



TEXAS
Department of Family
and Protective Services



2021 Texas ICWA Summit



SUPREME COURT OF TEXAS PERMANENT JUDICIAL
COMMISSION FOR CHILDREN, YOUTH AND FAMILIES

Slides were created for an event held on January 22, 2021

Case Study: ICWA in Practice

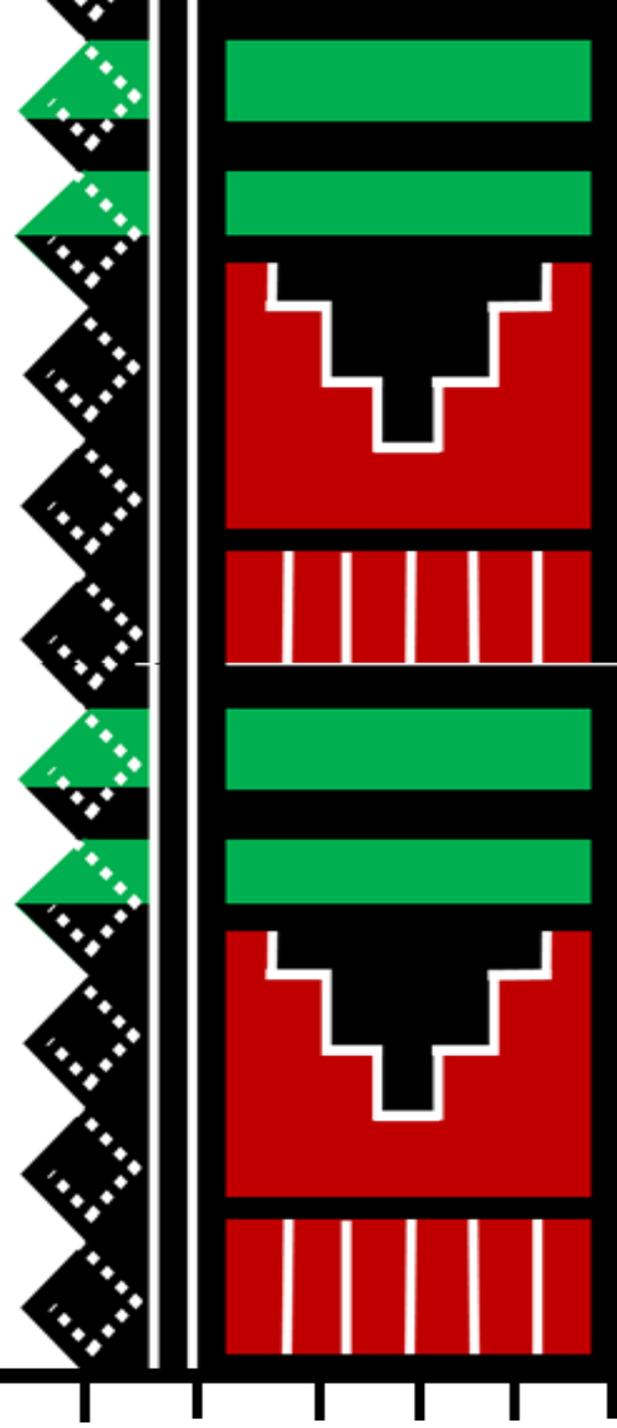
Indian Child

Welfare

John L. Williams

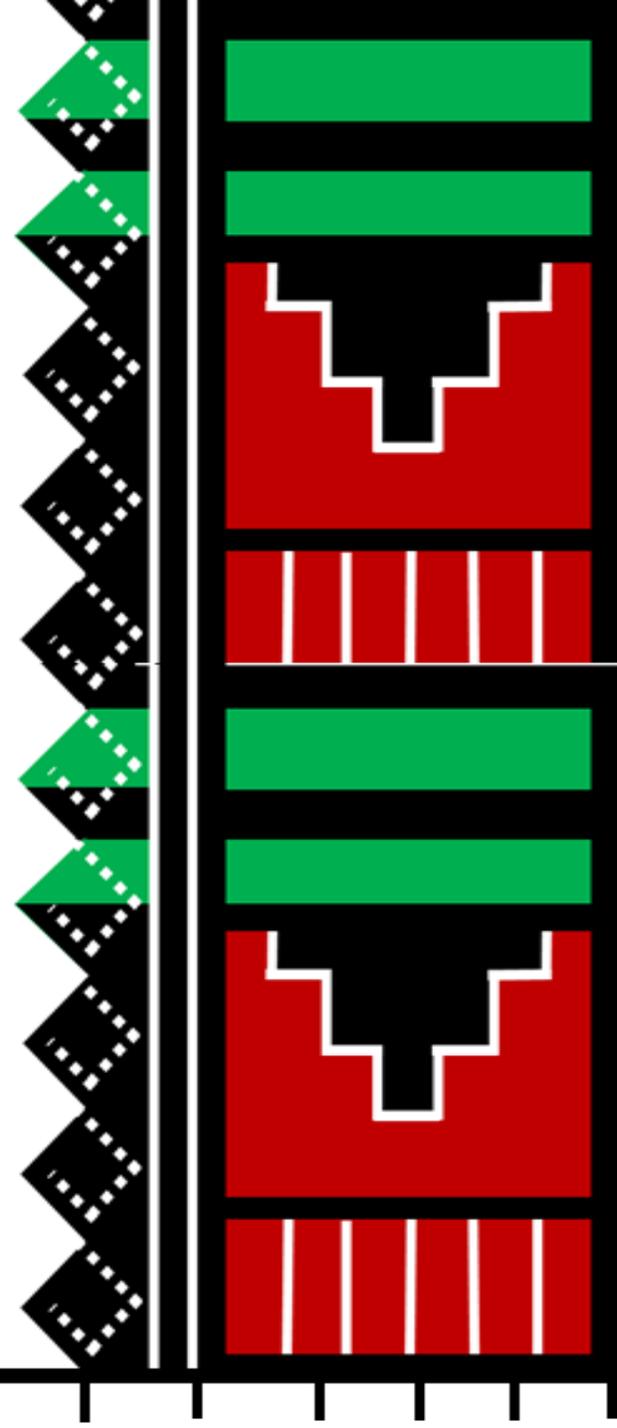
Leah Lopez, LMSW

Slide Design: MarySue Femath



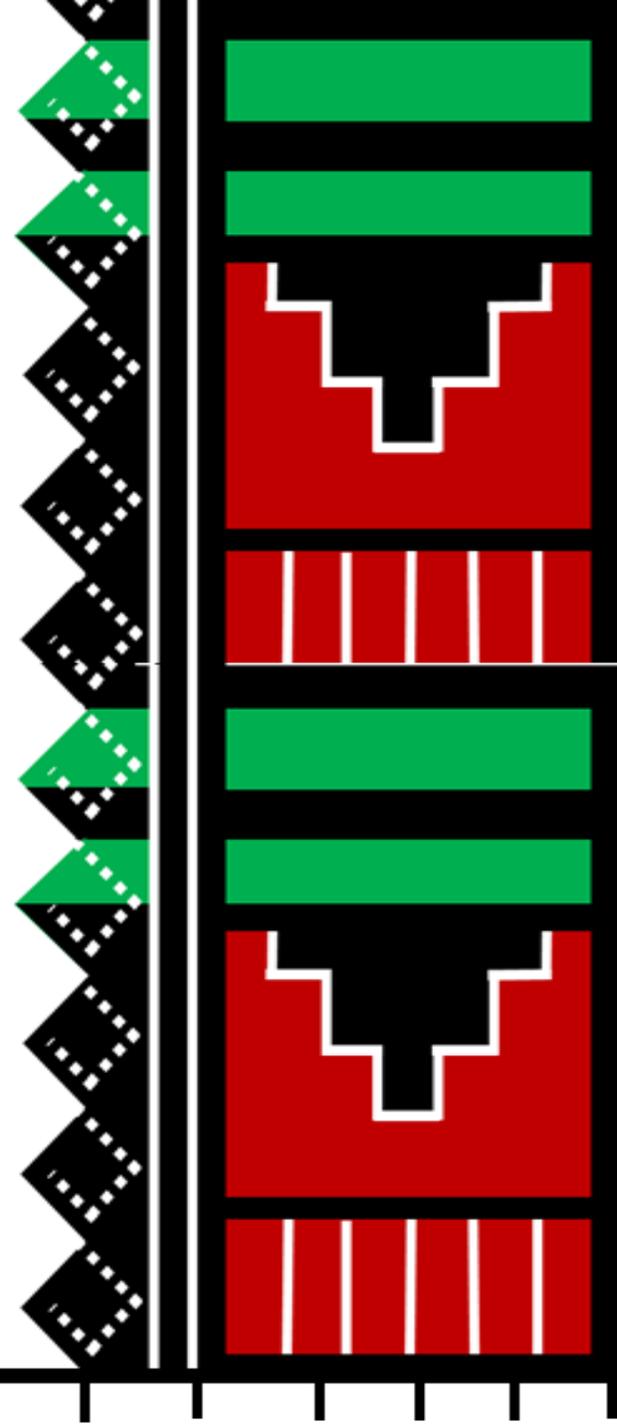
Why do we have ICWA & different standards for Native children?

1. An alarmingly high percentage of Indian families are broken up by the removal of their children from them by non-tribal agencies and placed in non-Indian foster homes and institutions
2. Agencies have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.
3. There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children
4. To protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society
5. To ensure that, when possible, an Indian child should remain in the Indian community and ensure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with a native family"



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6. Serious adjustment problems in adolescence by native children who are raised in non-native homes

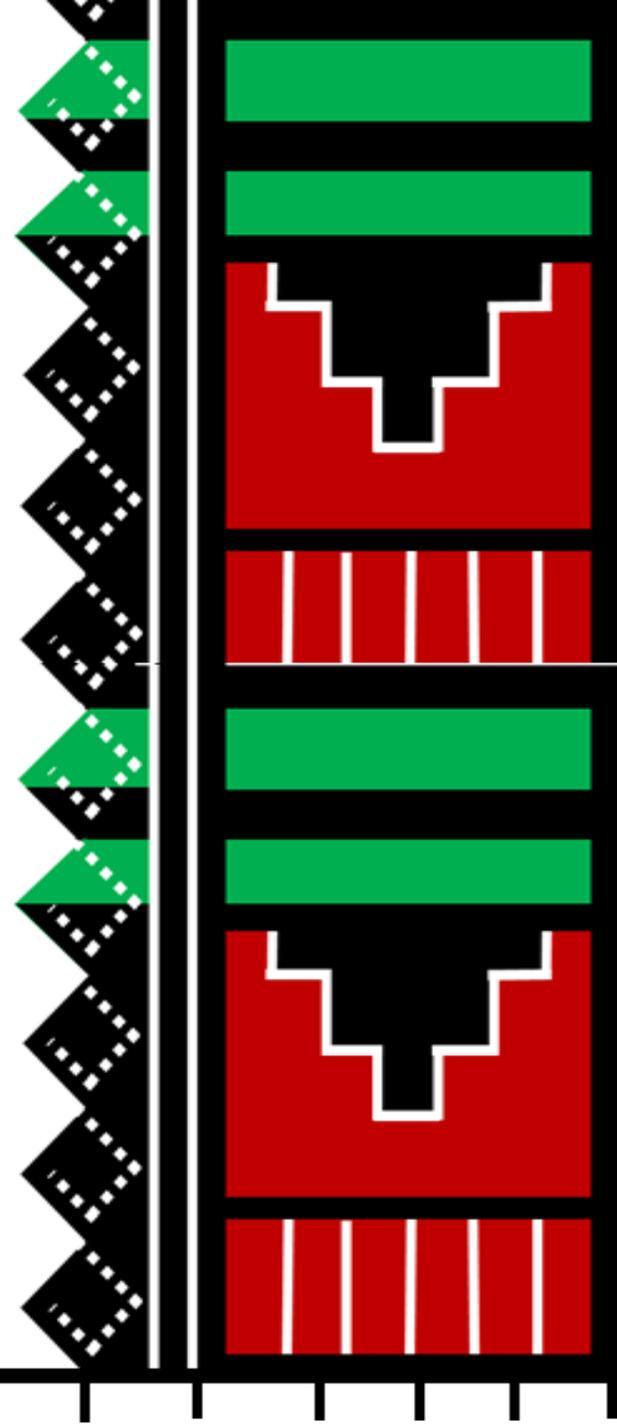


REASON TO KNOW & NOTICE:

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.

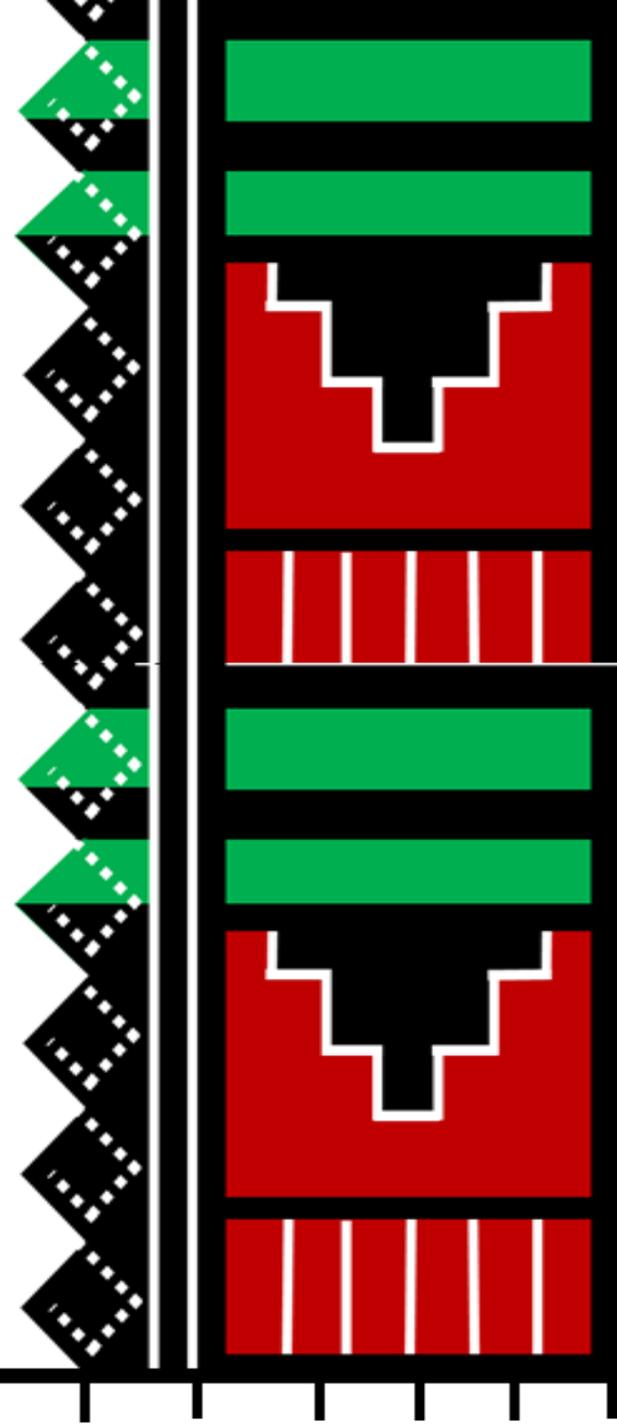
If the identity of location of the parent of Indian Custodian and the tribe cannot be determined, such notice shall be given to the Secretary in the like manner....

25 USC 1912



How should a State court determine if there is reason to know the child is an Indian child? (25 CFR § 23.107)

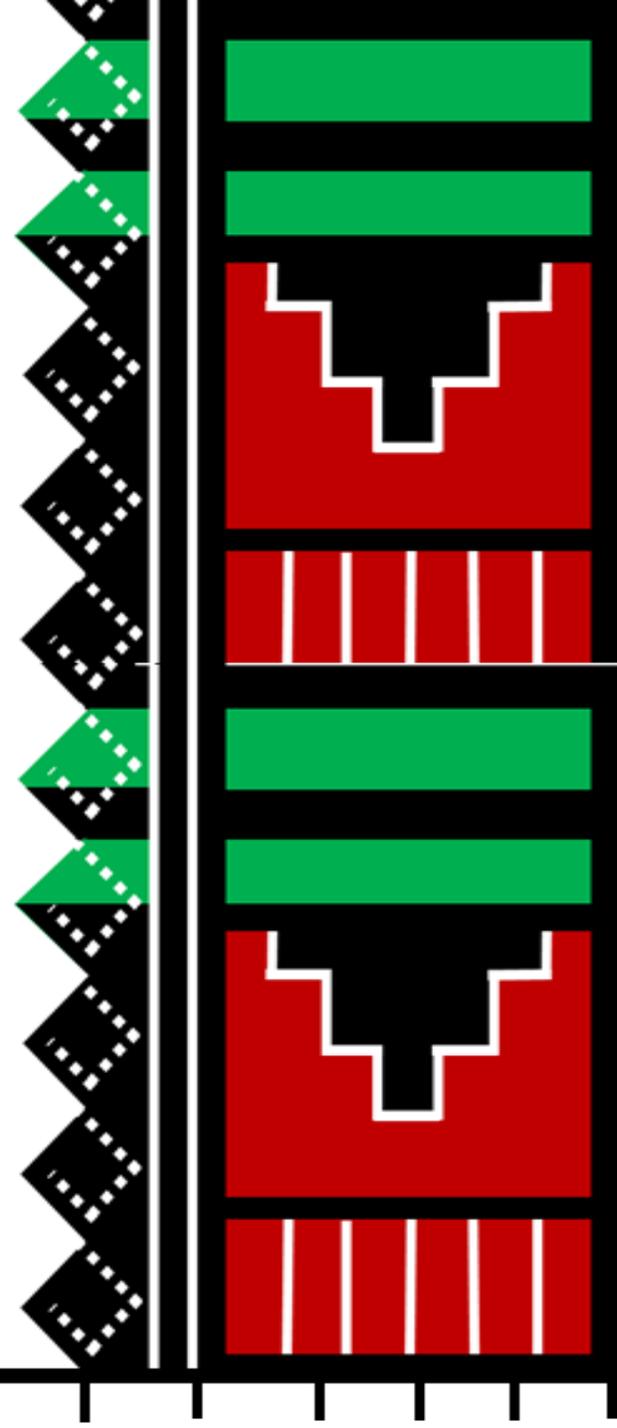
(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.



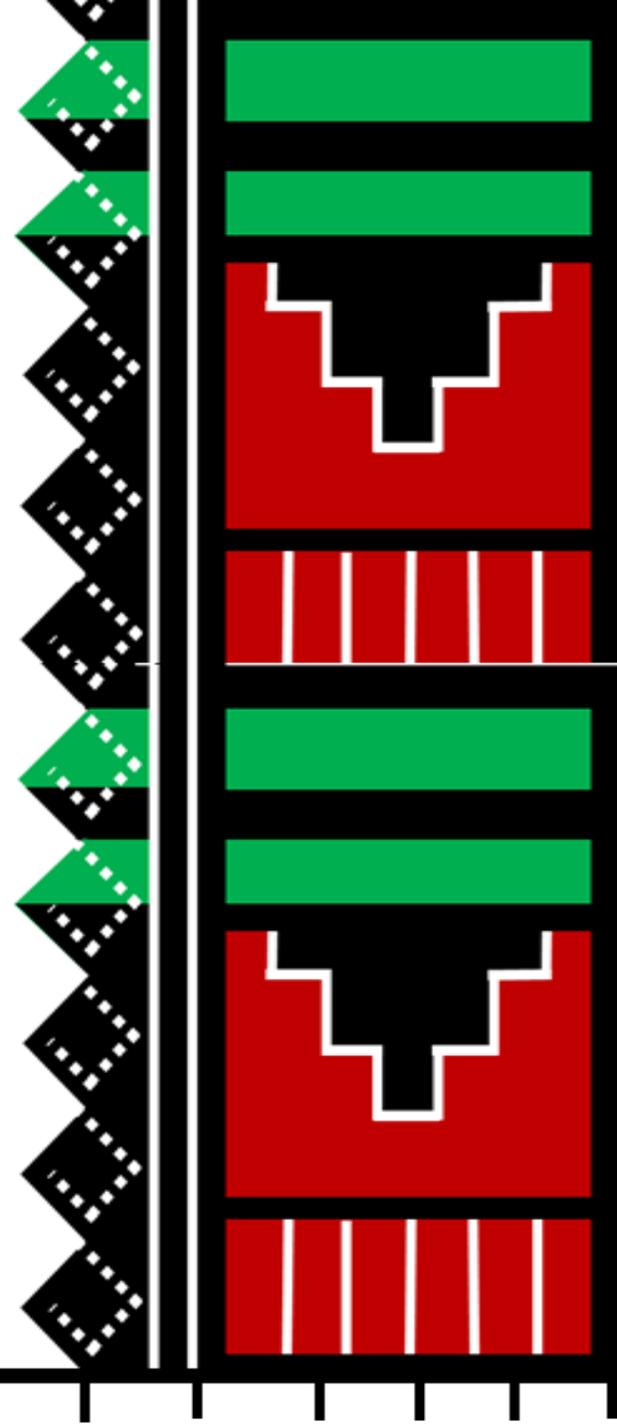
(b) If there is reason to know the child is an [Indian child](#), but the court does not have sufficient evidence to determine that the child is or is not an “Indian child,” the court must:

- (1) Confirm...that the [agency](#) or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological [parent](#) is a member and the child is eligible for membership); and
- (2) Treat the child as an [Indian child](#), unless and until it is determined on the record that the child does not meet the definition of an “Indian child” in this part.

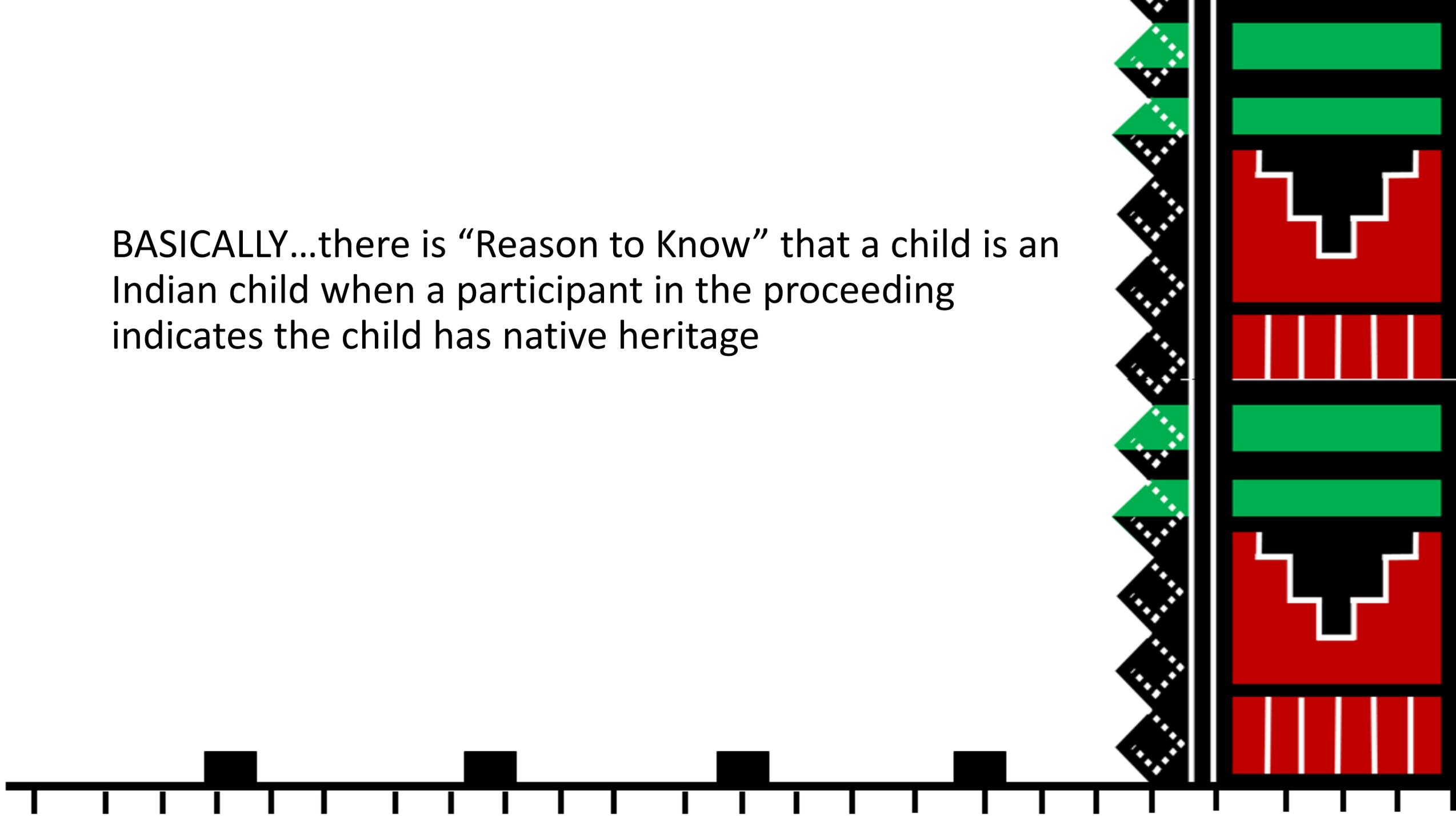
(c) A court, upon conducting the inquiry required in [paragraph \(a\)](#) of this section, has reason to know that a child involved in an emergency or [child-custody proceeding](#) is an [Indian child](#) if:



- Any participant..., officer of the court...Tribe, [Indian organization](#), or [agency](#) informs the court that the child is an [Indian child](#) [or]... has discovered information indicating that the child is an [Indian child](#)...[including] the [domicile](#) or residence of the child, the child's [parent](#), or the child's [Indian custodian](#) is on a [reservation](#) or in an Alaska Native village...the child is or has been a ward of a [Tribal court](#); or... either [parent](#) or the child possesses an identification card indicating membership in an [Indian Tribe](#).



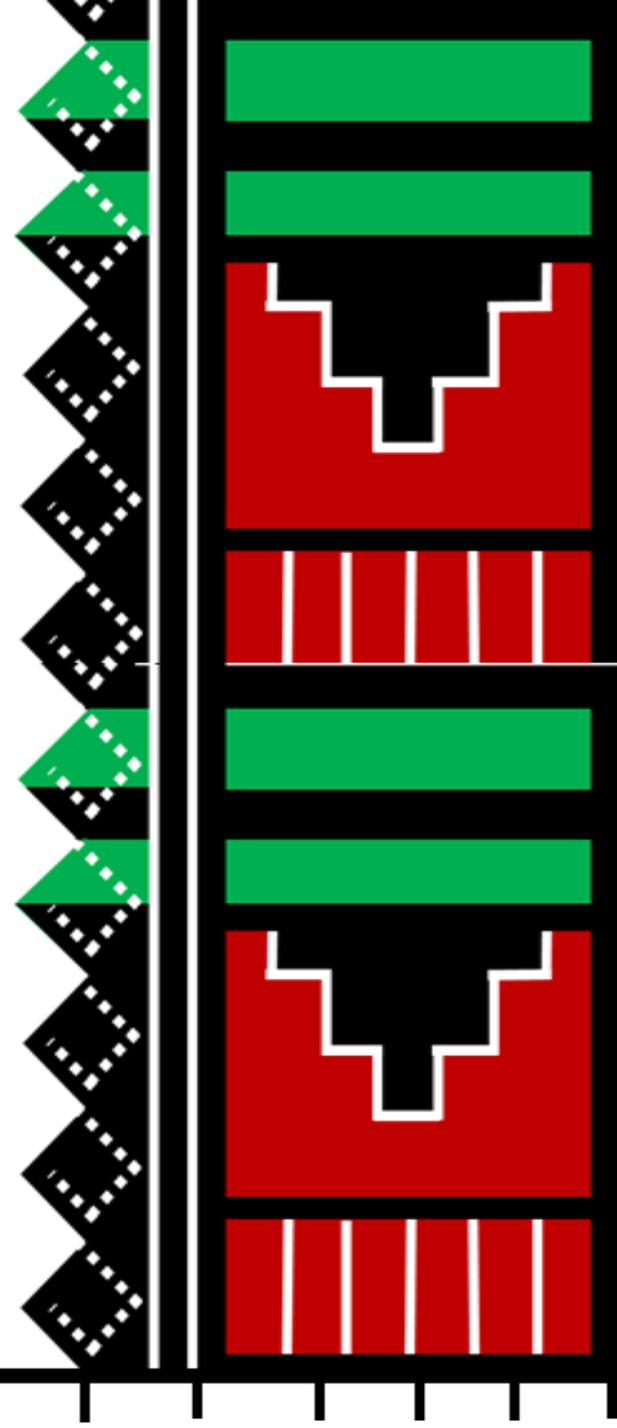
BASICALLY...there is "Reason to Know" that a child is an Indian child when a participant in the proceeding indicates the child has native heritage



What are the notice requirements for a child-custody proceeding involving an Indian child?

- Party seeking placement promptly sends notice of EACH such child-custody proceeding
- Original or a copy of each notice should be filed with the court along with proof of service.
- Notice must be sent to each Tribe where the child may be a member (or eligible for membership if a biological parent is a member), child's parents, and the child's Indian custodian.
- Notice must be sent by registered or certified mail with return receipt requested
- Notice must be in clear and understandable language and include:
 - A Laundry list of information that often is not included in notices!
 - There is a statement of rights that need to be included!
- PLEASE CHECK THE CFR and make sure your notice includes all identifying information & Statement of Rights!
- If you don't know which Tribes, send notice to appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov)

See 25 CFR § 23.111



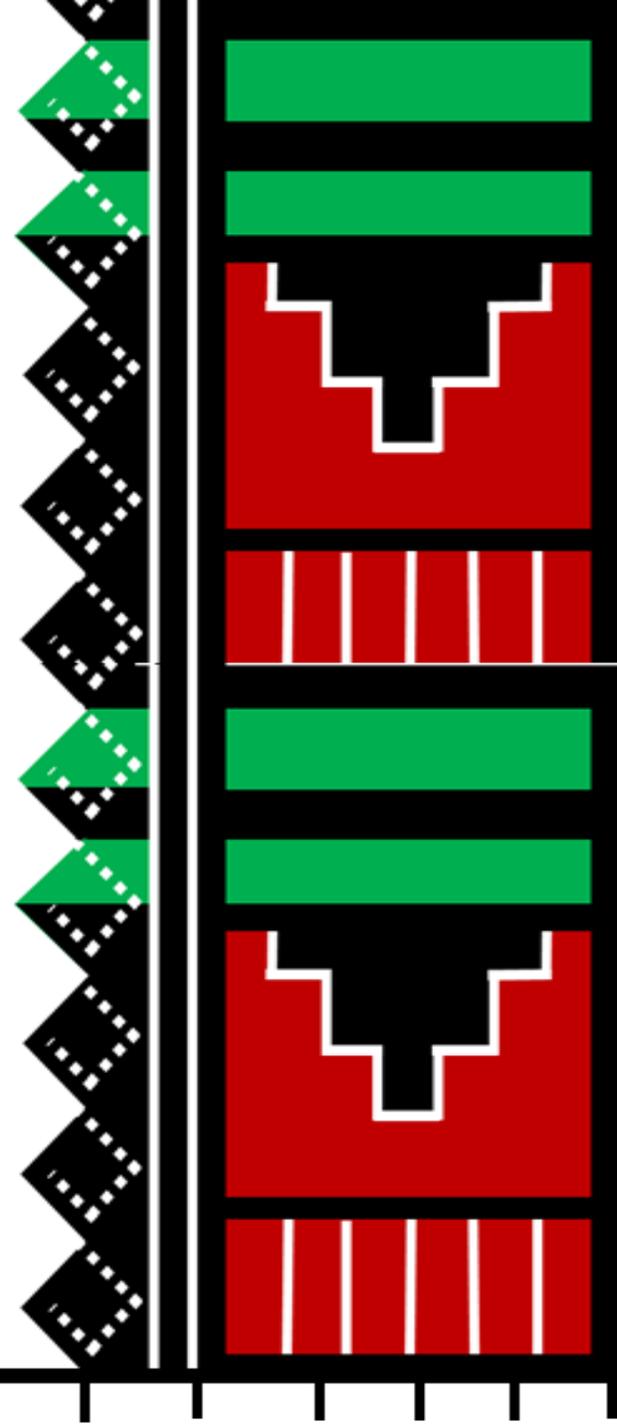
ACTIVE EFFORTS

25 CFR § 23.2

- Any party seeking to effect a [foster care placement](#) of, or [termination of parental rights](#) to, an [Indian child](#) under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the [Indian](#) family and that these efforts have proved unsuccessful.

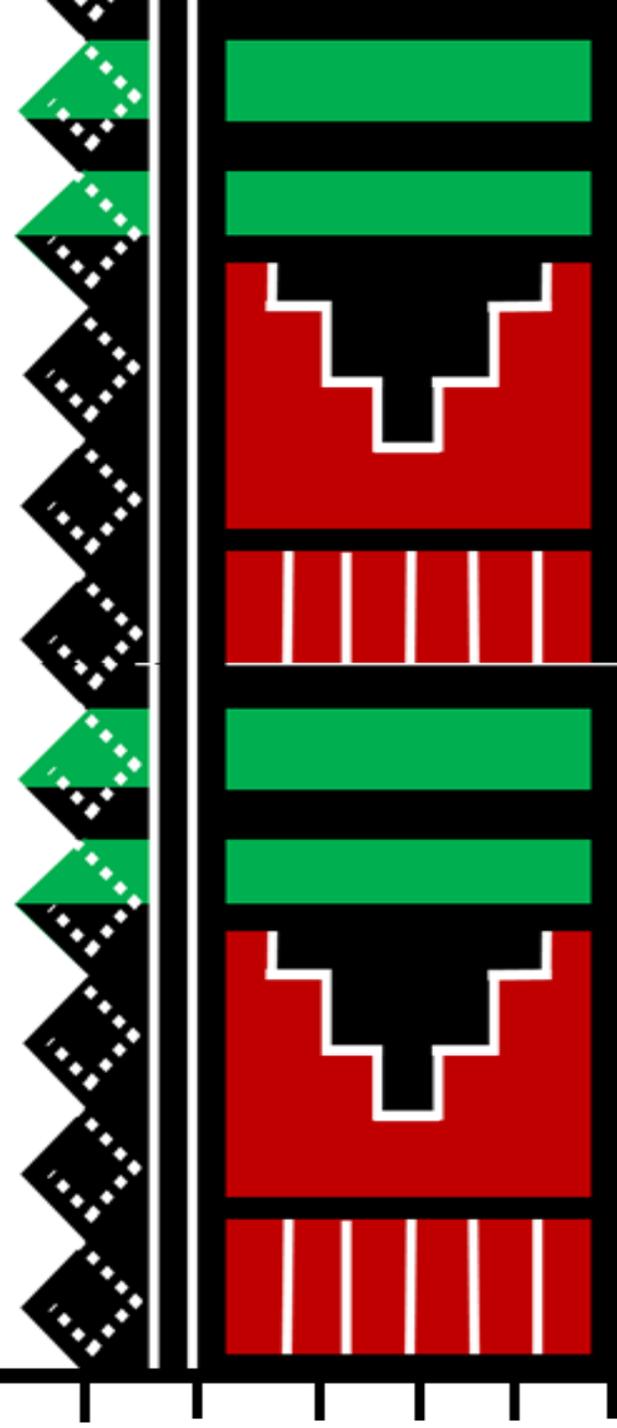
25 USC 1912

- NON-INDIAN CASES: Reasonable Efforts

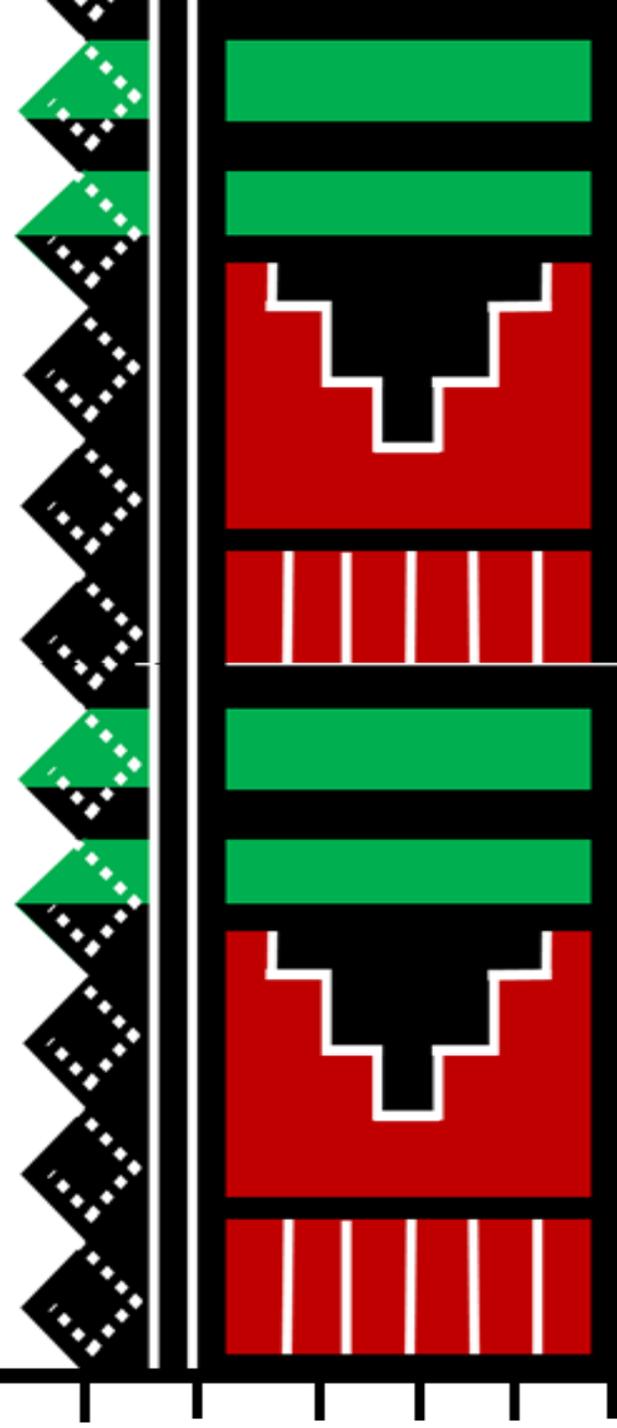


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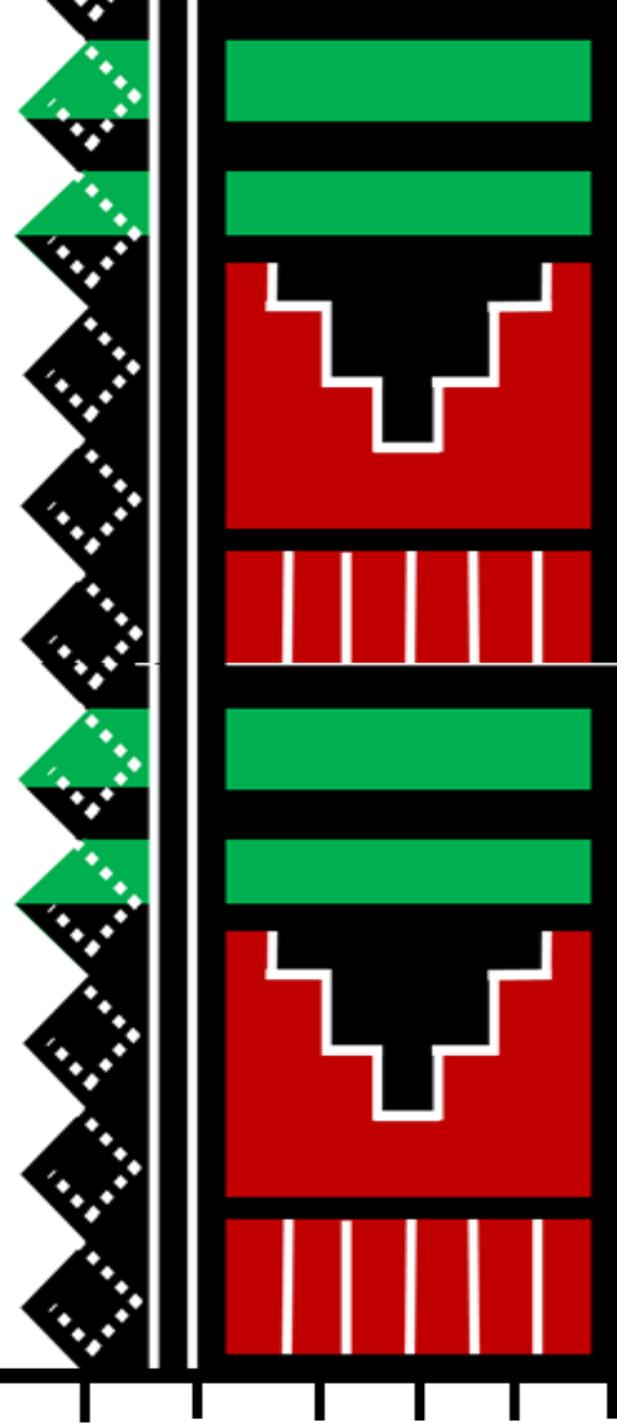
- Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an [Indian child](#) with his or her family.
- Where an agency is involved in the [child-custody proceeding](#), [active efforts](#) must involve assisting the [parent](#) or [parents](#) or [Indian custodian](#) through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, [active efforts](#) should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the [Indian child's Tribe](#) and should be conducted in partnership with the [Indian child](#) and the [Indian child's](#) parents, extended family members, [Indian](#) custodians, and Tribe.



- [Active efforts](#) are to be tailored to the facts and circumstances of the case and may include, for example:
 - (1) Conducting a comprehensive assessment of the circumstances of the [Indian child's](#) family, with a focus on safe reunification as the most desirable goal;
 - (2) Identifying appropriate services and helping the [parents](#) to overcome barriers, including actively assisting the [parents](#) in obtaining such services;
 - (3) Identifying, notifying, and inviting representatives of the [Indian child's Tribe](#) to participate in providing support and services to the [Indian child's](#) family and in family team meetings, permanency planning, and resolution of placement issues;
 - (4) Conducting or causing to be conducted a diligent search for the [Indian child's](#) extended family members, and contacting and consulting with extended family members to provide family structure and support for the [Indian child](#) and the [Indian child's](#) parents;
 - (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

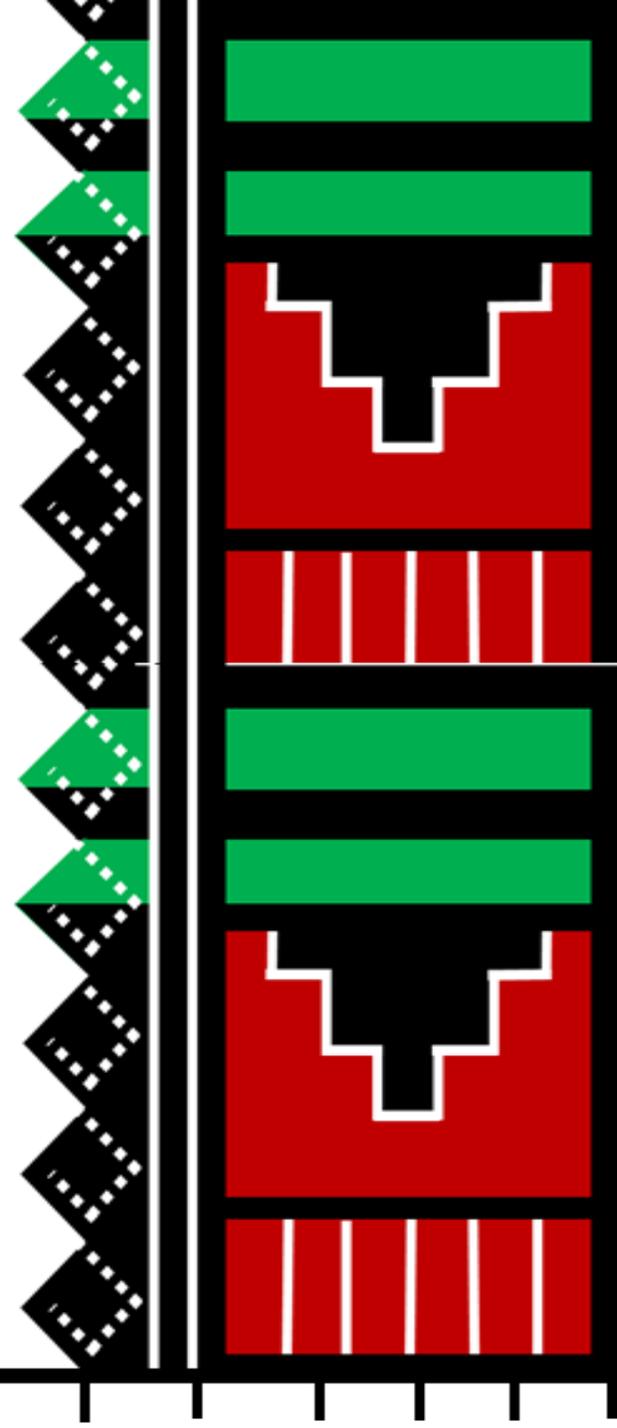


- (6) Taking steps to keep siblings together whenever possible;
- (7) Supporting regular visits with [parents](#) or [Indian custodians](#) in the most natural setting possible as well as trial home visits of the [Indian child](#) during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
- (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the [Indian child's parents](#) or, when appropriate, the child's family, in utilizing and accessing those resources;
- (9) Monitoring progress and participation in services;
- (10) Considering alternative ways to address the needs of the [Indian child's parents](#) and, where appropriate, the family, if the optimum services do not exist or are not available;
- (11) Providing post-reunification services and monitoring.



Case Scenario

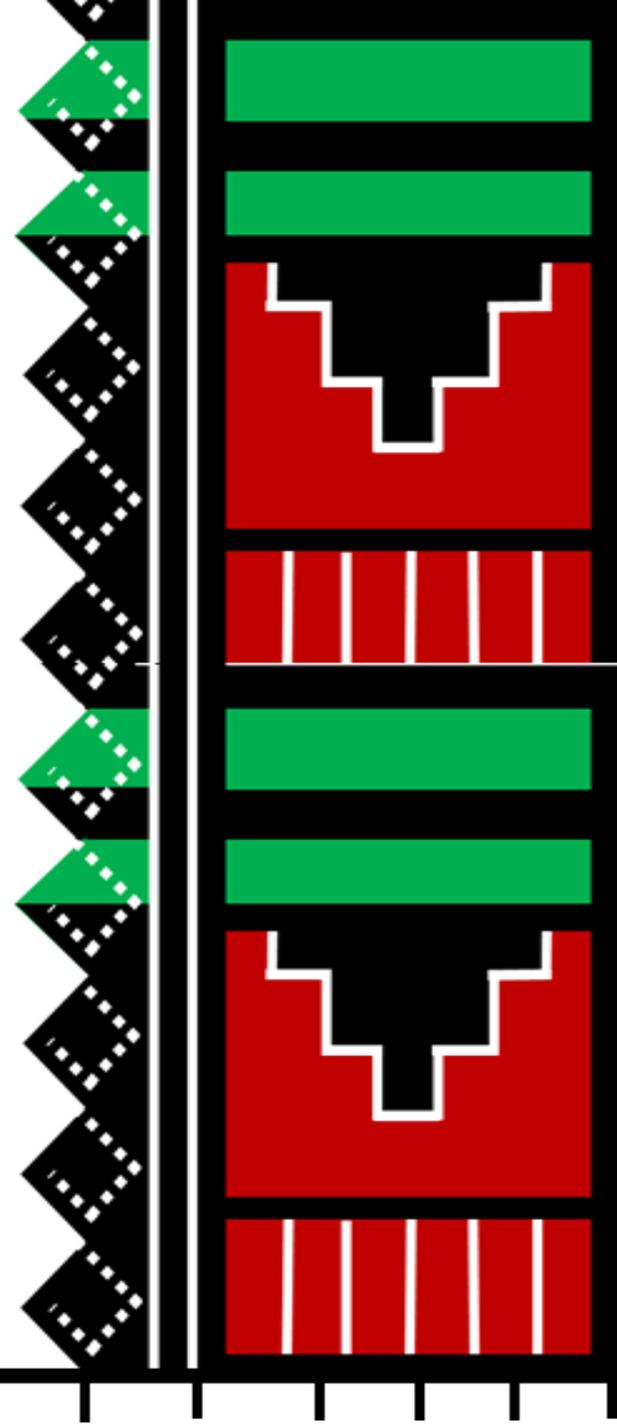
- A report of child abuse/neglect is received due to allegations of domestic violence and substance use.
- The report states that there are ongoing issues of domestic violence between father and mother.
- The report indicated that police were called out due to family violence and both parents appeared to be intoxicated, possibly under the influence of alcohol and cocaine.
- They have two children ages two and seven.



- During the initial interview Father states he is Native American and is enrolled in a federally recognized tribe. He provides an enrollment card with a census number. After interviewing the family, you have concerns regarding the allegations.

What do you do?

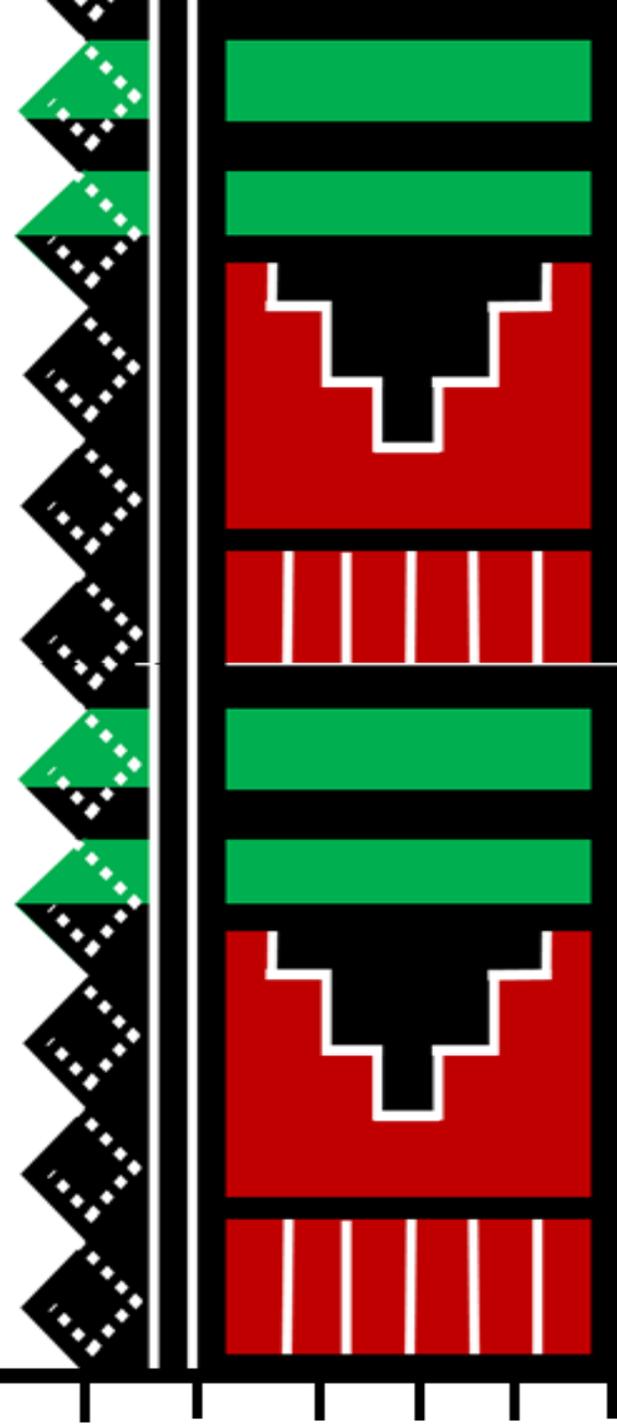
1. Nothing, ICWA doesn't apply until after removal
2. Ask the father to contact his tribe
3. Make a copy of the enrollment card and notify the tribe
4. Start treating the case as an ICWA case and active efforts start now.



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Reasonable Efforts-vs-Active Efforts

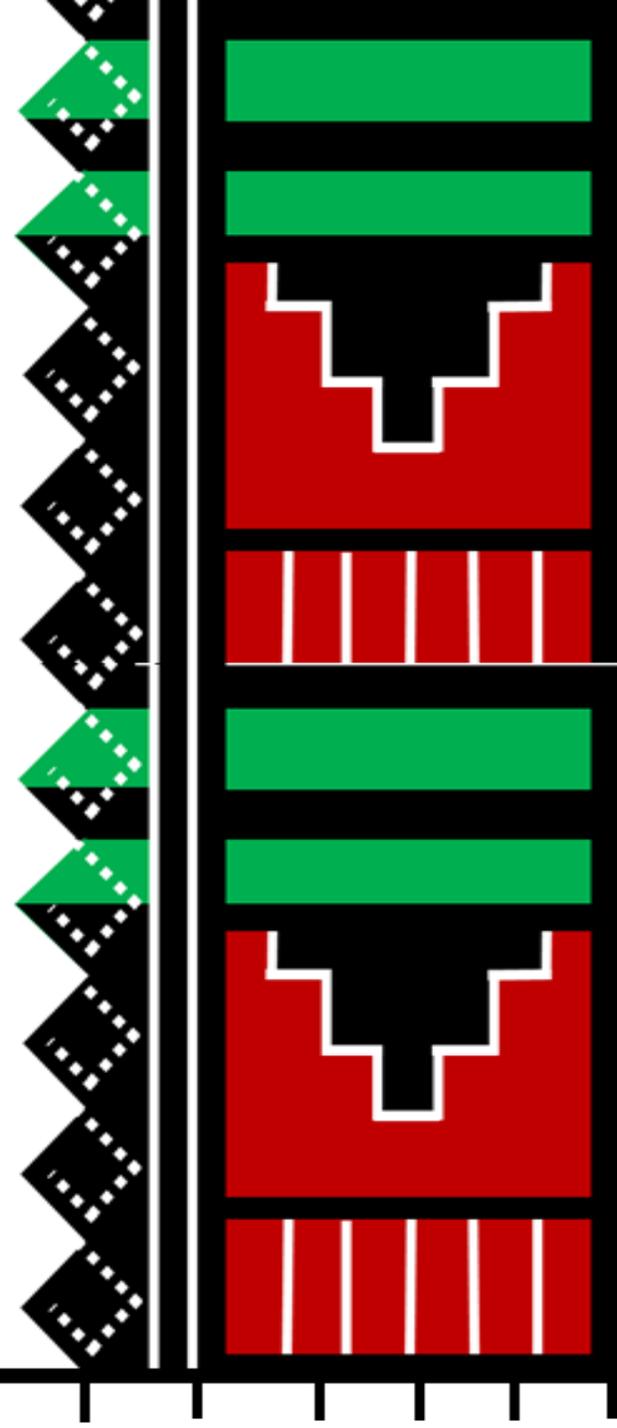
➤ Reasonable Efforts ex.

- Refer a client for Services
- Notify Client of Appointment
- Basic level case management

➤ Active Efforts ex.

- Transport client to Services referred to
- Better level of Care
- Intensive level of case management

Active efforts would be to arrange for the best-fitting services and help families engage in those services

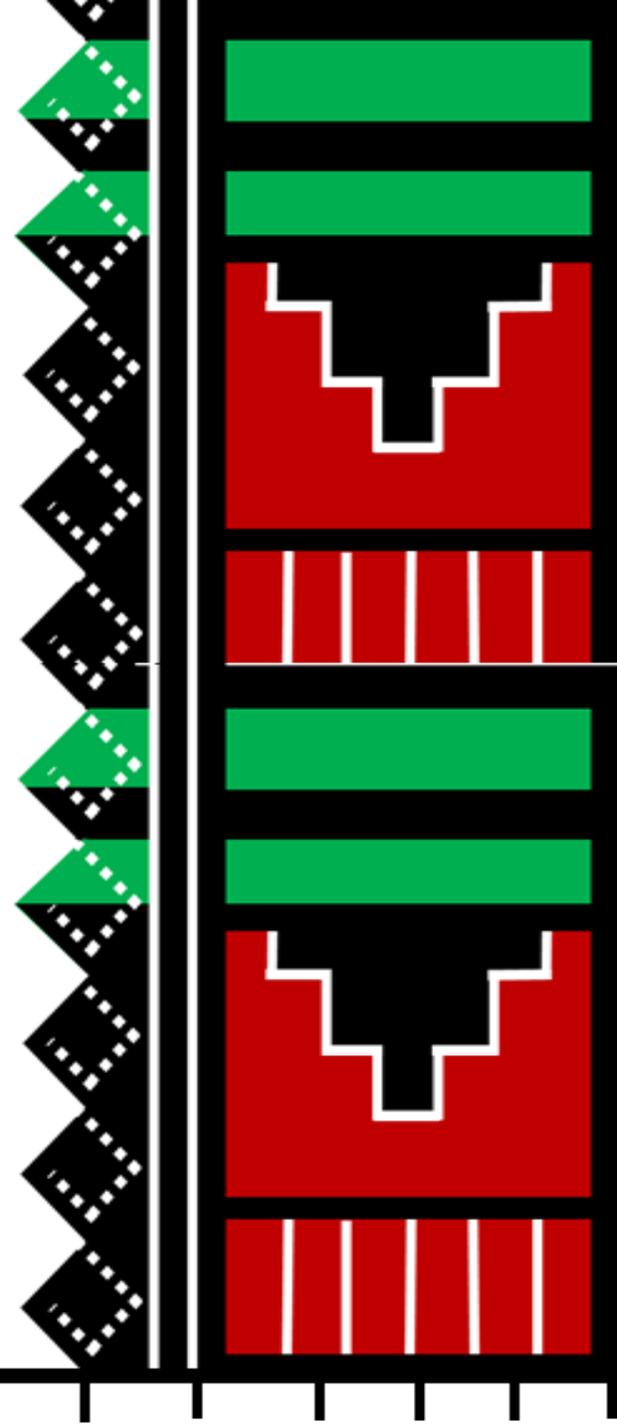


Case Scenario continued...

After interviewing the family, it is determined that the case will be transferred to Family Based Safety Services (FBSS).

What are some examples of active efforts at the investigative level?

1. Give a list of numbers for substance use treatment
2. Help mother and father make appointments for substance abuse treatment
3. Ask parents if they have transportation
4. Provide transportation to appointments, if needed
5. Give bus passes for transportation

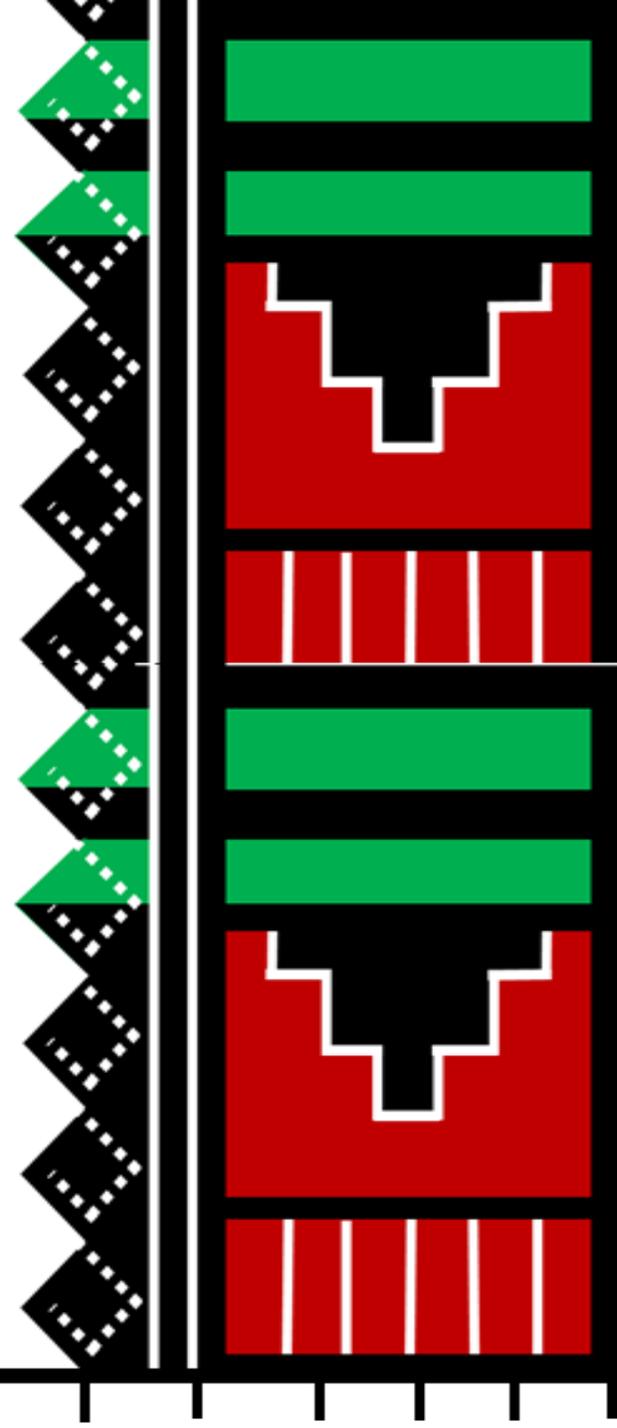


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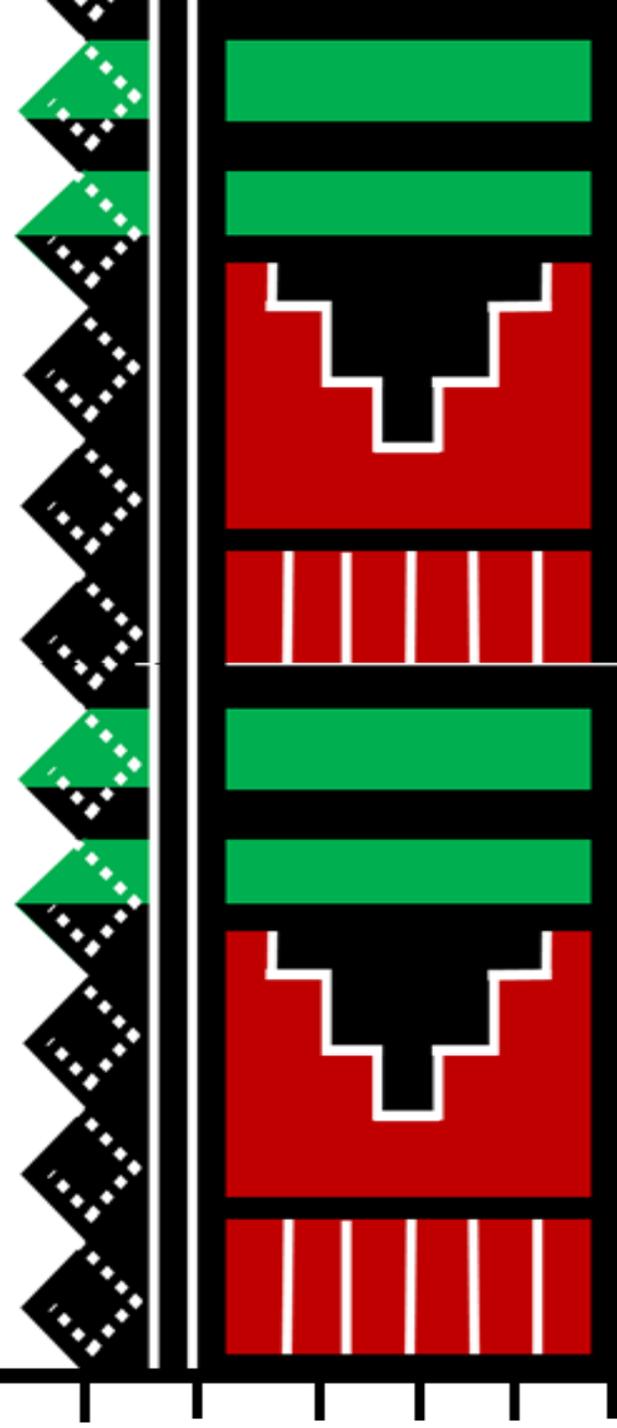


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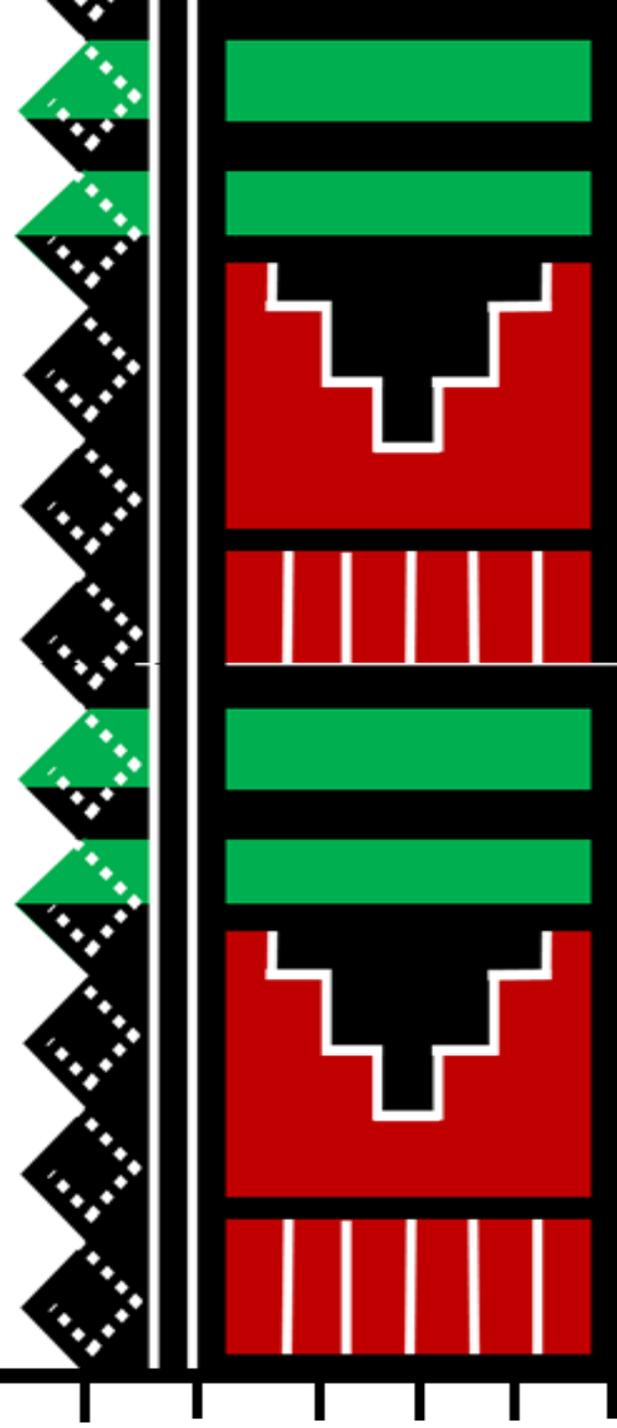


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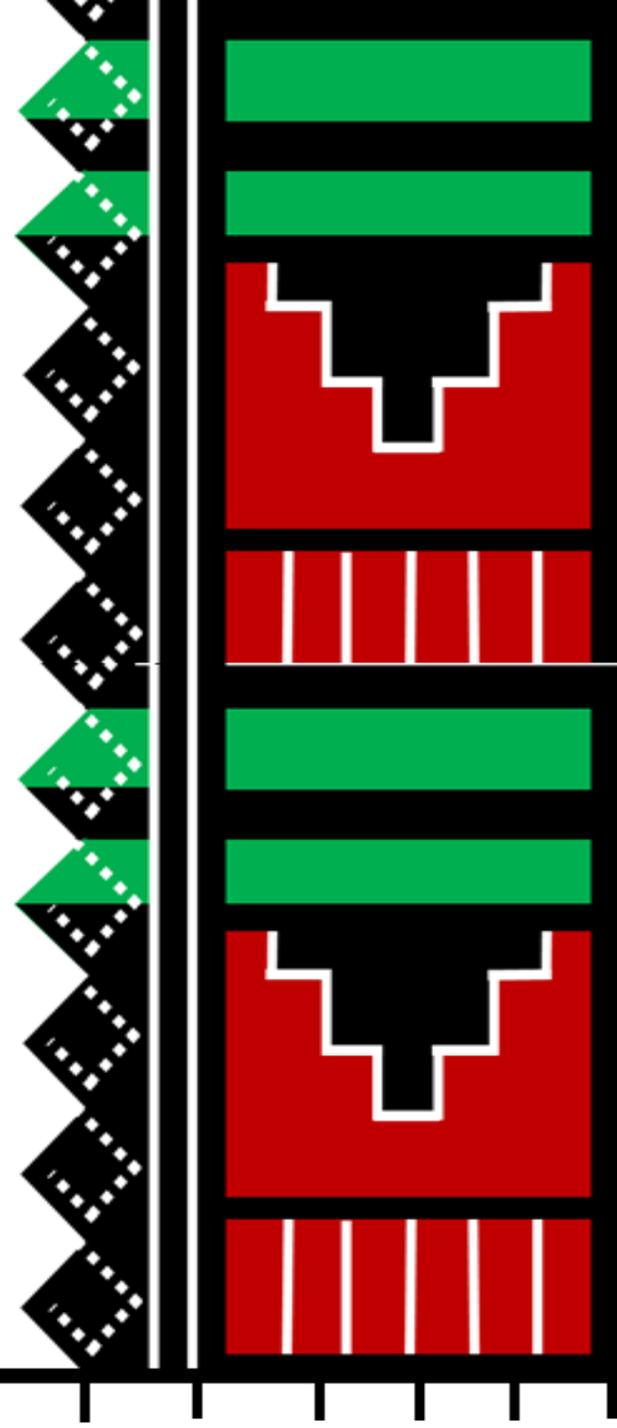
Reasonable Efforts vs. Active Efforts

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Active Efforts

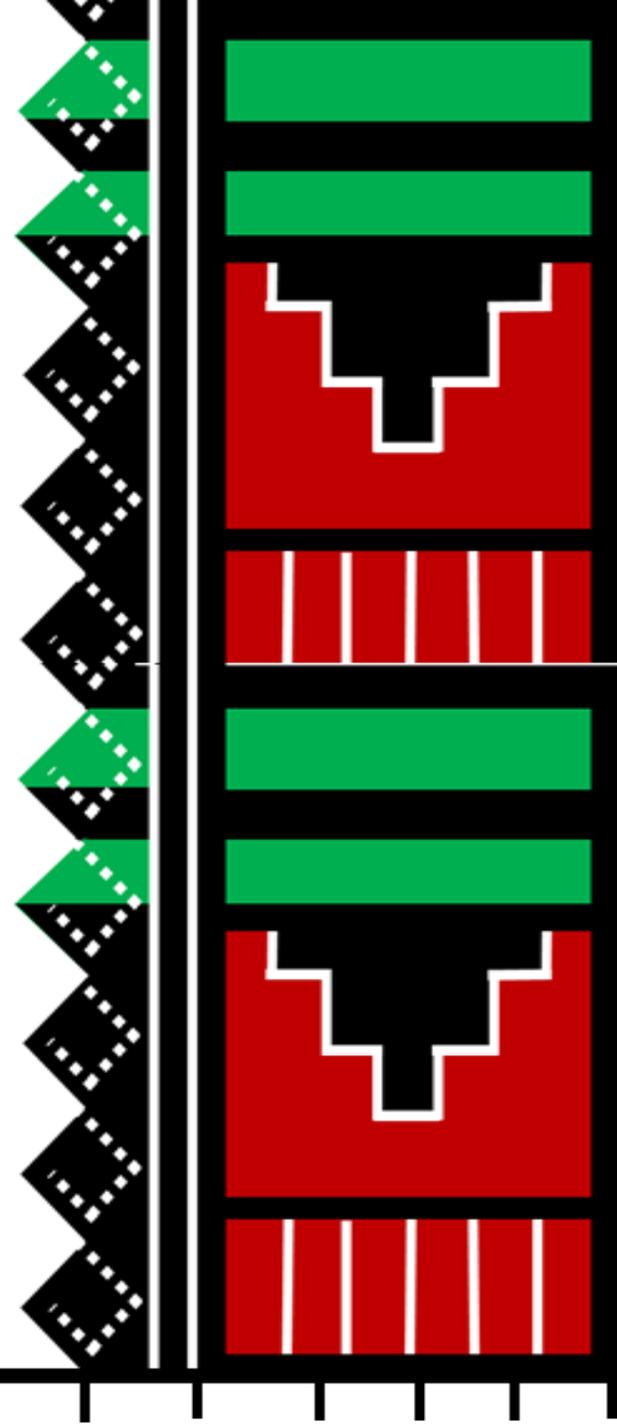
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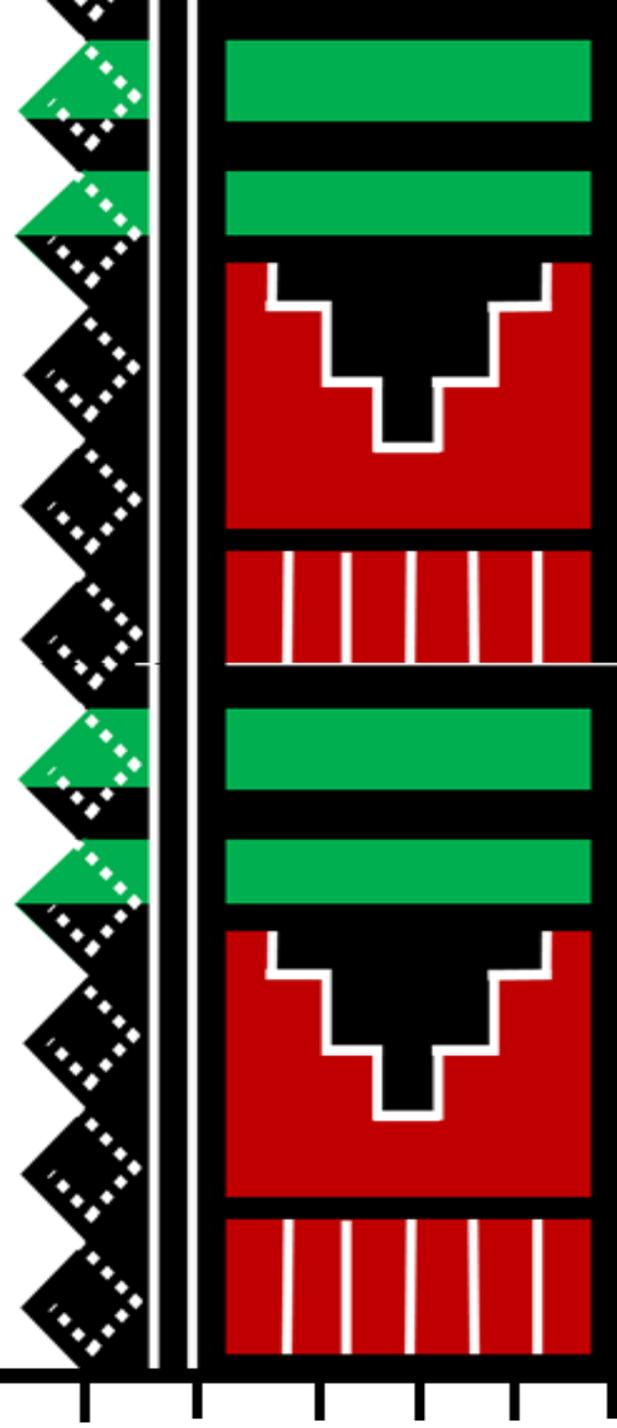
1. Nothing, he doesn't have an enrollment card
2. Nothing, he doesn't know which tribe he belongs to
3. Notify the Pueblo tribe in Texas
4. Notify all Pueblos and Bureau of Indian Affairs Regional Director
5. Collect as much family history as possible with names and dates of birth and send the information to all Pueblos and the Bureau of Indian Affairs Regional Director



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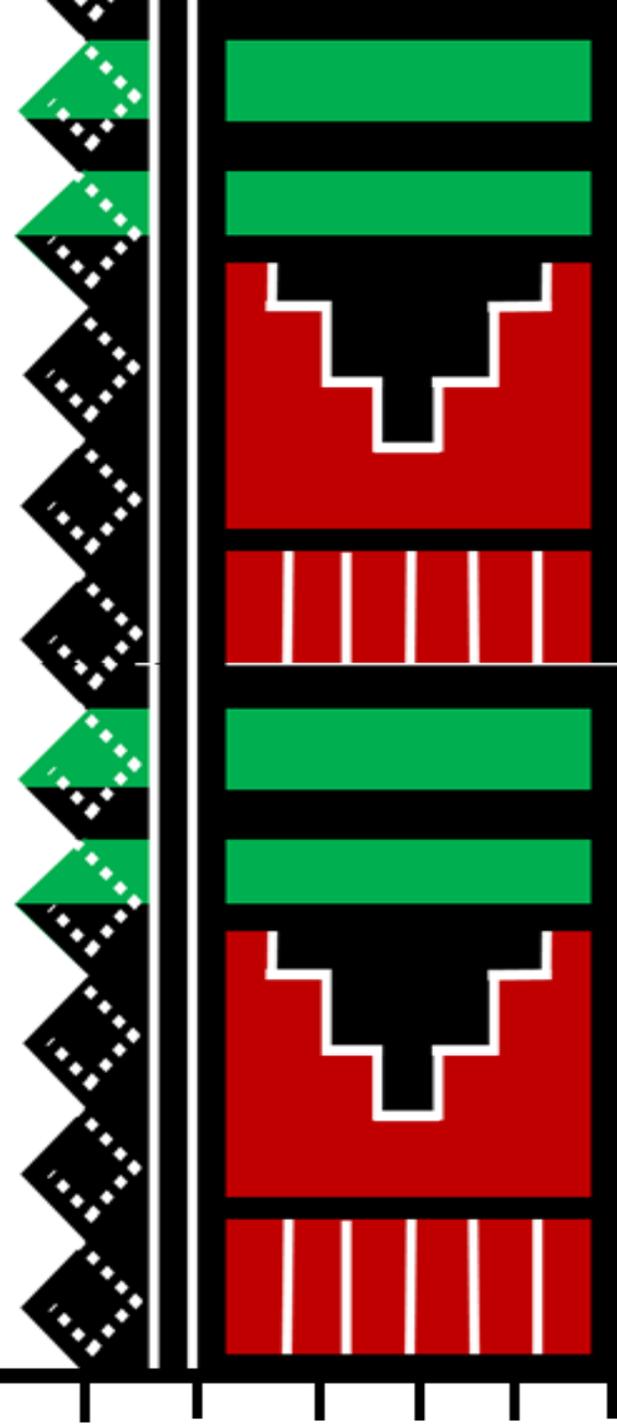
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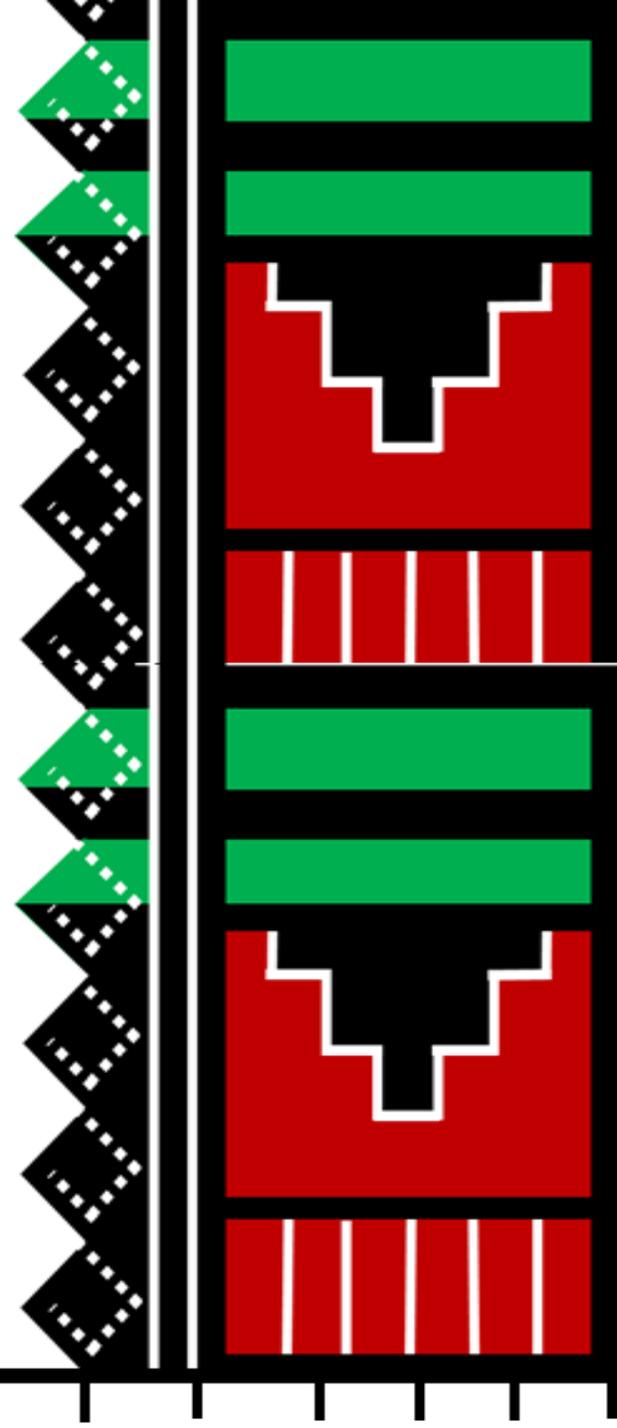
262/Removal Hearing

- Is there **REASON TO KNOW** the child has native heritage? 25 CFR 23.107
 - Court must ask each participant on record
 - Court must instruct each parties to inform the court if they subsequently receive information that provides reason to know
- Was **NOTICE** sent to parent and Tribe and was it compliant with statute? 25 CFR 23.111



Were **ACTIVE EFFORTS** made by investigator and/or FBSS to “provide remedial services and rehabilitative programs

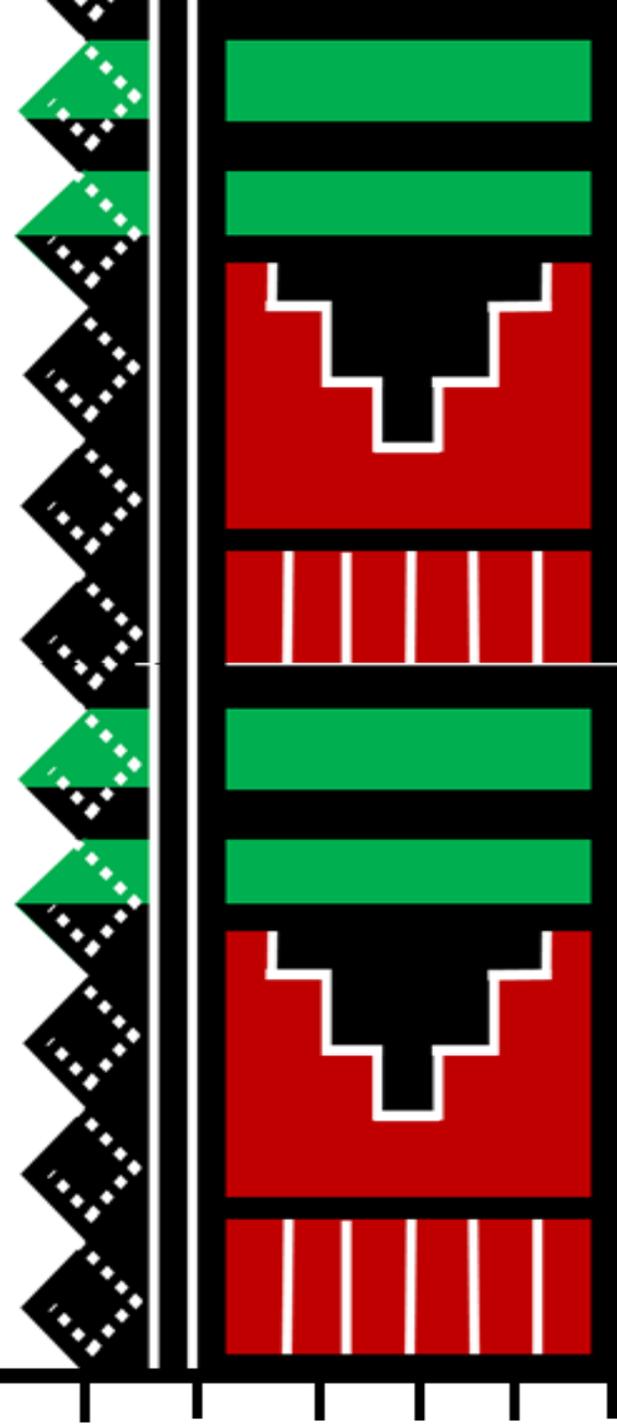
- designed to prevent the breakup of the Indian family?” 25 CFR 23.2
 - How CPS timely identify, notify and invite the Tribe?
 - Did CPS work with Tribe? Were tribal resources accessed?
 - Was there a diligent search for the child’s extended family & were they contacted & consulted?
 - Was there a comprehensive assessment conducted, appropriate services identified, & did CPS actively assist the parent in obtaining the services?
 - Were culturally appropriate family preservation strategies used?
 - Were steps taken to keep the siblings together whenever possible?
 - Were regular visits with parents in most natural setting possible provided?
 - Were community resources identified and did CPS actively assist parents or family in utilizing & accessing?
- Remember, more than **REASONABLE EFFORTS** required by 262.107



Burden of Proof:

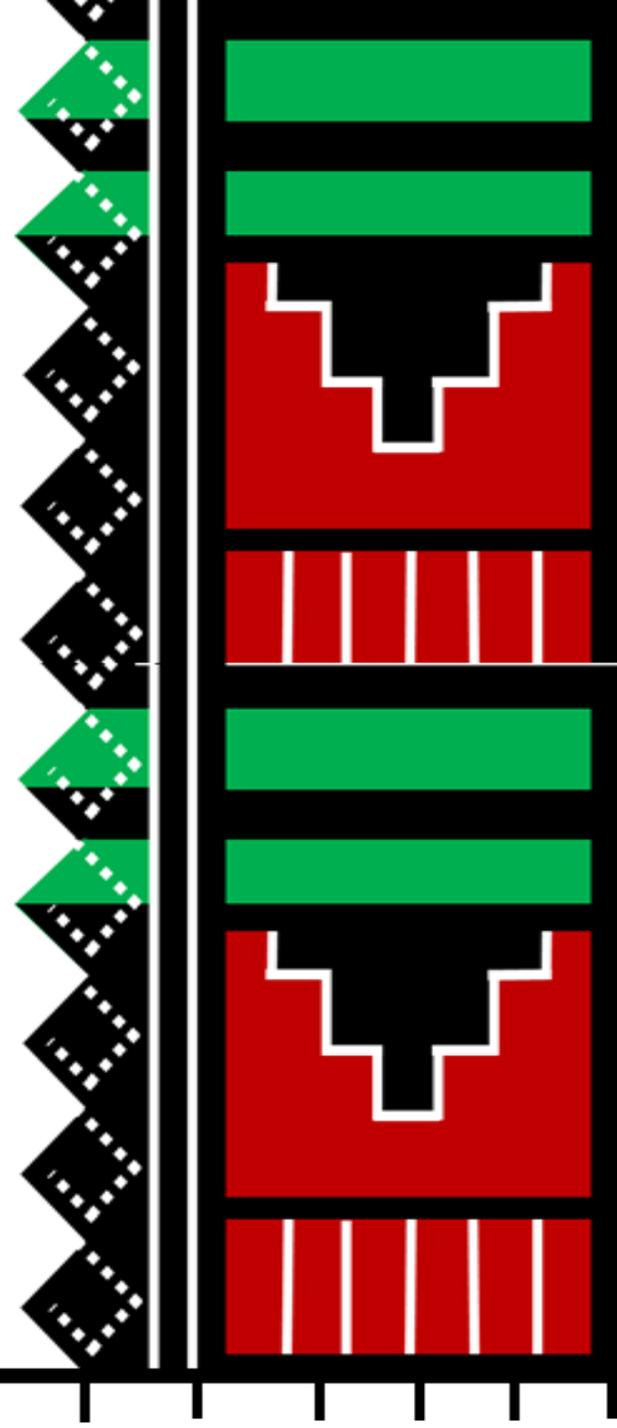
CLEAR AND CONVINCING Evidence that continued custody is likely to result in **SERIOUS** emotional or physical damage to the child

- rather than evidence sufficient to satisfy a person of ordinary prudence and caution that immediate danger to physical health or safety of the child



QUALIFIED EXPERT WITNESS (QEW)

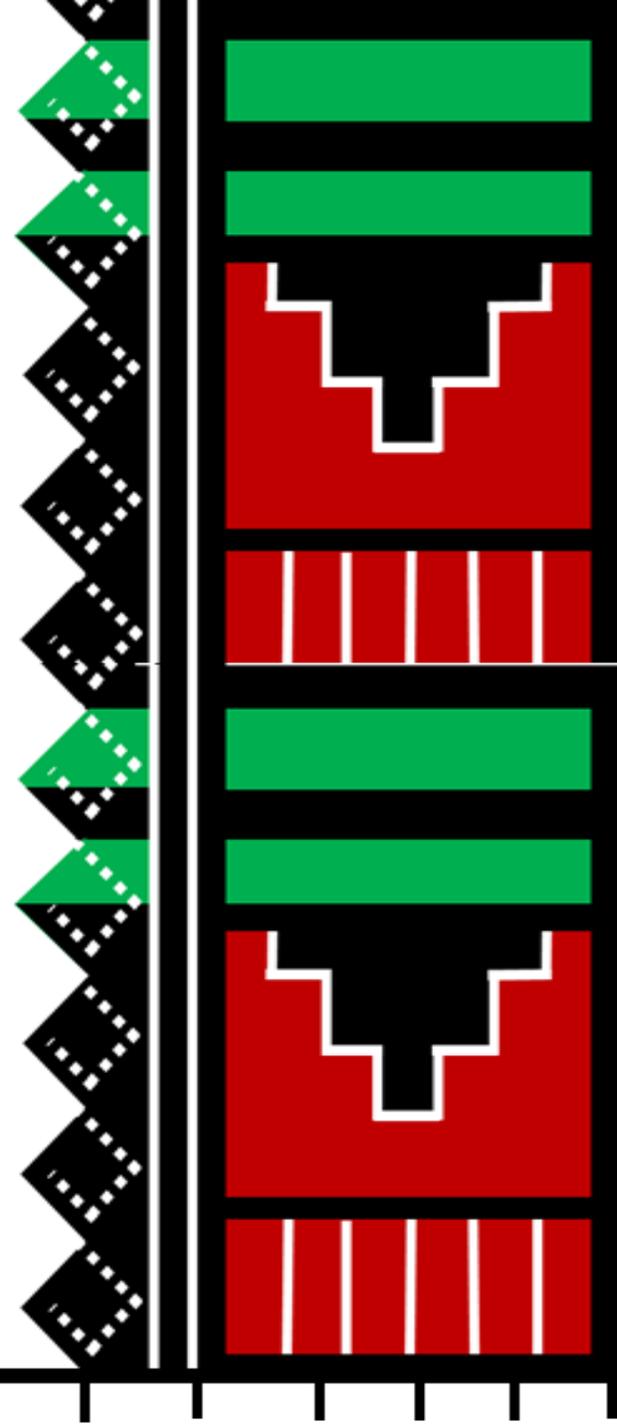
- Must be qualified to testify that continued custody is likely to result in serious emotional or physical damage to the child
- Should be qualified to testify as to the prevailing social and cultural standards of the Indian's Tribe
 - Best expert: someone designated by the Tribe as being qualified
 - Request assistance from Tribe or BIA to locate persons
 - The child's regularly assigned social worker cannot serve as QEW
 - If the person is not designated by the Tribe, Courts & parties should question their credentials and knowledge



PLACEMENT OF THE CHILD

Preference to the following types of placements must be given in the order provided, unless there is good cause to place the child elsewhere or the tribe has a different placement preference order 25 U.S.C. § 1915(b); 25 C.F.R. § 23.131(b):

1. Member of the child's extended family
 2. Foster home licensed, approved, or specified by the child's tribe
 3. Indian foster home licensed or approved by the state or other non-Native licensing authority
 4. Institution for children approved by an Indian tribe or operated by an Indian organization that meets the child's special needs
- **"Extended family member"** is "defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom"
 - ...a person 18+ who is grandparent, aunt or uncle, brother or sister, brother-in-law, sister-in-law, niece or nephew, first or second cousin, or stepparent

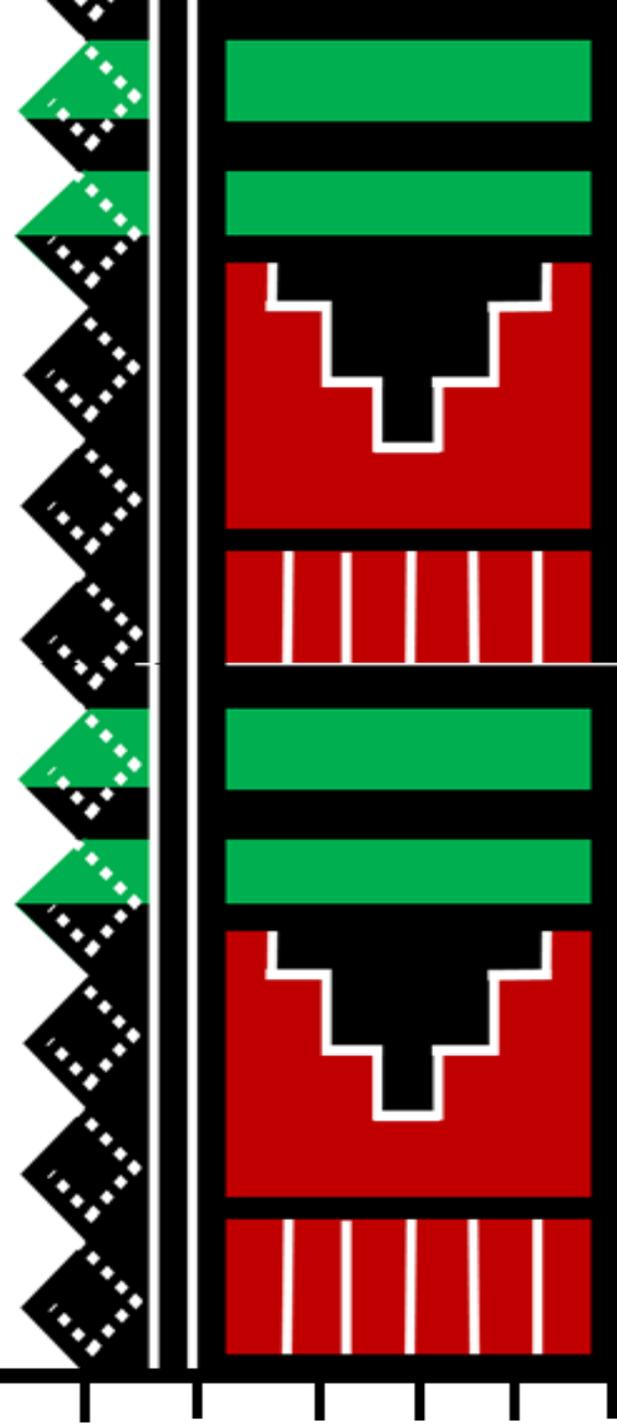


Case Scenario Continued...

After removal children are placed in a non-native foster home. However, a Pueblo in New Mexico has responded to the ICWA notice stating these children belong to their tribe and they have a foster family in New Mexico.

What are some possible next steps?

1. Include tribe in process prior to them filing a Motion to Intervene
2. Start the process for an ICPC
3. Object to an ICPC because the parents are in Texas
4. Have a discussion with foster parents about ICWA and ICWA preferred placements
5. Wait for the tribe to file a Motion to Intervene

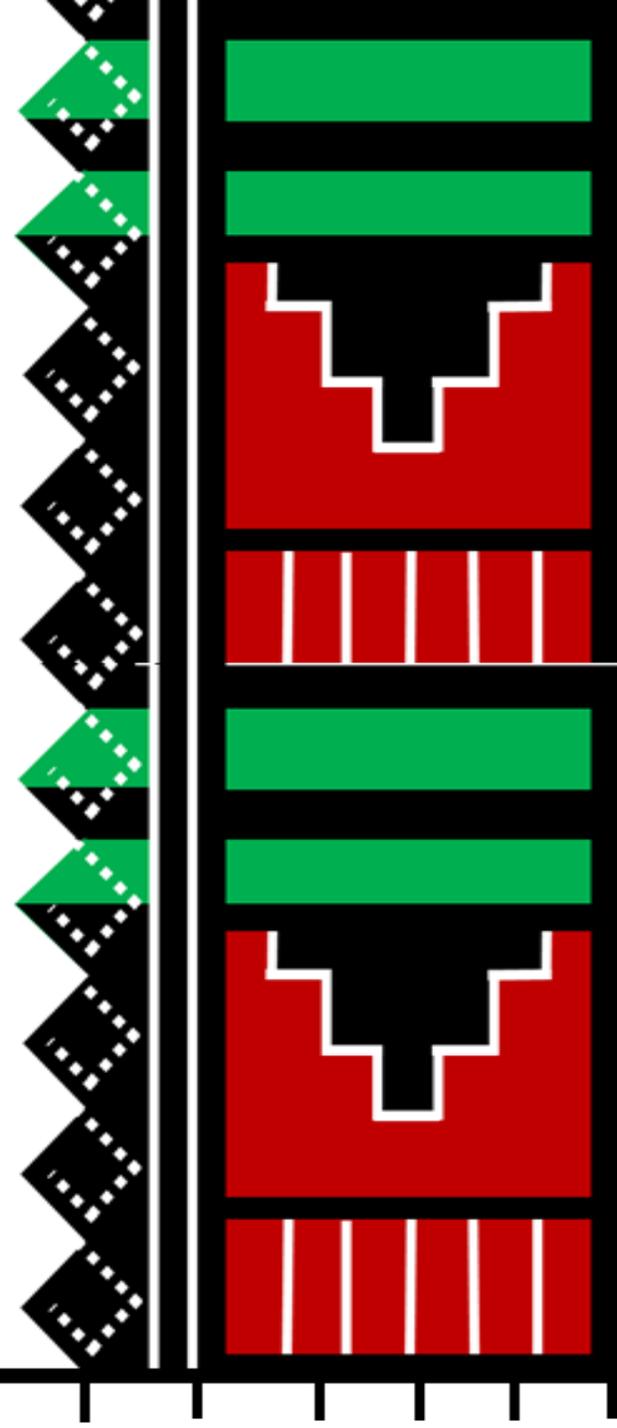


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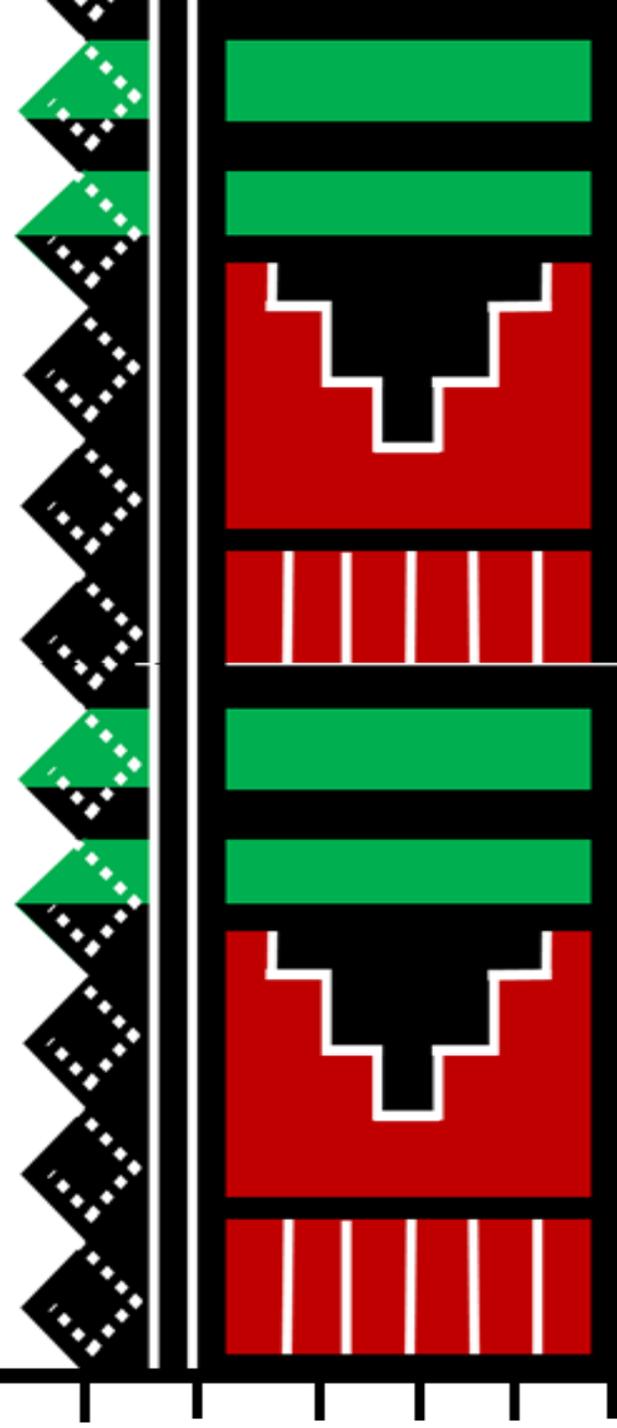
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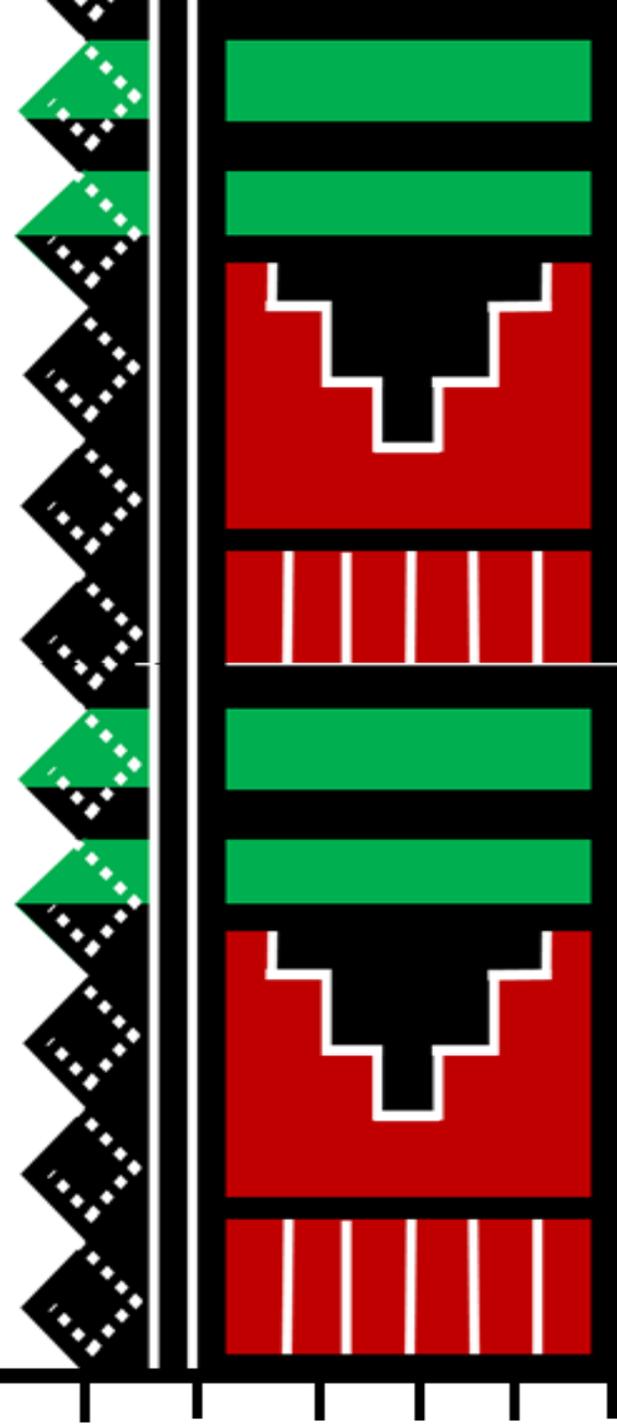
Case Scenario Continued...

- Parents are engaged in services, they attend their weekly visits with their children and visits are going great. Father continues to work and sometimes misses appointments because of work. Mother is not working, but expresses she wants to go back to school.
- They have completed individual therapy, father completed BIPP, mother completed domestic violence services and both successfully completed outpatient substance abuse treatment. Things are going well. However, at the last home visit there was tension between the parents. You have still concerns about domestic violence and father reported that sometimes mother triggers him to want to drink.



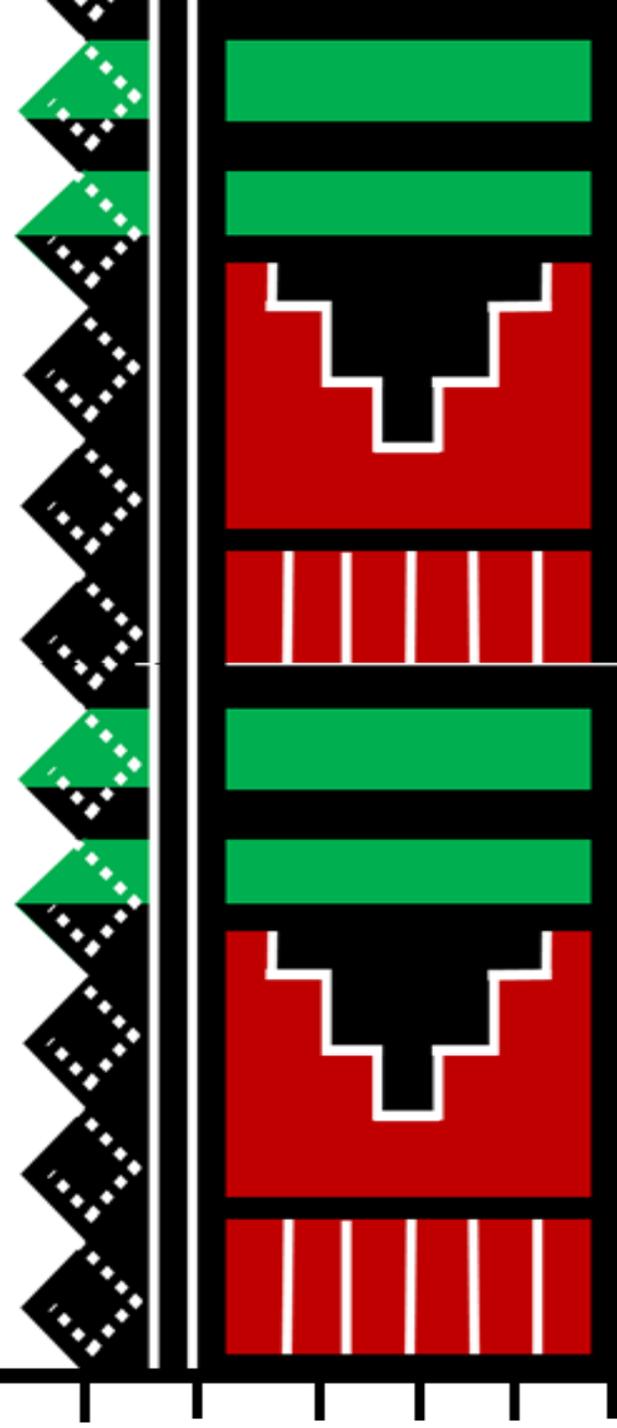
What are some active efforts at this level?

1. Help mom apply for school and financial aid
2. Talk to parents about concerns and tell them to talk to their therapists about your concerns
3. Ask father about a sponsor, peer recovery and ask him to follow up. Then follow up with father and his sponsor or peer recovery coach
4. Give them the number for ongoing services through a local domestic violence agency
5. Schedule a family meeting to include providers to see what else can help the family be successful for reunification



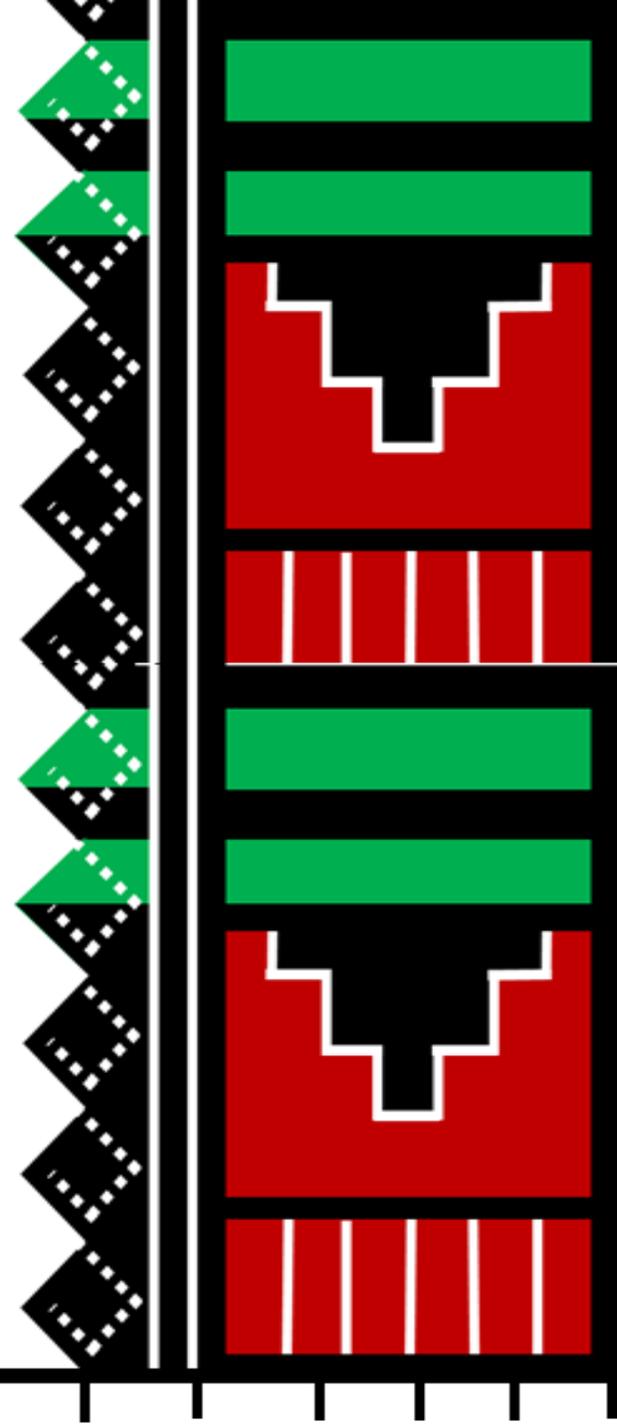
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6. Follow up with therapists about possible family therapy



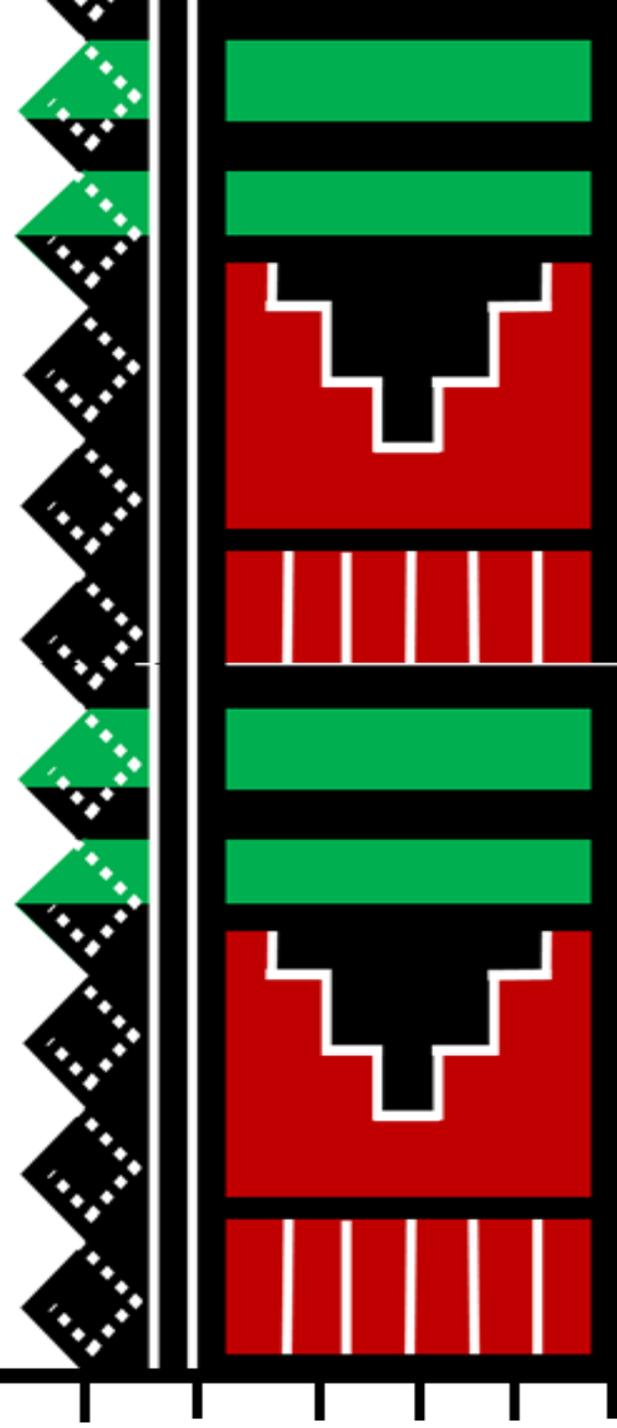
VOLUNTARY TERMINATION (25 USC 1913)

- **MUST BE SIGNED, RECORDED, AND CERTIFIED BEFORE A JUDGE** rather than just two witnesses
 - Where any parent...voluntarily consents...to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent...The Court shall certify that...the parent...fully understood the explanation in English or that it was interpreted into a language that the parent...understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.
- **Does it apply to non-native parents of Indian child?**
 - Yes! Statute says "any parent" and "parent" under 1903(9), means "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father where paternity has not been established.
- **CAN BE WITHDRAWN BEFORE TERMINATION**
 - In any voluntary proceeding for termination of parental rights, the consent may be withdrawn for any reason at any time prior to the entry of a final decree of termination (USC 1913(c))
- **DO YOUR TERMINATION HEARING RIGHT IMMEDIATELY AFTER RELINQUISHMENT**



TERMINATION TRIAL

1. Is there **REASON TO KNOW** the child has native heritage? 25 CFR 23.107
 2. Was **NOTICE** sent to parent and Tribe and was it compliant with statute? 25 CFR 23.111
 3. Were **ACTIVE EFFORTS** made by CVS worker to “provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family?” 25 USC 1912 (d); 25 CFR 23.2
 - How CPS timely identify, notify and invite the Tribe?
 - Did CPS work with Tribe? Were tribal resources accessed?
 - Was there a diligent search for the child’s extended family & were they contacted & consulted?
 - Was there a comprehensive assessment conducted, appropriate services identified, & did CPS actively assist the parent in obtaining the services?
 - Were culturally appropriate family preservation strategies used?
 - Were steps taken to keep the siblings together whenever possible?
 - Were regular visits with parents in most natural setting possible provided?
 - Were community resources identified and did CPS actively assist parents or family in utilizing & accessing?
- Remember, more than **REASONABLE EFFORTS** required by Texas Family Code

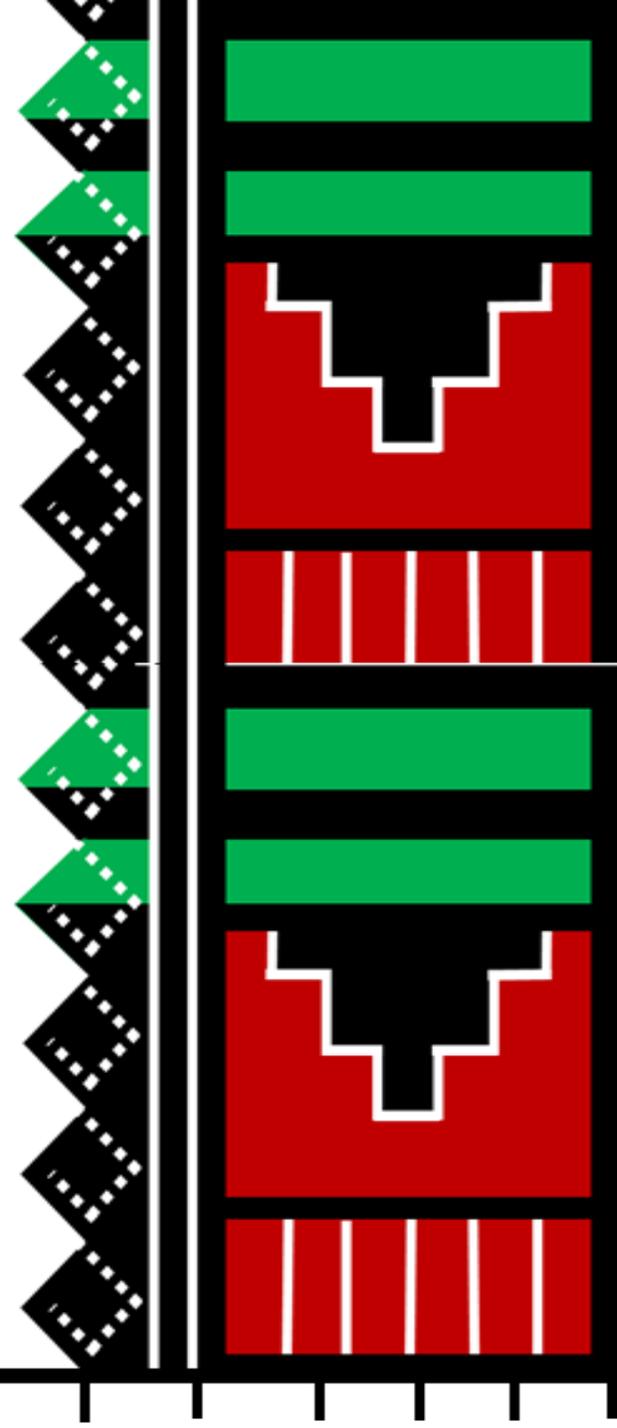


4. Burden of Proof: Evidence BEYOND A REASONABLE DOUBT that continued custody is likely to result in SERIOUS emotional or physical damage to the child (25 USC 1912(f))

- rather than **clear and convincing** required by Texas Family Code 161.101

5. QUALIFIED EXPERT WITNESS:

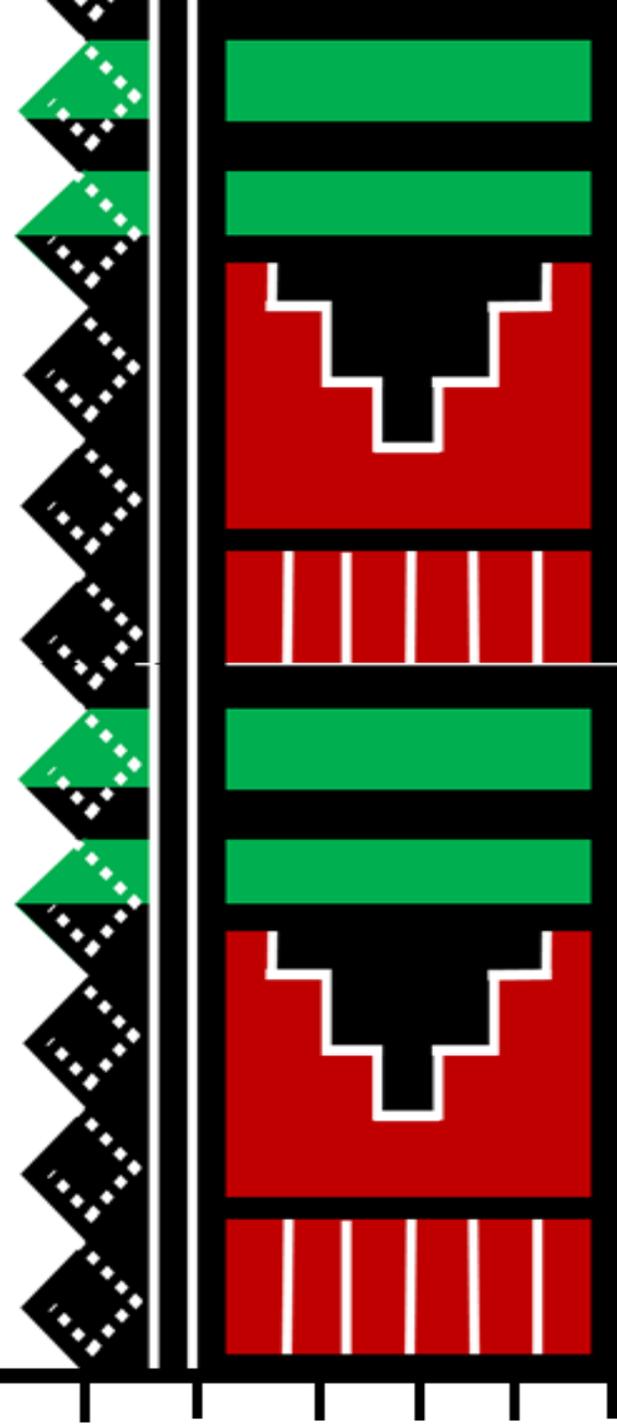
- Must be qualified to testify that continued custody is likely to result in serious emotional or physical damage to the child
- Should be qualified to testify as to the prevailing social and cultural standards of the Indian's Tribe



ADOPTION

- **PLACEMENT**

- Preference to the following types of placements must be given in the order provided, unless there is good cause to place the child elsewhere or the tribe has a different placement preference order 25 U.S.C. § 1915(a); 25 C.F.R. § 23.131(b):
 1. **Member of the child's extended family**
 2. **Foster home licensed, approved, or specified by the child's tribe**
 3. **Indian foster home licensed or approved by the state or other non-Native licensing authority**
- **"Extended family member"** is "defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom"
- ...a person 18+ who is grandparent, aunt or uncle, brother or sister, brother-in-law, sister-in-law, niece or nephew, first or second cousin, or stepparent



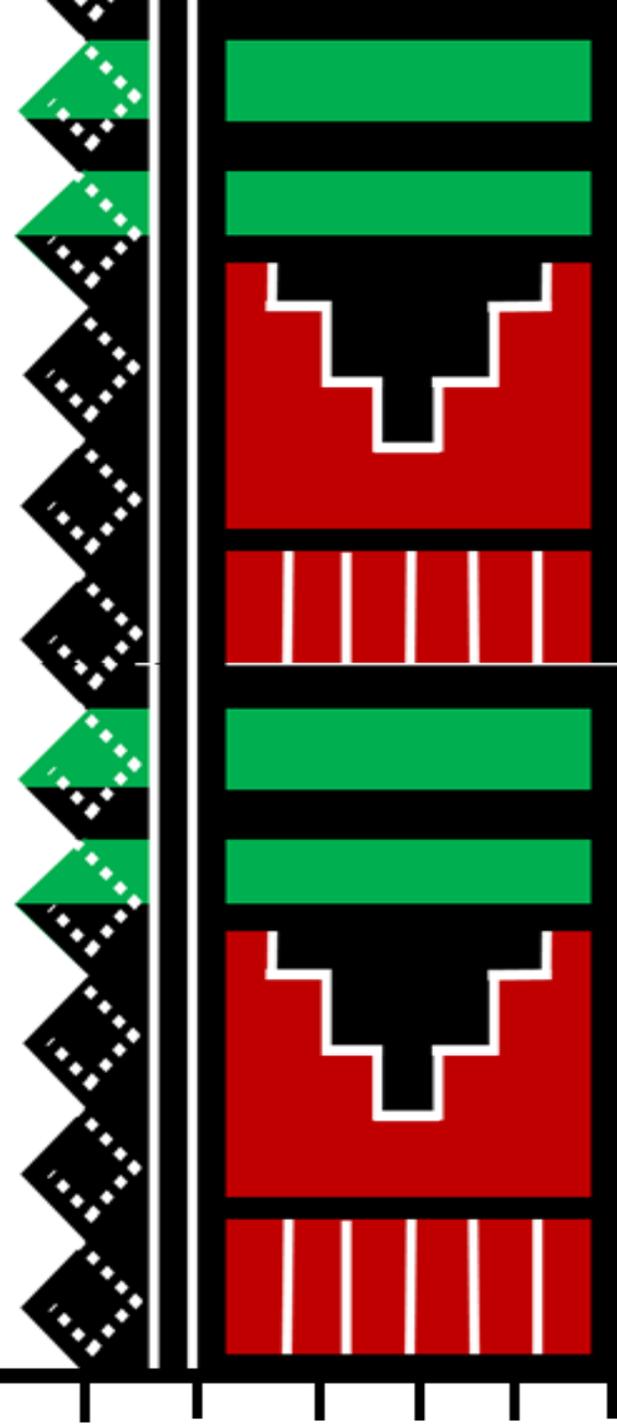
POST ADOPTION

- **Return to Custody of Parent:**

- If adoptive parents have their rights terminated, a bio parent may petition for return of custody and the court shall grant unless it is not in the best interest of the child. 25 USC 1916

- **Information available to Adoptee**

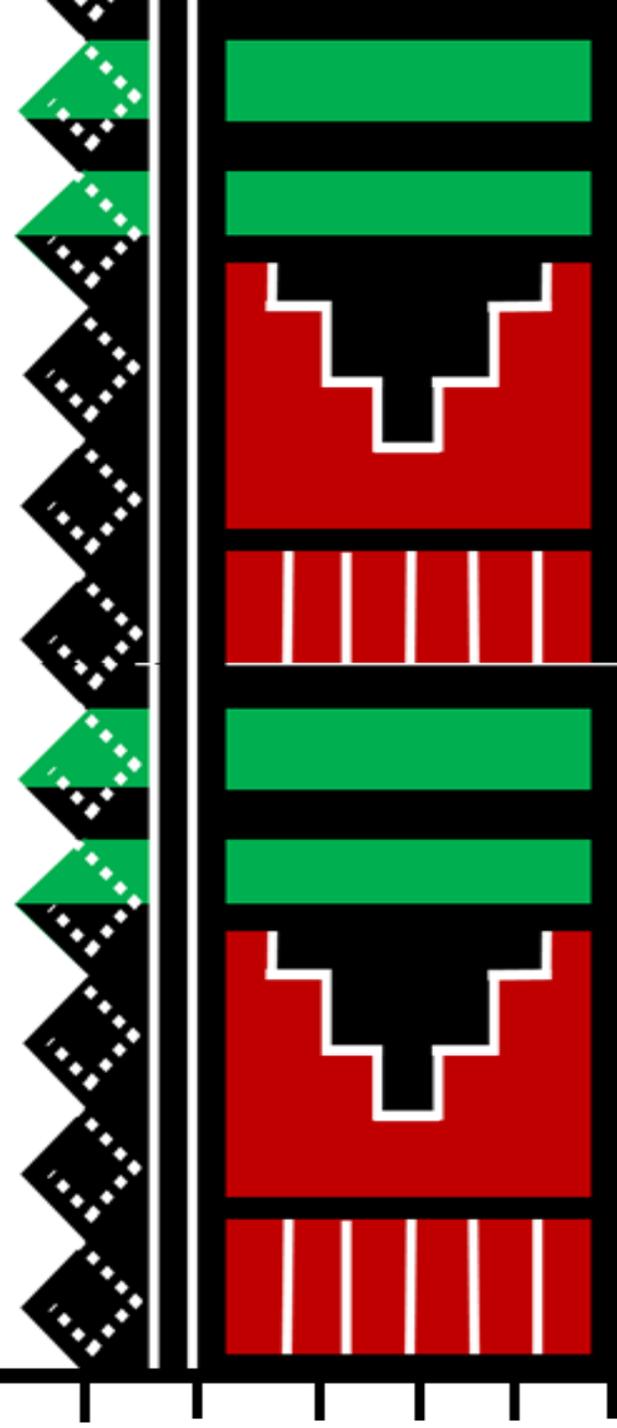
- Upon application by an Indian individual who has reached the age of 18, the Court who entered the adoption decree shall inform the individual of the tribal affiliation of the individual's biological parents and provide such information as necessary to protect any rights flowing from the individual's tribal relationship. 25 USC 1918



Best Practice

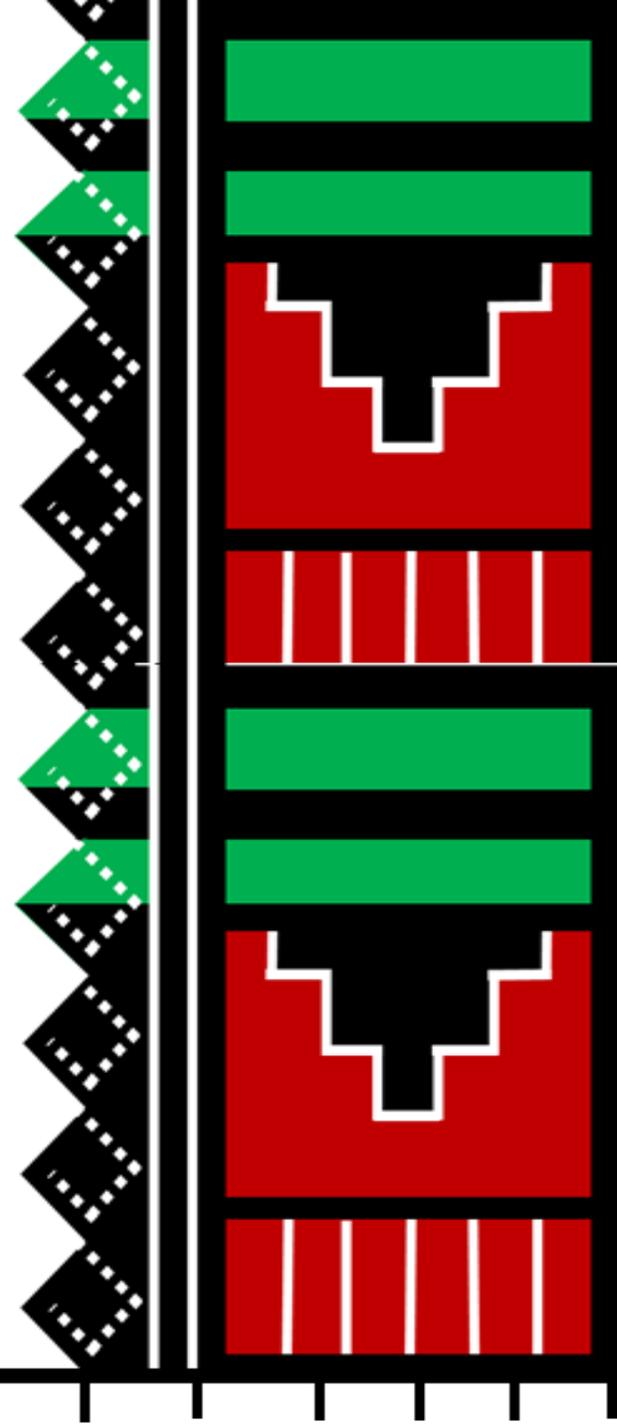
Caseworkers must make several considerations when handling an ICWA case, including:

1. Working actively to involve the child's tribe to provide intensive case management.
2. Providing **active efforts** to the family.
3. Identifying a placement that fits under the ICWA preference provisions
4. Notifying the child's tribe and the child's parents of the child custody proceeding



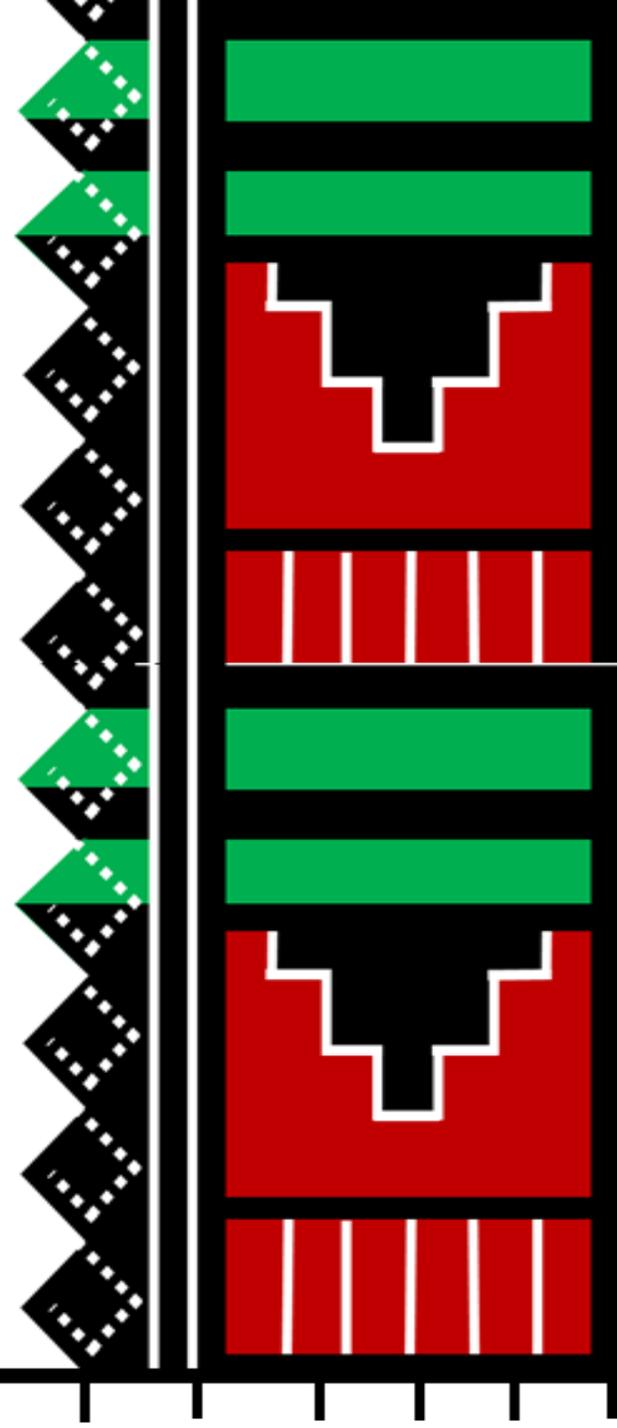
Active efforts were made to prevent the break up of an Indian family. However, all efforts were unsuccessful. You are now at termination. What is needed at this level?

1. Qualified expert witness: this could be anyone who has testified as an expert witness in an ICWA case
2. Qualified expert witness: preferably one designated by the tribe
3. Proof that reasonable efforts were made
4. Proof that active efforts were made
5. QEW testimony that returning the children to the home would cause serious, physical or emotional harm
6. Discussion with your QEW about why active efforts were or were not made



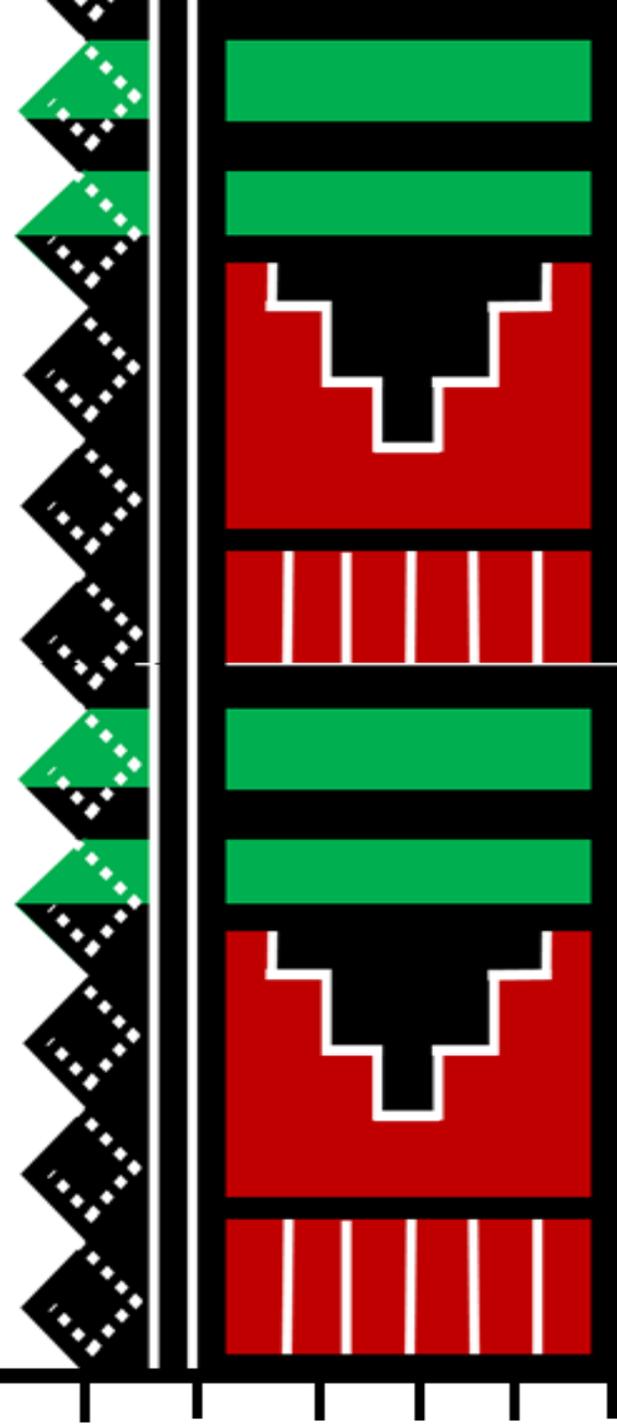
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Why It's Important to Collaborate

- Provides a better enhanced service delivery to families.
- Allows State and Tribal Courts to work together.
- Reconnect Children to their native community.
- Allows Tribal children in Foster or Kinship care to learn their Pueblo customs, traditions and history



Who is responsible for asking family about Native heritage?

1. Investigator
2. FBSS Worker
3. CVS Worker
4. Attorney
5. Judge



QUESTIONS?

COMMENTS?

Thank you!

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