DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, California 95814

September 7, 2004

ALL COUNTY INFORMATION NOTICE NO: I-43-04

REASON FOR THIS TRANSMITTAL
[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[x] Initiated by CDSS

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
CHIEF PROBATION OFFICERS
CALIFORNIA INDIAN TRIBES

SUBJECT: THE INDIAN CHILD WELFARE ACT/FREQUENTLY ASKED QUESTIONS

REFERENCE: All County Letters 01-85 (dated December 14, 2001) and 95-07 (dated February 9, 1995)

The purpose of this All County Information Notice is to provide clarification regarding the requirements of the Indian Child Welfare Act (ICWA) [Public Law 95-608, November 8, 1978 (25 U.S.C. section 1901 et. seq.)] and the importance of compliance with the Act. The proper implementation of the ICWA is paramount in maintaining Indian children safely within their community and preventing the breakup of Indian families. Additionally, this Notice responds to frequently asked questions received by the California Department of Social Services (Department) regarding the ICWA.

PURPOSE

The ICWA was created to stem the disproportionate number of Indian children placed and adopted out of their Indian communities without input from their tribe with resulting emotional injury and cultural loss to the child and damage to the integrity of tribal survival. The ICWA, as official United States federal law, sets forth two purposes: to promote the best interest of Indian children and the stability and security of Indian tribes and families. The policy embodied in the Act is 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.

MINIMUM STANDARDS

ICWA imposes minimum federal standards for state child custody court proceedings, which include voluntary and involuntary foster care placements, termination of parental rights, and pre-adoptive and adoptive placements involving Indian children. Key elements of these standards include:

- An Indian child, for purposes of the ICWA, means any unmarried person who is under age eighteen and is either (a) a member of a federally recognized Indian tribe or (b) is eligible for membership in a federally recognized Indian tribe and is the biological child of a member of a federally recognized Indian tribe.

- The Indian child's parent(s), Indian custodian **and** the child's tribe must be properly notified of pending custody proceedings. Child custody proceedings cannot proceed to hearing until at least ten court days after receipt of the notice by the parent(s), Indian custodian, and the tribe.
- Proper notice shall be written in clear and understandable language and include the following information: (1) the child's name, birthdate and birthplace; (2) the name of the Indian tribe(s) in which the child is a member or may be eligible for membership; (3) the names, if known, and current and former addresses of the child's mother, father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases, birthdates, places of birth and death, tribal enrollment numbers, and/or other identifying information; (4) a copy of the petition, complaint, or other document initiating the proceeding; (5) a statement of the right of the parents, Indian custodian, and tribe to intervene in the proceeding; (6) a statement that counsel will be appointed for parents or Indian custodians who cannot afford one; (7) a statement of the right of the parents, Indian custodian and tribe to receive, on request, an additional twenty days to prepare for the proceedings; (8) the location, mailing address and telephone number of the court; (9) a statement of the right of the parents, Indian custodian, and tribe to petition the court to transfer the proceeding to tribal court; (10) the potential legal consequences of the proceedings on the future custodial and parental rights of the parents or Indian custodians; and (11) a statement that all parties notified should keep confidential the information in the notice.
- Notice to a child's tribe should be sent to the tribe's chairperson or its designated agent for service of process. The Bureau of Indian Affairs (BIA) publishes in the Federal Register a listing of tribal leaders as well as tribal designated agents for ICWA notice. However, these lists are current only when published and often information is outdated. (See enclosed letter from the BIA.) Therefore, current tribal contact information can be found in CWS/CMS. For those who do not have access to the system, tribal information can be found on the Department's ICWA web page (www.childsworld.ca.gov – Quick Links, ICWA, Links, Tribe Listing) or by contacting the Department's ICWA Specialists. Notice must be sent via registered or certified mail with return receipt requested.
- If the identity or location of an Indian child's tribe cannot be determined, then notice shall be given to the BIA in like manner. Diligent efforts should be continued to obtain additional information regarding the child's tribal affiliation. If new information is obtained, appropriate notice is to be provided to that tribe(s).
- Clear and convincing evidence with testimony from an expert witness, is required for removal of an Indian child from his or her parent(s) or Indian custodian. Before removing Indian children from their homes, attempts must first be made to prevent the breakup of Indian families through active efforts to provide

rehabilitation and remedial services. A higher standard of proof, beyond a reasonable doubt and testimony of an expert witness, is required for termination of parental rights for an Indian child.

- ICWA specifies placement preferences that are to be followed for foster care, pre-adoptive and adoptive placements.
- Unless there is good cause to the contrary or the child's tribe establishes a different order of preference by resolution, foster care or preadoptive placement preferences shall be: 1) with a member of the Indian child's extended family, 2) a foster home licensed, approved, or specified by the Indian child's tribe, 3) an Indian foster home licensed by an authorized non-Indian licensing authority, 4) or an institution for children approved by an Indian tribe or operated by an Indian organization with a program suitable to meet the Indian child's needs.
- Unless there is good cause to the contrary or the child's tribe establishes a different order of preference by resolution, the adoptive placement preference shall be with: 1) a member of the child's extended family, 2) other members of the child's tribe, or (3) other Indian families.
- The removal of Indian children from their families and the placement of these children in foster and adoptive homes shall be consistent with the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or maintains social and cultural ties.

FREQUENTLY ASKED QUESTIONS

Who is considered an American Indian?

No single federal or tribal criterion establishes a person's status as an Indian. Government agencies use differing criteria to determine whether an Indian is eligible to participate in their programs. Each tribe establishes a protocol it uses when determining membership. To identify tribal membership, the tribe must be contacted directly. If a tribe recognizes an individual as a member, this determination is final.

Who is an Indian child as defined by ICWA?

An Indian child is any unmarried person who is under age eighteen and is either:

(a) a member of a federally recognized Indian tribe, or

(b) is eligible for membership in a federally recognized tribe and is the biological child of a member of a federally recognized tribe.

What is a federally recognized Indian tribe?

Federally recognized Indian tribes have a special legal and political relationship with the United States government as defined by the United States Constitution, Supreme Court decisions, as well as federal treaties and statutes. This relationship is referred to as a government to government relationship. This relationship is characterized as a political one between two nations; not a relationship based on a racial/ethnic classification of Native American. Congress has enacted laws that seek to carry out the government to government relationship and to ensure the sovereignty of tribes. There are more than 550 federally recognized tribes in the United States including 223 village groups in Alaska. In California there are 107 recognized tribes. California is also home to approximately 40 unrecognized tribes, and 10 tribes terminated in the 1950s and 1960s that are eligible for restoration.

How can one determine if a tribe is federally recognized?

The BIA is required to publish a list of federally recognized tribes once every three years. Because of recent litigation, accessing information directly from the BIA has been problematic. The Department maintains current tribal information in CWS/CMS and on its ICWA web page (www.childsworld.ca.gov – Quick Links, ICWA, Links, and Tribe Listing). Questions regarding current tribal information can be directed to the Department's ICWA Specialists.

Does a child have to be "enrolled" or "registered" with a tribe to be considered a member of that tribe? Who makes the determination of tribal membership?

The determination of tribal membership or eligibility for membership is made solely by the tribe. California Rules of Court Rule 1439(g) (1) states, "A tribe's determination that the child is or is not a member of or eligible for membership in the tribe is conclusive." Enrollment or registration is not necessarily required for the child to be considered a member. Each tribe may have different procedures and/or criteria for determining membership, and may change these criteria if the tribe chooses to do so. Tribal membership or eligibility may not necessarily be based on blood quantum. If a tribe indicates it recognizes a child as a member no further inquiry should be made and ICWA must be applied.

Does a child have to have an enrollment or registration number to be considered a member of a tribe?

Each tribe determines its own membership process. This process may mirror previously used methods that incorporated the use of enrollment and/or registration numbers. However, many tribes no longer utilize that method and the use of lineal descent is observed.

Should the county social worker attempt to enroll an Indian child?

If the parent(s), Indian custodian(s) or tribe requests assistance, best practice dictates that the county social worker will work in cooperation with these parties to ensure the Indian child's rights, including membership, are protected.

What kinds of cases are covered by ICWA?

A two-pronged test is used to initially review any case for ICWA applicability: 1) is the proceeding a "child custody proceeding," and 2) is the child involved an Indian child. The ICWA defines child custody proceedings as those involving foster care placements, termination of parental rights, pre-adoptive placements, and adoptive placements. It covers both voluntary and involuntary proceedings, although different sections of ICWA may apply to each.

Does ICWA apply to a custody dispute?

ICWA does not apply where the parents are involved in a custody dispute as long as custody is granted to one of the parents. If custody is awarded to any person, other than the parent, the Act will apply. If probate guardianship is being considered, ICWA may apply. Should there be an effort to terminate the parental rights of one of the parents (e.g., stepparent adoption) then ICWA would be triggered if the child falls within the definition of an ICWA child.

Does ICWA apply to delinquency cases and county probation officers?

ICWA states that it does not apply to "placements based on an act which, if committed by an adult, would be deemed a crime." Cases adjudicated pursuant to Welfare and Institutions (W&I) Code section 602 (delinquency cases) would not be subject to ICWA when placement is based on a criminal act. However, not all California delinquency cases involve removals based on criminal acts. If a ward is placed in a foster care placement (relatives, foster care, group home, or treatment facility), ICWA will apply because placement in foster care is based on the needs of the child and not based on the crime he or she committed. These placements fall within the federal definition of child custody proceedings covered by ICWA.

To the extent the policy underlying juvenile law in California remains treatment and rehabilitation of the child, the policy underlying the ICWA strongly supports tribal involvement in 602 proceedings. Accordingly, many tribes actively pursue involvement in 602 cases and make an effort to provide services and locate appropriate placements, which could include culturally appropriate treatment in an Indian foster home or services such as Indian health services.

When is notice of court proceedings provided and to whom?

ICWA requires any party to an involuntary child custody proceeding involving an Indian child to give notice to the child's parents, Indian custodian (if one exists), and tribe at the commencement of the proceeding. Notice is triggered by any suggestion ("knows or has reason to know") that the child is an Indian child. Any tribe with possible affiliation must be given notice. In many cases, more than one tribe must be given notice because of differing tribal affiliations among parents or separate bands or clans of a tribe. The notice requirements arise even where the child's Indian status is not certain. Whenever there is reason to believe that an Indian child may be involved, verification of the child's membership status must be sought first from the child's tribe. Notice to the BIA is required when the identity or location of the Indian tribe is unknown.

California Rules of Court require that notice of each hearing must be sent whenever there is reason to believe the child may be Indian, until such time as it is determined the child is not Indian.

When may a tribe intervene in a case?

ICWA states "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding" (25 U.S.C. sections 1911(c)). An intervening tribe may fully participate as a party to a proceeding. A tribe may also intervene by filing a petition before a court to invalidate a proceeding conducted in violation of designated provisions of ICWA. Even when parental rights have been terminated, ICWA still applies and requires compliance with placement preferences.

Is tribal intervention necessary to require compliance with ICWA?

If an Indian child, as defined by ICWA, is involved in a proceeding, ICWA applies and must be complied with whether or not the child's tribe chooses to formally intervene. A tribe may choose to participate in the court proceeding in several capacities. A tribe may, without intervening, exercise rights granted under ICWA to alter the minimum federal standards that the state court must then follow, e.g., defining extended family, altering placement preferences by tribal resolution. A tribe may provide evidence and testimony.

What are "active efforts" and when must they be provided?

Under ICWA any party seeking to make a foster care placement of, or terminate parental rights to, an Indian child must demonstrate that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" (25 U.S.C. section 1912(d)) and that such efforts have failed. This is different than state law, which only requires that a party seeking foster care placement of, or termination of parental rights to, a non-Indian child must demonstrate reasonable services to reunify the family. In order to meet the active effort requirement, the remedial and rehabilitative programs must take into account the prevailing social and cultural conditions and way of life of the child's tribe. All available resources should be used, including the extended family, the tribe, Indian social services agencies, Indian caregivers, and medicine people.

What is an expert witness and when must they be used?

No involuntary placement of an Indian child, outside his or her home, may be ordered until the party seeking **removal** establishes by **clear and convincing** evidence, supported by the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child (25 U.S.C. section 1912(e)). Additionally, no **termination of parental rights** may be ordered until a determination is made, supported by evidence **beyond a reasonable doubt**, including expert witness testimony, that the continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child (25 U.S.C. section 1912(f)). The expert witness must be qualified to speak specifically to the issue of whether continued custody will place the child at risk. A qualified expert witness may be:

- a member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices;
- a lay expert with substantial experience in the delivery of Indian child and family services and extensive knowledge of prevailing social and cultural standards and child rearing practices of tribes, specifically the child's tribe, if possible;
- a professional person with substantial education and experience in the area of his or her specialty; or
- 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 (added by California Rule of Court 1439(a) (10) (C)).

Do tribes have the authority to license or approve homes for placement of Indian children?

The ICWA authorizes Indian tribes and tribal organizations to establish and operate child and family services programs "on or near reservations," including a system for licensing or otherwise regulating Indian foster and adoptive homes.

Upon removal, what is county social worker's responsibility for placement?

In foster care placements, the preferences identified in ICWA - 1) with a member of the child's extended family; 2) with a foster home licensed, approved or specified by the Indian child's tribe; 3) with an Indian foster home licensed or approved by an authorized non-Indian licensing authority; 4) with an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs; or 5) as determined by the child's tribe - must be adhered to unless good cause exists not to do so.

The responsibility for determining the appropriateness of a placement for a child, including an Indian child, rests with the county social worker. If there is reason to believe that the placement would not be a safe one, the county placement worker should discuss the concern with the tribe and allow for possible correction of the issue of concern. Ultimately, the final decision and responsibility is with the county child welfare services agency. However, licensing/approval requirements (e.g., the size of the home, the number of individuals residing in the home, whether more than two children are sharing a bedroom) are **not** to be used as rationale for not placing an Indian child into a tribally-approved home.

Instances that may cause concern for the county placement worker are those that potentially place the child(ren) in situations that are dangerous or do not provide adequate protection. For example, if a child is removed from the parent's home due to substance abuse by the parent(s) that causes his or her inability to protect the child, and the tribe has indicated that it intends to place the child back with the parent(s), this would not be a safe placement for the child.

Are tribes required to use the same standards to license or approve homes as homes licensed by the State or counties? Are tribes required to use the same standards for approving relative or non-related extended family member homes as specified in the Adoption and Safe Families Act (ASFA) and Assembly Bill (AB) 1695?

ICWA states that for purposes of qualifying for funds under a federally-assisted program, tribal licensing or approval of foster or adoptive homes, which can include relative or non-related extended family members' homes, or institutions is equivalent to licensing or approval by a State (25 U.S.C. section 1931(b)). The authority to license or approve includes the authority to set standards. The relative or non-related

extended family member approval standards required by ASFA and AB 1695 are not to be applied to tribally approved homes. The only exception to this is the requirement for criminal records checks (see next question).

Are adults residing in homes licensed or approved by a tribe, including relatives or non-related extended family members, subject to a criminal records check?

Prior to a county social worker or probation officer placing a child in a tribally licensed or approved foster home a criminal records check must be completed on all individuals residing in the home over age eighteen. Tribes do not have access to the required Department of Justice (DOJ) information to conduct criminal records checks therefore these checks shall be completed by the counties. The criminal records check is to include a fingerprint clearance from the DOJ. This can be initiated by using fingerprint Live Scan technology, if available, or submission of fingerprint cards to DOJ. A check of the Child Abuse Index from DOJ will also need to be completed. A second set of fingerprints is to be submitted to DOJ for the purpose of searching the criminal records of the Federal Bureau of Investigation (FBI). If the response from the FBI is the only information that has not been received and the individual has signed and submitted a statement that he or she has not been convicted of a crime other than a minor traffic violation, the child may be placed.

To assist in the placement of Indian children with relatives or non-related extended family members a county can conduct a criminal records check through the California Law Enforcement Telecommunications System (CLETS). Within five judicial days following the CLETS check, the social worker shall ensure that a complete criminal records check, as described above, is initiated.

If the criminal records check indicates that an individual has been convicted of a crime, a child may not be placed in the home, unless a criminal records exemption is granted. The county may issue a criminal records exemption only if that county has been granted permission by the Director of the Department, pursuant to W&I Code section 361.4. To allow placement into a home licensed or approved by a tribe, the tribe may request either the county with jurisdiction over the child or the Department to evaluate the criminal exemption information and make a determination to grant or deny the request. Once a tribe has elected to have the exemption request reviewed by either the Department or the county, the exemption decision may only be made by that entity.

Can counties claim state and federal AFDC-FC on behalf of an eligible Indian child in a foster care placement made pursuant to the ICWA?

Counties may pay foster care and claim State and federal AFDC-FC for eligible Indian children in placement. These placements may include a state licensed or approved facility and any home of a relative or non-related extended family member located on or off the reservation, which is licensed, approved or specified by the Indian child's tribe and a criminal records check has been completed.

Where can I find the applicable legal references related to ICWA or tribal rights and responsibilities in child welfare proceedings?

1) 25 United States Code section 1901 et seq.
2) Welfare and Institutions Code sections 215, 272, 290.1 through 295, 297, 305.5, 306, 360.6, 361.4(f), and 10553.1
3) California Rules of Court, Rule 1410(b), 1411(i) and 1439
4) Manual of Policies and Procedures, Division 31

If you have questions or need further information, please contact Anne Smith, ICWA Specialist, at (916) 651-6031.

Sincerely,

Original signed by Patricia Aguiar

PATRICIA AGUIAR, Chief
Child and Youth Permanency Branch

Attachment