

# **Advanced Indian Child Welfare Act (ICWA): Active Efforts and Expert Witness V2.0**

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## **PARTICIPANT WORKBOOK**

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## SEGMENT 2

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### ICWA History, Overview and Key Components

#### TRAINING ACTIVITY 2A

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#### Brief History of ICWA

##### How did the ICWA come about?

In the mid-1970's the United States Congress authorized the creation of the American Indian Policy Review Commission. The purpose of the commission, as the name suggests, was to review the history and current status of the government's policy for dealing with Indians and make recommendations for Congressional changes in that policy. Task Force Four dealt with the issues of federal, state, and Tribal jurisdictions. Within their final report to the Commission in 1976 was a section regarding child custody which outlined the need for what was to become the Indian Child Welfare Act.

The Task Force Report cites a frequently asked question: since both Indian and non-Indian systems act in the best interests of the child, what difference does it make as to who makes the decision about Indian children? The answer to the question is then set forth in the Report. The difference is that these decisions are inherently biased by the cultural setting of the decision maker... when decisions are made by non-Indian authorities. The Report indicates that up to that time estimates based upon the best available data indicated that 25-35% of all Indian children were raised at some time by non-Indians in homes and institutions. *The Report further notes that it is a curious paradox that many early non-Indian commentators praised familial and Tribal devotion to their children. Yet now, after generations of contact and conflict with western "civilization," so many Indian families are perceived as incapable of child rearing.*

Congress, in passing the Indian Child Welfare Act of 1978, affirmatively stated, "...it is the policy of this Nation to protect the best interests of Indian children... by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture..."

In the hearings which preceded passage of the Act, Congress found that: 1) Indian children are the most vital resource for the continued existence of Indian Tribes and therefore must be protected; 2) an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of children by public and private agencies and an alarmingly high percentage of such children are then placed in non-Indian homes and institutions; and 3) the States have failed to recognize the tribal, social, and cultural standards prevailing in Indian communities and families.

## **TRAINING ACTIVITY 2A**

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### **Guidelines to Help Identify and Document an Indian Case**

#### **Guidelines to help identify and document an Indian Case:**

1. In all cases, at the initial intake, ask if the child may be of American Indian heritage (Division 31 regulations, 2016, Sec.31-125.223).
2. Ask again if the child is going to be placed in foster care.
3. If the answer is affirmative, immediately treat the case as Indian and follow the provisions of the ICWA.
4. Upon indication by the child (if old enough), the mother, father, grandparent or Indian custodian that the child may be Indian, obtain the information needed to develop a family tree.
5. Establish what Tribe the child may be and what reservation the family may be from.
6. Get enrollment numbers, Tribal telephone numbers and addresses. If the child is eligible for membership, but not yet a member of any Tribe, agencies should take the necessary steps to obtain Tribal membership for the child (ICWA guidelines, 2015, Sec. B.4.ii.F.iii).
7. If a child is in the adoption process and the records do not show the child is Indian or may be Indian, ask before proceeding with the adoption.

## **TRAINING ACTIVITY 2A**

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### **Inquiry, Noticing, and Placement**

#### **INQUIRY AND NOTICING<sup>1</sup>**

**What do I need to ensure proper noticing?** Notice must be given to each Tribe in which the child is a member or is eligible for membership. The BIA is required to publish annually in the Federal Register a list of Tribal entities recognized as eligible to receive services from the BIA. The list is provided on the BIA's website, which also has addresses for federally recognized Tribes and a listing of designated Tribal agents.

**Who needs to be notified besides the Tribe?** The other parties who must be notified are the parent(s) or Indian custodian and any agents for the Tribe who may be designated by the Tribe as agents, e.g. Indian organizations, etc. The noticing agents for Tribes are listed in the Federal Register every year. The March 2016 update of the Federal Register is accessible at: <https://www.bia.gov/cs/groups/xraca/documents/text/idc1-033456.pdf>.

Updates are also available through the Bureau of Indian Affairs at:

<http://www.bia.gov/DocumentLibrary/index.htm>. Additionally, the California Department of Social Services (CDSS) maintains a regularly updated list of federally recognized Tribes to be used in conjunction with the BIA list:

<http://www.childsworld.ca.gov/res/pdf/CDSSTribes.pdf>.

**How are they notified?** They are to be notified by registered mail with return receipt requested. “No foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the Tribe or the Secretary: Provided, that the parent or Indian custodian or the Tribe shall upon request, be granted up to twenty additional days to prepare for such proceeding.” (Title I, Sec 102). (Also see Division 31 regulations 2016, Sec. 31-125.7.)

If a determinative response to the notification has not been received within 60 days, a specific provision of the Welfare and Institutions Code applies:

If proper and adequate notice has been provided pursuant to Section 224.2, and neither a Tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, the court may determine that the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) does not apply to the proceedings, provided that the court shall reverse its

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<sup>1</sup> Orrantia, M., 1991, The Indian Child Welfare Act, A Handbook (pp. 77-78)

Native American Rights Fund, 2007, A Practical Guide to the Indian Child Welfare Act (p. 37)

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determination of the inapplicability of the Indian Child Welfare Act and apply the act prospectively if a Tribe or the Bureau of Indian Affairs subsequently confirms that the child is an Indian child (W&I Code Sec. 224.3(e)(3)).

**Key practice “take- aways” for participants in this training:**

- Participants should know to ask if this is an Indian child at every step of the case.
- Participants should understand the steps for proper noticing.
- Participants should review required local noticing forms that they are likely to use when working on an ICWA case.

**PLACEMENT**

***Who is extended family?***

“‘Extended family member’ shall be defined by the law or custom of the Indian child’s Tribe or, in the absence of such a law or custom, shall be a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin or stepparent...” (Sec 4 (2))

***What is the order of preference for placement as described in the ICWA for a foster care or preadoptive placement?***

“Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with:

- i. a member of the Indian child's extended family;
- ii. a foster home licensed, approved or specified by the Indian child's Tribe;
- iii. an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- iv. an institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.” (Sec.105 (b))

***For an adoptive placement?***

“In any adoptive placement of an Indian child under State law, a preference shall be given, in absence of good cause to the contrary, to a placement with:

- (1) a member of the child’s extended family;
- (2) other members of the Indian child’s Tribe; or
- (3) other Indian families.” (Sec 105(a))

Note that the stipulations of preferences for pre-adoptive and adoptive placements incorporate the phrase “*in absence of good cause to the contrary*” in the event that the specified preferences cannot be satisfied. In other words, in order for an Indian child to be placed in a non-Indian pre-adoptive or adoptive placement, good cause must be demonstrated.

**Can a different order of placement be used?** “In the case of a placement under subsection (a) or (b) of this section, if the Indian child’s Tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order...” (Sec 105 (c))

**What standards are used in applying preference requirements?** “The standards to be applied shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.” (Sec 105 (d))

**When else do placement preferences apply?** “Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed..” (Sec 106 (b))

**What does the act say about emergency removal?** “Nothing in this title shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution under applicable State law, in order to prevent imminent physical damage or harm to the child.” (Sec 112)

**When must an Indian child be returned who has been removed in an emergency?** “The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this title, transfer the child to the jurisdiction of the appropriate Indian Tribe, or restore the child to the parent or Indian custodian, as may be appropriate.” (Sec 112)

**Under what conditions may a child be placed in foster care or parental rights terminated?** Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. (Title I, Sec 102 (d))

**What are parent's rights when voluntarily consenting?** A voluntary consent given by an Indian parent for foster care placement or termination of parental rights "shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian."

The court must certify that the consent was understood by the parent or custodian and that the consent was given in a language understood by such. Any consent given prior to, or within ten days after birth of the Indian child, shall not be valid.

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# Following the Spirit of ICWA



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## Following The Spirit of the Indian Child Welfare Act (ICWA)

*A guide to understanding the benefits of providing culturally appropriate services to Native American families from non-federally recognized tribes within the juvenile dependency and delinquency systems<sup>1</sup>*

In an effort to ensure proper inquiry and noticing and to reduce the number of ICWA-related appeals in child welfare cases, this handout is intended to help social workers and others respond when they encounter children and families that report American Indian or Alaska Native ancestry yet find they are not from a federally recognized tribe. What is good social work practice in these cases, and how can courts support culturally centered practice that results in positive outcomes?

### How to Provide “Spirit of the Law” ICWA Services

- Find out which tribes and Native American resources are in your area.
- Visit and establish connections with local tribes and Native American resources regardless of federal recognition status.
- Request ICWA training from tribal resources, California Department of Social Services training academies, or the Administrative Office of the Courts.
- Conduct a proper inquiry of possible Native American ancestry in every case at the front end and throughout the duration of the case if family members provide additional lineage information.
- Connect a child and family with their tribe and local Native American resources regardless of tribal affiliation.
- Assist the child or family with the tribal enrollment process but understand it is up to the tribe to determine who is or is not eligible for enrollment.
- Conduct placements consistent with ICWA placement preferences even though not technically required. In the case of non-federally recognized tribes, tribal members would likely meet requirements as nonrelated extended family members because tribal communities tend to be related or close-knit communities.
- Consider the child’s tribal members as viable options for holiday visits, tutors, mentors, Court Appointed Special Advocates, etc.

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<sup>1</sup> This document was developed with the Fresno County Department of Social Services, Child Welfare Services, and Placer County System of Care as part of the American Indian Enhancement Team, an effort of the California Disproportionality Project, a Breakthrough Series Collaborative (BSC), resourced through the Annie E. Casey Foundation, The California Dept. of Social Services, Casey Family Programs, and the Stuart Foundation. In collaboration with the Child and Family Policy Institute of the California, the American Indian Caucus of the California ICWA Workgroup, California Social Work Education Center, and Tribal STAR.



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### The Benefits of Providing “Spirit of the Law” ICWA Services

- If the child’s tribe is seeking federal recognition and is granted such recognition, formal ICWA case services, such as active efforts to prevent the breakup of the Indian family, will be required. If ICWA active efforts are attempted before the federal recognition, it is less disruptive for the child than having to change services and placement to make them in accordance with ICWA.
- Welfare and Institutions Code section 306.6 leaves the determination of services to individuals of non-recognized tribes to the discretion of the court that has jurisdiction.
- Even if individuals are not associated with a federally recognized tribe, they can still be part of an Indian community, which can serve as a strength and provide resources that enhance resilience factors for youth.
- Native American agencies that serve youth regardless of their tribe’s status can have youth groups that provide mental health and substance abuse services as well as fun trips, at no cost to the county.
- Many resources available to Native Americans do not require status in a federally recognized tribe (such as tribal Temporary Assistance for Needy Families (TANF), Native American health centers, and title VII Indian education programs).
- Some Native American health centers can access funding for residential treatment in and out of the state for children who are from non-federally recognized tribes.
- When culturally centered practice is provided as early as possible, it can result in positive outcomes for tribal youth.
- Linking a child to cultural resources that support his or her development into a healthy self-reliant adult can reduce the number of times the person may enter public systems.
- Culturally centered practice provided at the front end and throughout the lifespan of the case, regardless of the recognition status of the tribe, can reduce the public burden of cost over time.

### Historical Background

- In 1848, gold was discovered in Coloma, California.
- In 1851 and 1852, representatives of the United States entered into 18 treaties with tribes throughout California that would have provided for more than 7.5 million acres of reserve land for the tribes’ use. These treaties were rejected by the U.S. Senate in secret session. The affected tribes were given no notice of the rejection for more than 50 years, and the promised reserve lands were never provided.
- In 1928, a census was conducted to determine the number of American Indians in California, resulting in the establishment of the 1933 California Indian Rolls (also referred to as the California Judgment Rolls). The purpose of the census and the rolls was

## **TRAINING ACTIVITY 2A**

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### **Data Collection and Its Impact on Indian Child Welfare Act Compliance Measures<sup>2</sup>**

The integrity of data is essential to conducting a reliable analysis of disproportionality, and for the provision of culturally appropriate services to Indian children and families.

Historically, data regarding the American Indian/Alaska Native population has been suspect by the Tribal community. For example, Child Welfare Services/Case Management (CWS/CMS) data has significantly undercounted the Tribal population throughout the country.

Undercounting minimizes the need for resources, primarily in the area of funding to Indian Tribes and service providing agencies.

#### ***Why accurate data is critical to compliance and well-being outcomes***

Agency improvement in ICWA-related outcomes is measured by assessing changes over time from baseline data. Consequently, the determination of accurate baseline data is fundamental to evaluating outcomes (e.g., entries, length of foster care stay), and for establishing the need for programs, services, and other resources. Collecting accurate data requires attention to the various areas in the CWS/CMS where data relevant to ICWA determinations are captured.

Efforts are currently underway at the state level to simplify the data entry process relevant to the ICWA. It is important for case workers to be aware of the multiple areas in CWS/CMS where ICWA-related data is required, and that all the fields of information related to the ICWA are updated on a routine basis.

#### ***What you can do to improve data accuracy***

It is widely accepted that there are significant inaccuracies in the count of ICWA cases in the state determined by the CWS/CMS. One problem associated with an inaccurate count is that CWS/CMS has several fields of information that relate to the ICWA. Three CWS/CMS data items are particularly relevant to American Indian or Alaska Native status: race/ethnicity status, Tribal membership status, and status with respect to the Indian Child Welfare Act.

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<sup>2</sup> This text was adapted from a document developed by the American Indian Enhancement Team, an effort of the California Disproportionality Project, a Breakthrough Series Collaborative (BSC) resourced through the Annie E. Casey Foundation, the California Department of Social Services, CalSWECC, Casey Family Programs, the Child and Family Policy Institute of California, the California Child Welfare Co-Investment Partnership, and the Stuart Foundation, in collaboration with the Administrative Office of the Courts, and TribalSTAR.

### Race/Ethnicity Status

If a respondent indicates more than one ethnicity, only the one that the respondent selects as the primary identity is recorded. If the secondary ethnicity is Indian, that information is not available.

### Tribal Membership Status

Tribal membership status may change over time pending verification received from one or more Tribes. Additionally, the space to report membership is limited to only one Tribe. If a child has membership in more than one Tribe, the selection of only one of the Tribes for inclusion in the CWS/CMS database is based on the strongest association. If the associations are equivalent, the choice is arbitrary. The data entry categories for Tribal Membership Status are: Member; Eligible; Pending Verification; Claims Membership; Not Eligible; and Missing.

### Status with Respect to the Indian Child Welfare Act

Reporting this status is mandatory for all children in the CWS/CMS. The categories are: Eligible; Pending; Not Eligible; Not Asked/Unknown. As with Tribal membership status, ICWA status may change over time as responses are received from inquiries to one or more Tribes.

### ***Better methods of identifying and counting Indian children in the CWS/CMS***

Some counties have devised ways to achieve a more accurate count of the number of Indian children in the child welfare system. For example, in San Diego County one staff person implemented the running of data in three sets—first to establish if the child was identified as Indian, second to see if the mother was identified as Indian, and third to see if the father was identified as Indian. By running the data in this manner, the staff person was able to achieve greater precision with respect to the number of Indian children in the system, and then follow-up to determine if the children were ICWA eligible.

Alameda County established a protocol to review all cases to determine if proper inquiry had been made regarding Indian identity and to enter any new ICWA-related information in CWS/CMS. The protocol also insured that proper inquiry is made and documented at the outset. By implementing this new protocol, county staff discovered that there were many more Indian children in the system than had previously been tabulated. A county representative commented that the count had almost tripled.

The lesson to be learned by these examples is that it is vitally important to document accurately the number of American Indian/Alaska Native children that enter the child welfare system and those who are identified as ICWA eligible.

***Tips for social workers to insure proper entry of ICWA-related data***

- Enter data accurately and with consistency in all fields of CWS/CMS that pertain to Indian ancestry and ICWA-related status.
- Check with your supervisor or manager to ensure you are following the correct protocol. (Some counties have staff specifically designated to record ICWA cases and provide notice.)
- Properly document cases that have been identified as ICWA eligible.
- Revisit your cases and update ICWA-related data on a regular basis, especially when subsequent inquiry indicates that a case is under the purview of the ICWA.

**Self-Assessment Quiz:**  
**“An Historical and Cultural Perspective on ICWA”**

1. How many Tribal courts are there in U.S? Are there over:
  - a. 10
  - b. 50
  - c. 300
  - d. 500
  
2. In 1977 the American Indian Policy Review Commission conducted research regarding the number of Indian children more likely to be in foster care or adopted by non-Tribal families than their Caucasian counterparts. Which statement is correct:
  - a. 120% more likely to be adopted and 50% more likely to be in foster care
  - b. 240% more likely to be adopted and 100% more likely to be in foster care
  - c. 500% more likely to be adopted and 150% more likely to be in foster care
  - d. 840% more likely to be adopted and 270% more likely to be in foster care
  
3. In 1840 there were 200,000 Indians in California. In 1870 there were:
  - a. 12,000
  - b. 24,000
  - c. 85,000
  - d. 100,000
  
4. Membership in a Tribe is determined by:
  - a. The Federal Government
  - b. The Tribe
  - c. The individual person
  - d. The State Court
  
5. How many years after 1851, when 18 treaties were signed by the Indians of California and Federal Government reserving 7.5 million acres for the Indians, were the Tribes notified that the treaties had not been ratified?
  - a. Never
  - b. 10 years
  - c. 50 years
  - d. 100 years

6. Instead of receiving the 7.5 million acres reserved for the Indians in the 1851 treaties, how many acres did they receive?
  - a. .5 million
  - b. 1.5 million
  - c. 4.5 million
  - d. 7.5 million
7. Which statement below does not describe the philosophy of the Bureau of Indian Affairs (when it was part of the war department)?
  - a. Strip the Indian away and save the child
  - b. Tradition is the enemy of progress
  - c. You can be educated or Indian but you can't be both
  - d. Indian tradition should be preserved
8. The BIA relocated 60-70,000 Indians to San Francisco and Los Angeles. Now over what % of California's Indian population traces their native ancestry to Tribes outside of California?
  - a. 10%
  - b. 30%
  - c. 50%
  - d. 70%
9. In 1870, the 15th Amendment to the U.S. Constitution affirmed voting rights for emancipated slaves. In what year was the passage of the Federal Citizenship Act that granted Indians the right to vote for the first time?
  - a. 1870
  - b. 1900
  - c. 1924
  - d. 1963
10. There are over how many federally recognized Tribes in California?
  - a. 60
  - b. 80
  - c. 100

## **Purpose and Intent of ICWA**

### **Purpose of the ICWA**

The purpose of ICWA is to protect the best interests of the Indian children and to promote the stability and security of Indian Tribes and families by establishing minimum federal standards for the removal of Indian children from their parents or Indian custodians. The ICWA also sets the priority for the placement of such children in foster or adoptive homes that reflect the unique values of Indian culture. The ICWA also provides some assistance to Indian Tribes in the operation of child and family service programs. (ICWA 1978)

### **The Intent of the ICWA**

- Prevent the unwarranted breakup of American Indian families.
- Recognize Tribal jurisdiction to make custody decisions involving the removal of Indian children from their homes.
- Establish minimum federal standards that county and/or state courts must follow when Indian children are removed from their homes and placed in foster care or adoptive homes. (*Orrantia*, 1991)

## TRAINING ACTIVITY 2E

# Insights from the Video: An Historical and Cultural Perspective on ICWA

## **TRAINING ACTIVITY 2E**

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### **Tribal Sovereignty and Child Welfare: Practice Tips<sup>3</sup>**

**Merriam Webster defines ‘Sovereignty’ as: (a) supreme power especially over a body politic; (b) freedom from external control: see autonomy; (c) controlling influence.**

-- retrieved [www.merriam-webster.com](http://www.merriam-webster.com) October 1, 2010

Why is there an act that specifically targets American Indian children in child welfare? Why aren't there other laws that address the needs of other groups such as African Americans or Hispanic/Latinos? Simply put, the United States has a government-to-government relationship with American Indian/Alaska Native Tribes. Being American Indian is not only a racial/ethnic distinction, it is also a political status. The fact that the U.S. and other countries have/had treaties with Indian Tribes demonstrates the historical status of Tribes as sovereign nations.

Social workers who have American Indian/Alaska Native children in their case load may be unaware of the sovereign status of the child's Tribe and how it can affect a child welfare/Indian Child Welfare Act case. Today, Tribes exercise their sovereignty in many ways, including how to define expert witness criteria, and during Tribal Customary Adoption (CA AB 1325).

Sovereignty is a word of many meanings. At the most basic level, the term refers to the inherent right or power to govern. Under the U.S. constitutional system, the right is inherent in the people and is exercised through their representative local, state, and federal governments. This is somewhat comparable to the inherent sovereignty of Indian people in the Tribal context (Canby, 1981; Deloria and Lytle, 1983).<sup>4</sup>

As active sovereign entities, Tribes have designated ICWA representatives for the process of receiving notice from state child welfare agencies and state courts in which an Indian child welfare case has been filed. The Tribe appoints an ICWA representative in order to ensure that the Tribe is informed and can respond to the notice.

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<sup>3</sup> This document was developed by the American Indian Enhancement team in collaboration with the National Resource Center for Tribes, and Tribal STAR with technical support from Hon. William Thorne. The American Indian Enhancement Team is an effort of the California Disproportionality Project, a Breakthrough Series Collaborative (BSC) resourced through the Annie E. Casey Foundation, California Department of Social Services, CalSWEC, Casey Family Program, Child and Family Policy Institute of California, and the Stuart Foundation.

<sup>4</sup> Utter, Jack, American Indians: Answers to Today's Questions: H-8s: Legal Status and Tribal Self-Government 1993, Oklahoma Press.

## **Tips for Social Workers**

1. Learn about the Tribe(s) in your county and state. You can obtain a copy of ICWA designated agents at <http://www.tribal-institute.org>. Be aware that when a Tribe intervenes in an ICWA case involving their child, the Tribe is then a party to the case and legally entitled to the same rights as all other parties to the case.
2. In cases where the child's Tribe is geographically too far to participate in the court process the Tribe may designate a representative to appear in court on the Tribe's behalf.
3. If the child's Tribe does not intervene in a case or assume jurisdiction, the case continues to maintain ICWA status and culturally appropriate active reunification services are still required.
4. Tribes exercise sovereign status in many ways, including during Tribal Customary Adoption, and to define criteria for expert witness.
5. Communicate with Tribes as though you were contacting the governor's office of a neighboring state. Show the same level of respect and adhere to appropriate protocols as you are dealing with representatives of a sovereign nation.
6. Respectfully consider what the Tribe has to say, otherwise the Tribe may decide to pursue legal avenues which could be timely and costly. If respect and courtesy is established early on in the relationship there is a greater potential for collaboration on case options. The more options, the better chances for positive outcomes for Indian children.
7. Attempt to resolve the case informally before having to resolve the case before a judge.

## **Sovereignty: An Historical Perspective**

As declared by Congress, the Executive, and the Supreme Court; the present rights of Tribes to govern their members and remaining territories derive from a sovereignty that pre-dates European arrival. It was a sovereignty that once made them fully independent nations. That sovereignty has been limited, but not abolished, by the Tribes' inclusion within the territorial boundaries of the United States.

The principal attributes of Tribal sovereignty today can be generally summarized as follows: (1) Indian Tribes possess inherent governmental power over all internal affairs, (2) the states are precluded from interfering with the Tribes' self-government, and (3) Congress has plenary (i.e., near absolute) power to limit Tribal sovereignty and thereby limit the first two attributes (Canby, 1981). The federal policy of Tribal self-determination, with its beginnings in the 1930s and a renewal in the 1970s, has created opportunities for Tribes to retain their sovereignty and to overcome some of the restraints arbitrarily or improperly placed on that sovereignty over the past 150 years (Canby, 1981).

Today, one can see the visible results of Tribal sovereignty and self-determination in the areas of enterprise (e.g. gaming, agriculture, shopping malls, restaurants, and hotels), health care, ICWA, and Tribal Customary Adoption.

## **SEGMENT 3**

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### **Why Active Efforts and Expert Witness?**

#### **TRAINING ACTIVITY 3A**

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### **Connecting the Historical Context with the Need for Active Efforts and Expert Witness**

#### **The ICWA as a remedy supporting Tribal preservation**

The historical origins of the ICWA are rooted in the need to support the survival and well-being of Indian Tribal groups and preserve the Indian way of life. The application of historical norms for removing Indian children from their homes and placing them in non-Indian adoptive homes at alarming rates led to more stringent legal requirements that were set forth in the ICWA, such as active efforts, expert witness, and higher standards of evidence.

#### **Cultural responsiveness necessitates engagement**

Inherent in the ICWA is the need for child welfare staff to honor and promote Tribal culture in their relationships with Indian children and families. This involves engaging with families from the very first contact and continues throughout the duration of the case. It starts with proper inquiry regarding Indian ancestry, contacting Tribes to determine membership status, and noticing Tribes regarding court hearings. However, engagement and cultural responsiveness do not end here. They continue through the active efforts and expert witness provisions of the ICWA.

The **active efforts** requirement is designed to promote reunification for Indian children in foster care. In order to prevent the breakup of Indian families, child welfare staff needs to engage with families to access available resources for rehabilitative and remedial services that are supportive of Indian cultural values and practices. Providing active efforts must therefore entail maximizing the use of available resources by developing relationships with the extended family, the Tribe, individual Indian caregivers, and Indian and Tribal service agencies. In the exercise of active efforts by child welfare staff, Indian Tribes should be considered as partners in the goal of serving the best interests of Indian children.

When we think about active efforts, a quote from Sitting Bull is particularly relevant:  
“Let us put our minds together and see what kind of life we can make for our children.”

The **expert witness** provisions of the ICWA complement the requirements for active efforts. The expert witness can provide an assessment regarding the adequacy of efforts to prevent removal or termination of parental rights, as well as testimony (or a written declaration) that addresses if the child is likely to suffer serious emotional or physical harm in the custody

of the parent or Indian custodian. The expert witness can also educate the child welfare staff and the court regarding customary Tribal values, particularly those related to child-rearing. In this manner, the expert witness serves as an additional check against unwarranted removal and adoption of Indian children.

## **TRAINING ACTIVITIES 3B, 4A & 5A**

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### **Excerpts from ICWA: Active Efforts, Expert Witness, and Standards of Evidence**

#### **(d) Remedial services and rehabilitative programs; preventive measures**

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

#### **(e) Foster care placement orders; evidence; determination of damage to child**

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

#### **(f) Parental rights termination orders; evidence; determination of damage to child**

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (Indian Child Welfare Act of 1978, § 1912 (d) - (f))

#### **Division 31 regulations (2016) provides the following definition for QUALIFIED EXPERT WITNESS**

“Qualified expert witness” means a person required to testify in an Indian child custody proceeding on whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. A qualified expert witness should have specific knowledge of the Indian Tribe's culture and customs. A qualified expert witness may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional Tribal therapist and healer, Tribal spiritual leader, Tribal historian, or Tribal elder, provided the individual is not an employee of the person or agency recommending foster care placement or termination of parental rights (Sec. 31-002 (q))

#### **Link to California Courts (Judicial Council) List of Expert Witnesses:**

<http://www.courts.ca.gov/8105.htm>

## **Legislative Updates**

### **Division 31 regulations (2016), ICWA guidelines (2015) and Senate Bill (SB) 678:**

#### **Overview**

The ICWA guidelines (2016) now also provide agencies with context and clearer directions of provisions, standards, procedures, requirements, and best practices for ICWA compliance.

The California MPP Division 31 regulations (2016) comprehensively incorporated requirements under Senate Bill (SB) 678, Chapter 838, Statutes of 2006 and language from the revised ICWA federal guidelines (2015) (ACIN No. I-29-16, 2016; ACL No. 16-87).

Further Division 31 regulations (2016) provide clearer guidance in the application of Active Efforts (now with a spelled-out definition and examples of what these are), Inquiry, and Identifying Tribal Affiliation, Noticing, Placement Preferences, Tribally Approved Homes, and Tribal Customary Adoptions Child Welfare Service (CWS) agencies and Probation Departments in California.

Senate Bill (SB) 678 incorporated the federal Indian Child Welfare Act into California state law for the purpose of improving compliance with respect to the uniform application of the federal Indian Child Welfare Act in California. However, pursuant to prerogatives afforded to the states in the ICWA, certain provisions of SB 678 established higher standards of protection for Indian children than mandated by federal law.

#### ***Court standing possible for non-federally recognized Tribes***

In some instances, SB 678 extends ICWA protections to Indian children who do not come within the definition of an Indian child for purposes of the Indian Child Welfare Act. Specifically, SB 678 allows the courts to have discretion for permitting participation of a **non-federally recognized Tribe** in dependency child custody proceedings. This change is significant since there are approximately 78 Tribes petitioning for recognition in California. In comparison, 107 Tribes in California are federally recognized (retrieved 10/26/11 from <http://www.courts.ca.gov/programs-tribal.htm>).

#### ***Exceptions for terminating parental rights***

SB 678 adds two new exceptions specific to Indian children regarding the termination of parental rights (ACL No. 08-02). These exceptions provide for **compelling reasons** for

determining that termination of parental rights would not be in the best interest of an Indian child. Two examples of compelling reasons for not terminating parental rights are incorporated in W&I Code Section 366.26(b)(5)(B)(vi). These apply when:

- “(I) termination of parental rights would substantially interfere with the child’s connection to his or her Tribal community or the child’s Tribal membership rights; or
- (II) the child’s Tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.”

*Improving compliance*

Senate Bill 678 specifically addresses improved compliance for many of the important provisions of the ICWA. For more detail, refer to **ACL No. 08-02**.

## **Legislative Updates: Assembly Bill (AB) 1325 Tribal Customary Adoption**

### **Overview**

Assembly Bill (AB) 1325 provides for Tribal Customary Adoption (TCA), a type of adoption proceeding which occurs under the customs, laws or traditions of the child's Tribe. **A distinguishing feature of Tribal Customary Adoption is that it does not require termination of parental rights.** Under AB 1325, the Indian child's Tribe is invested with the authority to recommend Tribal Customary Adoption as the permanency option for the Indian child. Additionally:

- A Tribe is not required to choose TCA as a permanent plan, but AB 1325 provides TCA as an option that the Tribe can pursue.
- A Tribe does not need to formally intervene in a case in order to be entitled to recommend TCA or any other appropriate permanent plan.
- An Indian child who becomes an adoptee through Tribal Customary Adoption is eligible to participate in the Adoption Assistance Program.

AB 1325 has been in effect since July 1, 2010, and will sunset on January 1, 2014. It is encoded in Welfare and Institutions Code Section 366.24. The information presented here highlights some key points. For more detail, consult ACL 10-17, ACL 10-47, ACL -09-28, and W&I Code 366.24.

### **Background**

Before the implementation of AB 1325, state law did not provide a culturally appropriate adoption option as a permanent plan for Indian children in the child welfare system. However, adoption in Indian Tribes has historically and traditionally been practiced through custom and ceremony, and has not involved termination of parental rights (National Indian Child Welfare Association, as stated in ACL No. 10-17).

Termination of parental rights “conflicts with many Tribal teachings and cultural values because it severs the child’s Tribal family systems, connections to extended family members, and to the Tribe” in addition to depriving Indian children of benefits associated with Tribal membership (ACL No. 10-17, p. 2). Consequently, the CDSS ICWA Workgroup, which includes representatives from Tribes, counties and other stakeholders in Indian child welfare, advocated for the provisions of AB 1325.

### *Implications for Concurrent Planning and Adoption Proceedings*

At the option of the child's Tribe, and pursuant to AB 1325, Tribal Customary Adoption may be recommended as an alternative permanent plan throughout the dependency process if family reunification cannot be achieved. Tribal Customary Adoption can become a permanency option at any time during the case. Consequently, Tribal Customary Adoption is closely connected with the goals, procedures, and practices of concurrent planning.

As noted in ACL No. 10-47, "The child welfare worker must provide the Tribe with information regarding Tribal Customary Adoption at every step throughout the case as part of concurrent planning." TCA can become a permanency option as early as the dispositional stage of a dependency case (W&IC Section 358.1), following the response of a federally recognized Tribe that affirms that the child is a member or eligible for membership in the Tribe (ACL No. 10-47).

Other rights that are afforded to Tribes in relation to adoption proceedings include petitioning to transfer jurisdiction and the ability to intervene before the finalization of an adoption:

- "A Tribe, parent, or Indian custodian may petition the court to transfer an Indian child's adoption proceeding to Tribal jurisdiction" (ACL No. 09-28).
- "The Indian child's Tribe, parents, and Indian custodian have the right to intervene at any point in adoption proceedings until finalization", either orally, in writing, or by submitting an ICWA-040 form to the court (ACL No. 09-28).

Note that the adoptive placement preferences specified in the ICWA also apply for Tribal Customary Adoption.

### *Discussions with the child's Tribe*

The child welfare agency is charged with obtaining "all information from the child's Tribe that the Tribe considers relevant and any information which will assist the agency in clarifying particular issues for the child or adoptive applicant(s)" (ACL No. 10-47). As noted in ACL No. 10-47, some examples for discussion topics include:

- Tribal customs
- Laws
- Traditions
- Ceremonies/events
- Geography; and
- Significant history

Per ACL No. 10-47, Tribes seeking more information regarding Tribal Customary Adoption should be referred to:

Tribal STAR: <http://theacademy.sdsu.edu/TribalSTAR/index.htm> or the sponsors of AB 1325:

Nancy Currie Director of Social Services Soboba Tribal Social Services Phone (951) 487-0283	Kimberly Cluff, Attorney Forman & Associates 4340 Redwood Hwy Ste F228 San Rafael, CA 94903 Phone (415) 491-2310
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#### *Adoptive home study*

The adoptive home study for a Tribal Customary Adoption is similar to a conventional adoption home study. However, there are some key differences:

- A Tribal customary adoptive home study is conducted by the child's Tribe or the Tribe's designee.
- If a Tribal designee is conducting the home study, the designee must do so in consultation with the Indian child's Tribe.
- "The standard for the evaluation of the prospective adoptive parents' home shall be the prevailing social and cultural standard of the child's Tribe."

(ACL No. 10-47; and W&I Code, Section 366.24(c)(1)(A) and (B)).

#### *Out-of-state Tribes and prospective adoptive homes*

A Tribal child from an out-of-state Tribe can be the subject of a Tribal Customary Adoption. Additionally, if an Indian child is placed in a prospective adoptive home out-of-state, ICPC obligations apply.

#### *Tribal Customary Adoption Order (TCAO)*

"The TCAO is an order completed by the Indian child's Tribe that will represent the legal framework of the modified relationships of the child" (ACL No. 10-47).

The Welfare and Institution Code 366.24 stipulates:

"The Tribal customary adoption order shall include, but not be limited to, a description of (A) the modification of the legal relationship of the birth parents or Indian custodian and the child, including contact, if any, between the child and the birth parents or Indian custodian, responsibilities of the birth parents or Indian custodian, and the rights of inheritance of the child and (B) the child's legal relationship with the Tribe. The order shall not include any

child support obligation from the birth parents or Indian custodian. There shall be a conclusive presumption that any parental rights or obligations not specified in the Tribal customary adoption order shall vest in the Tribal customary adoptive parents” (W&I Code, Section 366.24)

“Prior consent to a permanent plan of Tribal customary adoption of an Indian child shall not be required of an Indian parent or Indian custodian whose parental relationship to the child will be modified by the Tribal customary adoption” (W&I Code, Section 366.24).

#### *Rights of Biological Parents*

As noted in the terms of the TCAO, the rights of the biological parents are modified during the Tribal Customary Adoption Order process by the Indian child’s Tribe.

#### *New Forms Required*

Noticing and compliance provisions of Senate Bill 678 necessitated changes in Judicial Council rules and forms related to ICWA. Failure to adhere to the revised rules and forms can be grounds for a petition to invalidate a proceeding for adoption, guardianship, or termination of parental rights submitted to the court by an Indian child, the child’s Tribe, a parent, or an Indian custodian from whose custody the child has been removed. More detail is available in the Appendix in ACL No. 09-28, including information on inquiry, noticing, relinquishment, and adoption.

#### *Documentation and Court Reports*

Discussions with the child’s Tribe pertaining to TCA and other permanency options “must be documented in the court report, the foster care and adoption case record, and/or in the case notes section of CWS/CMS. Once TCA is recommended, the agency must continue to provide a report to the court at each hearing thereafter as relevant to the individual case” (ACL No. 10-47).

Refer to ACL No. 10-47 and W&I Code 366.24 for additional details about what is required for each hearing and court report.

#### *Judicial Council study and its relationship to accurate data entry in CWS/CMS*

According to the statute, the Judicial Council is required to complete a study of the provisions of AB 1325 and report its findings to the legislature on or before January 1, 2013. (ACL No. 10-17). The Judicial Council study will in part depend on the data provided in CWS/CMS. Consequently, child welfare workers should be aware of the importance of maintaining accurate data for Native American children for the Judicial Council study, as well as for the study’s implications for the formulation of state policy. Refer to the Participant Workbook handout “How to Enter Data in CWS/CMS re Tribal Customary Adoption”.

## **Other Legislative Updates**

### **Proper Inquiry Requires Ongoing Attention**

A recent ACL (09-28) reiterated the duty to perform proper inquiry to establish Indian heritage and protection under ICWA:

- “There is an ***affirmative and continuing duty to inquire*** whether a child, who is the subject of a child custody proceeding is or may be an Indian child” (ACL No. 09-28; as italicized in the ACL).
- If a child welfare worker receives information suggesting that the child is a member of a Tribe or eligible for membership in a Tribe, or that any of the child’s parents (birth mother, presumed and alleged fathers), grandparents or great-grandparents are or were members of a Tribe, the worker is deemed to have “reason to know” that the child is, or may be, an Indian child (ACL No. 09-28).

### **Proper Placement Remains a Major Concern**

Proper placement of Indian children is still a major issue, as 50% of Indian children in California are placed in non-Indian homes (ACL 08-02). Consequently, improved compliance with the ICWA is essential to realize the intent of the law, created more than 30 years ago, to protect the rights of Indian children to participate in their heritage and to preserve Indian culture.

An excerpt from All-County Letter No. 08-02 states:

“California’s Indian population now exceeds that of any other state, including Alaska. Recent data indicates that a large number of Indian children in the California child welfare system are still being placed in non-Indian homes. Data further indicates that **over 50 percent** of Indian children in California are placed with non-relative, non-Indian substitute caregivers. This reflects placement determinations made notwithstanding expressed congressional preferences in the ICWA on placement of Indian children in Indian homes. Further, these issues and others have been verbally expressed by Tribal members as part of California’s recently completed Children and Family Services Review Statewide Self-Assessment.” (From ACL 08-02, p. 2) (bold added)

### **The Need for Expert Witness Testimony Continues to be Critical**

ACIN I-40-10, written as recently as 2010, explains why expert witness testimony remains critical for preserving the cultural integrity of Indian children and their Tribes:

“While the situation has improved since the ICWA was passed in 1978, Native American children continue to be removed from their homes at a proportionally higher rate than other children in California. Additionally, a large number of Indian children placed in out-of-home care are placed in non-relative, non-Indian homes, further aggravating the loss of ties to the child’s Tribe and heritage. Therefore, it is critical that the requirement of qualified expert witness testimony is met in every case involving an Indian child. It is not only required by law, but is essential in helping the California courts and child welfare agencies ensure that every effort has been made to assess the safety of the child in the context of the prevailing cultural and child rearing practices within the child’s Tribe.” (ACIN I-40-10, p. 2)

### **Governor’s Tribal Advisor**

In September 2011, Governor Brown issued an Executive Order establishing the position of Governor’s Tribal Advisor in the Office of the Governor in order to facilitate communication and collaboration between California state government and Native American Tribes. “This position will serve as a direct link between the Governor’s Office and Tribal governments on matters including legislation, policy and regulation” (retrieved 10/18/11 from <http://gov.ca.gov/news.php?id=17222>).

**Entering Data in CWS/CMS re:  
Tribal Customary Adoption  
Excerpts from ACL No. 10-47**

**19.1 How can information regarding TCA be entered into CWS/CMS?**

The TCA Special Projects Code shall be selected on the Special Project tab of a case in CWS/CMS to indicate a child is being considered for Tribal Customary Adoption. Any case in which TCA is considered as a permanency option (regardless of whether or not TCA was actually selected as the permanency plan), must be identified with this TCA Special Projects Code in CWS/CMS. The Special Projects Code should be selected at the time TCA is considered. Once a case is identified with the TCA special projects code, the code should remain selected regardless of the case/permanency outcome. The Special Projects Code will assist in tracking cases for data collection to include in the study and report to Legislature, as aforementioned.

In order to identify a case in which TCA has been considered, use the following steps in CWS/CMS:

Step 1: In the Case Folder of the CWS/CMS, go to the, “Special Projects” tab. Select the Special Projects page tab and then the (+) button in the grid to enter a new Special Project for the focus child. Click the down (+) button to display the available list of Special Projects.

Step 2: Select the following code: **“S-Tribal Customary Adoption”**

The child is in out-of-home care, and reunification services have been ordered. The child has been determined to be ICWA eligible and Tribal Customary Adoption is an option to be discussed with the Tribe as a concurrent plan option should reunification be unsuccessful.

**19.2 To enter adoptive placement information in CWS/CMS, a TPR date is currently required. Since TCA does not require TPR, which date do I enter to allow CWS/CMS to complete adoptive placement?**

Until further notice directing you otherwise, enter the date the court afforded full faith and credit to the TCAO and note that in the case notes.

**19.3 Since the case plan of TCA is not currently available, which case plan should be selected?**

Until further notice directing you otherwise, select ADOPTION or ADOPTION WITH SIBLING(S).

## **TRAINING ACTIVITY 3D**

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### **Wakeem's Story: Finding Connection**

#### **Discussion Questions:**

1. At what point did Phil stop being just a “good social worker” and become like family to Wakeem (“his stationary point”)?
2. How did Phil demonstrate “active efforts” as compared to “reasonable efforts”?
3. In what ways did Susan and Phil work to connect Wakeem with his culture?
4. Why was it important for Wakeem to be connected to services such as the Regional Center? How will this help in his future?

## SEGMENT 4

### Active Efforts

#### TRAINING ACTIVITY 4A

#### Maps of California Tribes<sup>5</sup>



<sup>5</sup> California Indian Library Collections; [http://www.mip.berkeley.edu/cilc\\_images/bibs/maps/Tribemap.gif](http://www.mip.berkeley.edu/cilc_images/bibs/maps/Tribemap.gif)



# CALIFORNIA TRIBAL LANDS

■ INDIAN TRIBAL LANDS



<sup>6</sup> Map obtained from TribalSTAR website:

[http://theacademy.sdsu.edu/TribalSTAR/resources/Resource\\_List.htm](http://theacademy.sdsu.edu/TribalSTAR/resources/Resource_List.htm)

## **What Kind of Effort? Active Efforts vs. Reasonable Efforts**

### **Active Efforts**

Any party seeking an involuntary foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. This requirement applies regardless of whether the child's Tribe has intervened in the proceeding. The standard is higher than the finding of "reasonable efforts" needed for a non-Indian child.

The Bureau of Indian Affairs guidelines specify that the active remedial efforts must take into account the prevailing social and cultural conditions and way of life of the child's Tribe and must also involve and use the available resources of the child's extended family, the Tribe, Indian social service agencies, and individual Indian caregivers. The active remedial and rehabilitative efforts must be directed at remedying the basis for the parental removal proceedings; therefore, the type of services required depends on the facts of each case.

Active efforts include attempts to preserve the parent-child relationship regardless of the strength of the parent-child relationship or interaction. Active efforts must be aimed at remedying the basis for removal of the child or termination of parental rights. Following the intent of this law means including the Tribe at the earliest contact with the family and including them in all decisions. (*Adapted from "Bench Handbook: The Indian Child Welfare Act"* Administrative Office of the Courts, 2008)

Division 31 Regulations (2016) spells out the following definition for Active Efforts:

'Active Efforts' mean, in the case of an Indian child, those efforts intended primarily to maintain and reunite an Indian child with his or her family or Tribal community and includes all actions taken by a county to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. Active Efforts must take into account the prevailing social and cultural values, conditions, and way of life of the Indian child's [T]ribe and utilize the available resources of the child's extended family, [T]ribe, [T]ribal and other Indian social service agencies, and individual Indian caregiver service providers. (Sec. 31-002)

See ICWA regulations (2016) § 23.2 for the federal definition of Active Efforts.

Division 31 regulations (2016) provide the following examples of Active Efforts intended to prevent the breakup of the Indian family:

- a. Identify the child's Indian heritage in the assessment process.
- b. Take into account the prevailing social and cultural standards, and way of life of the Indian child's Tribe.
- c. Utilize Tribal resources to support Pre-Placement preventive efforts, including resources available from the child's extended family, Tribe, and Tribally based family preservation and reunification or other services when available; and non-Indian resources when Tribal resources are not available. (Sec. 31-135.23)<sup>7</sup>

Division 31 regulations (2016) reiterate the following 11 examples provided in the 2015 ICWA guidelines:

- a. Engaging the Indian child, the Indian child's parents, extended family members, custodian(s);
- b. Taking steps necessary to keep siblings together;
- c. Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents to obtain such services;
- d. Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate;
- e. Conducting or causing to be conducted a diligent search for the Indian child's extended family members for assistance and possible placement;
- f. Taking into account the Indian child's Tribe's prevailing social and cultural conditions and way of life and requesting the assistance of representatives designated by the Indian child's Tribe with substantial knowledge of the prevailing social and cultural standards;
- g. Offering and employing all available and culturally appropriate family preservation strategies;
- h. Completing a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal; notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;
- i. Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal;
- j. Identifying community resources including housing financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources;
- k. Monitoring progress and participation in services;

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<sup>7</sup> For more information on pre-removal "Active Efforts" see, California ICWA Compliance Taskforce (2016) pp. 18-24

- I. Providing consideration of alternative ways of addressing the needs of the Indian child's parents or extended family, if services do not exist or if existing services are not available;
- m. Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and
- n. Providing post-reunification services and monitoring (Sec. 31.002).

### **Active Efforts vs. Reasonable Efforts**

What are active efforts compared to reasonable efforts? The “active efforts” standard requires more effort than a “reasonable efforts” standard. An Alaska court cited an ICWA commentator who distinguished between active and passive efforts: “passive efforts entail merely drawing up a reunification plan and requiring the ‘client’ to use ‘his or her own resources to...bring...it to fruition.’” A.M. v. State, 945 P. 2nd 296, 306 (Alaska 1997).

A rule of thumb is that “active efforts” refers to engaging the family while “reasonable efforts” refers to providing referrals to the family, and leaving them on their own to seek out assistance.

*Some courts require proof that all active efforts to provide parents with adequate rehabilitative services have been exhausted but others do not require an undertaking of futile or nonproductive efforts.*

A state or private party cannot utilize the argument that it lacks resources to provide active efforts in order to refuse the mandate to provide active efforts. There are no exceptions in the ICWA to the mandate.

Generally, what constitutes “active efforts” is specific to the given situation, including the governing law and accepted social work standards, because such efforts are aimed at remedying the basis for the underlying proceedings, whether it relates to foster care placement or termination of parental rights. The types of required services and length of providing such services also depend on the facts of the case.

The best way to meet the needs of the child and family and to avoid unnecessary conflicts is to seriously consider whether one has met the “active efforts” requirement, as opposed to “reasonable efforts”, prior to filing a petition to terminate parental rights (Native American Rights Fund, 2007, A Practical Guide to the Indian Child Welfare Act, pp 93-94).

**TRAINING ACTIVITY 4B****Examples of Active Efforts vs. Reasonable Efforts**

Examples of Reasonable Efforts:	Examples of Active Efforts:
<b>Giving contact information to a parent for parenting classes they could sign up for.</b>	Signing up a client for parenting classes at a local Native American health center or TANF agency and arranging transportation to/from their classes.
<b>Referring a client to medical, dental and mental health services through county providers.</b>	Referring the family to the local Native American health center for medical, dental and mental health services.
<b>Referring a youth that is acting out violently to an anger management group with county providers.</b>	Speaking with youth violence prevention coordinators or anger management providers at a local Native American health center, Native American agency or youth's Tribe and finding a group time/class that works with the youth's schedule.
<b>Arranging general counseling once a week with county mental health providers.</b>	Finding a therapist at a local Native American agency, arranging a session that meets the needs of the family's schedule and asking the family if they want the Native American agency or their Tribe to provide a traditional healer to work with.
<b>Approving to occasionally attend family events, but not if potential for AWOL.</b>	Asking the family if there are any important ceremonies or events in their family and/or Tribe the child would like to participate in, arrange transportation and if potential for AWOL, coming up with a plan with the family and Tribe for how the child will be supervised and avert potential for AWOL(tip: often it is the Tribe's ceremonies that are the key in healing a child(ren) and their family).

<p><b>Social worker/probation officer creating a case plan for the family for the next court hearing.</b></p>	<p>Social worker/probation officer inviting the Tribe/Tribe's ICWA rep (via phone or in person) and the family to create a culturally appropriate case plan that is based on the family's needs and Tribe's childrearing practices/belief systems.</p>
<p><b>If a child is in juvenile hall and will not be released soon, but is in need of substance abuse services, referral to participate in the hall's substance abuse services.</b></p>	<p>If a child is in juvenile hall and will not be released soon, but is in need of substance abuse services, asking the child and family if they would like a traditional healer to work with the child, asking the child's Tribe or local Native American agency to assist in providing a traditional healer to work with the child, asking a substance abuse counselor at a local Native American agency to come into juvenile hall to provide substance abuse services with the child and getting permission from the hall to allow these providers to work with the child, and additional permission for the ability of the providers to utilize ceremonial methods if necessary (i.e., burning sage/sweetgrass/cedar to create billows of smoke that can be a process of purifying before a session starts and/or throughout the session).</p>
<p><b>Providing materials on how the family can contact and sign up for TANF.</b></p>	<p>Helping a family sign up for California Native or Tribal TANF, finding out what services the TANF office the family will be a part of may have, signing up the family for the services through that office and keeping in regular phone/in-person contact with the Native TANF provider(s).</p>

8

<sup>8</sup> Examples were provided courtesy of the Administrative Office of the Courts

## **TRAINING ACTIVITY 4C**

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### **Active Efforts**

### **Case Plan Scenario: Maria L.<sup>9</sup>**

Maria L. is 6 years old and lives with her mother in a rural area near a medium sized city. Her mother Carolyn L. is a member of an out-of-state Tribe. Maria has been detained based on a petition alleging that Maria is being neglected. Maria's kindergarten teacher reports that Maria's absences have become more and more frequent, and that Ms. L. has been inconsistent about picking her up on the days that she does attend. Maria's mother was recently laid off and received an eviction notice from her landlord due to failure to pay the rent. Ms. L. acknowledges that she has been depressed and has not taken Maria to school or picked her up because she cannot afford gas for her car. She has taken Maria with her to some temporary jobs. Maria describes being left alone frequently but has not been frightened because she knows that her aunt lives somewhere in the city and would help her.

At the detention hearing, the agency recommends continued detention based on the risk of serious neglect and the lack of means to protect her if she is returned home.

At the detention hearing, the agency recommends continued detention based on the risk of serious neglect and the lack of means to protect her if she is returned home. Notice to the Tribe has been prepared.

Have active efforts been made?

What could have been done?

What should have been done?

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<sup>9</sup> The case scenario was provided courtesy of the Administrative Office of the Courts

## **TRAINING ACTIVITY 4D**

# Bringing It Home

### **Examples of Active Efforts from your practice and in your county:**

**Promising Practices from others that you'd like to incorporate into your practice or share with your county:**

## **TRAINING ACTIVITY 4E**

## Active Efforts Reflection Page

**What is important for you to remember about Active Efforts?**

## **SEGMENT 5**

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### **Expert Witness**

#### **TRAINING ACTIVITY 5A**

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### **Expert Witness as Related to Active Efforts, Standards of Evidence and Placement Preferences**

#### **Purpose**

The purpose of the expert witness is to apprise the court about evidence concerning whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical harm, specifically in relation to the need for placement of an Indian child in foster care or with respect to the termination of parental rights.

#### **Prevailing Social and Cultural Values**

The Expert Witness must be qualified to ensure that decisions to remove a child or terminate parental rights are not based on ethnocentric biases, particularly those involving cultural practices related to childrearing and family organization.

#### **Provision of Active Efforts**

The expert witness can also provide evidence that can assist the court to determine whether or not active efforts were provided by the child welfare agency to prevent removal and to promote reunification. Active efforts must take into account the “prevailing social and cultural values and way of life of the Indian child’s Tribe.” Active efforts also require utilization of the available resources of the extended family, the Tribe, Tribal and other Indian social service agencies, and individual Indian caregiver service providers. The expert witness can attest to the availability of resources and their utilization.

#### **Standards of Evidence**

The information provided by the Expert Witness can assist the court to assess if the higher standards of evidence requirements for ICWA cases were satisfied, i.e., “clear and convincing” evidence for removal of an Indian child, and “beyond a reasonable doubt” for termination of parental rights.

The testimony of an expert witness is required at the dispositional hearing and at the hearing that terminates parental rights (W&IC Sec. 366.26). The following is excerpted from ACL No. -9-28, page 11:

“The removal of an Indian child may only occur if there is **clear and convincing evidence** that is supported by the testimony of an expert witness that

continued custody by the parent is likely to result in serious emotional or physical damage. The purpose for the use of the qualified expert witness is to provide testimony on the issue of detriment to the child. Qualified expert witness testimony is required before a court orders the child be placed out of the custody of his or her parents or terminates parental rights” (25 U.S.C. 1912(e); W&IC 361.7(c); and FC 7892.5(b))

“*Parental rights may not be terminated in the absence of a determination, supported by evidence “beyond a reasonable doubt” including testimony of a qualified expert witness that the continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child*” (25 U.S.C. 1912(f); W&IC 366.26(c)(2)(B)(ii); and FC 7892.5(b))

### ***Placement Preferences***

The Expert Witness can inform the court as to whether or not placement preferences designated by the ICWA were followed, and if prevailing social and cultural standards of the child’s Tribe were honored. The child’s Tribe may establish a different order of placement preferences, providing that the proposed placements are the least restrictive settings appropriate to the child’s needs. The preferences of parents and children (if of sufficient age) should also be considered. The order of placement preferences may also be changed if good cause can be demonstrated to the court.

## Expert Witness Qualifications

### ***Who can be qualified as an expert witness?***

Specific qualifications for an expert witness are not stipulated in the ICWA. However, guidelines issued by the Bureau of Indian Affairs emphasized that an expert witness should have knowledge of the prevailing social and cultural values and Tribal customs of the child's Tribe, especially those related to family organization and childrearing practices. Such knowledge can be acquired through education, experience, or a combination of both. Parties may disagree as to the qualifications of particular individuals. The court makes the determination whether or not to declare an individual as a qualified expert witness.

A qualified expert witness must fulfill at least one of the following criteria:

- a member of the child's Tribe who is recognized by the Tribal community as knowledgeable in Tribal customs as they pertain to family organization and childrearing practices;
- a lay expert with substantial experience in the delivery of Indian child and family services and extensive knowledge of prevailing social and cultural standards and child rearing practices of Tribes, specifically the child's Tribe, if possible;
- a professional person with substantial education and experience in the area of his or her specialty; or
- a professional person with substantial education and experience working with Indian families and familiar with Indian social and cultural standards, particularly those of the child's Tribe (added by California Rule of Court 1439(a) (10) (C)).

(ACL 1-43-04, p. 7)

An important consideration is that due to the variation among Native American cultures, family organization, and child-rearing practices, expertise in one Tribe does not necessarily confer expertise in the matters of another Tribe. However, it is generally assumed that "a Native American familiar with issues affecting an Indian child involved in a child custody proceeding may be better qualified than a non-Indian who is not involved in such issues" (ACIN I-40-10).

Additionally, the qualifications of an expert witness would vary depending on the facts of the case. For example, a case involving extreme physical abuse would focus more on the question of child endangerment and less on cultural competency (ACIN I-40-10).

Note that the qualified expert witness cannot be an employee of the person or agency seeking foster care placement or termination of parental rights, such as the child welfare worker, probation office, or probation social worker.

## Expert Witness Selection

### ***Selection of a Qualified Expert Witness***

The party seeking the order for placement of an Indian child in foster care or for termination of parental rights is responsible for fulfilling the requirement for providing the expert witness. Consequently, the child welfare agency or county counsel is usually the party charged with the responsibility for producing an expert witness.

CDSS recommends that seeking the advice of the child's Tribe is the first and best resource for identifying an expert witness. The Tribe is likely to know Tribal members who can address the issue of child endangerment within the context of the Tribe's prevailing social and cultural standards, particularly those related to family organization and childrearing practices. The identified individual will need to meet the criteria set forth for a qualified expert witness as noted in Segment 5A (ACIN No. I-40-10).

When identifying an expert witness, child welfare workers should keep in mind the goal of selecting an individual who will likely be deemed appropriate by all parties. When all parties agree, the selected individual often will be more disposed to exercising independent judgment. If the parties do not agree on the proposed expert witness, other individuals may be proposed to fulfill the role. The final decision regarding the selection of a qualified ICWA expert rests with the judge (ACIN No. I-40-10).

### ***How can child welfare workers find an Expert Witness?***

Other sources of ICWA expert witnesses are Tribal organizations and the listing maintained by the Center for Families, Children and the Courts (CFCC). This listing can be found at:  
<http://www.courts.ca.gov/8105.htm>

It should be noted that neither the Judicial Council or California nor CDSS endorse or guarantee any individuals on the list. Agencies contracting for the services of an expert witness bear the responsibility for vetting the appropriateness of a potential expert witness. Additionally, individuals who qualify as an expert witness do not have to be included on the list.

## **Expert Witness Testimony**

### **Preference for In-person Expert Witness Testimony**

The California Department of Social Services (CDSS) recommends the use of testimony rather than written declarations, because testimony can address issues that arose after a declaration was written, and testimony may be more informative to a judge. If all parties have agreed in writing, testimony may be submitted by declaration or affidavit, but this method is not preferred by CDSS. (See ACL 08-02.)

### **The Nature of Expert Witness Testimony**

The testimony of the expert witness can have substantial influence in the court. Expert witness testimony is used to answer these fundamental questions:

“Is it likely that the conduct of the parents will result in serious physical or emotional harm to the child?

If such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?” (BIA Recommended Guidelines for State Courts-Indian child Custody Proceedings, published in the Federal Register, vol. 44, No. 70/April 23, 1979)

The expert witness in ICWA matters is subject to the same standards that apply to expert witnesses in general. California Evidence Code Section 801 limits the testimony of expert witnesses to opinions that are:

“(1) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(2) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.”

This excerpt indicates that the expert witness employs his or her expertise to formulate an opinion for the court that will assist the judge to make a determination based on factual evidence.

Although no specific preparation is mandated for providing expert witness testimony, a general expectation exists that it is necessary for the expert witness to meet with the child’s

parents or Indian custodian, observe parent-child interaction whenever possible, meet with extended family members and Tribal representatives, and review the case information. Merely reviewing reports written by the child welfare worker would not meet customary standards (ACIN No. I-40-10).

CDSS recommends that counties request the proposed expert witness to contact the child's family and Tribe prior to court hearings, especially if the proposed expert is not from the child's Tribe (ACIN No. I-40-10, p. 3). Such individuals include:

- Birth parents
- Foster parents or kinship caregivers
- Children (if age-appropriate)
- Tribal members

The following are additional categories of individuals that the expert witness may choose to interview:

- Child welfare staff assigned to the child's case
- Service providers
- Attorneys

Exceptions to the generally accepted standards for preparation for ICWA expert witness testimony may occur when the expert witness is from an out-of-state Tribe, or for cases that concern extreme physical abuse. In situations where there is alleged extreme physical abuse, the focus of the testimony is on the continuing danger to the child and the need for immediate removal from the home (ACIN No. I-40-10).

Tribes or attorneys for children or parents may choose to provide a rebuttal expert witness. The rebuttal expert witness can serve as an additional legal protection for the child's right to preserve her/his Indian identity and Tribal connections. Out-of-state Tribes may decline this option, often because they do not have the resources to provide their own expert witness.

One resource that is helpful for child welfare workers are the *Guidelines for Psychological Evaluations in Child Protection Matters*, published by the American Psychological Association (APA) and available on the APA website: [www.apa.org/practice/childprotection.html](http://www.apa.org/practice/childprotection.html). It is recommended that the child welfare worker review these guidelines to become more knowledgeable about professional standards for rendering an expert opinion (ACIN No. I-40-10).

#### *Contracting for the Services of an Expert Witness*

Tribes are not required to provide an ICWA expert witness, although it is considered best practice for Tribes to assist in identifying qualified individuals, and presumed that Tribal

assistance in locating an expert witness is in the best interest of all parties (ACIN No. I-40-10).

The ICWA expert witness should be paid and reimbursed for services in the same manner as any other expert witness. However, expert witnesses are not precluded from offering their services at no cost. Payment (or the offering of services at no cost) does not carry the expectation that the expert witness agree with the recommendations of the county, and payment is not contingent upon the expert opinion provided by the expert witness. The goal of the ICWA expert witness testimony is to assist the court to rule in favor of the best interest of the Indian child based on the facts of the case.

## **TRAINING ACTIVITY 5C**

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### **Expert Witness in Action Questions**

1. What concerns or pressures do you think might be experienced by a Tribal representative providing testimony as an expert witness regarding a child and family that are members of his/her Tribe?
2. How might these concerns or pressures differ when the family: a) lives in the Tribal community; or b) lives in an urban area geographically removed from their Tribal lands?
3. How can counties build local capacity for hiring ICWA expert witnesses?

## **TRAINING ACTIVITY 5D**

## Expert Witness Reflection Page

## **What is important for you to remember about Expert Witness?**

## **SEGMENT 6**

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### **Bringing It Together: Case Plan**

#### **TRAINING ACTIVITY 6A**

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#### **Case Activity Questions**

**Discuss the following questions in your small groups:**

- Which active efforts they would have taken or should have been made in this case?
- Which recommendations would they make for additional active efforts?
- When locating an expert witness for this case, what qualifications would they be looking for?
- When and how would they go about locating the expert witness in their area?

## **SEGMENT 7**

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### **Wrap Up, Talking Circle, and Evaluation**

#### **TRAINING ACTIVITY 7A**

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#### **Walking into the Circle**

**Reflect on the following questions:**

1. What is my contribution to the group's understanding?
2. What did I gain most from the day?
3. What do I risk most by following through?
4. What touched my heart today?

#### **Background on the Talking Circle**

The Talking Circle represents many of the values associated with Native American communities. Inclusion, empowerment, collaboration, respect and honesty are just a few of the values that can be demonstrated through this process. While there are variations on how the Talking Circle is utilized, there are basic concepts in its implementation:

- A leader of the group sets the tone and outlines the rules for the process.
- An object of significance is used (a feather, stick, etc.) to be passed from person to person in the group.
- Each person is given an opportunity to say what he/she would like on the subject at hand. Everyone else is to listen and not interrupt the speaker.
- A person may “*pass*” and choose not to talk.
- The circle is an opportunity to speak without being judged or criticized, thus encouraging openness and honesty.
- The process is not time limited and ends when everyone has had an opportunity to speak.
- The process is one of interconnectedness, inclusiveness, and wholeness.