California ICWA Compliance Task Force

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

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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.

***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.

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

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]

[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.

[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.