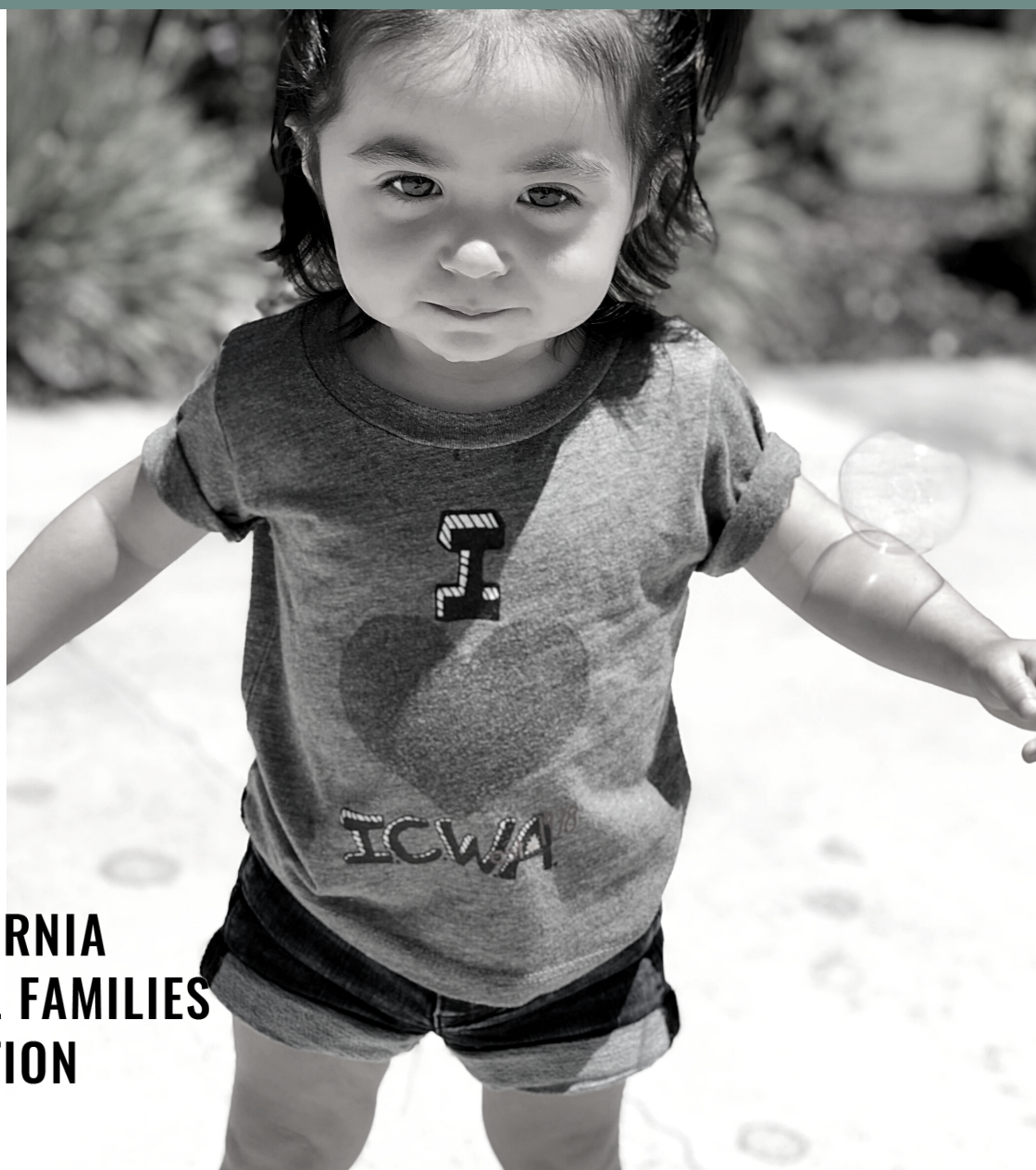


DECEMBER 2020

# TRIBAL CUSTOMARY ADOPTION (TCA) AND THE RESOURCE FAMILY APPROVAL (RFA) PROCESS: CHALLENGES AND OPPORTUNITIES



**CALIFORNIA  
TRIBAL FAMILIES  
COALITION**

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# TRIBAL CUSTOMARY ADOPTION (TCA) AND THE RESOURCE FAMILY APPROVAL (RFA) PROCESS: CHALLENGES AND OPPORTUNITIES



**CALIFORNIA  
TRIBAL FAMILIES  
COALITION**

**December 2020**

## ACKNOWLEDGMENTS

The Board of Directors and the staff at CTFC would like to acknowledge and thank the North Fork Rancheria for its dedication, support and generosity in allowing for the creation of this report and its recommendations. We would also like to express our deep gratitude to all the tribal ICWA representatives and ICWA advocates for their time, wisdom and guidance in the development of this report. Thank you for sharing your stories, concerns and insights. We will work hard to honor them through seeing the recommendations of this report realized.

## CALIFORNIA TRIBAL FAMILIES COALITION

The mission of the California Tribal Families Coalition is to promote and protect the health, safety and welfare of tribal children and families, which are inherent tribal governmental functions and are at the core of tribal sovereignty and tribal governance.

<https://www.caltribalfamilies.org/>



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TRIBAL FAMILIES  
COALITION**



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## EXECUTIVE SUMMARY

At the time of its passage in 1978, the Indian Child Welfare Act (ICWA), was landmark civil rights legislation. When California passed SB 678 in 2006 to adopt federal ICWA protections into California law, it was again a landmark moment. Unfortunately, even many years later the promise and potential of these landmarks have not been realized.

In 2017, a dedicated group of elected California tribal leaders formed the ICWA Task Force, to propel forward a unified effort in the implementation of ICWA in California. After a year of investigation, the Task Force delivered their findings regarding ICWA compliance in California to Attorney General Xavier Becerra. The mandate of the Task Force Report was clear: California must do better to protect tribes and tribal families, and to realize the promise of ICWA.

Soon after the delivery of the Task Force Report, the California Tribal Families Coalition (CTFC) was formed at the direction of tribal leaders to ensure that the recommendations of the Report did not languish, without action, leaving their promise untested. Follow through on the recommendations of the Task Force Report is critical for California tribes, as California is the epicenter of ICWA. The California courts see more ICWA appeals than all other states combined and are the home of some of the most divisive and controversial cases involving ICWA. As a state at the cutting edge of child welfare innovation and reform, California must fulfill the promises made to Indian tribes, communities and families in 1978, in 2006 with the passage of SB 678 (known as Cal-ICWA), and again with the issuance of the Task Force Report in 2017. CTFC has worked since its inception to see that the commitments made to tribes are honored and the State and counties are tested and held accountable for their failures.

This Report addresses the interplay between Tribal Customary Adoption (TCA) and Resource Family Approval (RFA), especially during the challenges of the COVID-19 pandemic. In four Listening Sessions with California tribal representatives, CTFC drilled down on issues surrounding TCA and RFA implementation. This Report started with listening- specifically listening to the tribal leaders and community on areas of practice that are wrought with misconceptions and mistakes. From the listening process, certain areas of concern emerged as points on which to focus.

## EXECUTIVE SUMMARY PT. II

Listening must be our starting point in these efforts. It is essential that the voices of tribes and communities be at the center of our progress. By first listening to tribal leaders and the community we are modeling an important component of how we achieve ICWA compliance.

From the Listening Sessions, specific areas of concern and findings emerged, including funding and tribal resources to support TCA, competence of counties to navigate the TCA and RFA processes, failures to collaborate with tribes, the need for clarity in state directives, and county compliance with home study standards. These areas of concern pointed our work to where the system is critically flawed.

From these challenges, CTFC developed remedies in the form of eight core recommendations that were vetted and sharpened with tribal representatives during a final Listening Session. While understanding the current challenges that California faces, including the COVID-19 pandemic, this report recommends a broad range of solutions, from legislative fixes, to the issuance of state guidance on key issues, increasing competency and collaboration and directly addressing the resource inequities so often at the heart of ICWA non-compliance.

As was stated in the original Task Force Report: "To achieve the promise of the ICWA...there must more than episodic rallying cries and well-meaning grant cycle initiatives; there must be a vigilant force that demands more than mere lip service to compliance."

This report attempts to honor the focus of the Task Force Report. As we look to the 45th anniversary of the ICWA, we must hold ourselves to a higher standard, test ourselves, to achieve the articulated national and state policies to protect Indian children and preserve Indian tribes. **Thank you for joining us.**

## SECTION 1: INTRODUCTION

### Legacy of Loss

California Indians have endured loss since first contact with European settlers to present. By conservative estimates, with the influx of European settlers in the 1800s, the California Indian population suffered a decline between 80%-90%. The loss continued through displacement from aboriginal land through theft, forced removal, enslavement, boarding schools, and the pendulum swing of federal Indian policies, including termination, assimilation, and self-determination. These large scale policies supported the separation of Indian children from their families, in efforts to assimilate the Indian child, and due to beliefs that Indian families were unfit. The cumulative effect of trauma from historical treatment of California Indians and tribal families led to further disintegration of tribal networks and culture loss for Indian individuals.

### Federal Response - ICWA

In an effort to redress the historical trauma caused by federal policies and the staggering rates of removal for Indian children from their homes and communities, Congress passed the Indian Child Welfare Act (ICWA) of 1978.[1] Congress found that the large scale removal of Indian children from their families and tribal communities was the result of racist child welfare practices and the flawed understanding about Indian family structures, traditions, and child rearing practices.[2] With the understanding that a tribe's greatest asset is their children, Congress set minimum federal standards to ensure Indian children remain connected to their families and tribal communities.[3] Thus ICWA mandated that all placements for an Indian child apply the prevailing cultural and social standards of the Indian child's tribe.[4]

More than 40 years after the passage of ICWA, Indian families and tribes continue to fight to educate county child welfare workers on tribal customs and child rearing practices. One such tribal custom and practice is maintaining a child's connection to his or her biological parent(s), even though the parent(s) may not be the primary custodian(s) or caretaker(s) of the child. The concept of "terminating parental rights" is at odds with tribal practices as many tribes teach that for an individual to be healthy in the future, they must know their roots and where they come from. Historically, in traditional practice, when a parent was unable or unavailable to care for their child, family members or other tribal members stepped in to care for the child without a formal or legal termination of the parent's rights. The family members or other tribal members still provided permanent care for the child, but did not sever the child's connection to their biological parent(s); this traditional practice is the basis of "Tribal Customary Adoption."

## **SECTION 2: AB 1325 TRIBAL CUSTOMARY ADOPTIONS (TCA)**

### **California Tribal Response**

In 2006, California passed SB 678 which incorporated ICWA into state law. While this was a huge step in California Indian child welfare practice, SB 678 did not assuage tensions surrounding terminating parental rights for Indian children. In 2009, AB 1325 - Tribal Customary Adoption (TCA), sponsored by the Soboba Band of Luiseño Indians, was introduced to the California Legislature. AB 1325 was signed into law in October 2009 and was effective July 1, 2010.

TCA became a unique permanency option in California for Indian children. TCA recognized both the federal and state policies that placements of an Indian child outside of their home must "...reflect the unique values of Indian culture." [5] Additionally, TCA provided a mechanism for the State to conduct an adoption of an Indian child without termination of parental rights. Unfortunately, since its passage, there has been no TCA-implementing regulations, and any state guidance on TCAs was issued 10 years ago.[6]

### **TCAs in Action**

Despite its enactment 10 years ago, state and county child welfare entities and courts continue to be confused about the TCA process. The law states that the Indian child's tribe must elect TCA as the permanent plan and, as with conventional adoptions, the case requires the requisite "adoptions-level" background checks of the home and an "adoptions home study." [7] Regarding the home study, the tribe can conduct the home study on their own or designate another agency (i.e., the county child welfare agency), and this tribal designee must complete the home study according the "prevailing social and cultural standards of the tribe." [8]

In addition to the home study, the tribe must issue a tribal customary adoption order (TCAO). Once the TCAO is issued, it is filed in the state juvenile dependency case and at the Selection and Implementation hearing (a.k.a. .26 or "two-six" hearing), the court, upon affording full faith and credit to the TCAO, authorizes the adoption to be finalized. While the tribe has already issued the TCAO, the tribal customary adoptive parents and agency must ensure that the petition to adopt the Indian child is filed with the state court. Since the case has not been transferred to tribal court for adoption finalization, the TCA must be finalized, like a conventional adoption, in state court with the issuance of a state adoption order.

## SECTION 3: RESOURCE FAMILY APPROVAL (RFA) PROGRAM

**The RFA Process provides a unified, family-friendly, and child-centered resource approval process.**

### Catalyst for RFA

The Resource Family Approval (RFA) Program was first introduced by legislation sponsored by the Child Welfare Directors' Association in 2007, with SB 1013 expanding the program. SB 1013 required that the California Department of Social Services (CDSS) implement a unified, family friendly, and child-centered resource approval process. Then in 2015, CDSS released a report titled "California's Child Welfare Continuum of Care Reform," which developed policy recommendations based on feedback from foster youth, foster families, care providers, and child welfare staff.[9] The report served as the basis for AB 403 and provided the structure and framework of the Continuum of Care Reform (CCR). The focus of AB 403 and CCR was to ensure that foster youth have their daily needs met in permanent supportive homes ("resource families") and to provide the homes with training and services to meet the child's need, thus preventing placement disruption.

### RFA Implementation

On January 1, 2017, the RFA process became effective for all out-of-home placements. All homes that were previously approved for placement, including foster homes, relative caregivers, or non-related extended family members (NREFMs), were required to convert to resource families. Prior to RFA, any time a child entered foster care, the county social worker would place the child in a foster-care level placement. If the reunification process was unsuccessful, the county would re-assess the child's placement at a higher adoption-level placement. This two-step process caused many placement disruptions for children because a family may have met the qualifications to serve as a foster-level placement, but under the stricter guidelines for adoption, many families did not qualify, resulting in a move of the child. RFA removed the two-step process as all resource families would be able to serve as foster-care placement and be able to adopt a child should reunification fail. Due to delays in the RFA process, on September 29, 2018, SB 1083 was passed to extend the foster care-RFA conversion to December 31, 2020.

### RFA Requirements

The RFA process removed the two-step placement check and front-ended approval requirements so that any resource family must pass the higher adoptions-level assessments, including health screenings, home health and safety assessments, and undergo a family evaluation. Prior to approval, resource families are also required to complete 12-hours of training. Upon approval, the resource family is required to conduct an annual update, which includes an additional 8-hours of training, and may be required to update the home health and safety assessment and background checks.

## THE IMPACT OF RFA ON ICWA CASES

**Resource families are not child-specific placements, but TAHs are Indian child-specific; RFA created new tensions between State and Tribal practices.**

### Tribally Approved Homes (TAH) and RFA

The RFA process creates a pool of pre-approved adoptions-level resource families to serve as immediate placements for a child. This process is intended to remove placement delays for a child who needs a substitute care provider. Additionally, the process is designed to prevent a child remaining in placement limbo while waiting for a specific home approval. The RFA process does not guarantee placement of a specific child.

Conversely, the TAH process is generally child-specific, as TAHs are frequently utilized when relatives step forward to serve as an immediate placement for the Indian child. As a result, it is often impractical for tribal communities to have a pre-approved pool of TAHs. Lastly, TAHs generally initiate as foster-care level placement and the TAH process closely tracks the two-level check on placement preferences as set by ICWA.

### AB 686

RFA made substantial changes to the foster care licensing process, but largely ignored the application of the Indian child's tribal culture and social standards in the approval of a home for an Indian child, as required by ICWA. As a result, AB 686 (2019, Waldron), CTFC-sponsored legislation, was introduced to amend California law requiring that "[i]n the case of an Indian child for whom the child's tribe is not exercising its right to approve a home, the county shall apply the prevailing social and cultural standards of the Indian community to the resource family approval for that child." [10] AB 686 further required CDSS to engage in a tribal consultation process to develop regulations to implement this new statutory language, such regulations remain outstanding.

### TCA Requirements under RFA

The shift in practice contemplated by RFA was meant to positively impact children in care, but since the RFA only contemplated conventional adoptions, RFA's application to the TCA process created confusion. County confusion around TCA is not new, with many county social workers unclear about roles and requirements, and specifically how the county must support a tribes with TCA. To exacerbate the issue, the only guidance on TCA has not been updated by CDSS in 10 years. Thus, when RFA front-ended the home approval process, which included a home study and adoption-level assessments, the RFA process conflicted with the TCA process where home-study and adoption-level assessments usually occur after family reunification services have been terminated.

## TRIBAL LISTENING SESSIONS

**33 tribal representatives**

**Four Regional Listening Sessions**

**Conducted by CTFC Legal Director Kimberly Cluff, and CILS Attorney Jedd Parr.**

**The Listening Sessions focused on understanding what tribal social workers and representatives encountered with both TCA and RFA processes.**

CTFC sponsored four (Zoom) Listening Sessions during September and October 2020. Each session was scheduled for three hours. Initially the sessions were to be limited to distinct geographical regions within the state (North, South, Central Coast, and Eastern Central), but due to challenges posed by wildfires and COVID-19, each was ultimately opened to anyone who wanted to attend from any region. The four sessions were attended by a total of 29 participants, including several individuals on behalf of organizations which represent groups or coalitions of multiple tribes. In total, 33 tribes were represented.





## SUMMARY OF FINDINGS AND ISSUES

**Issue 1:** Funding for Tribally-Approved Homes (TAH) and TCA Home Studies

**Issue 2:** Preference for RFA Homes Cause County Reluctance and/or Refusal to do TCA Home Studies

**Issue 3:** Application of Social/Cultural Standards to RFA Homes

**Issue 4:** RFA also Impacting TAHs

**Issue 5:** Confusion about TCA Process & Implementation

## ISSUE #1. FUNDING FOR TRIBALLY APPROVED HOMES (TAH) AND TCA HOME STUDIES



### **Multiple tribes reported the absence of funding to complete TCA home studies is a deterrent to selecting TCA as a permanency plan for their tribal children.**

A frequently raised issue during the Listening Sessions was a lack of funding available to tribes in dependency cases. Tribal representatives noted the disparate and unequal treatment of tribal social services departments in accessing funding from the state as it is common knowledge that, for example a private adoption agency, will receive reimbursement or funding. However, tribes are expected to complete the same work with no financial support from the state.

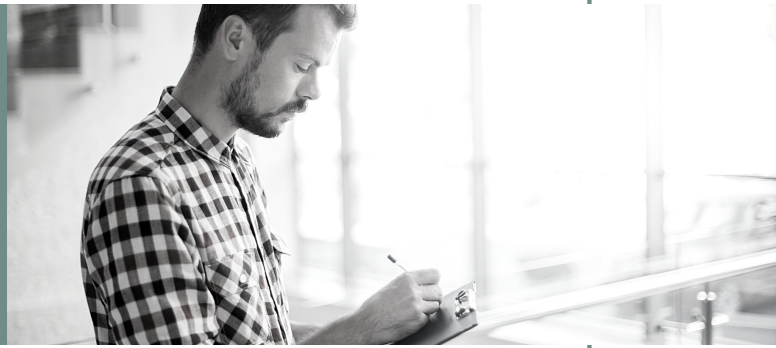
A home evaluation must include “background, safety, and health information of the adoptive home, including the biological, psychological, and social factors of the prospective adoptive parent or parents, and an assessment of the commitment, capability, and suitability of the prospective adoptive parent or parents to meet the child’s needs.”[11] To complete the TCA home assessment independently, the tribe must have authorization through SB 1460 (2012, Committee on Human Services) to access required criminal background checks and the Child Abuse Central Index.

Currently, there are only 18 tribes out of the 110 federally recognized tribes in California that are SB 1460 approved. As a result, most tribes must rely on counties in finalizing TCA home assessments.

California law requires that a tribe or its designee conduct a home study prior to finalizing the TCA placement.[12] A tribe may appoint as its designee: (1) a county adoption agency; (2) CDSS, when it is acting as an adoption agency; or (3) a California-licensed adoption agency. Of greatest concern is that current CDSS guidance states that a designee is not required to accept a tribal request to be its designee.[13]

While a tribe could request that a court compel the county to complete the requisite home study, tribes often lack legal counsel to seek redress from the juvenile dependency courts. Without legal counsel, tribes must rely on clarifying legislative amendments or CDSS guidance requiring county child welfare agencies accept designations from tribes and complete the TCA home study.

## ISSUE #2. COUNTIES ARE RELUCTANT TO CONDUCT TCA HOME STUDIES; PREFERENCE FOR RFA HOMES



Tribal representatives reported that county child welfare agencies often refuse to conduct TCA home studies when the home of a prospective tribal customary adoptive parent is an RFA home. Since the advent of RFA there has been a preference for RFA homes to avoid completing a TCA home study.

An additional example of challenges on this topic was shared by a tribal representative where a tribe completed a TCA home assessment, however a county social worker insisted that the prospective tribal customary adoptive parent obtain approval through RFA.

Conversely, tribal representatives reported that if TCA was the tribe's chosen plan, the county social workers expect the tribe to complete the TCA process on their own. One representative stated that with TCA the counties' approach is, "If you want a TCA then you have to be the ones [to do everything]." Tribes reported that once the TCA process was initiated, it felt like county social workers treated TCA as a reprieve from their caseload, as one less case requiring their attention.

Over the course of the Listening Sessions tribal representatives were unanimous that a TCA home study remains a necessary component of the TCA process, even with RFA homes. First, a TCA home study is still required to complete the TCAO. Second, depending on when the family was approved as a resource family, it is prudent for the tribe to confirm that the proposed TCA home is still appropriate.

**Example #1:** A county identified a home already approved through RFA, and did not agree with the tribe's identification of a different non-RFA home as a permanent placement through TCA. In this scenario, the county refused to conduct the home study on the basis that the Tribe designated a non-RFA home.

**Example #2:** A county simply refused to conduct a home study on a non-RFA home, even where there was no alternate home preferred by the county. This is most likely due to the ACL 10-47, which poses the question "Is an agency obligated to be a designee?", with the answer a flat "No", without any explanation or apparent statutory support.

## ISSUE #3. APPLICATION OF SOCIAL/CULTURAL STANDARDS TO RFA HOMES

**“We applied our cultural standards of knowing that people can change. We need to look at people with a lens of knowing that people have the capacity to change. How can you as a social worker believe people can't change?”**

With counties increased partiality to and reliance on RFA homes in lieu of TAH and in the TCA process, there is growing concern over the application of tribal social and cultural standards (“tribal standards”) being included in the RFA process. The ICWA and state law both require that tribal standards be applied in meeting the ICWA's placement preferences. The ICWA created minimum requirements in following tribal standards prevent another large scale loss of Indian children to non-Indian homes.

Tribal standards often deviate from Eurocentric ideals of child-rearing; where tribes frequently focus on restoration as opposed to punishment, state welfare agencies often use a criminal history in a punitive manner and to prevent placement of a foster child. A 2010 report highlighted that Native Americans are two times more likely than white Americans to be incarcerated,[14]. Clearly, high rates of incarceration do not comport with the strict RFA standards. However, tribal cultures focus on healing and restoration, putting tribal standards on a collision course with RFA standards.

A primary problem with incorporating tribal standards into RFA is timing. The RFA process is intended to create a pool of resource families that can be accessed when a child is in need of out-of-home placement. Since RFA approvals are not child-specific placements, verifying that an RFA family has been evaluated using a specific Indian child's tribal cultural and social standards is nearly impossible. Tribes noted that the RFA process is “culturally blind” and applies a one-size-fits-all set of requirements without assessing a family according to tribal standards. This challenge is further exacerbated by the fact that tribes are not monolithic and there is no way to create pan-Indian cultural and social standards when assessing resource families.

**“It's hard when children are placed in an RFA approved home which may not have anyone who's connected to your tribal community. ...Long term, how is that going to help this child? Because we know when they turn 18 they always come home or they reach out and they want to reconnect.”**

## ISSUE #4. RFA ALSO IMPACTING TAHs



RFA homes are preferred to TAHs due to pre-approvals and capacity for immediate placement. However, once an Indian child is placed in the RFA home, Listening Session participants reported that counties are reluctant to move children to a TAH, even when the RFA home does not meet ICWA's placement preferences.

Further, even when a relative is willing and able to complete the RFA process, the process often requires several months to complete. Because relatives of the Indian family are not readily approved or pre-approved by the RFA process, the Indian child is often placed in a non-relative or non-Indian RFA home at detention. By the time a relative or tribal member (preferred placements under ICWA) complete the RFA process, the child may have been in the initial placement for a significant period of time. While bonding is not a reason for deviating from ICWA placement preferences, it remains an issue for litigation when the tribe requests a change to the tribal placement. It is important to remember that both federal and state law explicitly require that meeting ICWA's placement preferences is in an Indian child's best interests.

TAHs are an important tool tribes can access to avoid placing tribal children in non-Indian RFA homes. Approving tribal homes allows the tribe to identify a family as a preferred placement before they have started the steps of RFA and allows the tribe to evaluate the home according to tribal standards. Another benefit of TAHs is that the home can be approved in a shorter timeframe than the RFA process.

Unfortunately, TAHs are not offered the same support or resources as RFA homes. Tribal representatives noted that in some counties, county social workers assume tribes will educate and support the family, even though tribes may not have the means to do so.

**It was reported that when tribal representatives request that TAH homes be allowed to attend RFA classes and trainings, some counties have denied access for TAHs and others have insisted that in order to participate in the classes and trainings the TAH will need to complete the RFA process.**



## ISSUE #5: CONFUSION WITH THE TCA PROCESS

### Confusion about the Tribe's Role



In order for TCA to be an option for an Indian child, the tribe must identify TCA as the permanent plan.<sup>[15]</sup> Additionally, the tribe or its designee must complete the home study and the tribe must complete the TCAO.

An overarching theme during the Listening Sessions was that many county social workers, either due to high turnover or non-exposure to the TCA process, are unfamiliar with working in collaboration with tribes and unfamiliar with tribal designations for completion of TCA home studies. As a result, tribes often expend a great amount of time to educate the county social workers on the TCA process.

While there were some instances where the tribe and county work well together on TCA home studies, often the positive collaboration with TCA occurred where the tribe and county already had a positive working relationship, despite confusion regarding TCA roles and responsibilities.

Further, whether tribal-county relationships are generally positive or not, Listening Session participants indicated that where county social workers are unfamiliar with the TCA process, tribal representatives often find themselves expending time and resources to educate county social workers on the TCA process. Listening Session participants noted that county social workers sometimes insist that the tribe is responsible for conducting the TCA home study, despite the tribe assigning the agency as its designee.

There appears to be a perception, likely based on state and county misconceptions about how federal, state, and tribal funding works, that tribes have access to resources to facilitate the TCA process. Tribes often are very limited in terms of resources for social services practice overall, operating with far less funding than counties.

**It is important for state and county social workers, law enforcement agencies, and judges to understand the impact on tribal social services of limited funding and resources in comparison to county or state offices.**

Often tribes utilize designees because they do not have the internal resources, with some tribal agencies being one-person operations, to conduct the home study. There is also confusion about whether a tribe can assign the county agency as a designee, when the prospective tribal customary adoptive parent's home is on tribal lands. Current CDSS guidance states, erroneously, that a county does not have to accept the tribal designation.

Tribal representatives also have difficulty with accessing county RFA home studies, reports, or findings. First, tribal representatives have trouble accessing background checks, even when families give the county permission to provide the information to tribal representatives. In cases where a home has been denied by the county, tribal representatives, despite affirming confidentiality requirements, are denied access to information surrounding the home. This means that tribal representatives often spend extra time following-up with the county, but also with the families and potential placements, especially because they are often trying to keep relationships intact across families and communities.

Tribes reported feeling pressured to select TCA as the permanent plan. While tribes are the only ones who can select TCA as the permanent plan, many county agencies assume that tribes will select TCA as the plan, resulting in confusion for the courts and caregivers. One tribal representative noted that this confusion about the permanent plan resulted in a breakdown in the relationship between the tribe and the caregiver. Relatedly, tribes feel pressured into selecting TCA as the permanent plan or else the county will move forward with termination of parental rights, in direct opposition to a tribe's belief, and breaking connections, which is detrimental for an Indian child and contrary to appellate court decisions.<sup>[15]</sup>

### What has worked for some tribes in California?

- Utilizing a template that guides the process between county and tribal workers. This template includes the step-by-step process for implementing a TCA and working with tribes through a more formalized process. This can be something referred to by county social workers so that the process remains consistent for them and for the tribes that they work with.
- Creating an MOU with the county and the tribe that is operational and reviewed on a regular basis to discuss best practices for implementing ICWA cases and TCAs. The MOU should be reaffirmed and include agreed upon protocols. Participants agreed that "manuals are not enough" and instead there needs to be a reaffirming of the relationship between the county and the tribe through review and re-assessment protocols on a consistent schedule.
- Tribal Court jurisdiction is an important support for the TCA process and often moves the process forward. In some cases, RFA designations and other recommendations or placement issues are held up in state court. One important suggestion by participants was to move toward tribal jurisdiction for all aspects from the RFA to the TCA.

## ISSUE #5: CONFUSION WITH THE TCA PROCESS

### Confusion about County Social Worker Roles

**Currently, because county social worker competence with TCA varies widely, there is tremendous variation in TCA processes across the state and even within counties.**

As part of the county social worker's duties, a concurrent planning process must include the tribe. Tribal inclusion must start at the earliest possible time in the process. Tribes are sometimes left out of early concurrent planning, which not only causes confusion but can be a burden on the families. This can also result in unnecessary repeating of efforts like home visits. When county social workers do not initiate concurrent planning, tribes are often in the precarious position of discussing a concurrent plan with the parents, which can damage the relationship between the tribe and parents. As a best practice, concurrent planning must be standard routine in every case to help remove tension and allow the parents to be authentically involved in the concurrent planning process.

### Some tribes have established tribal-county working guidelines

Established working guidelines between counties and tribes have the potential to decrease confusion and improve outcomes with TCA. Some Tribes have clarified TCA processes through the creation of a "checklist" that is shared between workers and includes an agreement for who will take on certain steps in the process like background checks and Live Scans. Other tribes have done this through an MOU with the county. However, it is important to note that tribes do not receive funding to help cover the costs of implementing these steps.

### Processes vary widely across the state and within counties

Currently, because county social worker competence with TCA varies widely, there is tremendous variation in TCA processes across the state and even within counties. For example, Listening Session participants reflected that some counties insist that tribes are responsible for all aspects of the TCA, others insist that TAHs must also be RFA certified, while other counties represent that they do not have to be RFA certified and are not eligible for any RFA affiliated classes or services.



When county social workers lack the general understanding of the TCA process, they create confusion among the parties and the court. Tribal representatives noted that often instead of addressing questions about TCA in the required Child and Family Team meetings, county social workers provide piecemeal explanations to the parties, sometimes contradicting their own colleagues. These inconsistencies often create confusion and build incorrect expectations. Often tribes are then left the task of clarifying the process and outcomes of a TCA for all involved.

## Counties can serve as tribal designees but still need to collaborate and meet TCA standards

Confusion often ensues when county practice requires a tribe to prepare a written memo or letter officially designating the county as the designee, as this requirement does not exist in California law but was included in CDSS guidance [16] which does not have the force of law. Additionally, when the county is the designee, California law requires the county to apply the prevailing cultural and social standards of the Indian child's tribe, but it was reported by participants that when tribes attempt to determine if these standards are met, they are often denied necessary access to materials compiled in conducting the home study. Lastly, it was reported that counties routinely neglect the required tribal collaboration and ignore mandates to obtain tribal approval for the home study. **If the county agency accepts the designation of being the tribal designee under California law the agency becomes responsible for conducting the TCA home study and background checks.**

## Counties sometimes pressure tribes to be responsible for the TCA process while others try to avoid the TCA process

Participants reported that some county social workers approach TCA as a way of avoiding the RFA process, pushing cases through before the tribe or families make informed decisions about permanent planning. Tribal representatives and families feel pressured to move forward with the process on an accelerated timeline. Further, tribal representatives shared that they felt the tribal norm is a focus on the potential for family healing over the long term while the county seems to focus on a 6-month timeline.

## Conflicts or disagreements can end up in court

Participants shared that when there are disagreements regarding home approval, home placements, or family histories they often result in escalating a case to a court matter or minimally having to involve legal counsel. Several participants noted that once a lawyer is involved, they and tribal interests are treated differently by county social workers, with a precipitous decline in collaboration. Examples of conflicts included: (1) a potential TAH which included household members with a CWS history that the tribe felt was resolved and thus was not relevant to the case; (2) disagreements regarding child rearing practices in an RFA designated home; (3) conflict over home improvements required by the county.

## ISSUE #5: CONFUSION WITH THE TCA PROCESS

### Court confusion about TCA Process



**In January 2013, the Administrative Office of the Courts prepared and submitted a report to the Legislature evaluating the implementation of the TCA in California. The report highlighted that 20 cases, involving approximately 23 Indian children, were finalized or pending finalization at the time of the report.[16] Despite this early progress, ten years later TCAs still pose significant challenges for the county child welfare agencies and courts.**

California law details that the court has the responsibility to afford full faith and credit to the TCAO. However, confusion remains about how involved the state juvenile court judge is in the process of issuing the TCAO.

Since state courts cannot conduct conventional adoptions without termination of parental rights, state courts are reliant upon tribal action, through the TCAO, modifying parental rights so adoptions without termination of parental rights can be ordered.

While the TCAO process supports tribal sovereignty and the right of the tribe to determine key issues for the Indian child, the process does not provide a clear route for addressing changes in elements like visitation after the adoption has finalized. Because the TCAO is provided full faith and credit by the state court this effectively converts the TCAO into a state court order, which means later modification to the TCAO must be through an action and order in state court.

In the Listening Sessions, tribal representatives articulated a need for more guidance and training on issues related to TCAs and modifying TCAOs as family circumstances evolve over the years. Further, tribal representatives felt a lack of guidance on how TCAOs can and should be enforced, as they can be caught in the middle of disputes between the birth parents and the tribal customary adoptive parents surrounding enforcement of the TCAO. Given that the TCAO has been granted full faith and credit by the state court, issues of enforcement of the court order need to be addressed in state court, requiring resources and training where confusion abounds.

## RECOMMENDATIONS

### **#1 Pass legislative amendments to reconcile conflicting TCA and RFA requirements**

In light of the Governor's executive order and public apology to California tribes, and the establishment of the California Truth and Healing Council (N-15-19), now is the time that CDSS must focus on working closely with tribes to amend the current TCA statute to resolve conflicts identified in this report between TCA and RFA that undermine the intent of both. CDSS must stand with tribes to see the identified statutory provisions are amended so that these laws continue to protect, preserve, and promote the safety and sanctity of Indian children, families and tribes.

### **#2 Prioritize development and consistent implementation of TCA regulations**

Since 2009, CDSS has been mandated to promulgate TCA regulations, but to date, no regulations have been contemplated, developed, or implemented. CDSS must promulgate then implement, by and through robust and authentic tribal consultation, TCA regulations. Implementation of TCA regulations must be consistent and across all stakeholders, county administrators and through CORE training, as soon as possible. Further, CDSS must commit to keeping TCA regulations current by vigilant attention to needed updates and edits as the landscape of child welfare, and especially Indian child welfare, evolves.

## RECOMMENDATIONS

### **#3 CDSS must provide updated guidance consistent with state law regarding TCA home studies**

Although Welfare and Institutions Code section 366.24 generally states that the tribe may conduct the TCA home study, the issue of preparing the home study is clearly in the tribe's purview. However, it is the position of CDSS that while a tribe may seek to designate a county as its designee to conduct the TCA adoptive home study, CDSS' ACL 10-47 erroneously states that counties do not have to accept the designation.

CDSS must immediately clarify and correct this issue and affirmatively state counties may not decline a tribe's request to act as the tribe's designee for the purpose of conducting the home study and associated background checks.

While California law authorizes the tribe to assign a designee to conduct the TCA home study, nowhere in the section is the tribe excluded from participating in and reviewing the home study. On the contrary, since the designee must still apply the tribe's social and cultural standards, the Legislature clearly intended for the tribe to be involved in overall collaboration, review, and finalization of the TCA home study.

### **#4 RFA Revise written directives to include requirements of AB 686**

Welfare and Institutions Code section 16519.5 was amended by AB 686 (Waldron, 2019) and became effective January 1, 2020. The RFA Written Directives must be revised to include the application of the prevailing social and cultural standards of the Indian community to all aspects of the RFA process for the placement of Indian children. The RFA Written Directives should also include guidance on the specialized requirements in the case of the adoption of an Indian child either through conventional adoption or TCA .

## RECOMMENDATIONS

### **#5: California should fund the development of tribally-specific foster parent training**

A key attribute of effective Indian child welfare practice is culturally relevant training modalities. This is especially true for training of foster parents who will have deep and lasting impacts on tribal citizens. CDSS must partner with tribes and tribal organizations to develop a culturally inclusive and tribally relevant foster parent training curriculum. This curriculum cannot be siloed in only RFA cases but must also be woven into all foster parent training and include training for tribal placements.

### **#6: Revise Written Directives to include tribally approved homes access to the same resources and information as resource families**

Tribes lack the critical infrastructure and necessary tax base to fund the provision of services to their tribally approved homes and foster families. However, tribes seek the same standards for foster families as the state, including ensuring that the tribal home is provided the necessary training and resources to provide long-term care for an Indian child without disruption. Families of tribally approved homes are eager to meet the Indian foster child's needs, but without adequate support, resources, or training, may not be able to fulfill the needs to assist the child in thriving. Tribal foster homes need equal access to resources, service providers, and support as resource families.

## RECOMMENDATIONS

### **#7: Assess legislative changes to allow tribes to access Private Agency Adoption Reimbursement Program (PAARP) funding to offset expenses in conducting home studies or issue guidance on tribes accessing PAARP**

AB 1301 (2019, Cooley) went into effect on July 1, 2020, setting new maximum amounts for adoption assessments at \$8,000.00. Further analysis should be conducted as to whether tribal social service agencies qualify as private adoption agencies. If tribes do not meet the definition of private adoption agencies, amendments to W&IC sections 16120 and 16122 may be required. If tribes meet the definition of private adoption agencies under W&IC, CDSS should issue guidance on whether tribes can qualify for PAARP funds. In general practice, FFAs write the preliminary adoption report and provide it to the county adoption worker. Currently, tribes are only writing the TCA home study and not a "preliminary adoption report" but this additional and often duplicative step could provide tribes with a major funding source.

### **#8: State must remediate key causes of tribal inequity in child welfare, like supporting tribally led initiatives for retained tribal dependency counsel**

At their core, ICWA and its progeny are remedial, civil rights statutes intended to fix past and continuing inequity. As the Governor of California faces and fixes the root causes of these inequities, for example through issuing a public apology to California tribes, and establishing the California Truth and Healing Council, it is incumbent on CDSS to step up. Tribes, especially low resourced tribes, are the only party in the child welfare courtroom without access to free legal counsel, which means inherent inequity persists. CDSS must partner with tribes to support the creation of programs that will allow all tribes to have competent legal counsel on cases involving tribal children. This support must come in the form of breaking legal and bureaucratic barriers to such programs, providing resources and partnering with tribes as such programs scale up to serve tribes statewide and become national models.

## APPENDIX

**23** Organization & Report  
Authors Bios

**24** References

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Kimberly serves as the Legal Director for CTFC. Prior to this role Kimberly served as In-House General Counsel for the Morongo Band of Mission Indians. Kimberly's legal career has focused advocacy and litigation connected to tribal economic development, ICWA, strengthening of tribal courts and governance and advocacy on legislative efforts, for example spearheading the California Tribal Customary Adoption Act.



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## THANK YOU

The work of the California Tribal Families Coalition would not be possible without the leadership and support of our member tribes.

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**DECEMBER 2020**