

# Working Effectively with Tribes to Meet ICWA Requirements

## Presentation Supplement

### 1. Native Americans, Generally

#### a. Use of Names

##### i. American Indians v. Native Americans v. Indigenous People

1. Many people are uncertain what to call a person who is Native American. As seen in federal laws and policy, the use of “Indian” is common. Some people prefer to use of Indian or American Indian. Some, however, prefer to be called Native Americans, Still, others prefer to identify with their tribe or their native language (i.e. Navajo or Diné). Others still, prefer to be identified as an indigenous person.
2. Note that all three terms may be used interchangeably by the same person. Practice tip: use the word that the person uses to identify themselves as. If you are still uncertain, ask.

##### ii. Tribal Nations

1. Many tribes will refer to themselves as a “Tribe.” Others identify as a” Band, “Nation,” “Community,” “Village,” “Rancheria,” or “Association.” While the Indian Child Welfare Act refers to Federally Recognized Tribes as “Tribes,” be aware that tribal entities may use a different term to identify themselves.
2. A list of the 573 Federally Recognized Tribes can be found at: <https://www.govinfo.gov/content/pkg/FR-2019-02-01/pdf/2019-00897.pdf>.

#### b. California Natives

- i. In California, there are 109 federally recognized Indian tribes. There are also approximately 45 tribal communities of formerly recognized Indian tribes that were terminated as part of the federal termination policy in the 1950s<sup>1</sup> or tribal communities that were never recognized by the federal government. There are approximately 78 entities currently petitioning for federal recognition.
  1. In addition to the people who are members of California tribes, there is a large population of Native Americans/Alaska Natives from other states residing in California. During various federal Indian policies (see below), many individual Native Americans from different states were forcefully relocated to California for school or work during the 1950’s termination policy.

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<sup>1</sup> For more information on this, see the Rancheria Act of 1958.

- ii. Land base - California tribes negotiated treaties with the United States government in the 1850s that set aside 7.5 million acres of land for the tribes. The treaties were never ratified and the treaties were secretly hidden. The tribes, believing the treaties were valid, moved to the areas of lands designated in the treaties only to be turned away. During the treaty making, the tribes relinquished their historic territories. The California tribes were not officially notified of the status of the treaties until 1905.
  - 1. As a result of the public outcry to the 1905 disclosure, Congress and the President established 61 small reservations or rancheria, totaling 7,500 acres for the settlement of homeless Indians.
  - 2. Additionally, under the General Allotment Act of 1887 allotted tribal land to individual members of a tribe, or when there was no tribal land, then land from the public domain. At the time, approximately 2,589 public domain allotments were made to California Indians, but most were in areas unsuitable for agriculture. Over time, the lands, like other Indian allotted lands, lost their “trust” status and currently owned by non-Indians. Fewer than 200 allotments remain in trust status with the federal government.
  - 3. Some tribes have purchased fee land and working with the federal government to place the land into “trust.”
  - 4. There are 107 tribal land areas in California. Agua Caliente Indian Reservation and Off-Reservation Trust Land is the largest land base with approximately 31,500 acres. The smallest tribal land base in California is Pit River Tribe with 1.32 acres.
  - 5. If the treaties of 1850 were ratified,  $\frac{1}{3}$  of the state of California would be designated as Indian Country. Currently, the land designated for California Indians is less than 1% of the state.
- iii. PL-280
  - 1. Outside of California (and the additional 5 states: AK, MN, NE, OR, WI), states lack jurisdiction in Indian Country. The foundational principle that states lacked jurisdiction in Indian Country came from *Worcester v. Georgia*, (1832) 31 U.S. 515, which barred state involvement by virtue of tribal sovereignty and federal protections from encroachment as manifested in treaties. In the other states, the federal government has criminal jurisdiction, for major crimes, over Indians in Indian Country.
  - 2. In 1953, Congress passed Public Law 280, which granted states authority over Indians in Indian Country. Under PL-280, federal jurisdiction over criminal and certain civil matters shifted to the

states. PL-280 did not confer total jurisdiction to the states, nor did it alter the trust relationship between tribes and the federal government.

c. Natives from Other States

- i. There are tribes located in the following states: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

d. History of California Natives

- i. Before Contact - Prior to contact with any Spanish, Russian, or American explorers, the estimated population for California Natives numbered from 100,000 to 300,000.
- ii. Missions: In the 1760s, Spain sought to claim territory ahead of the British, but learning from the Pueblo Revolt of 1680, instead of bringing civilian settlers, the Spanish developed missions, which were staffed by Franciscan priests and a defense of soldiers. With the focus on mission self-sufficiency, the priests looked to the California Indians for actual labor to handle tasks in farming, animal husbandry, building and construction, and domestic work. The Spanish saw the California Indians as *gente sin razon* or “people without reason,” which further translated to “uncivilized.” The Spanish treated the Indians as slave labor, utilizing physical, verbal, and sexual violence. In addition to mistreatment, the Indians were subjected to nutritional deficiencies and horrible health conditions. While the priests attempted to convert the California Indians, many resisted. During the Mission period, the California Indian population decreased by one-third prior to contact. Many of the deaths at the hands of the Missions were due to epidemics supported by the crowded conditions at the Missions, and many other deaths due to starvation, overwork, or mistreatment.
- iii. Around the same time, while southern California Indians were dealing with the Missions, California Indians in the north confronted Russians. Many Russians who settled at Fort Ross took Indian wives, and the relationship between the Indians and Russians was largely positive, especially in comparison to the Spanish and later, Americans<sup>2</sup> The main focus for the Russians was for animal pelts, and by 1841, the Russians had decimated the California sea otter populations.

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<sup>2</sup> <https://www.fortross.org/lib/41/life-at-fort-ross-as-the-indians-saw-it-stories-from-the-kashaya.pdf>

- iv. After the fall of the Mission system and the conquest of California by the United States, the California Indian population declined by at least 80 percent. The 1870 federal census for California totaled 7,241. While many California Indian deaths were due to starvation and disease, much more deaths were caused by the campaign of extermination.<sup>3</sup> This sentiment was further supported by California's first Governor, Peter Burnett who during his 1851 State of the State Address stated, "That a war of extermination will continue to be waged between the races until the Indian race becomes extinct must be expected."<sup>4</sup> In 1851, Shasta City officials offered a bounty of five dollars for every California Indian head turned in, spurring an economy for unsuccessful miners in California. The state of California also joined the policy and paid a bounty for Indian heads.<sup>5</sup>
  - v. In addition to calling for Indian heads, the California legislature passed the 1850 Act for the Government and Protection of Indians that forced many California Indians into slavery.<sup>6</sup> The Act included a vagrancy clause that made it illegal for a California Indian to be in public unless the Indian could prove he or she was employed by a white person. California Indians were also prevented from cultural burns of prairie land. These policies were in place during the time the California Indians signed treaties with the United States over designated Indian land in California. Ultimately, the California Indians were displaced from their lands and did not regain title to the lands they ceded during treaty negotiations.
- e. Brief History of Federal Indian Policy
    - i. Removal, Reservation, Treaty Period
      - 1. Treaties Generally.
        - a. Under the authority of the Treaty Clause of the federal Constitution, the President of the United States has negotiated and the Senate has approved treaties with certain tribes. There are several purposes of a treaty, which include making peace between the parties, having the tribe or tribes pledge allegiance to the United States, or extinguishing property rights to certain areas and/or reserving other areas as a homeland for the tribe.
        - b. Canon of Construction for Indian Treaties. Under special canons of construction, courts are to interpret treaties as the

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<sup>3</sup> To learn more about the campaign of extermination, UCLA historian and author, Benjamin Madley details the history in *An American Genocide*.

<sup>4</sup> [https://governors.library.ca.gov/addresses/s\\_01-Burnett2.html](https://governors.library.ca.gov/addresses/s_01-Burnett2.html)

<sup>5</sup> <https://www.kcet.org/shows/tending-the-wild/untold-history-the-survival-of-californias-indians>

<sup>6</sup> <https://www.pbs.org/wgbh/americanexperience/features/goldrush-act-for-government-and-protection-of-indians/>

Indians at the time would have understood them. *Minnesota v. Mille Lacs Band of Chippewa Indians*, (1999) 526 U.S. 172. Treaties are to be construed liberally and ambiguities are to be resolved in favor of the Indians. *Id.*

- c. Treaties as grants of rights. Treaties are a grant of rights by the tribes to the United States, not a grant of rights by the United States to the tribes. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, (1979) 443 U.S. 658. Treaties reserve all the rights or tribes not granted to the United States. Therefore, the powers of the tribes do not have to be explicitly enumerated for tribes to possess them.
- d. Congress prohibited treaty-making with tribes in 1871. 25 U.S.C. §71..

2. Federal Indian Policy in the beginning of the United States operated under the idea that the United States and the tribes were equal. From 1787-1828, Indian tribes were viewed as separate nations and the United States negotiated treaties with Indian tribes that had a strong military presence posing a threat to the new nation. During this time, laws were passed to protect against the taking of Indian land, however the laws were rarely enforced and expansion was encouraged
3. The Relocation Period started in 1828 and went until 1887. At this point, the United States was no longer a new nation and was stronger. There was no longer a policy of avoiding hostility with the Indian tribes. Removal of Indians became the dominant policy and with the passage of the Indian Removal Act of 1830, eastern tribes were forced to sign treaties that forced tribes to western lands. The issue of removal of Indians from their lands was exacerbated by the discovery of gold and the slaughter of bison, a major food source.
4. By 1887, 200 boarding schools were established with 14,000 Indian forcibly enrolled. During this time, the federal government was authorized to prosecute Indians who committed certain crimes on the reservation.
5. By 1871, Congress passed a law that stopped additional treaties with Indian tribes and the federal government no longer saw Indian tribes as independent nations.

ii. Allotment and Assimilation Period

1. From 1887 to 1934, Allotment and Assimilation were the new policies for Indians. The purpose of assimilation was to assimilate Indians into white society. Concurrent with assimilation, was the 1887 General Allotment Act (Dawes Act) which sought to extinguish tribal sovereignty, erase reservation boundaries, and forced assimilation. Surplus lands were sold to non-Indians and tribal culture was completely disrupted: communal life destroyed, land taken away again, and outsiders allowed to live on Indian reservations. Congress allowed Indian land to be leased to non-Indians, controlled funds that resulted from the leases, and determined when to distribute the funds
- iii. Indian Reorganization Period
  1. 1934-1953: Indian Reorganization Act of 1935 (IRA) was the change in federal Indian policy to protect the remaining Indian land base, encourage Indian tribes to adopt constitutions, and engage in self-government. The IRA has been criticized as paternalistic, ethnocentric, and insufficient.
- iv. Termination Period
  1. 1953-1968: The IRA goals were abandoned and federal policy changed again. Termination of the federal government's trust relationship with Indian tribes became the new policy with the goal of assimilation (again). Federal benefits and support services were eliminated. The 1953 Public Law 280 gave six states criminal jurisdiction over Indian reservations. In 1956, relocation programs offered job training and housing assistance to Indians who would leave the reservation for urban areas. Many tribal governments were disbanded and reservations abolished.
- v. Self-Determination Period
  1. After seeing the failures of the termination period and the passage of the Voting Rights Act, which affirmed the rights of Indians to vote in state and federal elections, a new policy for Indians emerged. In 1968, Congress passed the Indian Civil Rights Act which established civil rights for all people under tribal government jurisdiction. In 1970, President Nixon issued a new statement on Indian policy whereby he declared termination a failure and stressed the importance of the trust relationship between the federal government and tribes. He also urged new legislation to allow tribes the maximum amount of autonomy over their own tribal affairs. In support of the policy, Congress passed the following:

- a. The Indian Financing Act of 1974.
  - b. The Indian Self-Determination Act of 1975, which recognized the federal trust responsibility and directed the Bureau of Indian Affairs and Indian Health Services to contract with tribes for program that these agencies administer (education, health, and human services).
  - c. American Indian Religious Freedom Act of 1978, which preserves the rights of American Indians to practice traditional practices and religious beliefs.
- vi. Nation-to-Nation Period
  - 1. In 1994, President Clinton issued a memo to each agency of the federal government to operate “within a government-to-government relationship with federally recognized tribal governments.” 59 Fed. Reg. 22951 (1994). This policy was further supported when President Clinton issued Executive Order 13175 of November 6, 2000, which ordered agencies to engage in “regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationship with Indian tribes.” 65 Fed.Reg. 67249. The policy was further endorsed by President George W. Bush in 2002 and President Barack Obama in 2009.
- vii. Brief understanding of tribal sovereignty
  - 1. Tribes as Sovereign Governments
    - a. Domestic Dependent Nations and Inherent Sovereignty- Supreme Court case *Worcester v. Georgia*, (1932) 31 U.S. 515, states that by entering into treaties with the United States, Indian tribes sought the protection of the federal government and implicitly surrendered the full sovereignty tribes previously possessed. The Supreme Court also declared that Indian tribes are “domestic dependent nations” as a way to describe limited tribal autonomy within the federal system. *Cherokee Nation v. Georgia*, (1831) 30 U.S. 1. However, Tribes have inherent sovereignty and possess authority over their members, unless limited by federal law. *United States v. Wheeler*, (1978) 435 U.S. 313. Inherent sovereignty arises from a tribe’s status as autonomous governments predating the formation of the United States, and it does not derive from any delegated authority from the federal government. *Id.*

## 2. Creation of Tribal Governments

- a. The right to self-govern predates the formation of the United States. *Talton v. Mayes* (1896) 163 U.S. 376. This right is an inherent power and is not granted by the United States.
  - b. Tribes are not subject to the United States Constitution. As a separate sovereign, tribal nations are not subject to the restrictions on governmental action in the United States Constitution or the Bill of Rights. *Talton v. Mayes*, (1896) 163 U.S. 376.
  - c. Tribes are subject to the Indian Civil Rights Act. Congress passed the Indian Civil Rights Act (“ICRA”) in 1968 to extend most of the protections of the federal Bill of Rights to tribal governments. 25 U.S.C. §§1301 *et seq.* However, the Supreme Court has held that all actions brought to enforce the rights under the ICRA must be brought in tribal court, except for habeas corpus action. *Santa Clara Pueblo v. Martinez*, (1978) 436 U.S. 49. It should be noted that not all rights from the Bill of Rights carried over to ICRA.
  - d. Tribal Constitutions, Statutes, or Bills of Rights. Many tribes have their own bill of rights or similar provisions in their tribal constitutions or their tribal statutes. Some of the rights are broader than those found in the Constitution or ICRA.
- f. Brief History of ICWA and why created
- i. A background on Federal Indian policy and the constant pendulum swings helps with understanding the genesis of the ICWA. William Byler, Executive Director, Association on American Indian Affairs testified before Congress that, “The main thrust of Federal policy, since the close of the Indian wars, has been to break up the extended family, the clan structure, to detribalize and assimilate Indian populations. The practice of Indian religions was banned; children were, and sometimes still are, punished for speaking their mother tongue; even making beadwork was prohibited by Federal officials. The Dawes Act, The Indian Reorganization Act, P.L. 280, and H. Con. Res. 108 became the instruments of that policy. They represent some of our experiments to reform Indian family and community life.”<sup>7</sup>

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<sup>7</sup> April 8, 9, 1974 Hearing: Indian Child Welfare Program, Committee on Interior and Insular Affairs. Senate, Apr. 8, 9, 1974, p. 25..

<https://www.narf.org/nill/documents/icwa/federal/lh/hear040874/hear040874.pdf>.



- ii. This sentiment was echoed in the testimony of Evelyn Blanchard, Assistant Area Social Worker, Bureau of Indian Affairs, who stated, “As we look at the situation of services to Indian children today we must of necessity look at the history of Federal Indian relationships. It cannot be denied that the thrust of governmental programs has in many instances created conditions which have led to the destruction of Indian family life as opposed to strengthening it.”<sup>8</sup>
- iii. In the July 1976 Report on Federal, State, and Tribal Jurisdiction, Child Custody and Indian Child Welfare Statistics Survey, California’s Indian child removal and adoption statistics were as such:

“California, There are 39,579 Indian children under 21 in California. Of these, 1,507 (or 1 out of every 26.3) Indian children has been adopted; 92.5 percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is 1 out of every 219.8. There are therefore, by proportion, 8.4 times (840 percent) as many Indian children in adoptive homes as there are non-Indian children. There are 319 (or 1 out of every 124) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 366.6. There are therefore by proportion 2.7 times (270 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes or institutions.”<sup>9</sup>

“By per capita rate, Indian children are removed from their homes and placed in adoptive homes and foster homes 6.1 times (610 percent) more often than non-Indian children in the state of California. NOTE. In addition to the above figures, approximately 100 California Indian children between the ages of thirteen and eighteen attend a boarding school in California operated by the U.S. Bureau of Indian Affairs (Sherman Indian High School, Riverside, California). An additional 175 California Indian children attend BIA boarding schools in Utah, Nevada, Arizona, and New Mexico. Were these children to be added to the total above, Indian children would be away from their families at a per capita rate of 7.1 times (710 percent) greater than that for non-Indians.”<sup>10</sup>

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<sup>8</sup> April 8, 9, 1974 Hearing: Indian Child Welfare Program, Committee on Interior and Insular Affairs. Senate, Apr. 8, 9, 1974, p. 213..

<https://www.narf.org/nill/documents/icwa/federal/lh/hear040874/hear040874.pdf>.

<sup>9</sup>P. 81-82. <https://www.narf.org/nill/documents/icwa/federal/lh/76rep/76rep.pdf>.

<sup>10</sup> *Id.* p. 190.

- iv. This finding for California was not unique. Many states had similarly high rates of adoption and removal of Indian children. For adoption, the highest rate in Washington State with 740 or 1 out of every 21.6 Indian child in the state, which was 1900% higher than the rate of adoption for non-Indians. The lowest rate in South Dakota with 1,019 or 1 out of every 18 Indian child in the state, which was 180% higher than the rate for non-Indians. The highest rate of foster care in South Dakota with 832 or 1 out of every 22 Indian child, which was 2040% higher than the foster care rate for non-Indians. The lowest rate in New Mexico with 1 out of every 343 Indian child in foster care, which was 240% higher than the foster care rate for non-Indians.
1. Before Congress, William Byler, Executive Director, Association on American Indian Affairs put these numbers into context and testified in a survey of a North Dakota tribe, “of all the children that were removed from that tribe, only 1 percent were removed for physical abuse. About 99 percent were taken on the basis of such vague standards as deprivation, neglect, taken because their homes were thought to be too poverty stricken to support the children.”<sup>11</sup>
  2. Mr. Byler’s written statement notes the irony in Indian parents losing custody of their children for living on reservations by saying, “Ironically, tribes that were forced onto reservations at gunpoint and prohibited from leaving without a permit, are now being told that they live in a place unfit for raising their children.”<sup>12</sup>
  3. The report found that the United States, “pursuant to its trust responsibility to Indian tribes, has failed to protect the most valuable resources of any tribe -- it’s children.”<sup>13</sup> It also found that, “The policy of the United States should be to do all within its power to insure that Indian children remain in Indian homes.”<sup>14</sup>
  4. The report recommended the following:

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<sup>11</sup> April 8, 9, 1974 Hearing: Indian Child Welfare Program, Committee on Interior and Insular Affairs. Senate, Apr. 8, 9. 1974, p. 4.

<https://www.narf.org/nill/documents/icwa/federal/lh/hear040874/hear040874.pdf>.

<sup>12</sup> April 8, 9, 1974 Hearing: Indian Child Welfare Program, Committee on Interior and Insular Affairs. Senate, Apr. 8, 9. 1974, p. 20.

<https://www.narf.org/nill/documents/icwa/federal/lh/hear040874/hear040874.pdf>.

<sup>13</sup> *Report*. p. 87.

<sup>14</sup> *Id.*

- a. Congress should, by comprehensive legislation, directly address the problems of Indian child placement. The legislation should adhere to the following principles:
  - i. The issue of custody of an Indian child domiciled on a reservation shall be subject to the exclusive jurisdiction of the tribal court where such exists,
  - ii. Where an Indian child is not domiciled on a reservation and subject to the jurisdiction of non-Indian authorities, the tribe of origin of the child shall be given reasonable notice before any action affecting his/her custody is taken.
  - iii. The tribe of origin shall have the right to intervene as a party in interest in child placement proceedings.
  - iv. Non-Indian social service agencies, as a condition to Federal funding they receive, shall have an affirmative obligation -- by specific programs -- to:
    - (i) provide training concerning Indian culture and traditions to all its staff;
    - (ii) establish a preference for placement of Indian children in Indian homes;
    - (iii) evaluate and change all economically and culturally inappropriate placement criteria;
    - (iv) consult with Indian tribes in establishing (i), (ii), and (iii).<sup>15</sup>
- g. Given the variability in tribes, the contact with different settlers, the size in landbase, the location of tribal lands, and other varying factors, not all tribes will respond in the same way. Some tribal ICWA programs have a department dedicated to working on state ICWA cases, including verifying tribal memberships. Some tribes are part of a consortium that provides ICWA work to the tribe. Others still rely on their elected tribal leaders handle ICWA cases. Tribes are not similarly situated.
- h. Lack of funding is a key issue in Indian country. Depending on funding sources, tribes may or may not be able to support a tribal staff member to assist in ICWA cases.
- i. ICWA exists to ensure that the special political relationship between the federal government and tribes is protected. By ensuring minimum standards and requiring that child welfare agencies work with tribes, the ICWA ensures that tribes are involved with the care of their Indian children. Involving tribes affords the tribe

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<sup>15</sup> *Id.* pp. 87-88.

an opportunity to participate and share specific child-rearing practices and cultural values of the tribe.

2. Active Efforts - the measuring stick of how well County Agencies are interacting with the Tribe and family regarding the case/case plan.
  - a. Reasons for Active Efforts
    - i. Disproportionality/high rate of removal/overrepresentation in state child welfare proceedings
    - ii. Disparate treatment
    - iii. Bias/assimilation practices
  - b. Federal Source - Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have been proved unsuccessful. 25 U.S.C. Sec. 1912.
    - i. No Existing Indian Family doctrine - (81 F.R. 38778 (December 2016) 38802)(quoting “the final rule continues to clarify that there is no EIF exception to the application of ICWA. The final rule no longer uses the nomenclature of the exception, and instead focuses on the substance, rather than the label, of the exception. Thus, the final rule imposes a mandatory prohibition on consideration of certain listed factors, because they are not relevant to the inquiry of whether the statute applies. If a child-custody proceeding concerns a child who meets the statutory definition of “Indian child,” then the court may not determine that ICWA does not apply to the case based on factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her Indian parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum.)
    - ii. Why define active efforts? Inconsistent interpretation across State (and Court) jurisdictions. (See 81 F.R. 38778 (December 2016) 38813-16.)
    - iii. Parent’s fundamental liberty interest in the care, custody, and control of child does not “evaporate” simply because of loss of temporary custody to State. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
    - iv. Active efforts are the gold standard!! See (81 F.R. at 38813.)
  - c. If Active Efforts are not provided - Several remedies are available.
    - i. Invalidation/Appeal available for violations of 25 U.S.C. 1912
    - ii. Appellate Standard
      1. Substantial evidence – In re Michael G. (1998) 63 Cal. App. 4<sup>th</sup> 700, 715-716

2. Mixed question of law & fact – In re A.L. (2015) 243 Cal. App. 4<sup>th</sup> 628

3. Harmless Error

iii. Invalidation - Petition brought in “court of competent jurisdiction” - most Courts define that as the juvenile court hearing the matter.

d. Despite common belief - active efforts does not equal reasonable efforts. Now that “active efforts” is defined both in federal law and California statute, the Court should determine from the record whether the efforts made in this case comport with “active efforts” as defined by Welfare and Institutions § 224.1 (f). Those efforts, at a minimum, should consider the eleven (11) examples provided in the definition:

i. “Active efforts” means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with their family. If an agency is involved in an Indian child custody proceeding, active efforts shall involve assisting the parent, 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 shall be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child’s tribe and shall be conducted in partnership with the Indian child and the Indian child’s parents, extended family members, Indian custodians, and tribe. Active efforts shall be tailored to the facts and circumstances of the case and may include, but are not limited to, any of the following:

1. (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. (2) Identifying appropriate services and helping the parents overcome barriers, including actively assisting the parents in obtaining those services.
3. (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. (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. (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. (6) Taking steps to keep siblings together whenever possible.
7. (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. (8) Identifying community resources, including housing, financial assistance, transportation, mental health and substance abuse services, 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. (9) Monitoring progress and participation in services.
10. (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. (11) Providing postreunification services and monitoring.

e. Pre-removal

- i. Emergency Proceeding The statute treats emergency proceedings differently from other child-custody proceedings. *See* 25 U.S.C. 1922. In response to comments that reflected a lack of clarity on this point, the final rule adds a definition of "emergency proceedings." "Emergency proceedings" are defined as court actions involving emergency removals and emergency placements. (81 F.R. 38778 (December 2016) 38793.) These proceedings are distinct from other types of "child-custody proceedings" under the statute. While States use different terminology (*e.g.*, preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as are necessary to prevent imminent physical damage or harm to the child.
    1. California does require active efforts prior to initiating "child custody proceedings." (See generally Welf. & Inst. Section 319 (f)(2).)
  - ii. Initiating "active efforts" immediately, following detention (if detention is an "emergency" aka there was imminent risk of physical damage or harm.) (See Welf. & Inst. Sec. 319 (d).)
  - iii. If not an emergency, active efforts required prior to removal.
- f. Pre foster care, active efforts are to maintain or reunite child[ren] with parents, guardians and/or Indian custodian. State law requires that the Court find both

active efforts and reasonable efforts have been made and were unsuccessful. (25 U.S.C. 1912 (d); Welf. & Inst. Code § 361(e).)<sup>16</sup>

- g. Foster care placement - The statute requires a showing of active efforts prior to a foster-care placement. *See* 25 U.S.C. 1912(d). In many cases, this means that active efforts must commence at the earliest stages of a proceeding. 3881.
  - i. Case Plan design – *In re A.C.* (2015) 239 Cal. App. 4<sup>th</sup>, 641, 657
    - 1. Identify problems that lead to loss of custody
    - 2. Offer service to remedy problems
    - 3. Maintain reasonable contact with parents
    - 4. Make reasonable efforts to assist eh parents in areas where compliance proved difficult.
    - 5. *See also Patricia W. v. Superior Court* (2016) 244 Cal. App. 4<sup>th</sup> 397, 421-22 (identifying mental health issues)
  - ii. Social/Cultural Values - Active efforts must take into consideration the Tribe’s social and cultural values, service preferences and recommendations. (*See In re K.B.* (2009) 173 Cal. App. 4<sup>th</sup> 1275,1286.) In *K.B.*, the Court developed the following guideline for determining when efforts are “active” vs. “passive,” “[p]assive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts ... is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child.” (173 Cal. at 1287, citing *A.A. v. State* (Alaska 1999) 982 P.2d 256, 261).)
- h. Notwithstanding bypass - active efforts are required. (Welf. & Inst. Section 361.7)
  - i. Bypass (Welf. & Inst. Section 361.5 (b)(unless the Court finds clear & convincing evidence that reunification is in the best interest of the child.) Some examples (17 total)
    - 1. Whereabouts of parent/guardian unknown
    - 2. Parent/guardian suffering from mental disability that renders him/her incapable of reunifying even with services (competent mental health professional evidence)

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<sup>16</sup> See ICWA Information Sheet: Active Efforts and Resources (<https://www.courts.ca.gov/documents/ICWA-active-efforts.pdf>) (For additional citations on providing active efforts, see subdivision (d) of section 1912 of title 25 of the United States Code, Family Code section 177(a), Welfare and Institutions Code sections 224.1(f) & 361.7, and rule 5.484(c) of the California Rules of Court.)

3. Second removal - physical or sexual abuse
  4. Parent caused death of sibling through abuse or neglect
  5. Child is under 5 & 300 (e)(severe physical abuse)
  6. Severe physical or sexual abuse.
  7. Parent is incarcerated & clear and convincing evidence that services would be detrimental to child (weighing of factors)...
- i. Active efforts finding required at “any proceeding” involving Welf. & Inst. 300 et. seq. (among others: including 600 cases where child is 601, in foster care or at risk of foster care due to harmful conditions in his or her home, or termination of parental rights proceedings (TPR). (Cal. Rules of Ct., Rule 5.480.)
  - j. 387 Petition - 2nd Removal; Active efforts requires a higher level of support and involvement, and should require the County offer additional services and support to parents where those services were Tribal input was not adequately considered, services were not tailored to assist either parent to overcome obstacles to reunifying fully with their children, and comprehensive assessments of the family were not performed *with the Tribe* during large portions of time throughout the child-custody proceedings. By way of analogy, Welfare and Institutions § 361.5 allows for up to 24 months of services to a parent if the Court finds that reasonable services had not been provided to either parent. Id. at (a)(4). Further, the *Guidelines for Implementing the Indian Child Welfare Act* suggest that, “[i]f a child-custody proceeding is ongoing, even after return of the child, then active efforts would be required before there may be a subsequent foster-care placement.” (81 F.R. 964276 (December 2016) 43.)
  - k. At every placement. Welf. & Inst. section 361.31 (m)((m) (a record of each foster care placement or adoptive placement of an Indian child shall be maintained in perpetuity by the State Department of Social Services. The record shall document the active efforts to comply with the applicable order of preference specified in this section, and shall be made available within 14 days of a request by the child’s tribe.)
  - l. .26/Termination of parental rights
    - i. FINDING REQUIRED - County bears burden to show active efforts to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that those efforts were unsuccessful by clear & convincing evidence.
    - ii. Efforts include pursuit of any steps necessary to secure tribal membership for a child if the child is eligible for membership in any given tribe. (Cal. Rules of Ct. 5.484 (c)(2).