

VII. Intervention

A. Right of Tribe and Indian Custodian to Intervene

The ICWA and supplementary California laws have revolutionized the right of interested parties to intervene in Indian child custody proceedings by giving both the child's tribe and Indian custodian an absolute right to intervene at any point in any of the following proceedings:

- Foster care placements, guardianships, and conservatorships, if in any of these types of proceedings (whether voluntary or involuntary, temporary or long-term) the parent or Indian custodian does not retain the right to have the child returned upon demand;
- Custody awards to non-parents over the objection of parents;
- Termination of parental rights;
- Preadoptive and adoptive placements (including voluntary relinquishments); and,
- Certain delinquency proceedings.^{251, 252}

The right to intervene may be invoked at any time in a proceeding involving an Indian child, even if for the first time on appeal.²⁵³

There are no federal guidelines on the mechanism for intervention. The California Rules of Court provide that an intervention may be effected either orally or in writing, and may, but is not required to, utilize Form ICWA-040 (*Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child*).²⁵⁴ However, if the tribe does not appear by counsel, but instead appears by other designated representative, some form of written authentication (*e.g.*, tribal council resolution) must be provided to the court stating the representative's name and verifying that the representative is authorized to appear pursuant to an official act of the tribe.²⁵⁵

A tribe may choose not to formally intervene, but instead to seek the court's permission to simply participate in the proceedings, including receiving notice of and attending hearings, addressing the court, examining court documents, submitting written reports and

²⁵¹ 25 U.S.C. §§ 1903(1), 1911(c); FAM. CODE §§ 170(c), 177(a), 180(b)(5)(G)(i), 3041(e), and 8620(a)(3)(B) and (c); PROB. CODE § 1459.5; WELF. & INST. CODE §§ 224.1(c), 224.2(a)(5)(G)(i), and 224.4; CAL. RULES OF COURT, RULE 5.482(e); *see Stanley v. Illinois*, 405 U.S. 645, 657-658 (1972) (parents have a constitutional right to be a party in a child custody proceeding) and *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989) (“the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents”).

²⁵² *See* § XI of this Benchguide (“Delinquency Proceedings”).

²⁵³ 25 U.S.C. § 1911(c); FAM. CODE § 177(a); PROB. CODE § 1459.5(b); WELF. & INST. CODE § 224.4; CAL. RULES OF COURT, RULE 5.482(e); *In re Desiree F.*, 83 Cal. App. 4th 460 (2000) (the tribe may intervene at any point, including after parental rights have been terminated); *Matter of Begay*, 107 N.M. 810, 812-813 (N.M.App. 1988) (the tribe may intervene on appeal even when it did not intervene in earlier proceedings).

²⁵⁴ CAL. RULES OF COURT, RULE 5.482(e); *see, e.g., In re Alexandria Y.*, 45 Cal. App. 4th 1483, 1485 (1996) (notice of intervention by letter); *In re Crystal K.*, 226 Cal. App. 3d 655, 658 (1990), *cert. denied*, 502 U.S. 862 (1991) (notice by motion); *People ex rel. J.I.H.*, 768 N.W.2d 168, 170 (S.D., 2009) (notice by oral motion).

²⁵⁵ CAL. RULES OF COURT, RULE 5.534(i)(1).

recommendations, and performing other activities requested or approved by the court.²⁵⁶ The request to participate may also be made by use of the aforementioned Form ICWA-040. Of course, a tribe's request to participate does not negate the absolute right to formally intervene later in the proceedings. A non-federally-recognized tribe may also seek the court's permission to participate in what would otherwise constitute an Indian child custody proceeding within the meaning of 25 U.S.C. section 1903(1) if the child's tribe were federally recognized.²⁵⁷

B. Extension of Time

None of the proceedings listed above (except for the detention hearing in dependency and delinquency cases) may be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or Secretary of the Interior.²⁵⁸ If requested, the parent, Indian custodian or tribe must be granted up to 20 additional days to prepare for any such proceeding (except under the circumstances listed at California Rules of Court, rule 5.482(a)(3)).²⁵⁹

Tribes routinely request the 20-day extension as a matter of course to prepare for proceedings. The right to such an extension is a matter of both federal law and supplementary state law specifically intended to apply to the area of Indian child welfare, and in dependency cases will therefore prevail over other state law provisions of more general application which require showing of good cause for continuances in situations where a child is to be declared free from parental control.²⁶⁰ Given a defendant's right to a speedy trial, the application of this extension in delinquency cases is as yet unclear.²⁶¹

C. Access to Court Documents and Records

Every party to the proceedings listed above has the right to examine all reports or other documents filed with the court on which any decision regarding the action may be based.²⁶² Social services caseworkers typically file a report with the court before a hearing, summarizing case narratives, notes, activities, and any recommendations to the court on how to proceed. A Court-Appointed Special Advocate ("CASA") may also file a report.²⁶³ Parents, Indian custodians and tribes may find such reports useful in preparing for proceedings. In addition, access to a caseworker's actual notes may be critical when cross-examining for indications of potential cultural bias or inappropriate conclusions concerning Indian people or the requirements of the ICWA. Although this raw data may not technically be "filed with the court," courts have routinely ordered production of all relevant information when such issues have arisen.

²⁵⁶ CAL. RULES OF COURT, RULE 5.534(i)(2).

²⁵⁷ FAM. CODE § 185; WELF. & INST. CODE § 306.6.

²⁵⁸ 25 U.S.C. § 1912(a); FAM. CODE §§ 180(d), (e), and 8620(d); PROB. CODE § 1460.2(d), (e); WELF. & INST. CODE § 224.2(c), (d); CAL. RULES OF COURT, RULE 5.482(a)(1), (a)(2).

²⁵⁹ 25 U.S.C. § 1912(a); FAM. CODE § 180(d), (e); PROB. CODE § 1460.2(d), (e); WELF. & INST. CODE § 224.2(c), (d); CAL. RULES OF COURT, RULE 5.482(a)(3).

²⁶⁰ FAM. CODE §§ 7668, 7871.

²⁶¹ WELF. & INST. CODE § 352; *see* § XI of this Benchguide ("Delinquency Proceedings").

²⁶² 25 U.S.C. § 1912(c); FAM. CODE § 177(a); PROB. CODE § 1459.5; WELF. & INST. CODE § 224.4; CAL. CODE OF CIV. PROC. § 387; CAL. RULES OF COURT, RULES 5.482(e), 5.534(i).

²⁶³ WELF. & INST. CODE §§ 102(c), 104.