II. Frequently Asked Questions

A. General Questions About Indians and Tribes.

1. Who is considered an Indian?

In general, to be an Indian, a person must have some Indian blood and must be considered an Indian by his/her community. **No single Federal or tribal criterion establishes a person's status as an Indian**. Government agencies use differing criteria to determine who is an Indian eligible to participate in their programs. Tribes also have varying eligibility criteria for membership. To determine what the criteria might be for agencies or Tribes, you must contact them directly.

Indian status determinations **can be complex** undertakings, with **outcomes differing depending on the particular circumstances** surrounding an inquiry. The ICWA, a single federal statute contains multiple definitions of Indian (See Benchguide §IV.C.1.a.):

- 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 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 requires that notice be provided as required under the ICWA "*whenever the court knows or has reason to know the child may be an Indian*."

2. What is a Federally recognized Indian Tribe; how does a Tribe gain recogni tion, and why is recognition important?

There are more than 550 Federally recognized Tribes in the United States, including 223 village groups in Alaska. There are over 100 federally recognized Tribes in California. "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 government-to-government relationship. Indians must be members, i.e., "citizens" of a tribal government in order to be subject to many of the special laws governing Indians and tribes.

In the early 1980's the Bureau of Indian Affairs adopted regulations which require periodic publication of a list of recognized tribes in the Federal Register. The list must be published once every three years, with the most current list generally available through the BIA. The most recent list of federally recognized tribes is published in 65 Fed. Reg. 13298 (March 13, 2000). The regulations (which continue to evolve) also establish a procedure for "unrecognized tribes" to petition for recognition. 25 C.F.R. Part 83. In recent years "federally recognized" has commonly come to mean that a tribe is included on the Part 83 list. A Tribe can gain recognition (have their status as a tribe acknowledged or restored) by successfully petitioning under the regulations, or in some cases by securing status clarification from the Bureau through other means, through litigation or through legislation. See Benchguide § IV.C.1.b. for a discussion of the unique history of tribes in California.

3. Who governs an Indian Tribe and how does a Tribe take formal action?

Courts often struggle with issues that have at their core, this question. The question may arise in a variety of contexts, such as:

a. How is a court to determine if a non-attorney is a valid representative of a tribe?
b. How does the court know if someone is considered an expert by a tribe?
c. How does the court know if a tribe approves a placement?

Most tribal governments are organized democratically, that is, with an elected leadership. The governing body is generally referred to as a "council" and comprised of persons elected by vote of the eligible adult tribal members. The presiding official is the "chairperson," although some tribes use other titles. An elected tribal council, generally operating pursuant to a Tribal Constitution and recognized as such by the Secretary of the Interior, has authority to speak and act for the tribe and to represent it in negotiations with Federal, State and local governments. Most formal tribal council action is reflected in council meeting minutes and corresponding resolutions and ordinances or tribal statutes. **Resolutions** will commonly confirm a tribal action or designate an official with authority to represent the tribe for designated purposes. (For a common form of a tribal resolution, see Benchguide §VIII.H.) The form of tribal governmental organization and the procedures and processes followed by tribes may vary. However, tribes are governments. Upon inquiry, the tribe can clarify what the particular processes of its government are.

B. Questions about an Indian child's Best Interests

4. The Act requires the best interests of Indian children be protected. Is the best interest standard established by the Act the same as for non-Indian children?

No. The two purposes of the Indian Child Welfare Act - to promote "the 'best interests of Indian children' and the ... 'stability and security of Indian tribes and families' - are intertwined" with the underlying premise being that "**it is in the best interest of an American Indian child that the role of the tribal community in the child's life be protected.**" See 25 U.S.C. §1902. The Indian child has an interest in his or her tribe that Congress has sought to protect by, among other things, the imposition of minimum federal standards, in order to assure that cultural bias and misunderstanding does not adversely impact an Indian child's relationship with his or her Indian family and tribe. What the Act attempts to do is to eliminate biased subjectivity by imposing minimum standards for state court proceedings. As a matter of federal law, if these standards are met, the best interests of Indian children will be advanced. If they are not, then the action is not in the best interest of the Indian child regardless of the belief of the state court judge to the contrary. This approach was formally adopted by California in 1999, with passage of AB 65. The bill, codified in Fam. Code §7810 and Welf. & Inst. Code §§305.5 and 360.6, directs the courts to strive to promote the stability and security of Indian tribes and families and to comply with ICWA in all Indian child custody proceedings as specified by the Act.

5. What is the effect and importance of keeping half-siblings together when they may have different Indian heritages; or when some may be Indian children and others not? May the court consider the needs of the children to stay to gether over the interests of the tribe in a particular Indian child?

The Act establishes a "good cause" standard for both transfer of jurisdiction and for application of placement preferences. To the extent the needs of the Indian child present good cause to deny transfer to tribal court or placement in accordance with the preferences in the Act, the needs can be accommodated. However, in applying the good cause standard, a court should carefully bear in mind the likely outcome of the proceeding. In situations where children may ultimately be split up and adopted out because reunification has failed, no objective that advances the interests of the Indian child will be met by failure to apply the protection set forth in the Act.

As well, as discussed above, *it is misguided to view the interest of the tribe as opposed to those of the child*, and to view the application of the Act as only in the tribe's interest. The Indian child has an interest in his or her tribe that Congress has sought to protect. It is important to keep this in mind. It is the child's political status that allows application of different laws and that requires adherence to those laws, even though other family members may not be entitled to similar rights or protections.

6. Why apply the Act if the child has always lived with a non Indian parent and had little or no contact with their Indian heritage or tribe?

Congress found that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the *essential tribal relations* of Indian people *and* the *cultural and social standards* prevailing in Indian communities and families." 25 U.S.C. §1901(5).

This finding sets forth two important but distinct considerations that underlie the provisions of the Act and the federal best interest standard, and that render application of the Act to all Indian children important.

a. Cultural considerations.

- Concern for tribal culture and heritage are relevant to a proper application of the Indian Child Welfare Act. See, 25 U.S.C. §1912, §1915. (Assessment, treatment and placement standards require adherence to cultural dictates.)

- However, the Act is not simply an effort to strengthen Indian culture.

b. Political status. The Act acknowledges a *special relationship* between tribes and the federal government and seeks to protect *essential tribal relations.*

- The nature of these relationships, both between tribes and the federal government and between tribes and their members, are premised on more than mere cultural considerations.

- Indians as members of tribes are not simply separate racial or cultural groups, but also separate *political* groups. Indian tribes stand in a government to government relationship with the United States. An Indian child is a "citizen" of a tribe and entitled to the incidents of that status as determined both by the laws of the federal

California Judges Benchguide - The Indian Child Welfare Act, © 1998, 2000 California Indian Legal Services

government and the tribe. The Act is very much concerned with these legal/political relationships.

As U.S. citizenship is significant to a U.S. citizen, even one residing outside the United States, so Indian status and a relationship with one's tribe, is important to and in the best interest of an Indian child.

7. Under the ICWA Indians are treated differently than anyone else. Why is this not a violation of equal protection?

The Constitution of the United States establishes principals that require equality under the law. However, Indians are subject to many laws that apply only to Indian people. The principle case establishing the permissibility of this situation was a case involving laws allowing Indian employment preferences.

Indian employment preference means discrimination in favor of Indians. Why is this permitted? A group of non-Indian BIA employees asked this question in 1974. Their case, Morton v. Mancari, was presented to the U.S. Supreme Court. *Morton v. Mancari* (1974) 417 U.S. 535. There, the judges unanimously agreed that Indian Employment Preference is acceptable because of the unique nature of Indians and tribes.

> (Indian employment preference) does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government. . . The preference, as applied, is granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.

What makes tribes so special are political facts, not racial or cultural. A tribe is an ethnic group - - a cultural entity - - but also has the political right to self-government. Statutes passed for Indians may have incidental benefits of advancing Indian religion, culture, race, etc. However, they survive challenge because they are not based on these impermissible criteria, but on the unique relationship between tribes (as political entities) and the federal government.

C. Questions About Confirming a Child's Indian Status

8. How is the court to know if a child is an Indian and what is the court's obligation to determine an Indian child's status?

Indian status determinations can be very complicated. For this reason, the ICWA attempts to create a situation in which tribes, and in their absence, the Bureau of Indian Affairs (BIA), have the opportunity to determine if a child is an Indian. In the first instance, the Act does not require the court to make a final determination. Rather, if the court knows or has reason to know that the child is an Indian, then notice to the tribe(s) and BIA is required. Reason to know may involve a number of factors discussed at length in Section IV. E of the Benchguide. The Rules of Court impose an affirmative duty on the court to make inquiry in juvenile dependency cases. As well, failure to properly identify an Indian child and follow the Act, subjects the proceeding to invalidation.

Because Indian status determinations are complex, in juvenile cases, the California Rules of Court distinguish between children who may simply be of Indian descent, and Indian children, that is, children that may meet the definition of Indian set forth in the Act. When a child is simply of Indian descent, all that is required is notice to the Bureau of Indian Affairs and further inquiry. However, whenever the court has reason to believe a child may be *Indian*, that is, *a member or eligible for membership in an Indian tribe*, the rule specifies that the court should proceed in accordance with the Act. For cases that may involve Indian children, the rule essentially creates a presumption, thereby providing a basis for treating the case as an Indian case, in the absence of a definitive response from tribes or the Bureau of Indian Affairs. In this manner, if the minimum standards are complied with, then the case will not be subject to invalidation when it is later confirmed that the child is Indian. (See, California Rules of Court, rule 1439(e).)

9. How does the court find out the address of the tribe and if a child is enrolled?

23 C.F.R. §23.12 requires an annual publication in the Federal Register of the name and address of designated tribal agents for service. A current list of such agents is required to be available through the Bureau of Indian Affairs (BIA) Area Offices. Unfortunately, the list is not regularly published. Nevertheless, current addresses of tribes can generally be provided by the relevant BIA Area Office. In California, the Sacramento Area Office, can either provide the necessary address or assist in identifying the proper Area Office to call to obtain a tribe's current address.

In addition the local child welfare agency has access to tribal addresses via the Case Management System\Child Welfare System (CMS\CWS). This system lists the tribes, the addresses, the phone numbers and the name of the individual designated for service.

To determine if a child is enrolled in a tribe, one must generally contact the tribe. Tribes vary in their level of development and in their ability to provide an immediate answer. The law distinguishes between enrollment and "membership or eligibility for membership." FORMAL ENROLLMENT IS *NOT* REQUIRED IN ORDER FOR THE CHILD TO BE A MEMBER OR ELIGIBLE FOR MEMBERSHIP IN A TRIBE.

10. What if the questions regarding whether the child may be an Indian child have been asked, with a consistent negative answer, until it is time to terminate reunification services, at which point tribal membership is confirmed? Do we have to start all over again? Or, do we assume a tribe has been identified by a party, and notified, but determined that the child is neither a member nor eligible for membership? The party then identifies a different tribe as a possible source of membership. How many times must the court pursue this?

The notice requirements of the Act are triggered when the court knows or has reason to know a child may be an Indian. There may be factors other than a party's response that suggest a child may be Indian. Certainly, a mistaken answer or a negative answer given in an attempt to conceal Indian status, does not defeat application of the Act. Still, if a court has no reason to know a child is Indian, there is probably no violation of the notice requirement.

Other minimum federal standards, aside from notice, apply when an Indian child is involved in the case, whether or not the court is aware of the child's status. If these minimum standards are not complied with, the child, the parent, the Indian custodian or the Tribe may petition to invalidate the proceeding. The Tribe and Indian custodian may intervene at any point in the proceeding, including intervening late in the

proceeding to seek invalidation. If a case is invalidated, the basis for the invalidation would impact what must happen in the case and whether a court must "start over." See, *In re Desiree F.* (2000) 83 CA4th 460, 475. [The failure to give the Tribe notice as required by ICWA requires that we invalidate those juvenile court orders to which the Tribe objects."]

Because Indian status determinations are complex, in juvenile cases, the Rules of Court specify that the court should proceed in accordance with the Act whenever they have reason to believe a child may be Indian, that is, a member or eligible for membership in an Indian tribe and the child of a tribal member. The rule provides a basis for treating such case (as distinguished from cases where there is only a suggestion of Indian ancestry) as an Indian case. In this manner, if the minimum standards are complied with, then the case will not be subject to invalidation at such time as it may later be confirmed that the child is Indian.

D. Questions about the Minimum Federal Standards for State Courts

11. To which child custody cases does the ICWA apply?

The ICWA does not contain a definition of "custody" per se. Under its definition of "child custody proceeding", the Act specifies the types of custody cases to which it applies and to which types of custody cases it does not apply. The *focus is not on what a proceeding is called, or whether it is a private action or an action brought by a public agency, but on whether the proceeding meets a definition set forth in the Act*. 25 U.S.C. §1903(1).

a. Does the Act apply to private (probate) guardianships, private adoptions, or other proceedings involving child custody where children are not abused or neglected?

The Act covers any child custody proceeding that meets the definitions of foster care placement, pre-adoptive placement, adoption or termination of parental rights. Foster care placement is defined to mean *any* temporary placement where the child need not be returned upon demand, and includes placement in a foster home or institution or the home of a guardian or conservator. This clearly includes probate guardianships. Likewise, the definitions of adoption and termination of parental rights reference *any* proceeding resulting in adoption or termination of parental rights. This would include family court actions.

b. Does the Act apply to custody disputes between parents?

By its terms, the Act does NOT apply to all cases involving custody. The Act expressly excepts **custody disputes <u>between parents</u> in <u>divorce</u> proceedings,** and placements based on criminal acts.

While marriages in California are ended by dissolution and not "divorce," the Act is clearly **<u>not</u>** applicable to a custody dispute between parents in a dissolution action, a proceeding involving termination of a marriage. However, a dissolution proceeding may be covered if a third party seeks custody. See Benchguide, §IV.B.3. It is unsettled whether the ICWA applies to family law custody disputes between parents who were never married. To the extent such proceedings are like divorce cases, the Act probably does not apply. However, it has been held to apply to other types of proceedings, such as termination of parental rights, even when the action is between parents.

c. Does the Act apply to Welf. & Inst Code §602 proceedings?

By its terms, the Act does NOT apply to all cases involving custody of an Indian child. The Act expressly excepts **placements based on an act which, if committed by an adult, would be deemed a crime.** Hence, proceedings under Welfare and Institutions code §602 (delinquency cases) are not subject to the Act when placement is based on a criminal act. However, not all California delinquency cases involve removals based on criminal acts. (Remember, the focus is not on what a proceeding is called, but on whether the proceeding meets a definition set forth in the Act.) 1999 changes to California law make it clear that some removals in delinquency cases are "placements" which meet the requirements for federal foster care funding, in that they are made for the child's welfare after reasonable efforts have been made to prevent the need for removal of the child from his or her home. (See, e.g., Welf. & Inst §636.) In effect, the findings required to qualify the placement for federal foster care funding, also bring the proceeding within the federal definition of child custody proceeding covered by the Indian Child Welfare Act. The source of funding brings other requirements as well, including permanency planning requirements and the option of terminating parental rights. Termination of parental rights is, of course, a proceeding subject to the Act. Finally, California law now allows the granting of guardianships in delinquency proceedings. The granting of a guardianship is not limited to "placement" cases. Guardianship falls within the Act's definition of foster care placement and is covered by the Act. Given the Act's express exclusion of placements based on crimes, it is unlikely that all delinquency proceedings are brought within the Act's scope simply because any such proceeding could lead to guardianship. However, at such time as any delinquency case moves to guardianship, the proceeding would, at that point, be subject to the Act.

12. How can the court determine if proper notice has been given?

There are specific steps prescribed in the ICWA and further clarified in the Guidelines for State Courts, the California Rules of Court, rule 1439, and in California Department of Social Service Regulations. Notice must be sent by registered mail, return receipt requested to the child's parents, tribe(s), Indian custodian **and** the Bureau of Indian Affairs (BIA). Information to be included in the notice is specified in detail, *including notification of a right to intervene*.

Filing of proof of service, including the return receipt and the written notice, would allow the court to assure that notice is procedurally accurate.

An inquiry of the parties should also be made in an attempt to determine whether the proper tribe has been noticed. This is particularly important where there may be multiple tribes or where a child is not enrolled in a tribe but may be eligible for enrollment. If the identity of the child's tribe(s) is known, notice served only on the BIA is not sufficient. Notice must be provided to both the BIA and every tribe in which a child is a member or eligible for membership. Alternatively, if the court has reason to know the child is Indian but has a record to show it does not have reason to know who the child's tribe is, notice to the BIA is sufficient to meet the notice requirements of the Act. The court can then proceed to apply other provisions of the Act.

If the court has reason only to know that the child may be of Indian heritage, as opposed to a member or eligible for membership in an Indian tribe, all that is required is notice to the BIA and further inquiry. (Cal. Rules of Court, rule 1439(e).)

13. What if a petition is filed, but neither detention nor removal is recommended or contemplated? Should the tribe still be noticed?

California Rules of Court, rule 1439(f)(5) requires that "notice shall be sent whenever there is reason to believe the child may be an Indian child, and for every hearing thereafter unless it is determined that the child is not an Indian child." California Department of Social Services Regulations also require compliance with ICWA notice requirements at the time the petition is filed. This is consistent with the purpose and intent of the Act.

Even if removal is not recommended, notice is appropriate to ascertain other relevant determination, such as whether the state court has jurisdiction of the case and to inquire about culturally relevant services. For example, it is possible that the child may be a ward of the tribal court and therefore in that court's exclusive jurisdiction.

14. When may a tribe intervene in a case? *Can the tribe intervene between a .26 termination of parental rights and the adoption? After the adoption? If a tribe had proper notice at jurisdiction and failed to respond or intervene, may it do so at the .26?*

A tribe may intervene "at any point in the proceeding." 25 U.S.C. §1911(c). A tribe may also petition a court to invalidate a proceeding conducted in violation of designated provisions of the Act. 25 U.S.C. §1914. Hence, a tribe could intervene via a petition to invalidate. Finally, even when parental rights have been terminated, the Act still applies and requires compliance with placement preferences. Tribes may have a right to intervene under the Act to enforce placement preferences. Even in voluntary adoptions, California case law allows for permissive intervention for this purpose.

15. What is the tribe's role in a state court proceeding, and who can appear in court on behalf of a tribe?

If an Indian child is involved in a proceeding covered by the Act, the Act applies, whether or not the child's tribe opts to become involved. A tribe may choose to participate in a state court proceeding in several capacities:

- A tribe may petition to transfer the case to a tribal forum.

- The child's tribe may, without intervening, exercise rights granted under the Act to alter the minimum federal standards, which the state court must then follow. (Examples include altering placement preferences by resolution, and re-defining various definitions contained in the Act that reference tribal law or culture.)

- The child's tribe has a right to intervene as a party at any point in an Indian child custody proceeding covered by the Act. An intervening tribe may fully participate as a party to a proceeding.

- A tribe may provide evidence and testimony.

- Many tribes operate child and family service programs. Representatives of these pro grams may be available, not as a representative of the child's tribe, but as support service providers. Depending upon how the tribal program is designed, service provides may be available in cases involving Indian children from other tribes.

Case law and rules of court for juvenile court authorize non attorneys, as well as attorneys, to appear on behalf of tribes. Tribes may clarify the authority of a tribal representative via resolution or other appropriate documentation. See Benchguide §VIII.F. for forms designating tribal representatives.

16. We have very few Indian cases, and therefore we have no readily available "experts." How do we determine who can qualify?

California Evidence Code section 801 allows experts to offer testimony in the form of an opinion when the opinion is "related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." There are many issues that may arise in an Indian child custody proceeding where the testimony of an expert may be appropriate. Because the Act involves tribal law and Indian standards, not subjects within the common experience of most state court judges, any issue involving such matters, for example placement assessments under §1915, may benefit from expert testimony. However, there are mandatory findings that must be made where expert testimony is particularly appropriate or required. These include the services requirements of §1912(d) of the Act (active efforts to provide services to prevent break-up of the Indian family), and the expert witness requirement of §§1912(e) and (f) (expert testimony that continued custody is likely to result in serious emotional or physical damage to the child.)

A "qualified expert" is meant to apply to a person with expertise beyond the normal social worker qualifications. Persons likely to meet the requirements of a qualified expert include:

a. A tribal member knowledgeable in family organization and child rearing;

b. A lay expert with experience in Indian child and family services and a knowledge of the social and cultural standards of the child's tribe;

c. A professional person with substantial education and experience working with Indian families and familiar with Indian social and cultural standards, particularly those of the child's tribe; or

d. A professional person.

Standard rules of evidence apply to qualifying experts. To meet ICWA burdens, the court should look for testimony from a witness who can inform the court about culturally appropriate interpretations of behavior. The Tribe, the Bureau of Indian Affairs, and Indian organizations can aid in identifying "experts."

E. Questions about Tribal Courts and Jurisdiction

17. What is the extent of tribal intervention with regard to jurisdiction and conflicts of law?

The ICWA lays out a jurisdictional scheme that provides for exclusive and referral tribal jurisdiction under designated factual circumstances. Case law establishes that concurrent jurisdiction also exists. As appropriate, a tribe may seek transfer of jurisdiction to a tribal forum. In a tribal forum, tribal law applies. Tribes are not subject to the minimum federal standards established by the Act for state court proceedings. In state proceedings, mandatory minimum federal standards are prescribed. Under the Su-

 © 1998, 2000 California Indian Legal Services

premacy Clause of the U.S. Constitution, these standards must be applied even if they conflict with state law. These standards may by their terms be varied somewhat by tribal action (e.g. tribal variation of the definition of extended family). Such actions must be recognized by state courts. Additionally, the Act resolves many potential conflicts problems by specifying that the state or federal standard that provides the highest level of protection to Indian families is to be applied.

18. If the matter is transferred to a tribal court, does the state court dismiss its petition? If the tribe is in another state, does the Interstate Compact on the Placement of Children apply?

Once a case is transferred to a tribal court, it would be appropriate for a state court to dismiss its petition. If the state court transfers the proceeding, it should forward its court file and all available information to the tribal court. *Guidelines*, §C.4.(d). Before transfer, the Guidelines suggest written communication between the state and tribal court systems to confirm that the tribal court will accept transfer. This obviously should occur prior to the state court forwarding the case file. *There is no standard procedure for accomplishing transfer*. Discussions may be in order to determine how costs associated with the transfer will be apportioned and how physical custody of the child will be transferred. Finally, depending on the facts of the case, particularly if there is a need for a transition period, concurrent jurisdiction may be appropriate to allow the child access to necessary financial resources.

As a general matter, tribes are not subject to the Interstate Compact on the Placement of Children. A state court should consult with the particular tribal court involved.

19. Can the state court transfer to the tribal court without the tribe's permission or specific request? If the matter is transferred to a tribal court how is the child to be transported?

Some tribes, in states where jurisdiction is not otherwise vested in the State by Federal law, have exclusive jurisdiction over child custody proceedings involving an Indian child who resides or is domiciled within the reservation of such tribe. Where there is exclusive tribal jurisdiction, a state court would need to dismiss or transfer a child custody case involving an Indian child. This would not be contingent upon a request of the tribe. California is a Public Law 280 state and has concurrent jurisdiction.

Except in situations involving exclusive tribal jurisdiction, the ICWA makes transfer "subject to declination by the tribal court of such tribe." 25 U.S.C. §1911(b).

Details on transport of a child whose case is transferred to tribal court should be arranged in consultation with the particular tribe involved, as systems will vary among tribes.