preference for placements, absent good cause to the contrary, to protect the best interests of the Indian child and the child's tribe by ensuring a culturally appropriate placement.[202] According to the U.S. Supreme Court, these placement preferences are "[t]he most important substantive requirement imposed on state courts" by the ICWA.[203]

Cal-ICWA codified these placement preferences into state law.[204] It declared that California has an interest in "protecting the essential tribal relations and best

> *Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, testified before Congress as follows:*
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> *"Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships."*
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> *"One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child-rearing. Many of the individuals who decide the fate of our children are, at best, ignorant of our cultural values and, at worst, contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child."*
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> *Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978)*

[202] 25 U.S.C. §1915.
[203] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.
[204] Welf. & Inst. Code §361.31.

interest of an Indian child by… placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community."[205] Cal-ICWA made it clear that adhering to the ICWA's placement mandate, encouraging and protecting an Indian child's tribal membership and connection to his or her tribe, is in the best interest of that child.[206]

Existing law mandates that Indian children should be placed in Indian homes whenever possible. However, achieving this mandate remains elusive in many counties. Primary issues of contention related to placement include failure to place Indian children within the specified order of preference, failure to make active efforts to locate an ICWA-compliant placement, failure to obtain a court-ordered good cause finding prior to deviating from the statutory scheme, and delays and confusion within the placement approval process.

A. Placement of Indian Children Must be Within a Specific Order of Preference

Cal-ICWA sets forth two separate orders of placement preference – one for adoptive placements and one for pre-adoptive and similar placements (foster care, guardianship, etc.).

ISSUES:

1) Counties fail to document active efforts to locate ICWA-compliant homes.

2) Courts fail to make appropriate good cause findings if an Indian child is placed outside of the placement preferences.

Placement preferences for adoptive placements in descending order of priority are:

(1) A child's "extended family member."[207]

(2) A member of the child's tribe.

(3) Another Indian family.[208]

[205] Fam. Code §175(a); Prob. Code §1459(a); Welf. & Inst. Code §§ 224(a).
[206] *Ibid.*
[207] As that term is defined by the tribe, or in the absence of a tribal definition, the ICWA's default definition – not as defined by state law (e.g., not by default including de facto parents).
[208] 25 U.S.C. §1915(a); Welf. & Inst. Code §361.31(c).

For pre-adoptive and similar placements (foster care and guardianship), the placement must be in the "least restrictive setting" appropriate to the particular needs of the child. "Least restrictive setting" is that which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child.[209] Preference must be given in the following descending order of priority:

(1) A child's "extended family member" (per a tribal or federal definition rather than a state definition).
(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 approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

An "Indian organization" is defined as any group, association, partnership, corporation or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.[210]

ISSUES (cont.):

3) Delays and confusion caused by failure to follow the preferences.

4) Agencies fail or refuse to address harm to Indian children where TPR is part of the permanent plan.

5) TCA is the best permanency option for many Indian children where adoption is the plan; however Agencies are failing to fully utilize TCA.

6) Agencies and Courts continue to be inconsistent and unclear regarding implementing TCA, resulting in confusion and delay; standard tools such as ACLs and standard training have not been successful in increasing competency.

Counties are also required to take into consideration the social and cultural standards of the Indian child's tribe. "The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural

[209] 25 U.S.C. §1915(b).
[210] 25 U.S.C. §1903(7).

standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties."[211]

B. Counties Must Make Active Efforts to Locate an ICWA-Compliant Placement

California law provides that counties must make active efforts to place within Cal-ICWA's placement preferences and maintain documentation of these efforts.[212] It has frequently been reported that counties shift the burden of locating ICWA-compliant foster homes to tribes. The typical scenario includes a child being removed and an emergency call from the county to the tribal social worker asking if there are any tribal homes available and, if there are none, the tribal social worker is told to contact the county if one is located.

State law requires the county to document its efforts to seek ICWA-compliant placements, but in practice this documentation only exists in the form of any emails or telephonic notes the county social worker may keep. It has been reported that this information is not contained in the Delivered Service Logs and, when it has been requested through discovery, no formal documentation has been provided (only a list of places contacted with dates).

1. The Burden to Assist Funding Necessary Repairs to Make Housing Suitable for Placement is Shifted to the Tribe

In some situations, a home is suitable for the placement of a child, but there may be repairs needed to ensure child safety. Counties routinely pay for these repairs. However, in the case of an Indian child, when a relative or other ICWA-compliant placement is available but the home needs some repairs, counties generally look to tribes to pay the bills associated with these repairs. Common repairs include childproofing for fireplaces, railing for decks or repair of fences. Tribes argue that updating a home to be child-safe falls within the counties' obligation to make active efforts to locate an ICWA-compliant placement. However, counties disagree and look to

[211] 25 U.S.C. §1915(d).
[212] Welf. & Inst. Code §361.31(k).

tribes to pay. Covering these costs is not an option for all tribes, since most California tribes still lack significant financial resources of their own, and do not have access to the same considerable funding streams that agencies do. When counties refuse to assist with these improvements and refuse to place with the tribe's alternative home, which has been tribally approved (without county licensing requirements as approved under Cal-ICWA), the Indian child suffers and is usually placed in a non-ICWA compliant home.

The significance of the counties' failure here cannot be overstated. By refusing to pay for repairs or refusing to place in a tribally approved home, the Indian child suffers by being in multiple unnecessary placements.

2. Counties Fail to Locate Placement Options for Higher Need Children (Lack of Therapeutic Homes), Which Often Results in Children Being Sent Out-of-County

Tribal children have been placed in out-of-county group homes that do not meet their needs, as documented in court-ordered psychological evaluations because other placement options do not exist. Reports were received that these out-of-county placements have been made by the county without first contracting with appropriate service providers, and as a result of sending children far from home into a setting that cannot meet their needs, these same minors become the subjects of delinquency proceedings. To compound matters, it has been reported that, through the §241.1 process, the recommendation has been that wardship is the most appropriate action even where it is obvious that the dependency system set the youth up for failure by not adequately addressing documented needs. Statistically speaking, these minors then

RECOMMENDATIONS:

1) As part of active efforts, counties should and must reach out to tribes and Indian families to secure tribal placements for Indian children.

2) County funding used to make an ICWA-compliant placement child-safe.

3) When there is a shortage of ICWA-compliant placements, counties should work with the tribal community to train county foster homes to be sensitive to unique cultural issues concerning the care of an Indian child.

(continued)

become much more likely to be incarcerated as adults.

Having adequate placements is a statewide problem, not limited to tribal member children. More and more advocates are being forced to use the education system to effectuate appropriate placements out-of-state, since appropriate in-state placements do not exist. This is particularly true for native children though, since there are few, if any, culturally appropriate group homes in California for high-needs youth. This problem will be highlighted in coming years with the implementation of Continuum of Care, which will phase out congregate care.

Where counties cannot locate an ICWA-compliant placement, they must place with a family who will maintain the connection with the tribe and family.[213] We received reports that placements continue to occur with foster parents who are unwilling to render the services, supports or care to support reunification and the child's participation in tribal cultural and ceremonial events. Where there are shortages of ICWA-compliant placements, counties should work with the tribal community to train county foster homes to be sensitive to the unique cultural issues involved with caring for an Indian child.

RECOMMENDATIONS: (cont.)

4) Grant tribes access to criminal background information and CWS/CMS information.

5) CDSS should work with tribes to fund training on the exemption process.

6) Counties must document active efforts to meet the ICWA placement requirements for every Indian child. If no placement is available, the report must provide the court with explanations for the unavailability and document active efforts to find an ICWA-compliant placement. Without specific good cause findings, the court must sanction the agency for failing to provide this information.

7) CDSS should work with tribes to develop culturally based therapeutic foster homes, tribally based group homes and transitional living facilities, especially in those counties in which there is a disparate number of native kids in foster care.

[213] Welf. & Inst. Code §361.31(i).

C. Courts Must Make a Finding of Good Cause to Deviate from the Placement Preferences

Where an agency cannot locate or is unwilling to use an ICWA-compliant placement, the agency must seek a good cause finding to deviate from the placement preferences prior to making the placement.[214] The typical discretion that is afforded to social workers is limited in this circumstance, since the good cause determination can only be made by a court. Additionally, the burden of proof is on the party seeking to deviate from the placement preferences.[215]

Counties fail to document this requirement and fail to bring it to the court's attention. Courts can unintentionally condone, and possibly encourage, this practice by not issuing sanctions or other available remedies to a situation that is a win-win for the agency – they place where they want to and then argue it is in the best interest of the child to remain there or suffer from attachment issues. The 2016 ICWA Regulations, BIA Guidelines and case law hold that bonding that occurs due to placements of Indian children in violation of ICWA should not be considered.[216]

D. Placement Approval Process

1. Tribes May Conduct Home Studies and Background Checks

Cal-ICWA provides that a foster home licensed, approved or specified by the child's tribe is within the placement preferences. Tribes can and do tribally approve homes for Indian children on a regular basis. CDSS issued ACL 14-10 (January 31, 2014), which provides:

> In accordance with the Indian Child Welfare Act (ICWA) at 25 U.S.C. §1915, a federally recognized Indian tribe is authorized to approve or license a home for foster care or adoptive purposes according to the tribe's own licensing standards. The home is not required to obtain a state or county license. The tribe is able to approve or license the home according to its own socially and culturally appropriate standards pursuant to ICWA at 25 U.S.C. §1931. This section provides that a TAH is the equivalent of a licensed or approved foster home.

[214] Welf. & Inst. Code §361.31.
[215] ICWA Regulations, 25 CFR Part 23.132(e); BIA Guidelines, at §H.5.
[216] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30; *In re Desiree F.* (2000) 83 Cal.App.4th 460.

Even with Cal-ICWA and the ACL, agencies are reluctant to place Indian children in tribally approved homes (TAHs). Counties exhibit a lack of trust and confidence in TAHs and do not trust a tribe's assessment. Counties insist on imposing their standards rather than accept a "tribally approved home" designation. Some counties insist on approving a placement in addition to the Indian child's tribe. Counties' failures to recognize and accept TAHs lead to multiple placements for Indian children.

TAHs are approved based upon a tribe's social and cultural standards, but these approved homes must still clear a criminal background check. This compounds the placement issue because counties do not share this information with the Indian child's tribe. Access to criminal background information and CWS/CMS information is essential for tribes to make informed decisions. Even with the passage of SB 1460 and AB 430, where approved tribes can conduct their own criminal background checks and grant exemptions, many tribes do not have, but need, this clearance and information. It is imperative for CDSS to work with tribes in utilizing these new options, which should include funding training for tribes on how to obtain the necessary clearances, and what is required for the exemption process.

E. Recommendations for Placement

Counties must document, in delivered service logs and in their reports to the court, specifically the active efforts made to meet the applicable placement preferences for an Indian child. For example, if an Indian child is placed in an Indian home licensed by the county, the report to the court should explain why no extended family placement or tribally specified placement was possible. The same is true if an Indian child is placed in an Indian-approved institution (the lowest preferred placement). The report should explain why none of the three higher preferred placement types were possible. If the Indian child cannot be placed in any ICWA-compliant placement, the report must provide the court with explanations for the unavailability of each type of preferred placement and the active efforts to find an ICWA-compliant placement. With an ICWA-compliant placement, a good cause finding is required from the court to finalize the placement. Too often, the court is unaware that a good cause finding is required, because the report does not state the Indian child is not in an ICWA-compliant home.

Again, the report must demonstrate the good cause necessary to deviate from the preferred placement preferences. Failure to properly document this issue and the requisite good cause must be grounds for sanctions against the agency.

XII. There Must Be Culturally Relevant Options for Permanence

A. Termination of Parental Rights

Welfare and Institutions Code §366.26 lists conventional adoption, termination of parental rights (TPR), as the most preferred permanency option for dependents. However, there are several exceptions which are applicable in Indian child custody proceedings, but are often omitted from consideration. The most common exception is where there is a compelling reason for determining that termination of parental rights would not be in the best interest of an Indian child.[217]

ISSUES:

1) TPR is not in the best interest of the Indian child because of the loss of tribal membership, adoptive placement's failure to maintain contact between the tribe and child, and loss of inheritance rights to trust property.

2) TCA is the best permanency option for many Indian children where adoption is the plan. However, Agencies are failing to fully utilize TCA.

There are several consequences in which TPR can be adverse to an Indian child's best interest. The most serious consequence is loss of tribal membership, in tribes where the severance of the legal relationship between parent and child means that the child can no longer trace lineage to an enrolled member and thereby fails to qualify for membership, or any of the myriad benefits that may come with membership.

Another consequence is the Indian child's adoptive parent(s) often fail to maintain contact between the tribe and child.

A third consequence is that the American Indian Probate Reform Act of 2004 generally severs the rights of adopted-out children to inherit trust property from their biological parents, and from their extended family as well, unless the child and family

[217] Welf. & Inst. Code §366.26(c)(1)(B)(vi).

maintain a "family relationship" after adoption.[218] In addition to trust property itself, there are valuable benefits which can arise from the ownership of trust property – for example, hunting and fishing or other use rights, or membership in class action settlements like the recent *Cobell v. Jewell* litigation, which resulted in a $3.4-billion settlement in 2009 to compensate trust property owners for years of mismanagement of their trust assets by the Department of the Interior.[219]

> ***RECOMMENDATION:***
>
> *1) The tribe must be the sole entity to determine the terms of the TCA order and none of the parties need to consent to its terms and the juvenile court does not have the discretion to alter or edit the TCAO.*

Another statutory exception to conventional adoption includes where a child has a fit and willing relative who is willing to be a child's permanent placement via guardianship, but is unwilling to adopt.[220] This is not uncommon in tribal extended families -- there may be family willing to take the child permanently, but not via adoption, as the concept of severing the parent-child relationship is not accepted in many tribal cultures.[221]

Despite these consequences and exceptions, cases still arise where conventional adoption is assumed to be the permanent plan, and placement is made early on to that end, without adequate consideration of the Indian child's best interest, tribal input or investigating alternatives to conventional adoption.

B. Tribal Customary Adoption

Tribal Customary Adoption (TCA) was codified in California as a permanency option for Indian children in 2010. TCA is unique in that it does not terminate parental rights, but has the same degree of permanency as conventional adoption. It provides that the Indian child's tribe executes a TCA order which may include provisions for

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[218] 25 U.S.C. §2206(j)(2)(B)(iii).
[219] *Cobell v. Jewell* (formerly *Cobell v. Salazar*), U.S. District Court for the District of Columbia, case no. 1:96CV01285-JR, settlement filed on December 7, 2009.
[220] Welf. & Inst. Code §§366.26(c)(1)(A), (c)(1)(B)(iv).
[221] Assem. Bill No. 1325 (2009-2010 Reg. Sess.); 2009 Cal. Stats., ch. 287.

continued contact between the child and tribe and the child and the biological parents. The First District now considers it the default permanency option for Indian children,[222] and the Third District has acknowledged that it is the only option which can ensure that a connection will be maintained between child and tribe.[223]

TCA provides an Indian child with "the same stability and permanence of traditional adoption without terminating parental rights."[224] It is no less permanent than a conventional adoption and, like a conventional adoption, "gives the child the best chance at [a full] emotional commitment from a responsible caretaker" as compared to guardianship or foster care.[225] Tribal customary adoptive parents have all of the rights, privileges and duties of any other adoptive parents.[226] And a TCA allows a tribe to protect a child's inheritance rights.[227]

Perhaps because it is a relatively new option, there were numerous issues reported regarding TCA. Despite its advantages over conventional adoption, the latter is still viewed as the go-to option. Because TCA requires the tribe to issue the TCA order according to tribal law and custom, TCA must be selected by the tribe as a desired permanent plan. Despite a regulatory obligation to consult with tribes on TCA as an option in every case moving towards permanency,[228] and despite a statutory requirement to address TCA as an option every time an assessment is ordered pursuant to §§361.5, 366.21, 366.22, 366.25, or 366.26,[229] TCA is often not actually considered or treated as the superior choice for Indian children, unless the tribe formally intervenes in a case and advances TCA.

One of the main misperceptions of TCA is the process required to complete the Tribal Customary Adoption Order (TCAO) and finalize the TACO. According to the statute: 1) a tribe identifies TCA as an appropriate permanent plan before or at the initial

[222] *In re H.R.* (2012) 208 Cal.App.4th 751.
[223] *In re A.M.* (2013) 215 Cal.App.4th 339.
[224] *In re H.R., supra* at 763.
[225] *Id.* at 759, citing *In re Celine R.* (2003) 31 Cal.4th 45, 53; see also, *id.* at 763 (with TCA, "an Indian child's interest in stability and permanence no longer provides a counterbalance to the child's interest in maintaining his or her tribal connection").
[226] Welf. & Inst. Code §366.24(c)(13).
[227] Welf. & Inst. Code §366.24(c)(10).
[228] CDSS All County Letter No. 10-47 (2010), p. 8.
[229] Welf. & Inst. Code §366.24(b).

§366.26 selection and implementation hearing; 2) the court orders a continuance of the initial §366.26 hearing for up to 120 days to allow for the home study, criminal background check and for the tribe to prepare and file with the court a TCA order (the court has the discretion to grant an additional 60 days to this continuance);[230] 3) the tribe files the TCA order 20 or more days in advance of the continued §366.26 hearing;[231] the court conducts the continued §366.26 hearing, and affords full faith and credit to the TCAO, unless the order fails to qualify for full faith and credit; 4) the adoptive placement agreement and the adoption assistance agreement are signed, the petition for adoption is filed and the adoption finalized (unless a further period of court supervision is necessary).

TCA is commonly misconstrued. Some of the most common errors are that the terms of the TCA order are negotiable, or must be agreed to by all parties, or that the juvenile court has ultimate control over which terms are or are not included in the order. None of these is accurate. The tribe is the sole entity to determine the terms of the TCA order, although it does so after having given the child, birth parents or Indian custodian and the adoptive parents the opportunity to present evidence to the tribe regarding the TCA and the child's best interest.[232] Unless the order does not qualify for full faith and credit, the juvenile court's function is simply to receive and review the order prior to entering it. None of the parties need to consent to its terms,[233] and the juvenile court does not have the discretion to alter or edit the TCAO.

All County Letter 10-47 was intended to act as TCA's implementing regulations until actual regulations were published.[234] TCA has been an available permanency option for Indian children for more than five years. Now is the time to enact final regulations, taking into account the breadth of experience of tribes and tribal legal counsel in the development of those regulations.

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[230] The tribe prepares the TCA order after the child, parents, Indian custodian (if any), and the adoptive parents have an opportunity to present evidence to the tribe regarding the TCA and the child's best interest. (Welf. & Inst. Code §366.24(c)(7).) (emphasis added.)

[231] The statute clearly states that the TCA order should be filed prior to the continued §366.26 hearing, not the initial hearing.

[232] Welf. & Inst. Code §366.24(c)(7).

[233] See, e.g., Welf. & Inst. Code § 366.24(c)(11) (parent's/Indian custodian's consent not required).

[234] CDSS All County Letter No. 10-47 (2010), pp. 1-2.

XIII. Interagency/Crossover Issues Are Not Fully Vetted or Managed Consistent with Minors' Best Interests

A. Criminal Delinquency

The intention of Cal-ICWA was to apply ICWA to delinquency cases; the original thought behind including §600 minors under ICWA's protections stemmed from Probation and the Courts using IV-E funds for placement of delinquent minors, which triggered reunification plans that necessarily implicated the ICWA. However, the California Supreme Court case In re W.B. ruled that ICWA does not apply to delinquency cases where the "placement [is] based upon an act which, if committed by an adult, would be deemed a crime," and for conduct that is not in and of itself criminal.[235] By limiting ICWA to §601 minors (status offenders) and PVCs (breaking a promise to the court via probation terms), the Act's application to crossover populations was artificially constrained. This is extremely problematic, since tribes are not able to provide input on culturally appropriate rehabilitation options. California has effectively segregated §600 minors, so that the Act applies to §601 cases, but not §602s.

ISSUES:

1) Tribes are foreclosed from participating in many delinquency cases, despite the reality that many of the Indian children in the delinquency cases are former, current or future dependents. This is extremely problematic since tribes are not able to provide input on culturally appropriate rehabilitation options.

2) School districts do not cooperate or consult with tribal school systems despite receiving funding to serve tribal children.

3.) The probate court is poorly suited to handle Cal-ICWA probate petitions. However, many families and tribes are urged to utilize the probate court in lieu of a dependency case.

In several counties, dependent youth often end up in the delinquency system. The required §241.1 reports often jointly recommend that the child would best be served

[235] 25 U.S.C. §1903 (1)(iv)

by the delinquency system. There were no counties identified that permitted tribes to participate in the §241.1 process, even where the tribe had intervened as a party in the dependency case. This transition of systems deprives the tribe of the ability to be a party to the proceedings. As such, tribes are not provided with records related to the §602 proceeding. So tribes do not have the information necessary to offer services to the child or family.

RECOMMENDATIONS:

1) Allow tribes to review records relating to a §602 proceeding in order for the tribe to provide services to the child or family.

2) Continual efforts by the school district so that tribes can work directly with the schools to prevent missing the neediest families.

3) Ensure that probate guardianships are not used to circumvent ICWA compliance.

4) Treat ICWA cases similarly to CSEC case plans which allow for greater creative planning.

Once wardship is supervised under the §600 system, unlike Dependency, the parents generally do not receive services (unless it is part of a punitive component directed toward the minor). When a minor successfully completes his or her terms and conditions of probation, he or she is released to parents who have not received services, and who may not have demonstrated an ability to address the underlying conditions that led to supervision in the first place. This increases the likelihood that the child will reoffend, or possibly need removal under the Dependency system, thus perpetuating the cycle.

The Active Efforts, Placement Preferences and Culturally Sensitive Case Plans that are now divorced from the §600 system deprive Indian families of a vital transitional resource, even when the cause of their delinquent behavior is identical to conditions that justify §300 remedial plans.

B. Education

Many tribes in California have developed education departments or have prioritized education within their social services departments. Broad efforts include entering into agreements with local districts to: share information with the tribe, so that

tribes can track attendance and grades in order to intervene early where necessary; recognizing and rewarding perfect-attendance or high GPA; assist parents/educational rights holders with requests for additional services through student study team meetings, 504 plans or Individual Education Plans; and work to ensure coordination of services across providers (tribe, county social services departments, county mental health, schools).

It is encouraging that some school districts are working with tribes to provide the necessary information. Others that have not been so accommodating cite confidentiality concerns. In these situations, tribes offer to work directly with families to gain access to the information. Working more directly with families is a much more resource-intensive approach that misses some of the neediest families and creates difficulty with ongoing tracking.

Some tribes have become quite concerned with their students' education records. Specifically, some districts engage in silent suspensions – children are sent home for behavioral issues without them being counted as suspensions or expulsions. Additionally, records are not complete, making it difficult to evaluate the student's progress or need for individualized services.

C. Probate Guardianships

Guardianships over minors in California are codified in the California Probate Code. When a minor's guardian is nominated through a decedent's Will, it is a fundamentally different scenario from when a family member or another person asks the court to remove custody from a parent and appoint someone else as a guardian. When a parent is involuntarily deprived of custody and control of their child the *same* Cal-ICWA requirements that apply for *removal where the child cannot be returned upon demand* apply to guardianships. For that reason, Probate Code §1459 specifically defines Probate Guardianships as Indian Child Custody Proceedings, thereby invoking the Cal-ICWA's protections.

Many instances have been cited where guardianship petitions were filed in cases involving tribal children. While it is nearly impossible to discern from the filed papers

alone if the motivation was to circumvent a dependency and protections of Cal-ICWA in a dependency case, the practice of filing for temporary and/or permanent guardianships has become so widespread that one clear inference is petitioners are attempting to disenfranchise tribes from participating.

Fortunately, the code is clear in its application of the Cal-ICWA to Probate Guardianships. However, since probate judges are not always versed in dependency or ICWA law, there remains the potential for abuse, particularly if grandparents or other relatives have been coached into filing Probate Guardianships to avoid the procedural safeguards found in the Cal-ICWA.

Another issue identified as problematic is where probate guardianships are not subject to the same checks and balances as dependency guardianships, including case plans, periodic inspections and background checks.[236] This streamlined procedure, while seemingly well-intentioned, deprives Indian children and their tribes of the basic protections found in the state and federal ICWA, ICWA Regulations and the BIA Guidelines.

D. Commercial Sexually Exploited Children

California recently created a new category of dependent children under §300(b)(2) for victims of sexual exploitation. Since these minors are technically not delinquents and not dependents, but instead are being victimized, the law struggled with how to supervise or punish these youths. The solution, which is barely over a year old, is to impose a plan of supervision over CSEC minors under §300 in a way that mirrors dependent minor case plans. However, unlike delinquents, who receive consequences for their improper actions, CSEC minors call out for a different type of supervision—one that does not attribute wrongdoing to the non-offending parents, but which tries to alleviate the cultivating conditions with services.

[236] However, not all counties provide this level of checks and balances. Often, the dependency court will retain jurisdiction, but the court will dismiss the dependency and relieve court-appointed counsel once the dependency guardianship has issued. This is true whether the dependency guardianship issues at the disposition hearing or it is the permanent plan for the Indian child.

Like CSEC minors, tribal youth and Indian children are a different population that calls for creative thinking that does not punish the minors for their status. In the same way that CSEC case plans seek to remedy conditions and restore equilibrium, the ICWA should be viewed similarly. Section 300(b)(2) is codified as if it were a §300 case, but all indications are to the contrary. This amendment shows that the state can differentiate minor populations and not treat them all with the same remedies. As with CSEC minors, Indian children are victimized by being estranged from their culture and relying upon a system that will not recognize that dissonance.

XIV. Available Remedies Prove Ineffective for Cal-ICWA Non-Compliance

Current remedies available to tribes, parents, Indian custodians and Indian children to increase or secure compliance with the Cal-ICWA are limited. There are legal and non-legal remedies available, none of which have proven effective in securing compliance with Cal-ICWA on a statewide basis.

A. Statutory Remedies

At present, the available enforcement mechanisms to ensure consistent, continued implementation of the Cal-ICWA and complementary state law are inadequate. The Cal-ICWA provides parties with the right to continuances, which tribes request when Cal-ICWA is not being complied, but it comes at the cost of the expediency that is statutorily required. For example, where a tribe is not provided reports in advance of a hearing, the Tribal Representative can request a continuance. However, Tribal Representatives report that they are often pressured into going forward with a hearing without having time or resources to fully consider case-related documents.

> ***ISSUE:***
>
> *Statutory remedies such as continuance, invalidation and standard appellate remedies are inadequate.*

Invalidation is a state and federal remedy for violations of Cal-ICWA and ICWA.[237] If successful, the case is returned to the procedural posture at which the violation occurred or is dismissed. However, practically speaking, this requires a Motion to Invalidate and a hearing on that motion, which results in more continuances and delays, a lack of permanency for the child as well as significant legal fees for the moving parties and a backlog of the court system. Often, the violations are significant, but the result of an invalidation motion would be to return the child to a parent who is ill-prepared to have the child. In theory, invalidation is a useful tool, but it presents more as a legal fiction.

[237] 25 U.S.C. §1914 (if §§1911, 1912, or 1913 are violated). Welf. & Inst. Code §224(e), and Rule of Court 5.486.

Tribes, as well as other parties, always have standard appellate remedies available such as writs and appeals; however, for tribes with few resources or in cases where placement and concomitant bonding are primary issues, these appellate remedies do not address the tribes' immediate needs.

B. Non-Statutory Remedies

Tribes have "remedies" that have been utilized in the past with minimal long-term impact. For example, tribes and tribal groups have engaged in training efforts with counties in an effort to increase knowledge of ICWA compliance within county agencies. Tribes have also engaged in county-by-county workgroups, roundtables, alliances and other collaborative efforts, some of which have increased cooperation between tribal representatives and county representatives; however, given the resources necessary to initiate and sustain such efforts, the results are not sufficient. There are recent training efforts that hold promise for systemic change, such as the California Social Work Training Center's ICWA Core 3.0 training, which will be the most comprehensive training for social workers to date. However, training of social workers is only one step to creating systems that can sustain Cal-ICWA compliance long term.

Tribal-County Memoranda of Understanding or Agreements have been an effective tool for some tribes. Requiring agencies to negotiate MOUs with tribes where there have been particularly damaging statutory violations might help create a methodology for parties to improve future cooperation and compliance. However, the enforcement of MOUs also is a problem.

C. A Brief History of Collaborative Efforts: The Humboldt County CAPP Experience

Tribal-State collaboration is needed to solve issues of ICWA noncompliance. Unfortunately, collaboration has not always led to positive results because of the failure of state partners to uphold their promises. Humboldt County tribes shared their experience with the California Partners for Permanency process, which unfortunately was an overwhelmingly negative experience. Initially, tribes were hesitant to participate in CAPP, due to a long history of the county's failure to address concerns raised by

tribes or to implement tribal recommendations to enhance Cal-ICWA compliance. The CAPP process promised to be different. Although some relationships were built during the CAPP project, continued county failures to address tribal concerns strained new relationships.

In the fall of 2012, all eight Humboldt County Tribes signed a letter to the County expressing frustration with CAPP and providing specific recommendations for improvement including: (1) conduct the institutional analysis CAPP required; (2) develop an ICWA unit at the agency; and (3) reduce social workers' caseloads for those workers handling ICWA cases. In the fall of 2015, the institutional analysis was initiated, but there has been no action on the remaining recommendations.

Also in the fall of 2015, several Humboldt County tribes (Bear River, Wiyot, Trinidad, Yurok and Hoopa) contacted CDSS leadership controlling the CAPP project to express disappointment and alarm at not only the lack of improvement in the county system, but the marked decrease in functionality of the county system. This included not just a failure to provide active efforts, but a failure to provide basic reasonable efforts to families as well.

RECOMMENDATIONS:

1) Continual efforts to engage tribes and tribal groups in training efforts with counties to increase ICWA compliance.

2) Utilizing Tribal-County MOUs or MOAs to effectively negotiate for a methodology which will improve future cooperation and compliance.

Further troubling about the CAPP project is that tribes have consistently requested additional county services be provided in what is called the "east area," a rural isolated area in and around Weitchpec where there is no cell phone reception, limited internet service and many homes do not have electricity.[238] This area has very few local services available, even though it has a disproportionally high number of families receiving county services – residents are largely expected to travel to Eureka to receive services. The drive from Weitchpec to Eureka is three hours and relies on roads

[238] See Yurok Press Release January 22, 2016.

being clear. There is a bus option, but it runs only once in very early morning hours and once again in the evening. In January 2016, the Yurok Tribe declared a State of Emergency after seven tribal members committed suicide in this region alone in an 18-month span.

The CAPP project was fraught with issues at its inception and has been a target of tribal distrust and disappointment for the life of the project. The state failed to consult with tribes on a project earmarked to target Indian children and families, and this failure trickled down to the implementing counties. As far as the Task Force can discern, the CAPP project has produced little, if anything, of value. In fact, it has demonstrated that collaboration is of limited use without enforcement tools.

XV. Task Force Recommendations

To rectify the systemic violations of ICWA documented in this report, the Task Force proposes the following as remedies for consideration. These remedies are in addition to the identified list of immediate action items provided in the Executive Summary.

RECOMMENDATIONS FOR ICWA COMPLIANCE IN CALIFORNIA

Recommendation 1: Remediation of Tribal Inequity in California Courts

The injustice inherent in tribes not being fairly included in state court can only be overcome by ensuring: (1) tribal access to records, (2) appointment of counsel for tribes, (3) waiver of pro hac vice for out-of-state attorneys, and (3) tribal participation.

Tribal Access to Records: Despite the amendments to §827 designating tribes, tribal representatives and tribal attorneys as "parties," the practice of denying routine paperwork, pleadings and minutes to tribes remains. The costs of preventing access to court filings and discovery should be enforced by the Court, but if, after notice, an agency or county counsel continue to deny production, then monetary sanctions should be mandatory and awardable to the tribe. Further, the tribe, as a unique sovereign, should be exempted from additional fees for copying files to tribal attorneys and representatives under relevant government codes.

Appointment of Counsel or Resources to Retain Counsel: Welfare & Institutions Code §317 provides for appointment of legal counsel for parents or Indian custodians, and guardians who cannot afford counsel. It also compels appointment of counsel for children in every case. De facto parents may be appointed counsel under California Rules of Court, rule 5.534(e)(2). The agency is always represented by one or more counsel.

The absence of a corresponding provision for appointment of counsel for tribes is a significant breach of the mandates of due process. The multitude of errors in ICWA cases is a cost on the entire system, and could be minimized if tribes were afforded the same right to counsel consistent with other parties.

For tribes with resources to retain their own legal counsel, tribal attorneys could substitute into a case, as is done in other proceedings.

We specifically recommend the development of a four-year pilot project that would:

1. Obtain funding necessary for the provision of free legal counsel to tribes in dependency cases where the ICWA applies in at least two pilot counties. Management of the pilot project, including designation, supervision and training of court appointed counsel should be done by an organization governed by California tribal leaders with a focus on tribal children and families.
2. Require the Judicial Council to convene a working group comprised of all relevant persons, including tribal representatives and tribal advocates, state court judges, and Judicial Council staff that would provide a report to the Legislative Counsel within 12 months regarding the efficacy of the project.
3. Assess available funding sources for court appointed counsel in ICWA cases.

Waiver of Pro Hac Vice for Out-of-State Tribal Attorneys: California's pro hac vice rules should be amended to permit an out-of-state attorney who represents an Indian tribe to appear in a child custody proceeding without being required to associate with local counsel. The out-of-state attorney would be required to file an affidavit by the Indian child's tribe, asserting the tribe's intent to intervene and participate in the state court proceeding and affirming the child's membership or eligibility of membership pursuant to tribal law.[239]

[239] See, Michigan Proposed Rule 8.126 and Oregon Proposed Rule 3.170 waiving pro hac vice requirements for tribal ICWA attorneys.

Right of Tribes to Participate: In many cases and counties, tribes are not allowed in the courtroom or allowed at counsel table or permitted to meaningfully participate. Legislation should be sought authorizing designated tribal representatives (non-attorneys) to represent tribes. Only the court determines who may be allowed into a courtroom, not social workers or bailiffs. Amendment of relevant Rules of Court and regulations of intergovernmental agreements to secure and enforce tribal participation could alleviate this problem.

Recommendation 2: CDSS Must Exercise Oversight Authority

The California Department of Social Services (CDSS) must exercise its oversight authority and ensure ICWA compliance in each of its 58 political subdivisions to include investigations on ICWA compliance and annual public compliance reports. Investigations must use an investigation tool developed in consultation with tribes.

Recommendation 3: CDSS Office of Native American Affairs

CDSS must create an Office of Native American Affairs (ONAA) that answers directly to the Director of the California Department of Social Services. The ONAA will develop and maintain either cooperative or collaborative relationships with California's Indian tribes, Indian citizens and tribal organizations to promote the health, safety and welfare of California's Indian citizens. Formation of the ONAA shall be done in consultation between California tribes and CDSS to develop the staffing and purpose of the office.

Recommendation 4: Legislatively Mandated Workgroups

Indian tribes should be named as invited participants in any legislation which convenes a mandatory workgroup that pertains to children and families.

Recommendation 5: Foster Care Bill of Rights Amendment

There should be a legislative amendment to the foster care bill of rights that unequivocally codifies ICWA enforcement and application as a tribal foster care child's rights.

Recommendation 6: Judicial Competency and Appointment/Assignment

The Judicial Council should amend California Rule of Court 10.462 to include ICWA training for bench officers that is sufficient and ongoing to preside over ICWA cases and how they are different from other child custody proceedings.

The Governor and the Commission on Judicial Nominees Evaluation of the State Bar of California should consult tribes regarding appointment and assignment of bench officers.

Recommendation 7: ICWA Competency for Advocates, Party Representatives and Social Workers

Revise the Rules of Court to effectively mandate ICWA competency for legal counsel, social workers, CASAs, and others. Expand the Rule to require compliance with specific substantive, procedural and cultural components of the ICWA.

Recommendation 8: CDSS Tribal Consultation Policy

CDSS must complete a Tribal Consultation Policy in accordance with Executive Order B-10-11.

Recommendation 9: Tribal Title IV-E Unit within CDSS

It is recommended that a unit be developed within CDSS for the development and implementation of Title IV-E for tribes. This unit must include a coordinator who has decision-making power sufficient to assign and enforce tasks/deliverables and deadlines. This unit must issue a public report on a biannual basis.

Recommendation 10: Data Collection

The current data system utilized by the California Department of Social Services and California counties (CWS/CMS) to track child welfare cases contains inadequate data and system functionality regarding ICWA-eligible children. While the majority of the problem is likely a result of inadequate inquiry regarding children's tribal affiliations, overall the system fails to include data sets essential to tracking ICWA compliance. The new AFCARS regulations require ICWA specific data sets.[240] This lack of data makes it much more difficult for tribes to guide policy and budget allocation processes to ensure compliance with Cal-ICWA.[241] One step that must be taken is the addition of a drop-down, mandatory field to enter tribal affiliation when known. Next, UC Berkeley Social Welfare's Center for Social Services Research, which maintains the California Child Welfare Indicators Project (CCWIP), should create a whole data set specifically for American Indian Dependents, to provide for data collection outside of that which is collected via agency reporting.

Further, every county and the State are required to complete reporting to support and justify their annual funding allocations (e.g. CFSPs, APSRs). Unfortunately, these reports often misrepresent the level of collaboration and consultation occurring with the tribes. A forensic review of represented ICWA compliance as stated in these reports should be completed and discrepancies should be addressed. Counties with high compliance ratings would be eligible for additional state funding.

Recommendation 11: Proportional Distribution of Federal Funding to Tribes, as Occurs in Other States

CDSS receives federal funding as part of the social services funding budget process. A portion of these funds must be allocated to tribes or ICWA-related programs to fill in gaps where compliance efforts are under-resourced, resulting in non-compliance with the mandates of ICWA, as is done in other states.

[240] See, 81 Fed. Reg. 90524 (December 14, 2016) Adoption and Foster Care Analysis and Reporting System (AFCARS) Final Rule. Incorporation of data elements related to the Indian Child Welfare Act (ICWA) are mandatory by 2020. https://federalregister.gov/d/2016-29366

[241] See, the California CFSP, page 72-73 http://childsworld.ca.gov/res/TitleIV-B/CFSP_2015-2019.pdf

Recommendation 12: **Prioritize Implementation of Legislation**

CDSS must prioritize implementation of legislation, including drafting and publishing ACLs and regulations (1460/TCA). These delays result in a lack of Cal-ICWA compliance. For example, revisions to CDSS Division 31 regulations took 10 years to complete after the passage of Cal-ICWA in 2006. TCA regulations have not yet been drafted, six years since its enactment. These delays cause confusion with county child welfare agencies. CDSS has oversight authority and must assume a stronger role in implementation.

Recommendation 13: **Sanctions**

Monetary sanctions should be paid directly to tribes for the failure of child welfare agencies and/or their legal counsel who do not follow substantive and procedural rules.

Recommendation 14: **Development of Culturally-Based Placement for High-Need Youth**

Funding and technical assistance should be provided by CDSS to tribes to develop culturally based therapeutic foster homes, tribally based group homes and transitional living facilities, especially in those counties in which there is a disparate number of native children in foster care.

Recommendation 15: **Enforce and Implement the Judicial Council Strategic Plan and Operational Plan**

The Judicial Council adopted a Strategic Plan for California's Judicial Branch in 2006. In 2008, an Operational Plan was adopted to accomplish the goals identified in the Strategic Plan. Of the six goals, each of which is important, two stand out for Tribes: Goal I: Access, Fairness and Diversity, and Goal IV: Quality of Justice and Service to the Public. Tribes should be a part of the discussion and implementation of these goals, as well as the others, to ensure this population is heard by our judiciary.

Recommendation 16: **Consolidated Courts**

The model where all ICWA cases are heard in a single department, and by a single bench officer, creates an economy of scale. It may not be feasible in all counties, particularly small counties, but it could be limited to counties which annually reach a threshold number of ICWA cases.

Recommendation 17: **Concurrent Jurisdiction Court**

We recommend that the Judicial Council provide technical support to tribes and counties in the development of concurrent jurisdiction courts.

Recommendation 18: **Ombudsman – ICWA Training**

The director and staff of the Office of the Ombudsman must complete and certify they have received competent and ongoing training on ICWA.

Recommendation 19: **Contract with Culturally Appropriate Service Providers**

To ensure compliance, counties should contract directly with and pay for Indian Health Services, hospitals, clinics and treatment programs, tribal service providers, Indian organizations, and tribes for culturally appropriate services and directly pay the providers for such services.

Recommendation 20: **ICWA Units in Agencies**

Each county child welfare agency should designate personnel to develop expertise and relationships with tribes, tribal social workers and county social workers for the development of ICWA units.

Conclusion

The promise of the ICWA and Cal-ICWA is attainable. California has seen progress over the last decade, moving from wholesale ignorance of the statutes to a tentative embrace in some courts and, in some cases, truly innovative work to ensure that the interests of Indian families and tribes are protected. This report has highlighted issues that are most troubling and framed solutions with proposed actions that can be taken to improve ICWA compliance both in the short and long term. For example, the issue of competency in ICWA was a repeating theme throughout the data gathered and narratives shared. Thus, several of the proposed remedies, such as adopting Rules of Court regarding minimum standards for appointed counsel and advanced training resources for Bench Officers, address competency. The remedies presented are a start, but by no means an end, to the issues presented; the systemic denial of civil rights that ICWA provides is a symptom of the fundamental breakdown of the systems that are failing tribal families and children across the country.

We look forward to working with the BCJ to develop a concrete action plan for investigating, analyzing, pursuing and rectifying the ICWA failures of the last 40 years.

Title:
Traffic Injury on Tribal Lands in California

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Abstract:
There is a disproportional risk of motor vehicle death and injury among American Indian/Alaska Native (AI/AN) populations in the United States. As home to the nation's largest population of AI individuals, it is vital that California develop a better understanding of the factors contributing to this risk to guide the development and implementation of interventions to improve traffic safety for this population on the nearly 100 Rancherias and reservations in the state. However, there is very little data about the numbers and types of collisions, and driver and environmental factors contributing to the collisions that occur on tribal lands. As a first step toward better understanding the scope of the risk disparity, and the shortcomings in data collection, SafeTREC conducted a literature review and crash analysis using data from the Statewide Integrated Traffic Record System (SWITRS) and tribal area base maps targeting these communities. As a result of presentations and discussions at a California Tribal Safety conference where these analyses were presented, a number of procedural and institutional challenges were identified. Addressing these issues will not only help policymakers identify interventions to improve traffic safety on tribal lands, but it will give tribal jurisdictions tools to compete for scarce safety funding through the use of data documenting the need for safety improvements. Future research efforts should be aimed at refining these and other initiatives to address both the dire conditions of traffic safety on California's tribal lands, and the limitations of the data.

Traffic Injury on Tribal Lands in California

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ABSTRACT

There is a disproportional risk of motor vehicle death and injury among American Indian/Alaska Native (AI/AN) populations in the United States. As home to the nation's largest population of AI individuals, it is vital that California develop a better understanding of the factors contributing to this risk to guide the development and implementation of interventions to improve traffic safety for this population on the nearly 100 Rancherias and reservations in the state. However, there is very little data about the numbers and types of collisions, and driver and environmental factors contributing to the collisions that occur on tribal lands. As a first step toward better understanding the scope of the risk disparity, and the shortcomings in data collection, SafeTREC conducted a literature review and crash analysis using data from the Statewide Integrated Traffic Record System (SWITRS) and tribal area base maps targeting these communities. As a result of presentations and discussions at a California Tribal Safety conference where these analyses were presented, a number of procedural and institutional challenges were identified. Addressing these issues will not only help policymakers identify interventions to improve traffic safety on tribal lands, but it will give tribal jurisdictions tools to compete for scarce safety funding through the use of data documenting the need for safety improvements. Future research efforts should be aimed at refining these and other initiatives to address both the dire conditions of traffic safety on California's tribal lands, and the limitations of the data.

INTRODUCTION

There is a disproportional risk of motor vehicle death and injury among American Indian/Alaska Native (AI/AN) populations in the U.S. Nationwide motor vehicle collisions are the leading cause of unintentional injury for AI/AN populations between the ages of 1 and 44. Motor vehicle-related death rates for AI/AN adults are more than twice that of Caucasians, and almost twice that of African Americans *(1)*. Among AI/AN 19 years and younger, motor vehicle collisions are the leading cause of injury-related fatalities *(2)*, and AI/AN infants under one year of age experience the highest rate of motor-vehicle traffic deaths of all racial/ethnic groups *(3)*.

Based on these alarming statistics, and the fact that California has the largest Native American population in the nation, it is vital for the state to achieve a better understanding of the factors contributing to this risk to guide the development and implementation of interventions to improve traffic safety for this population on the nearly 100 Rancherias and reservations in the state. However, there is very little data about the numbers and types of collisions, and driver and environmental factors contributing to the collisions that occur on tribal lands. Therefore, it is essential for California to improve the quality and quantity of data collected about traffic collisions that occur within the boundaries of its nearly 100 Rancherias and reservations.

On a practical note, funding for traffic safety improvements is increasingly being awarded based on collision data that documents the extent of the safety problem. Projects for which data is required now include roadway upgrades, enforcement efforts, and education programs. However, data documenting collisions on tribal lands is lacking, putting tribal communities at a disadvantage in the competition for safety project funding, and prolonging their populations' high risk for traffic-related injuries. It is critical, therefore, to have adequate collision data—counts and descriptions—for all travel modes including pedestrians and bicyclists, for tribal lands, and they must be as accurate as possible.

Not only will better data help tribal lands compete for funding, it may lead to a better understanding of contributing factors including location, type of collision, and other elements that, if addressed, may help prevent traffic collisions on tribal lands in the future. MAP-21, the new Federal transportation bill, requires “a data-driven, strategic approach to improving highway safety on all public roads.” It also requires “a comprehensive, data-driven, Strategic Highway Safety Plan (SHSP) that defines state safety goals and describes a program of strategies to improve safety.” In order to meet the requirements of MAP-21, to be in compliance with the SHSP, and to promote safety on tribal lands, data collection and reporting must be improved.

As a first step toward this goal, the Safe Transportation Research and Education Center (SafeTREC) at the University of California, Berkeley, conducted a literature review and analysis of traffic fatality and injury patterns on tribal area roadways, in addition to investigating factors related to data quality and quantity limitations. This study aims to address both the need for improved traffic safety on California’s tribal lands, and the reasons behind the shortcomings in the data.

BACKGROUND

Native American Tribal Population in California

California is home to over one hundred federally recognized tribes, the largest Native American population in the nation, totaling 723,225 *(4)*, approximately 12 percent of the total Native American population in the nation, and the largest number of distinct tribes of any U.S. state. These tribes are characterized by linguistic and cultural diversity *(5)*.

Highest Population Concentrations

- U.S. locations with highest percentages of American Indians include Sacramento (466,488) and Santa Rosa (167,815) *(6)*.

Locations

- In rural areas and near highly populated cities (Los Angeles, San Francisco, San Diego, Sacramento)
- Close to borders of AZ, OR, and NV
- In deserts and mountains, on coast, near rivers and lakes

Tribal Populations

- California tribes range in number from five to 5,000 members.
- The largest tribal population in the state is Cherokee (approximately 18 percent), followed by Apache (6 percent), Navajo (5 percent), and Choctaw (5 percent) *(6)*.

Government

- Tribes have diverse governmental, cultural, social, economic, and geographic factors
- There are six tribal courts in California, leading to jurisdictional issues and questions

Traffic Injury Risk Factors Among Tribal Populations

Sever major risk factors impact the high rates of injury and fatality among AI/AN populations nationwide, including inadequate seat belt and child seat use and alcohol impaired driving. Seat belt use on reservations is low (55.4% overall), varying across individual locations from 8.8% to 84.8% *(6)*. Seat belt usage is greatly influenced by the presence, or lack, of primary seat belt laws *(7)*. Use of child car seats also varies greatly, but is generally much lower than the nationwide average *(8)*, with findings from a study of three Northwest tribes showing usage rates from 12% to 21% *(9)*, compared with the national average of 87% *(10)*. Among traffic collisions that occurred on reservations between 1982 and 2002, 65% were alcohol-related, compared with 47% of collisions nationwide *(7)*.

Risk Reduction

The risk of traffic-related injury and fatality on tribal lands can be reduced by increasing occupant restraint use, in part by establishing primary seat belt laws, and enforcing strict DUI legislation.

Extensive research has shown that seat belt laws, in particular, primary enforcement, increase seat belt use *(11)*. Child safety seats have been show to reduce vehicle occupant fatalities by 71% for infants and 54% for children between the ages of 1 and 4 *(12)*.

Countermeasures to reduce alcohol-impaired driving include committed enforcement of 0.08% BAC laws, minimum legal drinking age laws, and zero tolerance policies for drivers under the age of 21 *(14)*. Implementing sobriety checkpoints has also been proven to be effective in reducing alcohol-related collisions and death by approximately 17-25% *(15)*. The effectiveness of these measures can be enhanced through the addition of community outreach and education programs.

Individual Tribal Traffic Safety Programs

While individual AI/AN communities vary in environment, culture, and politics, effective traffic safety measures can be implemented to reduce injury and fatality. The Center for Disease Control (CDC) Injury Center funded four tribes from 2004-2009 to develop, implement, and evaluate their own programs to reduce motor vehicle-related injury and fatality in their communities. The following pilot programs were successful at increasing seat belt use, increasing child safety seat use, and decreasing alcohol-impaired driving *(16)*:

The Tohono O'odham Nation (TON) passed a primary seat belt law in 2005, allowing enforcement officers to ticket drivers for not wearing a seat belt, without any other traffic offense being observed. Efforts to support the law focused on increasing seat belt use on the reservation with a comprehensive media campaign and working with tribal police to enforce the new law. Driver seat belt use increased 47% and passenger seat belt use increased 62% from 2005 to 2008.

The Ho-Chunk Nation Motor Vehicle Prevention Program (MVPP) also set goals to increase seat belt use and child safety seat use. Through a number of activities—including partnering with local county police departments, implementing a comprehensive media campaign, and conducting targeted education and training for police officers— MVPP saw major improvements. From 2005 to 2009, driver seat belt use increased 38%, passenger seat belt use increased 94%, and child safety seat use increased from a baseline of 26% in 2005 to 76% in 2009.

The White Mountain Apache Tribe Motor Vehicle Injury Prevention Program has focused on increasing seat belt use and decreasing alcohol-impaired driving through the use of DUI sobriety checkpoints, enhanced police enforcement, and a comprehensive media campaign. In 2008 they conducted 24 sobriety checkpoints and stopped 13,408 vehicles. They also tracked rates of seat belt use among drivers and passengers and found that driver seat belt use increased from 13% to 54% and passenger seat belt use increased from 10% to 32% from 2004 to 2008. The San Carlos Apache Tribe Motor Vehicle Injury Prevention Program has focused on reducing alcohol-impaired driving and increasing seat belt use among tribal members. Media campaigns, sobriety checkpoints, enhanced police enforcement, and local community events were all important components of their program. Since 2004, total DUI arrests have increased 52%, driver seat belt use has increased 46%, and motor vehicle collisions have decreased 29%. In 2007, the San Carlos Tribal Council passed a primary seat belt law and a .08 blood alcohol concentration (BAC) law.

CALIFORNIA TRIBAL LANDS INJURY COLLISION ANALYSIS

SafeTREC conducted an analysis of traffic fatality and injury patterns on tribal area roadways across California. Data for the analysis came from the Statewide Integrated Traffic Record System (SWITRS), maintained by the California Highway Patrol (CHP), the same source of collision data for the rest of the state. Since the tribal areas of the 111 federally recognized tribes in California are not reported as separate jurisdictions in SWITRS, tribal area base maps were used and collisions that occurred within those coordinates were counted. The analysis identified 3,755 fatal and injury collisions that occurred within 29 tribal areas in California over a period of 10 years from 2002 to 2011 (Tables 1 & 2). While fatal and injury collisions decreased in tribal areas—and in California overall as well—there remain an unacceptable number of such collisions.

Table 1 Fatal and Injury Collisions in Tribal Areas by Severity, 2002-2011

Year	Fatal	Severe	Minor	Total
2002	25	38	322	385
2003	25	35	330	390
2004	25	44	391	460
2005	23	33	361	417
2006	12	46	341	399
2007	19	41	355	415
2008	24	25	324	373
2009	15	29	273	317
2010	6	24	273	303
2011	16	34	246	296
TOTAL	**190**	**349**	**3,216**	**3,755**

Table 2 Fatal and Injury Collisions by Tribal Area. 2002-2011 (Total = 3,755)

Tribal Land	Collisions
Agua Caliente Indian Reservation	1,744
Barona Rancheria	206
Bishop Rancheria	27
Cabazon Indian Reservation	114
Cahuilla Indian Reservation	59
Campo Indian Reservation	99
Chemehuevi Indian Reservation	16
Colorado River Indian Reservation	90
Fort Independence Indian Reservation	4
Fort Yuma Indian Reservation	140
Hoopa Valley Indian Reservation	159
La Jolla Indian Reservation	46
La Posta Indian Reservation	17
Mesa Grande Indian Reservation	1
Morongo Indian Reservation	305
Pala Indian Reservation	194
Rincon Indian Reservation	100
Round Valley Indian Reservation	31
San Pasqual Indian Reservation	3
Santa Rosa Indian Reservation	21
Santa Rosa Rancheria	13
Santa Ynez Indian Reservation	5
Santa Ysabel Indian Reservation	22
Soboba Indian Reservation	6
Susanville Rancheria	9
Torres-Martinez Indian Reservation	159
Viejas Indian Reservation	57
X. L. Rancheria	14
Yurok Indian Reservation	94

Data Limitations

SWITRS, maintained by CHP, processes all reported fatal and injury collisions that occur on California's state highways and all other public roadways, excluding private property. Anecdotally, data on tribal lands is likely to be under-reported to SWITRS due to discrepancies in jurisdictional authority. CHP responds to a limited number of tribal collisions, resulting in some unknown number not being reported at all. Of those to which CHP does respond, the collisions reported to SWITRS are limited to those that occur on state highways that traverse tribal lands, and those in which a crime occurs (e.g., DUI). All other collisions on tribal land are investigated by local tribal agencies and may or may not be entered into SWITRS. Individual tribal areas differ in how collisions are investigated and reported. Therefore, the count of 3,755 injury collisions is very likely a substantial underestimate.

Reasons for Underreporting

Various factors affect collision reporting on tribal lands, both during the primary collection phase, and the data processing phase, as described in a study on collision reporting on tribal lands in South Dakota, by Baily and Huft *(13)*. Barriers found that during the primary collection phase include lack of adequate officer training, removal of vehicles from crash scenes, law enforcement understaffing, and the fact that the Bureau of Indian Affairs (BIA) does not require incident reports. Barriers encountered during the date processing phase include incompatible electronic data systems, inadequate tribal data systems, lack of feedback regarding incomplete or incorrectly completed forms, and political concerns regarding tribal sovereignty. The authors grouped these factors into three general categories *(13)*:

- Tribal law enforcement capacity for reporting, which entails staffing shortages, staff turnover, resources, computing facilities, software, and training.
- Standardization issues for crash report forms, policies, and protocols.
- Issues of relations between the state and tribes, including data privacy concerns, problems of intergovernmental communication, and concerns about ultimate uses of crash data and potentially negative impacts to tribal members

Finally, conflicts between tribal and state law may lead to problems in crash reporting. Some tribes do not require driver licenses or vehicle registration, therefore a tribal member involved in a crash may not be able to provide this identification for a crash report. In this case, tribal law would have to change to allow for complete reporting. In the absence of such changes, the standard procedures for crash reporting would have exceptions on those tribal lands with differing laws.

Overcoming Barriers to Adequate Collision Reporting

While there are many reasons for the data shortcomings, in the South Dakota study, the authors recommended three basic measures to address the barriers to adequate collision reporting on tribal lands *(13)*:

- Training for law enforcement officers on the crash forms and crash reporting process required by the state.
- Software solutions for internal tribal data processing and making the crash report form easier to complete.
- Recommending that the state sign a memorandum of agreement (MOA) with each tribe to help overcome the political issues involved in crash reporting.

Case Studies in Addressing Tribal Collision Underreporting

Other states have made successful attempts to address the issue of underreporting of collisions on tribal lands. California can benefit from these efforts by analyzing which methods could be efficiently implemented on its tribal lands. Previous research has documented various methods that states and tribal nations have implemented to improve the quality and quantity of tribal collision reporting *(13)*:

In South Dakota, the Flandreau Santee Sioux Tribe fully reports its crashes to the state. The tribal police force operates under special circumstances, however. The tribe and the City of Flandreau have formed a combined police department that provides law enforcement services to both the city and the reservation. Because of these unique circumstances, the law enforcement officers are trained at the South Dakota Police Academy operated by the Division of Criminal Investigation in the Office of the Attorney General. By undergoing training specific to South Dakota law enforcement, the officers are more familiar with the state's crash report form. Some tribes in South Dakota have law enforcement assistants, whose main assignment is to process data, including crash data. These dedicated staff persons sometimes assist in the data collection process by reminding police officers that reports must be filled out.

The Rosebud Sioux Tribe expressed the most satisfaction with its internal collision processing software, Cisco. This system is user-friendly and has a number of built-in reports that have helped the tribe in applying for grants, making safety plans, and tracking progress on safety measures. The tribe has also received software support from Cisco, which has been helpful in the implementation of the system.

The Navajo Nation implemented a reporting system across three states: New Mexico, Arizona, and Utah, and according to tribal officials, all collisions are now reported to each state. The tribe maintains a database of collisions that occur across its seven districts. One shortfall is that the tribal council and courts decline to provide DUI information to the states, details including blood alcohol content levels

Efforts to improve reporting in Montana involve giving tribes the ability to track their collision data internally. Of the seven tribes with land in Montana, four are currently using Cisco software to track their collision data internally. The state is working to set up a system for electronic data submission. The Cisco data format is currently not compatible with the state's internal data system. Montana is considering purchasing the Cisco software so it can manipulate the data it receives from the tribes' in-house systems. The original plan was to have tribes submit data to Indian Highway Safety, who would then share it with Montana. This has not been successful to date. The state is now planning to retrieve data directly from the Cisco systems at each of the tribes.

The Inter-Tribal Council of Arizona (ITCA) has been working with tribes to improve collision reporting among several member tribes. The ITCA has had limited success to date. The focus of the efforts has been on collision data collection and tribal systems for tracking the collision data. Submitting data to the State of Arizona has not been a priority for the project. Generally, the tribes involved in the efforts are more interested in human factors in collisions, such as seatbelt use, speeding, and DUI. Identifying hazardous locations, which would be helpful for tribal transportation improvement plans, has not emerged as a primary focus.

CONCLUSION

California has the largest Native American population in the nation. Due to the disproportional risk of motor vehicle death and injury among this population, it is crucial for the state to achieve

a better understanding of the factors contributing to this threat to the communities who live on the nearly 100 Rancherias and reservations in the state. However, there is very little data about collisions that occur on tribal lands. Therefore, it is essential for the state to improve the quality and quantity of data collected about these traffic collisions to guide the development and implementation of interventions to improve traffic safety for these communities.

Collision data is often among the application requirements for funding for traffic safety improvements, including roadway upgrades, enforcement efforts, and education programs. Due to the lack of data documenting collisions on tribal lands, these communities are often at a disadvantage in competing for safety project funding. Adequate and accurate collision data for all travel modes on tribal lands is an essential element in securing this needed funding. It may also lead to a better understanding of the factors that contribute to the disproportionate traffic safety risks among these communities.

Improving Traffic Safety Data for Tribal Areas in California

One of the outcomes of the California Tribal Safety Summit was a recommendation for improved collection of collision data in tribal areas. The process for this could include some or all of the following actions:

- Survey all tribal areas to determine traffic safety data procedures, include handling of citations and collision reporting
- Develop and implement standardized reporting policies and procedures
- Develop a comprehensive traffic collision data base for the 111 recognized tribes
- Produce a quarterly report of traffic collisions
- Develop a Tribal Strategic Highway Safety Plan, in conjunction with the California Strategic Highway Safety Plan (SHSP) for the combined tribal areas

Effective Communication Between State Agencies and Tribal Governments

Finally, creating partnerships between state and tribal governments requires effective communication based on the following principles *(17)*:

- Develop trust and respect for different cultures
- Increase all parties' knowledge and understanding of: law, protocol, values, and jurisdiction
- Develop an understanding of the roles and responsibilities for tribal involvement
- Develop procedures appropriate to each group—departments within state and federal governments and tribes are unique. A one-size fits all approach may not work.

The findings of this paper represent only a first step. Future research efforts should be aimed at refining these and other initiatives to address both the dire conditions of traffic safety on California's tribal lands, and the shortcomings in the data.

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November 2016

New Federal Regulations Governing the Indian Child Welfare Act

This information is intended for practitioners and judicial officers with knowledge of and experience with the requirements of the Indian Child Welfare Act (ICWA) to inform them of the requirements of the new federal regulations governing court proceedings covered by ICWA (25 U.S.C. § 1901 et seq.) that become effective December 12, 2016. The substantive provisions of the new regulations are attached.[1] This Job Aid is not intended to be a complete analysis of the new federal regulations or how they relate to existing California law and practice. Further guidance on the implications of the new federal ICWA regulations will be forthcoming, but the purpose of this document is to alert courts to the potential need for immediate changes to court practice and procedure to comply with the new federal requirements.[2]

When do the new regulations apply?

The new regulations apply to "proceedings" initiated after December 12, 2016. "Child custody proceeding" as defined includes four separate phases of a case that may all take place within a single ongoing case: the foster care placement, termination of parental rights, preadoptive placement, and adoptive placement phases of a case are all considered separate "proceedings" for ICWA purposes. (See 25 U.S.C. § 1903(1); 25 C.F.R. §§ 23.143 and 23.2 (1996).)[3] Thus, for a case filed ***on or before*** December 12, 2016, the new regulations apply as long as the child's adoption is not yet final when the case moves from one of the four separate proceedings defined by ICWA. When a case procedurally moves from the foster care placement phase (reunification) to the termination of parental rights (TPR) phase or from TPR to adoptive placement, the new regulations apply to the new phase of the case because it is considered a new proceeding for ICWA purposes. The new regulations may pose a challenge for courts in determining when a new proceeding has started for ICWA purposes within an ongoing case.

[1] 81 Fed.Reg. 38864 et seq. (June 14, 2016).

[2] This information was provided at the 2016 Juvenile Law Institute and Pre-Institute ICWA Roundtable and at other multidisciplinary educational programs. The regulations are available online at *www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf*.

[3] The definition of child custody proceeding found in 25 CFR 23.2 specifies that "[t]here may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings…."

How do the new requirements relate to California law and practice?

The new regulations are binding on state courts as the minimum federal standard that must be followed. For example, 25 Code of Federal Regulations part 23.106 (2016) confirms section 1921 of the Act itself, that where applicable state or other federal law provides a higher standard of protection, the higher standard shall apply.

Applying ICWA

The new regulations require ICWA inquiry at the beginning of each proceeding (25 C.F.R. § 23.107 (2016)), not each case. If there is "reason to know" that the child is an Indian child, but the status is not confirmed, the new regulations require the court to obtain evidence from the agency on the efforts made to determine the child's status (*id.* at § 23.107(b)(1)), and "[t]reat 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." (*Id.* at § 23.107(b)(2).) This means that pending confirmation of the child's status, all ICWA requirements must be met.

Emergency Removals (Detentions)

As a general rule, an Indian child cannot be removed from parental custody without compliance with ICWA requirements. The only exception is for "emergency proceedings" (25 U.S.C. 1922; see also chart at 81 Fed.Reg. 38868–38869 (June 14, 2016), attached.)

The new regulations limit the emergency removal power whenever there is "reason to know" that the child involved is an "Indian child" (25 C.F.R. § 23.113 (2016)). The petition seeking emergency removal must contain specific factual information and allegations including the basis for belief that the child is at risk of imminent physical damage or harm, interactions with the tribe, and efforts made to assist the parents to have the child returned. (*Id.* at § 23.113(d).)

The court must make a specific finding that the removal or placement is necessary to prevent imminent physical damage or harm to the child. (*Id.* at § 23.113(b)(1).)

As a general rule, an emergency removal cannot last more than 30 days without compliance with ICWA requirements unless the court makes certain findings. (*Id.* at § 23.113(e).) This means that the court must generally consider evidence of active efforts, testimony of a qualified expert witness, and evidence of whether the placement follows the placement preferences at a hearing that is within 30 days of the date the child was removed from the parents' physical custody by the agency.

Jurisdiction

California courts may not have jurisdiction over proceedings (other than emergency proceedings) involving an Indian child if the child resides or is domiciled within the reservation of a tribe that exercises exclusive jurisdiction over child custody matters or if the child is already a ward of a tribal court. In a situation where the court lacks jurisdiction, 25 Code of Federal Regulations part 23.110 clarifies that the court must

expeditiously inform the tribal court of the matter, dismiss the state court proceeding, and provide the tribal court with all information regarding the proceeding including, but not limited to, the pleadings and any court records.

Active Efforts

The new regulations (25 Code of Federal Regulations part 23.2) now define active efforts as "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…" and describes 11 examples of active efforts. Courts should ensure that when a case involves an Indian child, case plans and services meet these new active efforts requirements.

Qualified Expert Witness

Regarding witnesses, 25 Code of Federal Regulations parts 23.121 and 23.122 discuss the requirements for qualified expert witness testimony as well as who can serve as a qualified expert witness.

Placement Preferences

Regarding placement, 25 Code of Federal Regulations parts 23.129 through 23.132 address placement preferences for an Indian child. One important clarification is that the issue of placement must be reassessed each time a change in placement is required and at each separate phase of the proceedings. Thus, the court must reassess whether the child's placement complies with the placement preferences when a case moves through each of the four ICWA phases: foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.

The new regulations place limitations on the factors that the court can consider in making a determination that there is "good cause" to deviate from the placement preferences. In particular, the court may not depart from the placement preferences based on the socioeconomic status of any placement relative to another placement (25 C.F.R. § 23.132 (d) (2016)), nor may the court find good cause to deviate from the placement 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." (*Id.* at § 23.132(e).)

Transfers to Tribal Court

Transfers to tribal court are discussed under 25 Code of Federal Regulations parts 23.115 through 23.119. Particular issues to note are that the right to seek a transfer to tribal court may be exercised at any time, but that right attaches separately at the foster care placement and termination of parental rights phases of the case. (*Id.* at § 23.115.) Further, the regulations require that the tribal court be promptly notified of the petition to transfer (*Id.* at § 23.116), all parties have an opportunity to be heard, any "good cause" reasons to deny transfer are stated on the record, and the court's decision be on the record or in a written order. (*Id.* at § 23.118.)

The new regulations list five factors that the court must not consider in determining whether "good cause" exists not to transfer jurisdiction: (1) whether the proceedings are at an advanced stage if the Indian child's parent, Indian custodian, or tribe only recently received notice of the proceedings; (2) whether there was an earlier "proceeding" (i.e., foster care phase of the case) at which no petition to transfer was filed; (3) whether the transfer could affect the child's placement; (4) the child's cultural connections with the tribe; and (5) the socioeconomic conditions or any negative perception of tribal social services or judicial system. (*Id.* at § 23.118.)

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Additional resources:

CFCC Tribal/State Programs http://www.courts.ca.gov/3067.htm
Bureau of Indian Affairs
http://www.bia.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm

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Part II

Department of the Interior

Bureau of Indian Affairs

25 CFR Part 23

Indian Child Welfare Act Proceedings; Final Rule

Section	Respondent	Information collection	Annual number of respondents	Frequency of responses	Annual number of responses	Completion time per response	Total annual burden hours
23.141	State court or State agency.	Notify where records maintained	50	167	8,350	0.5	4,175
			.....	.....	98,069	.....	301,811

The annual cost burden to respondents associated with providing notice by certified mail is $6.74 and the cost of a return receipt green card is $2.80. For each Indian child-custody proceeding, at least two notices must be sent—one to the parent and one to the Tribe, totaling $19.08. At an annual estimated 13,000 child welfare proceedings that may involve an ''Indian child,'' where approximately 650 of these include an interstate transfer (13,650), this totals: $260,442. In addition, there are approximately 2,578 voluntary proceedings for which parties may choose to provide notice, at a cost of $49,118. Together, the total cost burden is $309,630.

Comment was taken on this information collection in the proposed rule, as part of the public notice and comment period proposed rule, in compliance with OMB regulations. One commenter, the California Health and Human Services Agency, Department of Social Services (CHHS) submitted comments specifically in response to the request for comments on the information collection burden.

• *Comment on Proposed § 23.111:* The proposed rule states that notice must be by registered mail, whereas the current 23.11(a) allows for notice by certified mail. To require registered mail will increase costs that undermine noticing under ICWA. *Response:* The statute specifies ''registered mail with return receipt requested.'' 25 U.S.C. 1912(a). In response to these comments, the Department examined whether certified mail with return receipt requested is allowable under the statute, and determined that it is because certified mail with return receipt requested better meets the goals of prompt, documented notice. The final rule allows for certified mail.

• *Comment on Proposed § 23.104, providing information on how to contact a Tribe:* The rule should clarify BIA's obligation in gathering the information for the list of Tribe's designated agents and contact information because the current list is outdated, inefficient, and inconsistently maintained. The list is hampered by publication in the **Federal Register** and BIA should be required to publish updates on the Web. The list also no longer maintains the historical affiliations, which was helpful. *Response:* BIA is now publishing the list using historical affiliations, as requested, and making the list available on its Web site, where it can be updated more frequently. The rule does not address this because these are procedures internal to the BIA.

• *Comment on Proposed § 23.111(i), requiring notice by both States where child is transferred interstate:* Requiring both the originating State court and receiving State court to provide notice is duplicative and burdensome because notice should only be required in the State where the actual court proceeding is pending. Another commenter stated that the provision appears to apply to transfers between Tribes and States, where notice is unnecessary. *Response:* The final rule deletes this provision.

• *Comment on Proposed § 23.134, requiring BIA to disclose information to adult adoptees:* This section appears to be creating duplicative work of the BIA and States, because both sections require each to provide adult adoptees information for Tribal enrollment. *Response:* The Act imposes this responsibility on both BIA and the State. Section 1951(b) of the Act imposes the responsibility on BIA, which is in § 23.71(b) of the final rule. Section 1917 of the Act imposes the responsibility on States, which is addressed at § 23.134 of the final rule.

• *Comment on Proposed § 23.137, requiring the State to establish a single location for placement records:* This requirement would be an unfunded mandate with undue burden and would require relocating 1,145 files to a different location and require changes to existing recordkeeping systems. Another State agency commented that there is a significant fiscal and annual burden due to the staffing, costs for copying, packaging and transferring physical files to a different location. *Response:* The final rule deletes the provision requiring States to establish a single, central repository. The associated information collection request has also been deleted.

• *Comment on Proposed § 23.137, requiring providing records to the Department or Tribe upon request:* The 15-minute burden estimate allocated to this task is too low. The time to copy, package and mail the documents will be no less than one hour, but more realistically two hours. *Response:* The final rule updates the burden estimates to reflect 1.5 hours.

If you have comments on this information collection, please submit them to Elizabeth K. Appel, Office of Regulatory Affairs & Collaborative Action—Indian Affairs, U.S. Department of the Interior, 1849 C Street NW., MS–3071, Washington, DC 20240, or by email to *elizabeth.appel@bia.gov.*

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, and procedural nature. *See,* 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 25 CFR Part 23

Administrative practice and procedure, Child welfare, Indians, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 23 in Title 25 of the Code of Federal Regulations as follows:

PART 23—INDIAN CHILD WELFARE ACT

■ 1. The authority citation for part 23 continues to read as follows: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

■ 2. In § 23.2:

■ a. Add a definition for ''active efforts'' in alphabetical order;

■ b. Revise the definition of ''child-custody proceeding'';

■ c. Add definitions for ''continued custody'', ''custody'', and ''domicile'' in alphabetical order;

■ d. Add a definition for ''emergency proceeding'' in alphabetical order;
■ e. Revise the definition of ''extended family member'';
■ f. Add a definition for ''hearing'' in alphabetical order;
■ g. Revise the definitions of ''Indian child'', ''Indian child's Tribe'', and ''Indian custodian'';
■ h. Add a definition for ''Indian foster home'' in alphabetical order;
■ i. Add a definition of ''involuntary proceeding'' in alphabetical order;
■ j. Revise the definition of ''parent'';
■ k. Revise the definitions of ''reservation'' and ''Secretary'';
■ l. Add a definition for ''status offenses'' in alphabetical order;
■ m. Revise the definition of ''Tribal court''; and
■ n. Add definitions for ''upon demand'', and ''voluntary proceeding'' in alphabetical order.

The additions and revisions read as follows:

§ 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 participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

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

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

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

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

(9) Monitoring progress and participation in services;

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

(11) Providing post-reunification services and monitoring.

* * * * *

Child-custody proceeding. (1) ''Child-custody proceeding'' means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:

(i) *Foster-care placement,* which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

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

(iii) *Preadoptive placement,* which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or

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

(2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

* * * * *

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

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

Domicile means:

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

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

Emergency proceeding means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Extended family member is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

* * * * *

Hearing means a judicial session held for the purpose of deciding issues of fact, of law, or both.

* * * * *

Indian child means any unmarried person who is under age 18 and either:

(1) Is a member or citizen of an Indian Tribe; or

(2) Is eligible for membership or citizenship in an Indian Tribe and is the

biological child of a member/citizen of an Indian Tribe.

Indian child's Tribe means:

(1) The Indian Tribe in which an Indian child is a member or eligible for membership; or

(2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in § 23.109.

Indian custodian means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.

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

Involuntary proceeding means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

* * * * *

Parent or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.

Secretary means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.

* * * * *

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).

* * * * *

Tribal court means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.

* * * * *

Upon demand means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.

* * * * *

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.

■ 3. Revise § 23.11 to read as follows:

§ 23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in § 23.111, consistent with the confidentiality requirement in § 23.111(d)(6)(ix). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by § 23.111.

(b)(1) For child-custody proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, or any territory or possession of the United States, notices must be sent to the following address: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.

(2) For child-custody proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices must be sent to the following address: Minneapolis Regional Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401–2241.

(3) For child-custody proceedings in Nebraska, North Dakota, or South Dakota, notices must be sent to the following address: Aberdeen Regional Director, Bureau of Indian Affairs, 115 Fourth Avenue SE., Aberdeen, South Dakota 57401.

(4) For child-custody proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), or the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods or Woodward, notices must be sent to the following address: Anadarko Regional Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6) of this section.

(5) For child-custody proceedings in Wyoming or Montana (except for notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), notices must be sent to the following address: Billings Regional Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(6) For child-custody proceedings in the Texas counties of El Paso and Hudspeth or in Colorado or New Mexico (exclusive of notices to the Navajo Nation from the New Mexico counties listed in paragraph (b)(9) of this section), notices must be sent to the following address: Albuquerque Regional Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Nation must be sent to the Navajo Regional Director at the address listed in paragraph (b)(9) of this section.

(7) For child-custody proceedings in Alaska (except for notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska), notices must be sent to the following address: Juneau Regional Director, Bureau of Indian

Affairs, 709 West 9th Street, Juneau, Alaska 99802–1219. Notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(8) For child-custody proceedings in Arkansas, Missouri, or the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Stephens, Tulsa, Wagoner, or Washington, notices must be sent to the following address: Muskogee Regional Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For child-custody proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi Tribe of Arizona and the San Juan Southern Paiute Tribe of Arizona) or Navajo (except for notices to the Hopi Tribe of Arizona); the New Mexico counties of McKinley (except for notices to the Zuni Tribe of the Zuni Reservation), San Juan, or Socorro; or the Utah county of San Juan, notices must be sent to the following address: Navajo Regional Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Southern Paiute Tribes of Arizona must be sent to the Phoenix Regional Director at the address listed in paragraph (b)(10) of this section. Notices to the Zuni Tribe of the Zuni Reservation must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6 of this section).

(10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9) of this section), Nevada, or Utah (exclusive of San Juan County), notices must be sent to the following address: Phoenix Regional Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For child-custody proceedings in Idaho, Oregon, or Washington, notices must be sent to the following address: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, must also be sent to the Portland Regional Director.

(12) For child-custody proceedings in California or Hawaii, notices must be sent to the following address: Sacramento Regional Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in § 23.2, or is unable to locate the parents or Indian custodians, the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

■ 4. Revise § 23.71 to read as follows:

§ 23.71 Recordkeeping and information availability.

(a) The Division of Human Services, Bureau of Indian Affairs (BIA), is authorized to receive all information and to maintain a central file on all State Indian adoptions. This file is confidential and only designated persons may have access to it.

(b) Upon the request of an adopted Indian who has reached age 18, the adoptive or foster parents of an Indian child, or an Indian Tribe, BIA will disclose such information as may be necessary for purposes of Tribal enrollment or determining any rights or benefits associated with Tribal membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, BIA must certify to the Indian child's Tribe, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment under the criteria established by such Tribe.

(c) BIA will ensure that the confidentiality of this information is maintained and that the information is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.

■ 5. Add subpart I to read as follows:

Subpart I—Indian Child Welfare Act Proceedings

General Provisions

Sec.

Pretrial Requirements

Petitions To Transfer to Tribal Court

Adjudication of Involuntary Proceedings

Voluntary Proceedings

Subpart I—Indian Child Welfare Act Proceedings

General Provisions

§ 23.101 What is the purpose of this subpart?

The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

§ 23.102 What terms do I need to know?

The following terms and their definitions apply to this subpart. All other terms have the meanings assigned in § 23.2.

Agency means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements.

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

§ 23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of ''Indian child,'' then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

§ 23.104 What provisions of this subpart apply to each type of child-custody proceeding?

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in § 23.103(a):

Section	Type of proceeding
23.101–23.106 (General Provisions)	Emergency, Involuntary, Voluntary.
Pretrial Requirements:	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?).	Emergency, Involuntary, Voluntary.
23.108 (Who makes the determination as to whether a child is a member whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?).	Emergency, Involuntary, Voluntary.
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?).	Emergency, Involuntary, Voluntary.
23.110 (When must a State court dismiss an action?)	Involuntary, Voluntary.
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?).	Involuntary (foster-care placement and termination of parental rights).
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and termination of parental rights).
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency.
23.114 (What are the requirements for determining improper removal?)	Involuntary.
Petitions to Transfer to Tribal Court:	
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).

Section	Type of proceeding
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.118 (How is a determination of ''good cause'' to deny transfer made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
Adjudication of Involuntary Proceedings:	
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and termination of parental rights).
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and termination of parental rights).
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement and termination of parental rights).
23.123 Reserved	N/A.
Voluntary Proceedings:	
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary.
23.125 (How is consent obtained?)	Voluntary.
23.126 (What information must a consent document contain?)	Voluntary.
23.127 (How is withdrawal of consent to a foster-care placement achieved?)	Voluntary.
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary.
Dispositions:	
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary.
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary.
23.131 (What placement preferences apply in foster-care or preadoptive placements?)	Involuntary, Voluntary.
23.132 (How is a determination of ''good cause'' to depart from the placement preferences made?).	Involuntary, Voluntary.
Access:	
23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary.
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary.
23.135 Reserved.	N/A.
Post-Trial Rights & Responsibilities:	
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?).	Involuntary (if consent given under threat of removal), voluntary.
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent it involved a specified violation), involuntary, voluntary.
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary.
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary.
Recordkeeping:	
23.140 (What information must States furnish to the Bureau of Indian Affairs?)	Involuntary, Voluntary.
23.141 (What records must the State maintain?)	Involuntary, Voluntary.
23.142 (How does the Paperwork Reduction Act affect this subpart?)	Emergency, Involuntary, Voluntary.
Effective Date:	
23.143 (How does this subpart apply to pending proceedings?)	Emergency, Involuntary, Voluntary.
Severability:	
23.144 (What happens if some portion of part is held to be invalid by a court of competent jurisdiction?).	Emergency, Involuntary, Voluntary.

Note: For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

§ 23.105 How do I contact a Tribe under the regulations in this subpart?

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the **Federal Register** each year and makes the list available on its Web site at *www.bia.gov.*

(b) For a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to be directed to the appropriate office or individual.

(c) If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, DC (see *www.bia.gov*).

§ 23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

Pretrial Requirements

§ 23.107 How should a State court determine if there is reason to know the child is an Indian child?

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does

not have sufficient evidence to determine that the child is or is not an ''Indian child,'' the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an ''Indian child'' in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an ''Indian child.'' A Tribe receiving information related to this inquiry must keep documents and information confidential.

§ 23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?

(a) The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.

(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

(c) The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an ''Indian child.'' An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation.

§ 23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

(a) If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe.

(b) If the Indian child meets the definition of ''Indian child'' through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of ''Indian child'' through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

§ 23.110 When must a State court dismiss an action?

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

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

(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or

termination-of-parental-rights proceeding is an Indian child, the court must ensure that:

(1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and

(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to:

(1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (*see* § 23.105 for information on how to contact a Tribe);

(2) The child's parents; and

(3) If applicable, the child's Indian custodian.

(c) Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

(d) Notice must be in clear and understandable language and include the following:

(1) The child's name, birthdate, and birthplace;

(2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;

(3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;

(4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);

(5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;

(6) Statements setting out:

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

(ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.

(iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.

(iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.

(v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.

(vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and § 23.115.

(vii) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.

(viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.

(ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

(e) If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see *www.bia.gov*). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in § 23.112, and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

§ 23.112 What time limits and extensions apply?

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and § 23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows:

(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the child-custody proceeding as provided in 25 U.S.C. 1912(a) and § 23.111; and

(4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and § 23.111 may also be available under State law or pursuant to extensions granted by the court.

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;

(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or

(3) Restoring the child to the parent or Indian custodian.

(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child;

(2) The name and address of the child's parents and Indian custodians, if any;

(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;

(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see *www.bia.gov*);

(5) The residence and the domicile of the Indian child;

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

(7) The Tribal affiliation of the child and of the parents or Indian custodians;

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

(9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and

(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;

(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and

(3) It has not been possible to initiate a ''child-custody proceeding'' as defined in § 23.2.

§ 23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

Petitions To Transfer to Tribal Court

§ 23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

§ 23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

§ 23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

(a) Either parent objects to such transfer;

(b) The Tribal court declines the transfer; or

(c) Good cause exists for denying the transfer.

§ 23.118 How is a determination of ''good cause'' to deny transfer made?

(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.

(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider:

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

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

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

(4) The Indian child's cultural connections with the Tribe or its reservation; or

(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

§ 23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

Adjudication of Involuntary Proceedings

§ 23.120 How does the State court ensure that active efforts have been made?

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail in the record.

§ 23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

§ 23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

§ 23.123 [Reserved]

Voluntary Proceedings

§ 23.124 What actions must a State court undertake in voluntary proceedings?

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in § 23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

(c) State courts must ensure that the placement for the Indian child complies with §§ 23.129–23.132.

§ 23.125 How is consent obtained?

(a) A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain to the parent or Indian custodian:

(1) The terms and consequences of the consent in detail; and

(2) The following limitations, applicable to the type of child-custody proceeding for which consent is given, on withdrawal of consent:

(i) For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned; or

(ii) For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or

(iii) For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.

(c) The court must certify that the terms and consequences of the consent were explained on the record in detail in English (or the language of the parent or Indian custodian, if English is not the primary language) and were fully understood by the parent or Indian custodian.

(d) Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(e) A consent given prior to, or within 10 days after, the birth of an Indian child is not valid.

§ 23.126 What information must a consent document contain?

(a) If there are any conditions to the consent, the written consent must clearly set out the conditions.

(b) A written consent to foster-care placement should contain, in addition to the information specified in paragraph (a) of this section, the name

and birthdate of the Indian child; the name of the Indian child's Tribe; the Tribal enrollment number for the parent and for the Indian child, where known, or some other indication of the child's membership in the Tribe; the name, address, and other identifying information of the consenting parent or Indian custodian; the name and address of the person or entity, if any, who arranged the placement; and the name and address of the prospective foster parents, if known at the time.

§ 23.127 How is withdrawal of consent to a foster-care placement achieved?

(a) The parent or Indian custodian may withdraw consent to voluntary foster-care placement at any time.

(b) To withdraw consent, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(c) When a parent or Indian custodian withdraws consent to a voluntary foster-care placement, the court must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.

§ 23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?

(a) A parent may withdraw consent to voluntary termination of parental rights at any time prior to the entry of a final decree of termination.

(b) A parent or Indian custodian may withdraw consent to voluntary adoption at any time prior to the entry of a final decree of adoption.

(c) To withdraw consent prior to the entry of a final decree of adoption, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(d) The court in which the withdrawal of consent is filed must promptly notify the person or entity who arranged any voluntary preadoptive or adoptive placement of such filing, and the Indian child must be returned to the parent or Indian custodian as soon as practicable.

Dispositions

§ 23.129 When do the placement preferences apply?

(a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in § 23.130 and § 23.131 apply.

(b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.

(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.

§ 23.130 What placement preferences apply in adoptive placements?

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:

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

(2) Other members of the Indian child's Tribe; or

(3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

§ 23.131 What placement preferences apply in foster-care or preadoptive placements?

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that:

(1) Most approximates a family, taking into consideration sibling attachment;

(2) Allows the Indian child's special needs (if any) to be met; and

(3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:

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

(2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;

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

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

(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

§ 23.132 How is a determination of ''good cause'' to depart from the placement preferences made?

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is ''good cause'' to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

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

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

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

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

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or

with which the Indian child's parent or extended family members maintain social and cultural ties.

(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Access

§ 23.133 Should courts allow participation by alternative methods?

If it possesses the capability, the court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

§ 23.134 Who has access to reports and records during a proceeding?

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

§ 23.135 [Reserved]

Post-Trial Rights & Responsibilities

§ 23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, the State court may invalidate the voluntary adoption upon finding that the parent's consent was obtained by fraud or duress.

(b) Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition.

(c) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the final decree of adoption, order the consent revoked, and order that the child be returned to the parent.

§ 23.137 Who can petition to invalidate an action for certain ICWA violations?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster-care placement or termination of parental rights under state law where it is alleged that 25 U.S.C. 1911, 1912, or 1913 has been violated:

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's Tribe.

(b) Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.

§ 23.138 What are the rights to information about adoptees' Tribal affiliations?

Upon application by an Indian who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree of adoption must inform such individual of the Tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

§ 23.139 Must notice be given of a change in an adopted Indian child's status?

(a) If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe whenever:

(1) A final decree of adoption of the Indian child has been vacated or set aside; or

(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child.

(b) The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court.

(1) Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.

(2) The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained in detail in English (or the language of the parent or Indian custodian, if English is not the primary language), and were fully understood by the parent or Indian custodian.

(3) Where confidentiality is requested or indicated, execution of the waiver need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(4) The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.

(5) A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation.

Recordkeeping

§ 23.140 What information must States furnish to the Bureau of Indian Affairs?

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 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 foster-care, preadoptive, and adoptive

placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

§ 23.142 How does the Paperwork Reduction Act affect this subpart?

The collections of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076–0186. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number. Send comments regarding this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer—Indian Affairs, 1849 C Street NW., Washington, DC 20240.

Effective Date

§ 23.143 How does this subpart apply to pending proceedings?

None of the provisions of this subpart affects a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement that was initiated prior to December 12, 2016, but the provisions of this subpart apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

Severability

§ 23.144 What happens if some portion of this part is held to be invalid by a court of competent jurisdiction?

If any portion of this part is determined to be invalid by a court of competent jurisdiction, the other portions of the part remain in effect. For example, the Department has considered separately whether the provisions of this part apply to involuntary and voluntary proceedings; thus, if a particular provision is held to be invalid as to one type of proceeding, it is the Department's intent that it remains valid as to the other type of proceeding.

Dated: June 6, 2016.

Lawrence S. Roberts,

Acting Assistant Secretary—Indian Affairs.

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Programs

- Alternative Dispute Resolution (ADR)
- Civics Education
- Collaborative Justice Courts
- Court Interpreters Program (CIP)
- Criminal Justice Programs
- Domestic Violence
- Equal Access
- **Families and Children**
  - Family Law
  - Juvenile Law
  - **Conferences & Trainings**
    - **Beyond the Bench 2017**
  - Publications
  - FAQs
- Judicial Administration Fellowship
- JusticeCorps
- Language Access
- Tribal/State Programs

Beyond the Bench 2017

Print

Beyond the Bench 24: Uniting for a Better Future

We are now accepting content suggestions for *Beyond the Bench 24: Uniting for a Better Future*. Please use this Survey Monkey form to submit either general content suggestions or formal proposals. **April 14, 2017 is the deadline for receipt of formal workshop proposals as well as suggestions for content or speakers.**

Please note, to submit a formal workshop proposal you need to include a description of the course, learning objectives, and information for up to three faculty including a copy of a CV or resume. Please compile what you need before starting the Survey Monkey .

Beyond the Bench 24: Uniting for a Better Future will take place in San Diego on December 19–20, 2017, with pre-conference events December 18, 2017. This multidisciplinary statewide conference is devoted to meaningful physical, remote, and equal access to the justice system for those involved—voluntarily or involuntarily—with the court system. The conference will bring together over 1,200 participants—including judges, local, state, and tribal court leaders, attorneys, probation officers, social workers, family court professionals, court users, researchers, policy makers, volunteers, and other court-related professionals from across California. Sessions will address core legal issues and related social issues pertaining to juvenile law, family law, criminal law, probate guardianship and conservatorship, domestic violence, collaborative courts, tribal court-state court jurisdiction, veterans and military families, incarceration and reentry, mental health, education, immigration, human trafficking, trauma-informed practice, community engagement, and racial justice. Emphasizing hope, humanity, and healthy families, the conference will focus on uniting court professionals and justice partners to build a better future for all Californians.

Sponsored by the Judicial Council's Center for Families, Children & the Courts, the conference is primarily funded by registration fees, the U.S. Department of Health and Human Services, foundations, and other agencies.

Please forward this message to anyone who might be interested in attending or presenting at the conference. This message will be sent to multiple mailing lists, we apologize in advance if you receive it more than once. If you want to be removed from our mailing list, please let us know.

If you have any questions about the program please email beyondthebench@jud.ca.gov or by phone 415-865-7599.

Beyond the Bench Staff