INDIAN CHILD WELFARE ACT DESK REFERENCE, A FRAMEWORK AND QUICK REFERENCE RESOURCE FOR THE PRACTITIONER, Office of Tribal Affairs California Department of Social Services, 2020

ICWA Desk Reference (ca.gov); https://www.cdss.ca.gov/Portals/9/Additional-Resources/ICWA/ICWA%20Desk%20Reference_whb_9-30-20.pdf

[Excerpts from Section II of the Desk Reference – Overview of the ICWA]

1. Basic Principles of Federal Indian Law

Indian tribes have a unique legal relationship with the U.S. government unlike that of any other group of Americans. This relationship is based, in large part, on the recognition in the U.S. Constitution of tribes as sovereign nations. This relationship is further cemented by historic treaties (agreements between sovereign nations) that the federal government signed with Indian tribes, which acknowledged and recognized the tribes' inherent sovereignty as nations predating formation of the United States. Therefore, the relationship between the federal government and Indian tribes is a political one, based on this hist oric and evolving relationship between sovereign governments, and not on the race or ethnicity of American Indians.

This political relationship has taken shape in the arena of the U.S. legal system . . . . , the legal environment tribes operate within is subject to the processes and complexities of the United States legal system. Consequently, answers to questions about why a tribe does or does not take a particular action may not be simply a matter of a tribe's prerogative but may be impacted by an entire body of federal law.

One of the most significant legal concerns for Indian tribes is the safeguarding of tribal sovereignty, that is, the authority to self-govern. Tribal sovereignty is recognized as being inherent, meaning that the traditional authority of tribal leaders to govern their people and lands existed long before their relationship with the U.S. government. Indian treaties were based on the sovereign power of Indian tribes to enter into agreements on a government-to-government basis with the United States. Because it is inherent, tribal sovereignty is something Indian tribes have retained, not something granted to them by the federal government.

Tribal sovereignty was reaffirmed in the landmark cases of Johnson v. McIntosh (1823), Cherokee Nation v. Georgia (1831), and Worchester v. Georgia (1832), wherein the Supreme Court, in opinions penned by Chief Justice John Marshall, held that tribes retained a nationhood status and inherent powers of self-governance. These cases, referred to as the Marshall Trilogy, formed a large part of the foundation of present-day federal Indian law.
. . .
These rights are in effect unless waived by a tribe, or modified by treaty, statute, or federal Court decision.

Another vital aspect of the unique relationship between the federal government and Indian tribes is the federal trust responsibility. This trust responsibility requires the federal government to uphold rights reserved by, or granted to, Indian tribes and Indian individuals by treaties, federal statutes, and executive orders, which are sometimes

further interpreted through court decisions and federal regulations.
. . .
While the basic framework of the relationship between the United States and Indian tribes has remained constant, the fundamental principles are grounded in the federal legal system. This has provided opportunity for great variation and complexity in the law as it applies to Indians and tribes. Why?
The unique legal posture of the tribes in relation to the federal government is deeply rooted in American history. Knowledge of historical context is perhaps more important to the understanding of Indian Law than any other legal subject. Indian Law has always been heavily intertwined with federal Indian policy. Over the years the law has shifted back and forth with the flow of popular and governmental attitudes towards Indians. For this reason, many laws have "expressly qualified" tribal powers, at times generally and at other times with respect to only some tribes in some states. An entire multi-volume title of the federal statutes, Title 25 of the U.S. Code, is titled "Indians" and focuses exclusively on laws impacting Indians and tribes.

2. Factual Orientation

a. American Indians in California

There are more than 570 federally recognized tribes in the United States, including 227 village groups in Alaska. The Bureau of Indian Affairs (BIA) recognizes 109 California Tribes, 104 based in California and another 5 with territory extending into California. Some of these tribes are among the most sophisticated tribes in the United States. However, of the federally recognized tribes, a significant number are formerly terminated tribes that have been restored (that is, "unterminated") in recent years via litigation or legislation. Termination is the process by which Congress abolishes a tribe's government, and with it, the tribe's unique sovereign status, distributes tribal assets, and ends (terminates) the federal government's trust relationship with the tribe and its members. Between 1954 and 1966, Congress terminated over one hundred tribes, most of them in Oregon and California.[1] A shift in federal policy ended the termination era and ushered in a period of critical examination of the termination process. This resulted in a number of lawsuits. One example of an untermination lawsuit that has impacted a number of California Tribes is the class action lawsuit Tillie Hardwick v. United States of America, U.S. District Court for the Northern District of California, No. C-79-1710-SW. This litigation, settled in the 1980's, resulted in the untermination of 17 California Tribes that had been terminated. The litigation reestablished tribal status and confirmed reservation boundaries. However, since in this case and others the tribal existence of an unterminated tribe may have been interrupted for decades - formerly terminated but now recognized tribes may be in greatly varied stages of organization. Today, nearly 100 separate Indian reservations dot the California landscape. Membership rolls range from fewer than 25 members for smaller tribes to the more than 4,500 members of the Yurok Tribe.

Although the Bureau of Indian Affairs (BIA) recognizes 109 California Tribes, there are additional tribes in the state: California is also home to non-federally recognized tribes. Under recent regulatory changes, the BIA now identifies as a non-federally recognized tribe only the number of tribes that have completed petitions for federal recognition pending with the BIA. In 2020 that number was three. However, the

[1] American Indian Policy Review Commission, Final Report p. 447-53 (Washington D.C.: Government Printing Office, 1977)

number of tribes that have initiated the process of petitioning for federal recognition is much higher, with some reports placing the number as high as 78.

With a total population of more than 720,000 American Indian/Alaska Native persons (alone or in combination), California has the highest Indian population in the nation, 2% of the total California population. Due to past federal initiatives such as the BIA Relocation Program, designed to assimilate Indians by moving them to urban areas, the majority of the Indian population in California is affiliated with tribes located in other states. The tribes with the largest populations are Cherokee (18%), Apache (6%), Navajo (5%), and Choctaw (5%).

Among counties in the United States, Los Angeles has the highest Indian population. As of 2005, only 3% of the Indian population lived on a reservation in California.

b. Indian Programs and Services

Because P.L. 280 extends state laws of general application to reservation Indians in California, Indians throughout the state are eligible for state programs and services. In addition, tribes and the federal government share the responsibility of delivering social services to Indians in California. Primary federal agencies involved with delivery of social services include: the U.S. Department of the Interior, Bureau of Indian Affairs; ("BIA"); and, the U.S. Department of Health and Human Services, Indian Health Service ("IHS"). Additionally, many federal agencies have Indian program components.

In California, tribes and non-profit groups operate many IHS funded programs, directly providing medical and mental health services, including drug and alcohol rehabilitation. Both the BIA and a number of tribes also run a range of programs, including job, housing, disaster and educational support programs. Indian programs and services are not centralized or uniformly delivered, so the social worker must investigate all potential sources of assistance for each client. . . .

The "Special Case of California"

The Bureau of Indian Affairs identifies 104 federally recognized tribes as based in California with another five possessing territory extending into California. Federal law imposes various requirements on the states to consult with tribes in their state. For tribal consultation purposes all 109 tribes are considered to be "California Tribes." "Federally recognized" means that these tribes and groups have a special, legal relationship with the U.S. government. This relationship is referred to as a governmentto-government relationship. (See 25 C.F.R. §83.2.) Today, Indians must generally be members, i.e., "citizens" of a tribal government, in order to be subject to many of the special laws governing Indians and tribes, including a number of the protections of the Indian Child Welfare Act. The concept of recognition as "eligible for services provided to Indians because of their unique status as Indians" appears in the definition of Indian tribe that is set forth in the ICWA. This same definition has appeared in statutes since the early part of 20th century, long before the existence of federal recognition regulations or published lists of federally recognized tribes. Under many of these statutes, as descendants of original sovereign nations, Indians in California received services, with their Indian status and eligibility regularly certified by the Bureau of Indian Affairs based on official records of past dealings dating back to unratified treaties signed in the 1800's.

In the early 1980's the BIA first adopted regulations that required publication of a list of federally recognized tribes in the Federal Register. The list must now be published annually, with the most current list, as well as a Tribal Leader Directory available on the BIA website.

The regulations also establish a procedure for non-federally recognized tribes to petition for recognition. 25 C.F.R. Part 83. A tribe can gain recognition (have their status as a tribe acknowledged or restored) by successfully petitioning under the regulations, through litigation, or through legislation.

Federally recognized tribes qualify to participate in virtually all federal programs. Federal recognition confirms a contemporary political tribal identity. This political identity may or may not correspond to the tribe's historical/cultural identity, something the BIA refers to as "ancestral tribal affiliation." This is the result of the interplay of fluctuating federal law and policy together with unique historical interactions between the federal government and Indians. Federally recognized tribes in California often do not correspond to historic/ancestral tribal groups.

First, it should be noted that "Indians of California" have been recognized by the federal government for many purposes via a course of dealings between the government and California Indians and resulting special statutes.[2] Unique to California, a federal agency service delivery system has developed that allows certification of the Indian status of California Indians and their eligibility for Indian services.[3]

Second, many California Indians and Tribes are not listed on the 25 C.F.R. Part 83 published list of federally recognized tribes. This is because of the approach the BIA took to implementing the Indian Reorganization Act of 1934 (25 U.S.C. §461 et seq.), a federal law that allowed a tribe or tribes occupying a reservation to organize as a tribe. In California, under the California Rancheria Act, small parcels of land throughout the state were obtained by the BIA in trust status for landless/homeless California Indians. Subsequently, as the BIA implemented the Indian Reorganization Act, the BIA treated these small parcels as reservations and allowed the occupants of each of these small parcels to organize as tribes. Hence, many California Tribes later selected for inclusion on the list of federally recognized tribes corresponded to groups of individual Indians occupying these rancheria areas at the time the BIA implemented the Indian Reorganization Act. Thus, for example, while there may have been several

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[2] See, e.g., 25 U.S.C.§651 et seq. (Indians of California); 25 U.S.C. §1679(b) (Indian Health Care Improvement Act, special California Indian eligibility definition).

[3] A short explanation is required detailing the reasons why there appear to be a large number of non-federallyrecognized tribes in California as well as a large number of aboriginal California Indians unaffiliated with a federally recognized tribe. Tribal existence and identity have never depended on federal recognition or acknowledgment; tribal existence predates the United States. During the Indian treaty-making period of the 1880's the United States treated all tribes as sovereigns and all tribes were "recognized" through course of dealings and treaties with the federal government. Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States pursuant to P.L. 102-416. (1997) Recognition report at 8. Once the treaty-making era ended Congress continued to pass laws applying to tribes "recognized by the political department of the government." United States v. 43 Gallons of Whiskey (1876) 93 U.S. 188, 195. These tribes included California Indian tribes. However, the government did not have one definition for recognized tribes until 1978, when the Department of the Interior created the Branch of Acknowledgment and Research to process tribal petitions for official recognition. (1979) 44 F.R. 7235. Thus, a number of tribes, including California tribes, found themselves excluded in the new approach to identifying Indian and tribes and are still in the process of applying for official (Part 83) recognition

rancherias located within the aboriginal territory of a historical tribe, only the residents of each rancheria, comprising only a fraction of the larger historic tribe, ended up recognized as distinct sovereign nations. No Indians or historic tribal groups not occupying these rancheria/reservation lands were listed. In the 1980's, when the BIA first started publishing the Part 83 list, it included as tribes Indians occupying the reservations and rancherias located in the state. An anomaly developed in California where one family or a small group of Indians residing on each of several parcels of rancheria trust land within a historic tribe's aboriginal territory was deemed a federally recognized, quasi-sovereign tribal nation. For this reason, there is not, for example, a single Miwok Tribe but rather several small tribes identified by the BIA as possessing an affiliation with the historic or ancestral Miwok Tribe. The larger historical tribal group no longer fits into this approach, and under the prevailing policy of tribal self-governance, significant numbers of Indians and some historic tribes in California are now largely deemed "non-federally recognized." This is the case even though these "non-federally recognized" Indians in California can receive Certificates of Degree of Indian Blood documents from the BIA confirming their Indian status, may continue to qualify for some federal Indian services, and in some cases continue to hold interests in lands held in trust by the United States for their benefit as Indians. Response to the unique circumstance of California Indians and tribes is evolving, with special legislation and litigation addressing the problem. Nevertheless, as a consequence of this unique history, many California Indians may not be affiliated with a tribe listed in the federal register, but may still be entitled to treatment as Indians for some purposes.

c. Non-federally Recognized Tribes and the Spirit of ICWA

California Senate Bill 678 was passed in 2006 and codified in the Family, Probate, and Welfare and Institutions codes. It included section 306.6 of the Welfare and Institutions Code, which is commonly referred to as implementing "the Spirit of ICWA."

Section 306.6 responds to the special case of California just discussed. It allows nonfederally recognized tribes, on request and at the discretion of the judge in the dependency matter, to participate in the case. Because juvenile cases are confidential, without Section 306.6 a non-federally recognized tribe is precluded from participating, even though that participation could expand both the availability of relevant information to the court and options for culturally appropriate services to children from non-federally recognized tribes. A number of child welfare policies encourage or require respect for a child's ethnic identity and provision of culturally appropriate services. These requirements apply to all children, including children with Indian ancestry, regardless of membership or citizenship in a federally recognized tribe. However, for children of Indian ancestry, the effect of this heritage may be different due to the impact of federal law. As an example, the definition of Indian child remains one of the most difficult and least understood concepts within the ICWA. This, in significant part, is because the singular definition set forth in 1903(4) is not the only definition in the Act. Two other definitions of Indian exist within the ICWA, each broader in scope than the section 1903(4) definition. Tribes also have an opportunity to impact the definition of Indian child via their particular and varying rules governing "membership." The ICWA definitions include all of the following: 1. The definition section of the ICWA defines Indian child as any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. §1903(4). 2. The second definition of Indian is alluded to but not explicitly set forth in 25 U.S.C. §1912(a). The section states that where the court "knows or has reason to know" that an Indian child is involved in the proceedings, the notice requirements of the Act are triggered. Federal regulations effective in 2016 further clarify that the child is to be treated as an Indian child unless and until it is determined on the record that the child does not meet the definition of "Indian child" set forth

previously. 3. The third definition applies only to Title II of the Act, governing grants and funding for off-reservation services. 25 U.S.C. §1934 specifies that for the purposes of off-reservation programs, the term "Indian" is defined in 25 U.S.C. §1603(c). Section 1603(c) sets forth the broader Indian Health Care Improvement Act definition of "Indian." It defines an Indian as any person who is a member of an Indian tribe, except that for health related services, the term means any individual who (1) irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the state in which they reside, or who is a descendant, in the first or second degree, of any such member; or (2) is an Eskimo or Aleut or other Alaska Native; or (3) is considered by the Secretary of the Interior to be an Indian for any purpose; or (4) is determined to be an Indian under regulations promulgated by the Secretary. (25 U.S.C. § 1603(c).[4]

Practice Tip: The ICWA requires the application of special laws to Indian children as defined in §1903 of the Act. The ability to do this is, in significant part, based on the unique political status of the child as a member/citizen of a federally recognized tribe. Applying different laws based on race or ethnicity would be unconstitutional under federal law. However, given the complex system of federal Indian law, and because of the broad definition applicable to Indian child and family programs funded under the ICWA, a tribal program may provide services to Indians and Indian children who are not members of their tribe, nor in some cases affiliated with tribes that are federally recognized. Two things to keep in mind about this:

1) An Indian or tribal representative may participate in a child custody case as a service provider, versus as a representative of an Indian child's tribe. Hence, the status of tribal or Indian program representatives should not simply be assumed. Clarify the capacity and authority of all participants in a proceeding. See, California Rules of Court, rule 5.534(e).

2) While a child affiliated with a non-federally recognized tribe may qualify for treatment as an Indian in some instances, this is not a matter of racial or cultural self-identification, but pursuant to federal law and historic interactions that provide standards and a documentary basis for determining eligibility.

[4] The issue of defining Indians in California is even more complex. 25 U.S.C. §1679(b) modifies the §1603(c) definition. The Indian Health Care Improvement Act contains a special eligibility definition for California Indians which includes 1) Any member of a federally recognized Indian tribe; 2) Any descendant of an Indian who was residing in California on June 1, 1852, but only if such descendant (A) is living in California, (B) is a member of the Indian community served by a local program of the Service, and (C) is regarded as an Indian by the community in which such descendant lives; 3) Any Indian in California who holds trust interests in public domain, national forest, or Indian reservation allotments in California; and 4) Any Indian in California who is listed on the plans for distribution of the assets of California rancherias and reservations under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian.

[Excerpts from Section IV of the Desk Reference – Frequently Asked Questions]

2. What are some important terms for me to be aware of and how do I know which term(s) to use?

Federal Indian law involves over a century of legislation and case law responding to the unique history, status and changing circumstances of Indians and tribes in the United States. Federal law contains express definitions, many specific to a particular context and many applicable only to federally recognized tribes. For this reason, when interacting with Indian people and tribes It is important to be familiar with the following terms: sovereignty, historic/aboriginal/ancestral tribes, federally recognized tribe, and non-federally recognized tribe.

Common terms to be familiar with when speaking of the original inhabitants of what is now the United States include: Native American, Indigenous/Aboriginal; and American Indian/Indian.

It is not uncommon to find people taking issue with being referred to as "Indian" and IV-2 expressing a preference for another term. Being respectful of how an individual selfidentifies is always appropriate. However, it is also important to have an understanding of what terminology is appropriate to the subject at hand (for example, when a law uses a particular term), and to be intentional about the particular term used for the subject being addressed.

The body of federal law that frames the contemporary legal and sovereign status of federally recognized tribes is called federal Indian law, with title 25 of the United States Code titled "Indians." The 570+ federally recognized tribes in the U.S. are generally very protective of the legal principles, laws and terminology that support their unique legal status and contemporary tribal operations. Although there is not a single definition, the term Indian often has legal significance, which can differ depending on the context. For this reason, other terms that often have ethnic or cultural meanings should not be loosely substituted for the term "Indian" which has a specific legal meaning particularly in the context of the ICWA.

Because of the variations in definition, these and other terms relevant to Indian child welfare are defined in Section V, The ICWA Glossary.

3. Why is it so hard to know if someone is an "Indian" for ICWA purposes?

As discussed above, there is no single definition to use in determining if an individual is an Indian. For certain purposes and programs, a person's self-identification as an Indian or indigenous person may be sufficient. In other contexts, the legal definition may be more restrictive. People are not always familiar with the legal definitions and restrictions. Generally, to be an Indian:

- A person must have some Indian blood (i.e., biological ancestry) and must be considered an Indian by his/her community.

- No single federal criterion establishes a person's status as an "Indian." Various federal laws define the term differently. This results in differing criteria for who a law may apply to and who may qualify as an Indian eligible to participate in any program authorized by that law.

- Membership/citizenship in a federally recognized tribe establish the individual's Indian status for virtually all purposes.

- Tribes have varying eligibility criteria for membership/citizenship.

To determine what the criteria might be for agencies or tribes, to avoid an inappropriate assumption, you must contact them directly.

Indian status determinations can be complex undertakings, with outcomes differing, depending on the particular circumstances surrounding an inquiry. As an example, ICWA, a single federal statute contains multiple definitions of Indian:

- Section 1903 (3) defines Indian as a member of an Indian tribe. Section 1903(4) defines Indian child as a member or eligible for membership and the biological child of a member of an Indian tribe.

- Section 1934 contains a special (and broader) definition of Indian for purposes of eligibility for Child and Family Services funded under Title II of the Act.

- Section 1912 provides a functional definition by requiring that notice be provided as required under the ICWA "whenever the court knows or has reason to know the child may be an Indian." [Caution - Note that nowhere does the ICWA talk about "enrollment". Enrollment is an administrative process that many tribes use to prove or establish membership or citizenship, but it should not be confused with membership or citizenship itself!]

4. Do Indian children have other special rights social workers should be aware of?

Yes. All children and nonminor dependents placed in foster care whether in the dependency or the delinquency system have rights as specified in California law, commonly known as the Foster Youth Bill of Rights. (W.I.C. §16001.9) **All children of native heritage, regardless of membership in a federally recognized tribe enjoy the following rights:**

- To receive adequate clothing and grooming and hygiene products that respect the child's culture and ethnicity.

- To be placed with a relative or nonrelative extended family member if an appropriate and willing individual is available. (This is also the first order of placement in the ICWA placement preferences).

- To participate in extracurricular, cultural, racial, ethnic, personal enrichment, and social activities.

- To attend religious services, activities, and ceremonies of the child's choice, including, but not limited to, engaging in traditional Native American religious practices.

In the spirit of the ICWA, any Indian child or child with native heritage that identifies as Indian should be connected to his or her identified tribe or Indian community through tribal events, classes, participation

in ceremonies, and local intertribal events at tribal agencies or centers whether or not the ICWA applies to the case.

However, beyond that, the tribal rights and the minimum federal standards for state courts apply only when it is known or there is reason to know the child is an Indian child, that is, a member or eligible for membership in a federally recognized tribe and the child of a member of a federally recognized tribe. **Special rights applying to these Indian children include the following:**

- To live in a home that upholds the prevailing social and cultural standards of the child's Indian community, including, but not limited to, family, social, and political ties.

- To be provided the names and contact information for representatives designated by the child's Indian tribe to participate in the juvenile court proceeding, and to communicate with these individuals privately.

- To have the right to have contact with tribal members and members of their Indian community consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe.

- To have child welfare and probation personnel and legal counsel who have received instruction on the federal Indian Child Welfare Act and on cultural competency and sensitivity relating to, and best practices for, providing adequate care to Indian children in out-of-home care.

- To have recognition of the child's political affiliation with an Indian tribe or Alaskan village, including a determination of the child's membership or citizenship in an Indian tribe or Alaskan village; to receive assistance in becoming a member of an Indian tribe or Alaskan village in which the child is eligible for membership or citizenship; to receive all benefits and privileges that flow from membership or citizenship in an Indian tribe or Alaskan village; and to be free from discrimination based on the child's political affiliation with an Indian tribe or Alaskan village.

- To have a representative designated by the child's Indian tribe be in attendance during hearings.

- To have a case plan that includes protecting the essential tribal relations and best interests of the Indian child by assisting the child in establishing, developing, and maintaining political, cultural, and social relationships with the child's Indian tribe and Indian community.

- To be provided with contact information for the tribal authority approving a tribally approved home at the time of each placement, and to contact this office immediately upon request regarding violations of rights, to speak to representatives of the tribe confidentially, and to be free from threats or punishment for making complaints. Note that these rights of an Indian child protected by the Foster Care Bill of Rights apply equally to all Indian children in foster care whether they enter foster care through the dependency or delinquency system. Social workers and probation officers can play a key role in securing an Indian child's rights by:

- Asking relatives if the child is or may be an Indian child and documenting relevant information.

- Assisting the child in pursuing tribal enrollment for the child and informing the IV-16 Bureau of Indian Affairs that the child is in foster care in the event the child has an Individual Indian Money or other Account.

- Incorporating into the case plan activities that support and encourage the child's connection to their tribe, and tribal services or services created for American Indian families (if available in the area).

    - Resources for American Indian families in California, some of which may not require membership in a federally recognized tribe include health centers; substance abuse programs; title VII education programs (available in many public schools); foster family agencies; college recruiting programs; tribal TANF (Temporary Assistance for Needy Families) services.

    - Because of placement preferences it is not uncommon for Indian children to be placed outside the county with jurisdiction over their case. This can create challenges in accessing needed services. Indian health centers located throughout the state often have medical, mental health and dental services that are culturally appropriate for Indian children and not limited by county boundaries. A Statewide Directory of Services for Native American Families that lists many of the available services available to Indian children can be found on the California Courts website here: https://www.courts.ca.gov/5807.htm

    - There are over 570 federally recognized tribes. There are 109 federally recognized tribes located in California and the largest Indian population in the nation, most affiliated with tribes located outside the state. To accommodate this and make resources accessible to TAHs that might otherwise not be, CDSS sometimes serves as the gateway to useful services. An example is access to the on-line Foster Parent College which presents training modules on behavioral and other issues commonly encountered with foster children. To learn more or to obtain a required log-in code (otherwise provided to foster homes through Foster Family Agencies), contact the CDSS Office of Tribal Affairs at TribalAffairs@dss.ca.gov.

[Excerpts from Section V of the Desk Reference – ICWA Glossary]

V. The Indian Child Welfare Act (ICWA) Glossary

- The Challenge
    - The use of inconsistent or imprecise terminology creates tension with tribes and confusion resulting in the Indian Child Welfare Act (ICWA) compliance problems.
    - The ICWA contains its own unique definition of a number of terms which are commonly used to express something different in the child welfare context. Examples include "child custody proceeding", "foster care placement", "extended family", and Indian "parent".
    - State statutes and California Department of Social Services (CDSS) documents use a multitude of terms relating to Indians and tribes, many of which are not expressly defined and are loosely used. Examples include indiscriminately used and sometimes undefined terms such as:
      1. American Indian; Indian; Indian ancestry; Native American; Native American heritage;
      2. Indian Tribe; California Native American Tribe; Non-Federally Recognized Tribe
      3. ICWA Eligible

4. On or near reservation service area

- The Solution
    - To achieve ICWA compliance, it is important that terms be clearly defined and carefully and consistently applied. Federal Indian law involves more than a century of legislation and case law responding to the unique history, status, and changing circumstances of Indians and tribes. Federal law contains express definitions, many specific to particular contexts.
        - Federally recognized **Indian tribes are** quasi-sovereign **governments** who, by virtue of the U.S. Constitution and federal law, enjoy a government-to-government relationship with each other, the federal government, and the 50 states.
        - In the exercise of their internal sovereign powers, Indian tribes may regulate domestic relations, including child welfare, and are service providers if they choose to operate child welfare programs pursuant to tribal and federal law.
        - Federally recognized Indian tribes and other groups descend from historic tribal nations that are distinct ethnic/cultural groups.
- ICWA compliance requires terminology that relates to the varied capacities in which tribes interact with child welfare systems – as governments, as service providers and as cultural groups – and applies that terminology in the appropriate circumstances.

[Select definitions.]

TERM	AUTHORITY	DEFINITION
Indian	25 USC §1903 (3) (ICWA)	Indian means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43.
	25 USC §1934 (ICWA)	Indian defined for certain purposes For the purposes of sections 1932 and 1933 of this title (ICWA title II, Indian Child and Family Programs), the term "Indian" shall include persons defined in section 1603(c) of this title.
	25 USC §1912 (ICWA)	Pending court proceedings (a) Notice In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe . . .
	25 USC §1603 (3) (Indian Health Care Improvement Act)	The term "California Indian" means any Indian who is eligible for health services provided by the Service pursuant to section 1679 of this title.
	25 USC §1603 (13) (Indian Health Care Improvement Act)	The term"Indians" or "Indian", unless otherwise designated, means any person who is a member of an Indian tribe, as defined in subsection (d) hereof, except that, for the purpose of sections

		1612 and 1613 of this title, such terms shall mean any individual who: (A), irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the state in which they reside, or who is a descendant, in the first or second degree, of any such member, or (B) Is an Eskimo or Aleut or other Alaska Native, or (C) Is considered by the Secretary of the Interior to be an Indian for any purpose, or (D) Is determined to be an Indian under regulations promulgated by the Secretary.[5]
	25 USC §1679 (Indian Health Care Improvement Act)	Eligibility of California Indians (a) In general. The following California Indians shall be eligible for health services provided by the Service: (1) Any member of a federally recognized Indian tribe. (2) Any descendant of an Indian who was residing in California on June 1, 1852, if such descendant— (A) Is a member of the Indian community served by a local program of the Service; and (B) Is regarded as an Indian by the community in which such descendant lives. (3) Any Indian who holds trust interests in public domain, national forest, or reservation allotments in California. (4) Any Indian of California who is listed on the plans for distribution of the assets of rancherias and reservations located within the State of California under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian. ♦♦♦ PRACTICE TIP: AFCARS defines race - American Indian or Alaska Native as having "origins in any of the original peoples of North or South American (including Central America), and maintains Tribal affiliation or community attachment." Race ≠

[5] Reference is to the Secretary of the Health and Human Services Department.

		Political Status Among a host of racial categories, CDSS must collect information on American Indian or Alaska Native race. This involves self-identification and IS NOT the same thing as political status that results from membership/citizenship in a federally recognized tribe. For application of the ICWA minimum federal standards for state courts "Indian" does not refer to race but rather to political status. The child must be a member or eligible for membership and the child of a member of a federally recognized tribe. Race, ethnicity/culture are relevant for some purposes, but the application of the ICWA standards to only one class of people is based not on race but on political status.
Indian Tribe (Federally Recognized)	25 USC §1903(8) (ICWA)	Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended.
	25 CFR § 83.2[6] Purpose.	Acknowledgment of tribal existence by the Department (i.e. recognition) is a prerequisite to the protection, services, and benefits of the federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.
	25 CFR §83.6(a) Duties of the Department.	The Department shall publish in the FEDERAL REGISTER, by January 30 of each year, a list of all Indian tribes entitled to receive services from the Bureau of Indian Affairs by virtue of their status as Indian tribes.

[6] 25 CFR Part 83 are Bureau of Indian Affairs Procedures for Federal Acknowledgment of Indian Tribes. There are additional definitions for Indian Tribe found in federal statutes and regulations. As an example, the statute governing health services for Indians and tribes, at 25 USC 1603(14), defines Indian tribe as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or group or regional or village corporation as defined in or established pursuant to the Alaska Natives Claims Settlement Act . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."