



JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

Why Is Notice Under The Indian Child Welfare Act (ICWA) So Hard To Get Right?¹

Introduction

More Indian Child Welfare Act (ICWA) cases are overturned for failure to give proper notice than for any other cause. Given that ICWA has been around since 1978, why is this still such a problem?

The answer is that finding out where to send notice is much more complicated than many people realize. This is particularly true in California. California has more than 100 federally recognized Indian tribes, as well as unrecognized tribes, and more individuals with Indian ancestry than any other state in the nation. Many of these individuals trace their Indian ancestry to tribes outside of California; for an individual who does trace his or her ancestry to a historical California Indian tribe, finding out whether or not he or she is “a member or eligible for membership” in a federally recognized tribe, and if so which tribe, can be very difficult.

Historical Conditions and Policies in California

There are a number of historical conditions and policies that make the application of ICWA in California very complicated and very difficult. These include:

- Comprehensive treaties with California Indians were never implemented the way they were in many other areas of the United States.
- In 1851 and 1852, representatives of the United States entered into 18 treaties with tribes throughout California that would have provided for more than 7.5 million acres of reserve land for the tribes’ use. These treaties were rejected by the U.S. Senate in secret session. The affected tribes were given no notice of the rejection for more than 50 years, and the promised reserve lands were never provided.
- Early California Indian law and policy provided that:

¹ Prepared by the ICWA Initiative, Center for Families, Children & the Courts, Judicial Council of California.

- A justice of the peace had the legal authority to remove Indians from lands in a white person's possession
 - Any Indian could be declared vagrant (upon word of a white person) and thrown into jail, and his or her labor could be sold at auction for up to four months, with no pay (called "indenture" but, in effect, slavery)
 - Indian children could be kidnapped, sold, and used as indentured labor, which was effectively slavery slaves
 - Any Indian could be put into indentured servitude (one report mentioned 110 servants who ranged from ages 2 to 50, 49 of whom were between 7 and 12 years old)
 - Government-sponsored militias organized against Indian tribes were allowed²
- As a result, of these policies as well as disease brought by settlers, between 1840 and 1870, California's Indian population plummeted from an estimated 300,000 to an estimated 12,000.
 - Those who survived scattered into small groups and hid themselves and their identity because it was too dangerous to remain as a group and be identified as Indian.
 - No land base was set aside for most Indians in California.
 - Few California tribes have substantial "reservations."
 - Instead of substantial reserve lands for California's Indian population, in the early 1900s, small plots of land were set aside for "homeless California Indians."
 - When the federal government did recognize tribes, it tended to identify tribes not by their historical identity, but in terms of the locality in which lands were set aside for them.
 - Then, during the "termination period," in the 1950s and 1960s, the federal government "terminated" more than 40 California tribes; they were no longer recognized as Indians or tribes.
 - Also, during this same timeframe (ie. the 1960's), the federal government relocated 60,000–70,000 Indians from other parts of the country to California, mainly to the Los Angeles and San Francisco Bay areas.
 - Since the 1970s, many terminated tribes have been restored through litigation and legislation.³

This history makes compliance with ICWA requirements in California very complicated and difficult. ICWA requires that when a child is a "member of or eligible for membership in and the biological child of a member of" a federally recognized tribe, notice of most involuntary child custody proceedings must be sent to that tribe. Notice must be sent to the tribal chairman unless the tribe has designated another agent for service of ICWA notice. The Department of Interior is charged with maintaining and publishing a list of "Agents for Service of ICWA Notice" in the federal register. The list

² For more information on early California Laws and Policies relating to Indians, please see Johnston-Dodds, Kimberly, *Early California Laws and Policies Related to California Indians* (California Research Bureau, Sacramento, CA, 2002).

³ For further information on Termination, Restoration and Federal Acknowledgement of Unrecognized California Tribes, please see the Final Report of the Advisory Council on California Indian Policy, 1997.

was last published in March 8, 2017⁴. The Bureau of Indian Affairs (BIA) Regional Office in Sacramento acknowledges that the information in the federal register list is often out of date as soon as it is published.

Further, in California, as a result of the historical events described above, the way people with a Native American background identify themselves may not be consistent with the way in which tribes are identified by the federal government.⁵

This is a map of historic California tribal territories:



⁴ As of March 2018. That list can be accessed here: <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-061761.pdf>

⁵ To a greater or a lesser extent, the same is also true of many tribes throughout the United States.

This is a map showing names and locations of federally recognized tribes in California:



As the reader can see when comparing these two maps, many of the names by which the federal government currently recognizes tribes bear no relationship to historical tribal identifications.

A similar situation is true, in differing degrees, for many tribes across the United States.

Sorting Through Tribal Lists

At the time of writing, the most recent BIA list of federally recognized Indian tribes was published on January 17, 2017, and can be found at <https://www.gpo.gov/fdsys/pkg/FR-2017-01-17/pdf/2017-00912.pdf>.

This is an alphabetical list of federally recognized tribes throughout the country and contains no contact information.

At the time of writing, the most recent BIA list of Agents for Service of ICWA Notice was published in March 8, 2017 can be found at <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-061761.pdf>

This lists the tribes, alphabetically, by BIA region (most California tribes are in the Pacific Region).

If an individual is an enrolled member⁶ of a federally recognized tribe, he or she will likely be able to tell you the name of the tribe as it is identified in the federal register. Many people who identify as California Indians, however, may not be able to tell you the name of their tribe as it appears in the federal register. They may instead identify their tribe by its historic tribal name, for instance Pomo or Cahuilla. If someone states they have Pomo ancestry, it will not be possible to go to the federal register list of Agents for Service of ICWA Notice and look under “P” to find Pomo tribes. There are more than 20 federally recognized tribes whose members trace their ancestry to the historic “Pomo” tribe. Not a single one of these tribes’ federally recognized tribal names begins with the word “Pomo.” Only six of these tribes even have the word “Pomo” in their federally recognized tribal name.

Similarly, if someone states that he or she has Cahuilla ancestry, it is not possible to look up Cahuilla in the federal register and be certain you have found his or her tribe. Although there is a federally recognized tribe named “Cahuilla,” it does not include all people of Cahuilla ancestry. There are nine federally recognized tribes whose members trace their ancestry to the historic Cahuilla tribe. Of those, the federally recognized tribal name of only one (the Cahuilla Band of Mission Indians) begins with the word Cahuilla. Only three have the word Cahuilla in their federally recognized tribal name.

To further complicate matters, several tribes have traditional territories and reservation land bases that straddle the California border. For instance, the Colorado River Indian Tribes (“CRIT”) are recognized by the federal government as a single federally

⁶ Caution: Not all tribes require “enrollment” for membership. In many cases simple descent from an individual on a base roll or early member of the tribe may be sufficient for membership.

recognized tribe. CRIT is, however, composed of descendants of four distinct historic tribes—the Mohave, Chemehuevi, Hopi, and Navajo—who had land set aside in common for them by the federal government in 1865. The reserve straddles the California/Arizona border, with a substantial portion of the reservation lying within San Bernardino County. Nevertheless, because the primary community and tribal offices are located in Arizona, the Colorado River Indian Tribes are not even listed as a “California” tribe in the federal register of Designated Agents for Service of ICWA Notice. Instead, they are listed under the Western Region of BIA, which includes Arizona. The same is true of the Chemehuevi Indian Tribe, the Fort Mojave Indian Tribe, and the Fort Yuma Tribe and perhaps others that also have reserve lands that straddle the California/Arizona border.

The California Department of Social Services (CDSS) has attempted to address some of the difficulties state and local agencies have when trying to use the federal register of Designated Agents for Service of ICWA Notice to determine which tribes they need to send notice to, by creating their own list, which can be found at:

<http://www.childsworld.ca.gov/res/pdf/CDSSTribes.pdf> . Recently the federal Bureau of Indian Affairs has also created a list of tribes by tribal affiliation. That list was last updated 11/28/2015. It is available here: **Indian Child Welfare Act; Designated Tribal Agents for Service of Notice**

This list is updated regularly with information provided by tribes and agencies to the CDSS.⁷ Further, it lists the tribes according to their historic tribal identification and affiliation rather than by their federal register name. This means that if an individual states he or she has Cahuilla ancestry, it is possible to look alphabetically on this list for Cahuilla and find the nine federally recognized tribes whose members trace their ancestry to the historic Cahuilla tribe. Although this list is generally recognized as being a more effective way of obtaining information about where ICWA notice must be sent and as containing more accurate and up-to-date information about tribal contact information, **it is not referred to or recognized in the federal statute or regulations.** ICWA and its implementing regulations refer only to the federal list of Designated Agents for Service of ICWA Notice. This means that if the contact information on the CDSS list for a particular tribe is different from the contact information contained in the federal register list for that tribe, to be protected from reversal on appeal notice will have to be sent **BOTH** to the address listed in the CDSS list and to the address listed in the most current federal register publication of Designated Agents for Service of ICWA Notice.

⁷ If in doing an ICWA noticing, you learn that any of the information contained on the list is out of date or incorrect, you should contact the individuals listed as contacts at CDSS so they can update the information.

Why Don't People Claiming Native American Ancestry Know Whether They Are a Member of a Federally Recognized Tribe or, If So, to Which Tribe They Belong?

State and local agency personnel are sometimes frustrated that people claiming Native American ancestry may have very little information about their potential links to federally recognized tribes. Similarly, sometimes there is frustration that, when notice is sent to tribes, the tribes sometimes take a very long time to determine whether particular individuals are members or eligible for membership in their tribes.

Many of the historical factors discussed above contribute to the problem that people of Native American ancestry are sometimes disconnected from their tribal communities and do not know whether or not they are members of or eligible for membership in a federally recognized tribe. As discussed in the previous section, not all the historic California tribes currently have status as "federally recognized tribes." Reservations were not set aside for all the tribes in California, even the tribes that signed the eighteen 1851–1852 unratified treaties. The idea of a comprehensive "list" of federally recognized tribes is quite recent; one was first published in 1979. The "list" was primarily based on those groups for which the federal government held lands in trust, and thus left out many individuals and families that descend from historic California tribes and identify as Indian even though they might not be eligible for membership in a federally recognized tribe. These people's status as "Indian" has in many ways been confirmed by federal laws and policies. Federal legislation still contains a unique definition of California Indian that more people than just members of federally recognized tribes and that recognizes this broader category as eligible for health and education services from the BIA. This definition, from 25 U.S.C.A. § 1679, is given below:

(b) Eligible Indians

Until such time as any subsequent law may otherwise provide, the following California Indians shall be eligible for health services provided by the Service:

- (1) Any member of a federally recognized Indian tribe.
- (2) Any descendant of an Indian who was residing in California on June 1, 1852, but only if such descendant--
 - (A) is living in California,
 - (B) is a member of the Indian community served by a local program of the Service, and
 - (C) is regarded as an Indian by the community in which such descendant lives.

(3) Any Indian who holds trust interests in public domain, national forest, or Indian reservation allotments in California.

(4) Any Indian in California who is listed on the plans for distribution of the assets of California rancherias and reservations under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian.⁸

Further, there may be close historical family connections between people who are currently members of federally recognized tribes and those who are not. An individual's ancestors may primarily identify with a group that is not currently federally recognized, but they may still be eligible for membership in one or more federally recognized tribes. This is why notice must be sent to each tribe of which a child "may be eligible for membership,"⁹ to allow each tribe to investigate and make a determination about the child's eligibility.

It is important to know that membership criteria vary from tribe to tribe and may change over time. Membership criteria for many California tribes is based on descent from a "base roll" that in many cases was established by the BIA and does not necessarily reflect any historic practice of the tribe. Following are several examples of membership criteria for several California tribes¹⁰:

Example 1:

(a) The membership of the XXXXXXXXXXXX Band of Mission Indians shall consist of all persons whose names appear on the last official per capita payroll of June 1954, and children born to such members as issue of a legal marriage, provided such children shall possess at least 1/8 degree of Indian blood.

(b) No new members may be adopted.

Example 2:

SECTION 1. The membership of the xxxxxxxx Band of Pomo Indians shall consist of-

(a) All persons of Indian blood whose names appear on the official census rolls of the band as of April 1, 1935;

(b) All children born to any member of the band who is a resident of the rancheria at the time of the birth of said children.

SEC. 2. The general community council shall have the power to promulgate ordinances, subject to review by the Secretary of the Interior, covering future membership and the adoption of new members, when the resources of the band make such adoptions feasible.

⁸ 25 U.S.C.A. § 1679

⁹ Welf & Inst. Code § 224.2(a)(3)

¹⁰ These examples are taken from tribal constitutions found online at the National Tribal Justice site, www.tribalresourcecenter.org/tribalcourts/codes/constdirectory.asp. We have removed the names of the tribes because we do not know whether the membership criteria are still current.

An individual may know that his or her ancestors identified as Cahuilla but may not know whether any such ancestors' names appeared on a "per capita payroll of June 1954." An individual may not know whether he or she or his or her children possess 1/8 degree Indian blood without completing a family tree (as required by the ICWA-030 form). An individual may know that his or her ancestors identify as Pomo but not know whether any of their names appear on a census roll from April 1, 1935. They may not know whether a particular ancestor was a "resident of the rancharia" at the time of the birth of their children. Similarly, a tribe may not be able immediately to determine whether a particular individual is a member of or eligible for membership in a given tribe without conducting extensive family background research, going back several generations or often beyond. This is why tribes require the detailed information required in the ICWA-030 form. This is why it is critical that this information be complete and accurate. Even with this information, it may take some time for a tribe to be able to check this historical information and make a determination about tribal membership.