



Advocating for Native American Children: *Beginning to Understand how to Advocate*

PURPOSE: *To begin a dialogue about the history, law, and advocacy needs of Native American Children.*

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Objectives

By the end of this chapter, I will be able to...

- ✓ Understand the role as a CASA volunteer in advocating for Native American children.
- ✓ Begin to understand the history from a Native American perspective.
- ✓ Recognize the need for Native American Advocacy in child welfare.
- ✓ Identify when a child is subject to the provisions of federal/state Indian Child Welfare Act.
- ✓ Understand some difference between working in state courts versus tribal courts.





UNIT 1: Common Misconceptions about Tribes and Indians

Many people know very little about the sovereign status of tribes or tribal people in the U.S. today. It is no surprise since very little is taught about Native people or tribes in schools in the U.S. Here is a true false test that involves some of the most common misconceptions people have about tribes. Read through the questions below and then the answers.

Activity A: Indian Misconceptions True or False Quiz

1. Indian people are not citizens of the United States.
2. Indian people do not pay taxes.
3. Indian people receive money from the government when they turn 18.
4. Indian people are genetically predisposed to being alcoholics.
5. Indian people do not have to pay for college.
6. Indian people have special abilities to communicate with nature, animals and the universe.
7. Indian people do not value formal education.
8. Indian people in California are wealthy because of Casinos.
9. Indian tribes were given the ability to have Casinos by the federal and state government.
10. There are no real Indians in California anymore.

Answers to True False Quiz

If you answered false to all of the above you got a perfect score. Below are some real facts about Indian people.

1. Indian people are not citizens of the United States.

False: Indian people were granted U.S. citizenship, mandatory citizenship, in 1924. Many Indian people have “dual” citizenship in their tribe and the U.S. Indian people are also citizens of whatever state they live in just like all other U.S. citizens.

2. Indian people do not pay taxes.

False: Everyone pays federal taxes. Everyone. Indian people who earn their income on reservations do not pay state taxes on that income. Tribal governments do not pay federal or state taxes on their income. The state governments do not have the right to tax tribal governments because tribal governments are sovereign and separate. This is the same for all government entities. For example the State of California does not pay federal tax on income from the State Lottery. However, tribes in California do pay a certain percent of their gaming income into two state funds. One is designed to offset the impacts of gaming on the surrounding local communities, and the other is distributed to tribes who do not profit from casinos. Most Indian people in California live in and work in urban areas and pay state and federal taxes.





3. Indian people receive money from the government when they turn 18.

False: There is no “Indian fund” set aside for Indian people when they turn, 18, 21, or 65. Indian people do not receive any set amount of money from either the state or federal government just because they are Indian.

4. Indian people are genetically predisposed to being alcoholics.

False: Not all Indian people are alcoholics, just like not all of any group of people are alcoholics. Some Indian people drink socially like anyone else, and some are alcoholics. Like all alcoholics, no one is sure why some Indian people have alcohol issues. There is nothing in the genetic code of Indian people that predisposes them to being alcoholics. If alcoholism “runs in their family” it is likely a learned behavior, not a physical or biological response.

5. Indian people do not have to pay for college.

False: Again, there is no government money that pays for Indians to go to college. There is no free government run Indian college for all Indians to attend. It doesn’t exist. Some Indian people may be able to receive scholarships based on the fact that they are Indian; however these are competitive scholarships, usually administered by private agencies and non-profits that not all Indian people will receive. Some schools administer scholarships for Indian students, again these are competitive scholarships that students must apply and qualify for. Some Indian students receive money from their tribe to attend college. This varies greatly depending on the tribe and their resources.

6. Indian people have special abilities to communicate with nature, animals and the universe.

False: Indian people have no more or less ability than any other group of people to communicate with nature, animals or anything else. Some native people are raised with a heightened awareness of nature and a respect for animals. Many tribes have a spiritual belief system that is based in this respect and stewardship of nature and animals. This is not the same as the myth that all Indian people are “one with nature”. That is a stereotype that takes a complex belief system and oversimplifies it into a caricature of what an Indian is or should be.

7. Indian people do not value formal education.

False: Indian people value formal education to varying degrees just like everyone else. What is unique to the Indian experience is the history with formal education. Some Indian people do not trust the public education system due to the history of forced assimilation through boarding schools. Additionally, like other underrepresented groups, Indian people may not have or may not feel they have, access to formal education or college due to socio-economic circumstances.

8. Indian people in California are wealthy because of Casinos.

False: Not all Indian people in California benefit from tribal government gaming. First, there are many Indian people in California who are from tribes located outside of California. Second, not all tribes in California have successful casino enterprises. Lastly, not all tribes





with Casinos elect to disburse the income from their casinos directly to members, some do, but not all. Some tribes put all income into a general fund and use it for community measures, the same way California's government uses the income from the state lottery.

9. Indian tribes were given the ability to have Casinos by the federal and state government.

False: Anytime you see the sentence Indian tribes were give XXX by the government, it is almost always false. Tribes retained the right to run casinos limited only by the Congressional action governing gambling by tribes in states. Tribes have always had this right it was not a gift by anyone.

10. Real Indians don't exist in California anymore.

False. There is a very diverse Indian population, alive and well in California. Many of the Indians in California, and elsewhere for that matter, may not fit the common stereotype of what an Indian is or should be. The stereotypical Indian was created in part by the government, part by Hollywood and partly just by word of mouth through generations. That "Hollywood Indian" is what does not exist, it never did. The stereotypical Indian is usually stuck in history, one with nature, rejecting the advances of modern science and wearing traditional clothes made of animal skins. "Real" Indian people and their culture and way of life can and have evolved right along with everyone else, that does not mean that they have lost what makes them Indian. In fact, some medical advances we all enjoy today were first utilized by Indian people. It is possible for Indian people to drive cars and still practice their traditional beliefs and traditions. "Real" Indian people don't all look a certain way or act a certain way or adopt a certain religion.





UNIT 2: **Historic Background – a Native American Perspective**

Historical Trauma

“Historical Trauma is cumulative emotional and psychological wounding, over the lifespan and across generations, emanating from massive group trauma experiences.”ⁱ The concept of Historical Trauma was developed by Maria Yellow Horse Brave Heart who holds a PhD in Clinical Social Work. Historical Trauma responds specifically to the Native American community as it describes “massive cumulative trauma across generations.”ⁱⁱ Similar theories such as post-traumatic stress disorder (PTSD) and Intergenerational trauma are limited in their application to the Native American Community in that they do not account for the group trauma experiences suffered by the Native American Community. In order to serve the Native American Community in a culturally responsive way, it is critical to consider the history of the trauma’s suffered by the Native American Community and the “continuing transfer of trauma across generations.”ⁱⁱⁱ Thus the rest of this chapter will discuss some of the history experienced by Native American people nationwide and specifically in the state of California.

California Indian History, Post European Contact

“Cultural genocide can be defined as the effective destruction of a people by systematically or systemically (intentionally or unintentionally in order to achieve other goals) destroying, erasing or undermining the integrity of the culture and system of values that defines a people and gives them life.”^{iv}

The Mission Era

California’s Mission Era ran from 1769-1836.^v In 1769 Catholic missionaries along with Spanish military authorities established the first of 21 coastal missions in the San Diego area.^{vi} The goal of the Spanish government was to thwart Russian colonial expansion from the North.^{vii} The Spanish mission system in California is often credited with bringing the gifts of literacy and Christianity to the Indian people in California. In their quest to convert Indians to Christianity, missionaries failed to acknowledge that Indian people of California had their own culture, governments, religions and spiritual beliefs and practices, which they still maintain today.^{viii} Most “conversions” recorded by missionaries were actually merely baptisms that did not amount to the “convert” giving up his own beliefs and practices, at least not completely.^{ix} Indian “recruits” were often captured and forcibly taken to the missions for conversion.^x If a recruited Indian resisted baptism it was common to imprison or beat the “recruit” until they were willing to convert.^{xi}

Missions brought disease, starvation, warfare and coerced assimilation of Indian people.^{xii} At the time of the establishment of the first Mission there were approximately 300,000 Native Americans living in California.^{xiii} By 1821 only 200,000 remained.^{xiv}





When numbers of Indians declined in the missions due to disease or escape soldiers would have to venture further and further away from the missions to “recruit” new groups of Indians.^{xv}

The Gold Rush

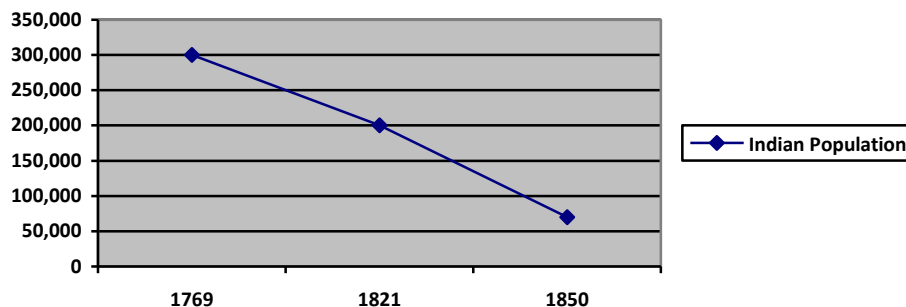
California is very proud of the legacy of the gold rush era. The state nickname is “The Golden State”, the state motto is “Eureka” Greek for “I found it” referring to the discovery of gold in 1848. Ironically, the state animal, the grizzly bear, proudly displayed on the state flag, is extinct, “less than 75 years after the discovery of gold, every grizzly bear in California had been tracked down and killed.”^{xvi} Native Americans in California nearly suffered a similar fate.

Miner and Indian relations were hostile and violent during the gold rush era. There are well documented accounts of the enslavement and killing of Indian people by the white settlers, most of whom came to California in search of gold.^{xvii} There are newspaper reports, as well as military records of military troops or miners massacring entire villages of Indian men, women and children.^{xviii}

“The handiwork of these well armed death squads combined with the widespread random killing of Indians by individual miners resulted in the death of 100,000 Indians in the first two years of the gold rush. A staggering loss of two thirds of the population. Nothing in American Indian history is even remotely comparable to this massive orgy of theft and mass murder. Stunned survivors now perhaps numbering fewer than 70,000 teetered near the brink of total annihilation.”^{xix}

The Indian child slave trade began shortly after the discovery of gold in 1850 continuing for over a decade.^{xx} “Between 1852 and 1867, three to four thousand children were taken. Added to these figures must be hundreds of Indian women who were seized for concubinage and adult men apprehended for field labor.”^{xxi}

The rush for gold and land in California left the Indian people of California struggling for their very survival.





The War of Extermination in California

In the first annual Governor's address to the legislature in 1851, Governor Peter H. Burnett stated, "that a war of extermination will continue to be waged between the races, until the Indian race becomes extinct, must be expected."^{xxii} This statement by Governor Burnett was made during what is known in Indian history as the Treaty Era. The federal government was adopting a policy of assimilation of the Indians versus extermination and was negotiating treaties with tribes across the nation. California's government, through statements like the one above and several acts of the legislature, however, made a clear, public statement that they were not following the federal example, that extermination was the favored Indian policy in California.

"The California Legislature created the laws that controlled California Indians' land, lives and livelihoods, while enforcement and implementation occurred at the county and local township levels. Some examples include:

- County-level Courts of Sessions and local township Justices of the Peace determined which Indians and Indian children were "apprenticed" or indentured pursuant to the *1850 Act for the Government and Protection of Indians*.
- Under the same act, Justices of the Peace, mayors or recorders of incorporated towns or cities, decided the status and punishment of "vagrant" Indians.
- Under the California Constitution and state militia laws, California governors ordered local sheriffs to organize the men to conduct the "Expeditions against the Indians."^{xxiii}

Indian Lands and the 18 Treaties

At the same time the Government of California was publicly adopting a policy of genocide of Native Americans, the federal government was attempting to negotiate treaties with tribes in California. Between 1851-1852 agents from the Bureau of Indian Affairs (BIA) had negotiated 18 treaties with over 100 tribes or groups of Indians in California reserving over 8 million acres of land for the tribes.^{xxiv} However, the tribes did not know that before these treaties would be honored by the federal government, they had to be ratified by the U.S. Senate.^{xxv} California's government expressed their opposition to the treaties which were perceived by California's non-Indian population to be against mining and agricultural interests.^{xxvi} In closed executive session and under an injunction of secrecy, congress refused to ratify the 18 treaties.^{xxvii} Tribes were left homeless with nowhere safe to go.^{xxviii}

Decades later Congress passed the California Jurisdictional Act of 1928 which allowed the Indians to use the California Attorney General's office to sue the federal government over the any claims California Indians may have against the government.^{xxix} After years of legal battles, in 1944, the California Indians won a judgment of only about \$5 million, plus about \$28,000 was deducted to cover California's court expenses.^{xxx}



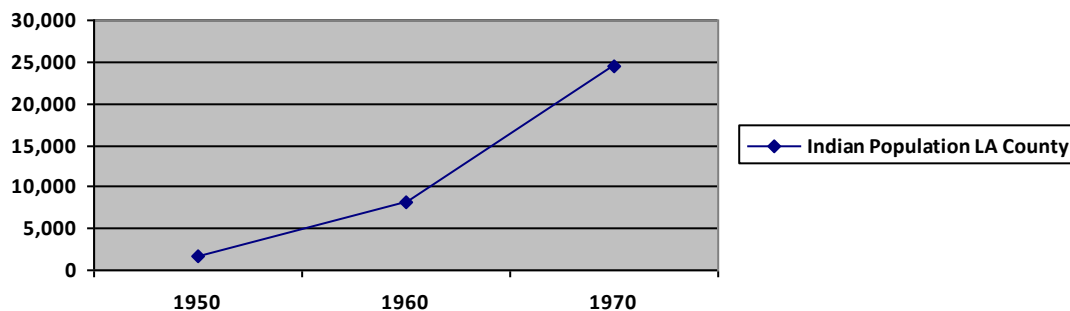


Natives of California, feeling this judgment was wildly unfair, filed claims against the federal government, under the Indian Land Claims Commission Act of 1946, over the theft of their land beginning in 1850.^{xxxii} After years of settlement negotiations, in 1968, California's Indians, as counted by the federal government census roll prepared for the settlement, known as the California Indian Judgment Roll^{xxxiii}, received \$0.47 per acre of land, based on what the land may have been worth in 1850.^{xxxiii} The resentment over this settlement still lingers in the Native American community today.

Relocation Program

In furtherance of the federal policy of assimilation the BIA instituted the relocation program beginning in the late 1940's.^{xxxiv} The program was designed to assimilate Native American individuals living on reservations across the nation to into mainstream America.^{xxxv} Native American individuals left their reservation communities under the government promise of a better life.^{xxxvi} Native American people were moved from reservations outside of California to major urban centers in the country at the time.^{xxxvii} Two of the largest relocation centers were California's Bay Area and Los Angeles.^{xxxviii} With this latest attempt at government assimilation of Native Americans, California's urban Indian population was born. The U.S. Census statistics for Indians residing in Los Angeles County are: 1950 = 1,671 Indians; 1960 = 8,109 Indians; and 1970 = 24,509 Indians.^{xxxix}

Native Americans were provided training in the lowest status jobs with the potential for earning very low wages, moving them from poverty on the reservation to poverty in urban neighborhoods.^{xi} Additionally, there were no services or programs designed to guide Native American people through, what must have been, the large scale culture shock of moving from a reservation community to an urban community.^{xii} By the 1960's the program had all but failed and by the 1970's it officially ended. However, this urban Indian population remained, and remains today.





Early Indian Child Welfare in the U.S.

Indian Boarding Schools

As yet another attempt at assimilating the Indian population into the mainstream population, the federal government, beginning in 1879, funded and authorized the Indian Boarding School System. The schools were run by Christian Missionaries, despite the United State’s policy of separation of church and state. In advocating for the use of Christian teaching and influences in boarding schools by use of Christian educators and missionaries, Indian Commissioner Price had this to say in 1882:

“If we expect to stop sun dances, snake worship, and other debasing forms of superstition and idolatry among Indians, we must teach them some better way...the establishment of industrial schools, where the thousands of Indian children now roaming wild shall be taught to speak the English language and earn their own living, will accomplish what is so much desired, to wit, the conversion of the wild roving Indian into an industrious, peaceable, and law abiding citizen...”^{xlii}

The motto of the boarding schools was “kill the Indian, save the man.”^{xliii} That was what the schools attempted to do. Children who attended the boarding schools ranged in age from 5 years old to 21.^{xliv} Children were taken from their homes on reservations by bribery, persuasion, fraud, threats and force.^{xlv} Children who attended were banned from speaking their language, practicing their religion, and wearing their traditional clothes and hairstyles.^{xlvi} There were given a new, English name in place of the name they had been given by their families.^{xlvii} The end result for many students was loss of culture, loss of intergenerational family connection, internalized low self worth, physical and sexual abuse and for some, death.^{xlviii} The trauma experienced by Indian families as a result of the boarding schools is still felt in the Native American community.

In 1969 the Senate ordered a special report on Indian education, the following were some of the statistics in the report^{xlix}:

	Indian Students	National Average
Children who attend college	18% (of those in Federal Indian Schools)	50%
Percent of those enrolled in college who graduate	3%	32%
Amount spent on text books and supplies per year per child	\$18.00 (by BIA)	\$40.00

These statistics reinforce that the goal of the boarding schools was to assimilate rather than educate Indian children. The basic finding of the report was: “that our Nation’s policies and programs for educating American Indians are a national tragedy.”¹





The Indian Adoption Project

The Indian Adoption project was funded by the BIA and administered by the Child Welfare League of American from 1958 through 1967.^{li} The purpose of the project was to remove Indian children from poverty stricken Native American communities and place these children for adoption into non-Indian homes.^{lii} Although the child welfare policy of the day was, “matching” or pairing adoptive homes and children placed for adoption by race/ethnicity, an exception was made for Native American children in order to provide the possibility for a better life for these children by placing in non-Indian homes.^{liii} “This was the first national effort to place an entire population transracially and transculturally.”^{liv}

Hundreds of children were “adopted out” of the Native American community directly through this project.^{lv} Countless more Native American children were adopted out via state child welfare agencies and private adoption agencies following the model of the Indian Adoption Project.

In 2001 the Executive Director of the Child Welfare League of America affirmed the agency’s support of the ICWA by stating:

“No matter how well intentioned and how squarely in the mainstream this was at the time, it was wrong; it was hurtful; and it reflected a kind of bias that surfaces feelings of shame.”^{lvi}

Congressional Investigation into Child Welfare Practices Relating to Indian Children and Families

Historically Indian children, as recently as the 1950’s, 1960’s and 1970’s, were being removed from their tribal homes and placed in non-Indian foster and adoptive homes and institutions at rates disproportionately higher than federal and state averages.^{lvii} In the majority of the cases where Indian children were removed from their homes, approximately 99%, the basis for the removal were vague standards such as deprivation and neglect, only in about 1% of the cases were Indian children removed for alleged “abuse”.^{lviii} Social workers and adoption agencies perceptions of what are appropriate child rearing practices did not align with tribal social and cultural norms. Thus, Indian children were being removed from their families and placed into non-Indian homes at disproportionately high rates based on cultural bias against tribal childrearing practices.^{lix}

In the 1970’s, at the urging of the Native American community, Congress formed a task force to investigate these practices. In 1976, the American Indian Child Welfare Review Commission issued a report which included the following statistics for California:

Indian Children Placed for Adoption^{lx}:

- 1 out of every 26.3 Indian children had been adopted.
- The adoption rate for non-Indian children was 1 out of every 219.8
- Thus, there were 8.4 times (840 %) as many Indian children in adoptive homes as there were non-Indian children.
- 92.5 % of these Indian children were adopted by non-Indian families.

Indian Children Placed in Foster Care^{lxi}:





- 1 out of every 12 Indian children was in foster care.
- The foster care rate for non-Indians was 1 out of every 366.6.
- Thus, there were 2.7 times (270 %) as many Indian children in foster care as there were non-Indian children.
- No data was available on how many Indian children are placed in non-Indian homes or institutions

The same disproportionality was seen in other states that were part of the report.^{lxii} Nationally, approximately 25 – 35% of all Indian children were placed in foster homes, adoptive homes or institutions.^{lxiii} The federal Committee on Interior and Insular Affairs, stated in their report that called for the enactment of the ICWA:

“It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.”^{lxiv}

UNIT 3: The Need

California Tribal Statistics

California is home to 107 federally-recognized Tribes.^{lxv} More Native Americans live in California than in any other state.^{lxvi} Furthermore, the majority of the Native Americans living in California are from tribes located outside of California.^{lxvii} If you read the history of the relocation project above, it is probably clear why the Native Community in California is so large and so diverse.

Disproportionality of Native American Children in Care

Today, in California, Native American children are still vastly over-represented in the California child welfare system compared to other populations. Native American children are the second highest over-represented population in the system.^{lxviii} In fact, African American children and Native American Children are the only two populations that are over-represented in the child welfare system in California. According to the CWS/CMS data for 2008, while .65% of the total population of children in California is “in care” in the child welfare system, 2.11% of the Native American children in California is in care.

Native American children comprise 1.5% of all the children in care in California and only comprise .47% of California’s total population of children. Additionally, many of the out of home placements of Indian children are in non-relative, non-Indian homes.^{lxix}





UNIT 4: ICWA Overview

What is ICWA?

The Indian Child Welfare Act, often abbreviated as ICWA, is a federal law that was enacted by Congress in 1978.^{lxx} This law establishes the minimum federal standards that must be applied in state child custody proceeding involving Indian children. The ICWA acknowledges and implements the child's tribe's right to intervene and participate in state child custody proceedings. The ICWA acts as the federal government's method of ensuring that state governments honor the political standing that tribes have in the United States.

The ICWA applies to any state court proceeding involving an Indian child that may result in a voluntary or involuntary foster care placement; guardianship placement; termination of parental rights; or voluntary or involuntary adoptive placement. This includes all proceedings under WIC §300 et. seq. and WIC §600 et. seq. when the child is in foster care or at risk of entering foster care.

California Indian Child Welfare Law

Senate Bill No. 678 ("SB 678") is a piece of California legislation that was signed into law in 2006. This law amended several sections of the California Welfare and Institutions Code ("WIC"), the California Probate Code ("Probate Code") and the California Family Code ("Family Code"). SB 678 codified what is required in cases involving Indian children in California.

Definitions

Indian Child

The term Indian is defined in many different ways depending on the application. For the purpose of the ICWA, an Indian child means any unmarried person who is under the age eighteen and is either:

- a) a member of an Indian tribe or
- b) is eligible for membership in and Indian tribe and is the biological child of a member of an Indian tribe.

In other words if the child is not a member, but is eligible for membership in a tribe at least one of the child's biological parents must be a member of the tribe for the child to be considered an Indian child for the purposes of the ICWA.

Indian Tribe

For the purpose of the ICWA, an Indian Tribe is any federally-recognized tribe, including any Alaska Native village. Tribes of Canada, Mexico or any other foreign country are not considered tribes for the purposes of the ICWA.





WIC §306.6 provides for the court to permit non-federally recognized tribes to participate in the proceedings upon the request of the tribe. This is due to the large number of non-federally-recognized tribes located in California.

Indian Child's Tribe

The Indian child's tribe is the tribe of which the child is a member of or eligible for membership in. If the child is eligible for membership in more than one tribe, the child's tribe will be the tribe with which the child has more significant contacts as determined by the court.

Extended Family

The child's tribe's laws and customs define who is considered the child's extended family. Some tribes define extended family very broadly for example they make no distinction between first, second or eighth cousin, if you are cousins by any degree you are cousins, period. Other tribes have very specific rules that consider relationships beyond kinship, for example two children who are raised together in the same house may be considered to be siblings even if they have different biological parents. You would have to consult each child's tribe to know who they consider extended family. In the absence of any tribal customs applying to extended family the following definition applies: a person 18 or older who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or step-parent.

Indian Custodian

An Indian custodian is any Indian person who has legal custody under tribal law or custom or under state law over an Indian child, or who has been given physical custody by the child's parent. This grant of legal or physical custody does not have to be in writing. If an Indian child is removed while under the physical or legal care of an Indian custodian that Indian custodian will have the same rights as the parents do in the case. It is almost as if there is a third parent involved in the proceedings.





UNIT 5: Major Provisions of ICWA

Inquiry

In *all* child custody proceedings, the court and the social worker¹, must ask the child, the parents or legal guardians, and the Indian custodian as soon as possible whether the child is or may be an Indian child. There is a judicial council form that the social worker must attach to every petition regarding the ICWA inquiry. You should see one of these forms attached to every petition in every case.

Sometimes those responsible for inquiry assume that someone is not Indian and then fail to ask. You cannot tell if someone is an Indian child by looking at them, or by looking at one or both of their parents, you must ask. A child who has blended ancestry may physically present as another ethnicity. You cannot assume that because a child looks African American, for example, that they are not an Indian child. Similarly you cannot tell by the family's last name if the child is Indian or not. Too many times families with Spanish last names are not asked about their Indian ancestry, because the assumption is that they are not Native American.

As a CASA you can make your own inquiry in every case. You can ask the child, the family members or others that you interview if this could be an Indian child. If you discover information that indicates the child may be an Indian child, you should alert the court right away.

Notice

If there is reason to know that the child is an Indian child, notice must be sent to the parent or legal guardian and Indian Custodian of the child, and the child's tribe. There is another Judicial Council form that must be used by the social worker sending the notice.

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.

¹ The law defines several duties that "the petitioner" has in cases involving Indian children. Petitioner includes, the social worker, the probation officer, a licensed adoption agency or adoption service provider, the petitioning party in a probate guardianship or an investigator. For this training manual social worker means petitioner.





The requirements for notice in a case involving an Indian child are very specific. If any of these requirements are not met, exactly, the case is subject possible invalidation or to being overturned on appeal. Inquiry and notice are the threshold requirements of ICWA. If either of these provisions is not met the tribe has no chance of participating in the case. Further if the tribe does not receive proper notice it is unlikely any of the other provisions of the ICWA will be met in the case.

As a CASA, if you see any inconsistencies in the notice, for example, the social worker has stated on the notice form that the child's birth certificate is unavailable but you also saw a copy of the birth certificate in the file, or the notice says that there is no known address for the maternal grandparent in the case but that address is on a document in the file, you should notify the court as soon as possible so this error can be corrected. It may not seem like much, but cases are overturned for mistakes like this very often and that can lead to delays in permanency for the child.

Placement Preferences

Foster Care and Guardianship Placements

Any foster care or guardianship placement of an Indian child preference shall be given to the child's placement with one of the following, in descending priority order:

- 1) A member of the child's extended family.
- 2) A foster home licensed, approved, or specified by the child's tribe.
- 3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority.
- 4) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Adoptive Placements

In any adoptive placement of an Indian child, preference shall be given to a placement with one of the following, in descending priority order:

- 1) A member of the child's extended family
- 2) Other members of the child's tribe.
- 3) Another Indian family.

Notice that neither list above includes non-relative, non-Indian placements. This is intentional to ensure that we reverse the practice of removing Indian children from their families and placing in non-Indian homes. Yet many Indian children are still placed in non-relative, non-Indian homes. Check your county statistics online at: http://cssr.berkeley.edu/ucb_childwelfare/CdssFiles.aspx

Tribes and Termination of Parental Rights

Not all tribes support the concept of termination of parental rights. WIC § 366.26(c)(1)(B)(vi) defines an exception specifically for Indian children where either termination of parental rights would interfere with the child's relationship with the child or the tribe has indentified an





alternative long term placement option. Many tribes in California are opposed to adoption with termination of parental rights. It is not that they do not acknowledge the need for someone other than the biological parents to care for some children, no matter how unequipped for parenting, a person's status as the parent of a child survives indefinitely, even if they are never capable of parenting. It relates directly to the ways that tribes view kinship and how closely kinship relationships are tied to every aspect of tribal life.

Tribes may have different models for adoption that do not involve termination of parental rights; these are sometimes referred to as customary adoptions, or traditional adoptions. Many times in these tribal proceedings parent's rights are modified rather than terminated. In 2009 the Tribal Customary Adoptions bill passed allowing state courts to make an order on behalf of a tribe that allows for a tribal customary adoption without terminating parental rights. This is a very new law and forms and procedures to govern the specifics of such orders are still under development by the relevant state agencies.

Good Cause to Deviate from the Placement Preferences

In some circumstances there may be good reason or good cause not to follow the placement preferences. The court may determine that good cause exists not to follow placement preferences. Good cause to deviate from the placement preference may include the following considerations:

- 1) Requests of the parent or Indian custodian
- 2) Requests of the Indian child
- 3) Extraordinary physical or emotional needs of the Indian child as established by the testimony of a qualified expert witness.
- 4) Unavailability of suitable families based on a diligent effort to identify families meeting the preference criteria.





UNIT 6: Understanding Tribal Governments and Tribal Courts

Federally-recognized Tribe v. Non-federally-recognized Tribe

So what is a federally-recognized tribe and why aren't all tribes federally-recognized? Tribes that are federally-recognized are acknowledged by the federal government as being a distinct quasi-sovereign political entity. There are over 500 tribes nationwide that are federally-recognized.^{lxxi} A tribe can be recognized by the federal government by treaty, by executive order, via court order or settlement, or through a petition process. The petition process to become federally-recognized was devised by the federal government, not by the tribes. It is a tedious process, and many tribes apply several times before they are granted federal recognition, if they are ever successful. As of September 2008 the BIA had received 74 petitions from tribes seeking recognition in California.^{lxxii}

California does not have a formal “state recognition” process although non-recognized tribes are afforded rights and courtesies under certain California laws.

Sovereignty and Jurisdiction

Tribes are sovereign governments with the ability to govern their members independent of the state or federal government in many areas of law. The sovereign rights and jurisdiction that tribes have was not given to them by anyone, it is inherent, it pre-dates the establishment of the united states and tribes fight to retain and in some cases regain as much sovereignty as they can. However, over the years, Congress has taken the right to govern certain areas of law (to varying degrees) away from tribes and given this right to govern or “jurisdiction” to either the federal government or the state government. Tribes have retained any jurisdiction that was not expressly taken from them by Congress. Jurisdiction over Indian children in California is explained below.

State Court Jurisdiction – Tribal Intervention

The Indian child's tribe and Indian custodian have the right to intervene at any point in an Indian child custody proceeding in state court. The tribe may intervene either orally or in writing. The tribe may designate anyone they want to serve as their representative. The person may be an attorney (at the tribe's expense), an employee of the tribe who may or may not be Indian, or anyone else the tribes designates. If the tribe intervenes in the case they are a party and should be afforded all the rights and courtesies of any party in the case.

If a tribe chooses not to intervene in the case, all of the provisions of the ICWA still apply. It is not the tribe's duty to ensure compliance with the ICWA.





Tribal Jurisdiction

What is a tribal court?

A tribal court, for the purposes of the ICWA is a court with jurisdiction over child custody proceedings and which is a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which the tribe has given authority over child custody proceedings. Tribal courts may look very different from what you may be used to in state court. Tribal court proceedings may take place in a conference room, the judge may not have any formal legal training, and in fact there may not be any lawyers involved at all. In contrast some tribal courts are just as formal as any state or federal court. Every tribe is entitled to establish a court that reflects what they think will best serve their tribal community.

There are tribal courts in California. They range in style and size just as the tribes in California do. Many of them are only in session part-time. Some are consortium courts that are shared by several tribes. Some only hear certain types of cases for example housing or child welfare. There are also many tribes outside of California that have courts.

Exclusive Jurisdiction

In general a tribal court has exclusive jurisdiction over proceedings involving Indian children who reside or are domiciled on the tribe's reservation, or are wards of the tribal court, regardless of domicile or residence.

Most tribes in the United States have exclusive jurisdiction over children residing or domiciled within the reservation. Tribes in California do not exercise exclusive jurisdiction over juvenile matters but do have concurrent jurisdiction as discussed below.

Concurrent Jurisdiction

In 1953 Congress enacted what is commonly known as Public Law 280 or P.L. 280.^{lxxiii} Congress, via P.L. 280 delegated to some states, including California, partial jurisdiction over Indian reservations located within the state's borders. This provision take exclusive jurisdiction from Tribes in California over juvenile matters, but tribes in California still have concurrent jurisdiction.^{lxxiv}

What this means is that tribes in California have "concurrent" or shared jurisdiction over child welfare matters arising on the reservation. If the tribe has a tribal court, they may initiate proceedings in tribal court over these matters.

Transfers from State to Tribal Court

The child's tribe, either parent, or the Indian custodian, may petition the court (orally or in writing) to transfer the case to the tribe's court. If any of the following circumstances exist the case cannot transfer:

- a) One or both of the child's parents object to the transfer.





- b) The child's tribe does not have a “tribal court.”
- c) The tribal court of the child's tribe declines the transfer.

Absent any of the above circumstances, the state court must transfer the case unless the court finds good cause not to transfer. Good cause not to transfer the proceeding may exist if:

- a) The evidence necessary to decide the case cannot be presented in the tribal court without undue hardship to the parties or the witnesses and there is no practical way to resolve this hardship.
- b) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition within a reasonable time after receiving notice of the proceeding. It shall not, in and of itself, be considered an unreasonable delay for a party to wait until reunification efforts have failed and reunification services have been terminated before filing a petition to transfer.
- c) The Indian child is over 12 years of age and objects to the transfer.
- d) The parents of the child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

Socioeconomic conditions and the perceived adequacy of tribal social services or judicial systems may not be considered in a determination that good cause exists. The burden of establishing good cause not to transfer shall be on the party opposing the transfer.





UNIT 7: Advocating for Native Children

Culturally Appropriate Case Planning

The ICWA requires social workers to make active efforts to provide services designed to prevent the breakup of the Indian family. Social workers must provide the court with evidence that they have made these active efforts and that these efforts have proved unsuccessful in order for the court order foster care or termination of parental rights.

There is no standard definition for what constitutes active efforts. There is not one model case plan that meets the active efforts standard. Whether active efforts have been made is determined on a case-by-case basis. This is because every Indian family's situation and needs will be different, and services provided should be case specific.

The active efforts must take into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. In creating a culturally appropriate case plan, social workers must 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. The services provided should be culturally appropriate and when applicable have a Native American specific component.

As a CASA for a Native youth you can make recommendation to the court about services that may be available to the child you are an advocate for. You should do your own research to see what resources may be available to the child and family in the local community. You can recommend utilizing Native American specific services for the family. You can recommend services available to the Indian child like tribal after school programs, Indian health services, and cultural events.

Resources for American Indian Children and Families

There are many resources available to Indian children and families in California. These resources include health services, mental health services, substance abuse programs, parenting classes and more. These services are provided by Indian health service centers, non-profit organizations and tribes and tribally organized entities.

Statewide Resources

Some great resources for general ICWA information in California are:

- CFCC ICWA Initiative: at: www.courtinfo.ca.gov (enter ICWA into the search box) Judicial Council's Administrative Office of the Courts, Center for Families, Children and the Courts ("CFCC") has an ICWA Initiative maintains a website with a large collection of very useful materials. This website includes a list of resources online that are organized by region and service type. It is a great place to start when searching for Indian specific services.





- California Department of Social Services: : www.childsworld.ca.gov (click on ICWA)
The CDSS has a section of their website dedicated to the ICWA.

Local Resources

In order to find resources specific to your county you can search online or in the yellow pages for Indian or Native American specific services. Also, you can and should always contact the tribe directly to see what resources they offer or other resources they may be aware of. The CDSS website above maintains a list of contact information for tribes: www.childsworld.ca.gov (click on ICWA). Find the child's tribe's contact information and start investigating what services and or benefits may be available for this child.

Securing the Child's Tribal Membership

If the child is eligible for membership in their tribe but not yet a member, your "active efforts" must include any steps necessary to secure the child's tribal membership. The importance of securing the child's tribal membership cannot be stressed enough. It is a permanent political connection for this child which opens the door to personal and social connections as well. For most Indian children, securing their tribal membership would be handled by their parents, for obvious reasons, that is unlikely to happen for the children you are working with. Thus, the duty falls to the social worker.

Social workers are so overburdened this aspect of the case may slip through the cracks. As a CASA you can offer to assist in securing the child's membership by gathering information on the process, gathering information on the child's family background, and even completing any necessary paperwork.

Since membership requirements and procedures are different for every tribe, you will need to check with the tribe on a case-by-case basis to find out what you need to do. Start by calling the tribal offices to see if there is a membership department, if not someone in social services or even on the tribal council may be able to help.





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