Legal Studies
Research Paper Series

Research Paper No. 07 - 07

The Cherokee Conundrum: California Courts and the Indian Child Welfare Act

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"We are growing weary of appeals in which the only error is the Department's failure to comply with ICWA"[2]

I. Introduction

California has a notice problem. The Indian Child Welfare Act,[3] passed in 1978, is legislation designed to ensure that Indian children are not automatically removed from their families and tribes by state social workers and state courts. The states are required, in ICWA cases, to notify a child's tribe of the proceeding. This may be the only way tribes become aware of an Indian child in state court. Without notice, tribes cannot exercise their additional rights under the statute, making the notice provision of ICWA one of the most important sections[4] Only after tribes are notified of an Indian child is in the state court system, can the tribe act on their rights of intervention,[5] transfer,[6] and work with the state to ensure compliance with the placement provisions.[7] Without this notice, tribes may not know if one of their children passed through the state court system, been removed from his or her family, or placed with a non-Indian family. Notice, therefore, is the first step the state court must pass in order to successfully comply with the ICWA. Lack of notice is cause for remand and reversal of a termination or placement proceeding.

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[2] *Justin L.* at 1410.
[3] 25 U.S.C. §1901-1963.
[4] 25 U.S.C. §1912(a).
[5] 25 U.S.C. §1911(c).
[6] 25 U.S.C. §1911(b).
[7] 25 U.S.C. §1915 (while this provision is a mandate on the state, and the tribe is not required to participate to ensure placement preferences are followed, the law also requires the state to follow tribal law regarding placement preferences if they differ from the statute's preferences).

California has the most number of ICWA cases of any state in the country. Far and away notice noncompliance is the most litigated issue in these California cases.[8] The situation has become so dire a recent California appellate court decision goes so far as to state that the court is "weary" of these lack of notice proceedings.[9] California is doing a poor job of notifying tribes of Indian children in its court system. But why does California have so many notice cases? And which tribes are, or are not, receiving all of these faulty notifications? Without any doubt, the Cherokee tribes[10] have the most number of parents claiming affiliation. Why is this the case? Why are cases involving potential Cherokee children most likely to have bad notice litigation?

Second II of this article briefly describes the purpose and history of the Indian Child Welfare Act, while Section III considers Indian identity as it relates to the ICWA. Sections IV and V discuss California's long running ICWA notice problems, evaluates a year of California ICWA cases and offers some reasons for this phenomena.

II. The Indian Child Welfare Act

In response to overwhelming numbers of Indian children removed from their homes as a result of an ongoing policy of assimilation, Congress passed the Indian Child Welfare Act[11] in 1978.[12] Congress spent four years hearing testimony from tribal leaders, psychologists, social workers, and tribal citizens who were removed from their homes and placed in non-Indian

[8] *See infra* Section V.
[9] *In re Justin L.* at 1410.
[10] The three federally recognized Cherokee tribes, Cherokee Nation of Oklahoma, United Keetowah Band of Cherokee Indians, and the Eastern Band of Cherokee Indians are all required to be notified any time a parent claims "Cherokee" status.
[11] 25 U.S.C. §1901-1963
[12] See *Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes*, H.R. Rep. 95-1386 (July 24, 1978); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1989)("Studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions.")

homes.[13] Reasons for these removals were based primarily on racist assumptions about Indian families, Indian homes and reservations, and the removals were primarily done through routine and automatic state court actions.[14] Specifically, one member of the Sisseton-Wahpeton Sioux Tribe and her attorney testified that Indian children were taken without any notice to their families.[15] The attorney also discussed the practice of the courts to provide notice through publication rather than service, even when the state agency had the mailing address of the parent.[16] Prior to 1978, 25 to 35 percent of all Indian children were removed from their homes.[17] More recently, studies continue to show that Indian children are still significantly overrepresented in foster care and those waiting for adoptive homes.[18]

The ICWA was an attempt to circumvent routine removals and sets up a series of roadblocks to prevent the routine removal and adoption of Indian children by non-Indians. The Act guarantees certain minimum federal standards in several areas when Indian children are in state courts.[19] The ICWA has a number of provisions, including jurisdictional, notice, placement preferences and other standards to provide Indian children and tribes with protection from state agencies and courts.

The ICWA codified jurisdiction[20] so that children living on the reservation are under the exclusive jurisdiction of tribal courts, while those living off are under "transfer jurisdiction"[21]

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[13] *Holyfield, Id* at 33-34.
[14] *Indian Child Welfare Program*, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 2d. Sess. (April 8&9, 1974) 19-23.
[15] *Indian Child Welfare Program, Id* at 67-69 (Statement of Cheryl DeCoteau), *See also Id* at 224-5 (Statement of Mel Tonasket).
[16] *Indian Child Welfare Program, Id* at 68.
[17] Jones, Tilden and Gaines-Stoner, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children*, (Chicago: ABA Publishing, 2008), 2.
[18] National Indian Child Welfare Association and The Pew Charitable Trusts, *Time for Reform: A Matter of Justice for American Indian and Alaska Native Children*, (http://www.kidsarewaiting.org/tools/reports/files/0009.pdf, 2007), 5.
[19] 25 U.S.C. §1902.
[20] *See Fisher v. District Court*, 424 U.S. 382 (1976)(upholding exclusive tribal jurisdiction over a child when all interested parties lived on the Northern Cheyenne Indian Reservation).

between the state and the tribe.[22] In other words, the tribe, parent or Indian custodian has the right to request the case be transferred to tribal court even if the case has started in state court and the child lives off the reservation.[23] The state "shall transfer" the case to tribe court absent parental objection.[24] However, in addition to these jurisdictional rules, the ICWA also sets up requirements for cases going forward in state court, regardless of whether the tribe chooses to participate in the case or not. The state is required to follow these standards as soon it becomes aware the case may involve an Indian child as defined by ICWA. The requirements are not for the tribe or parent to enforce, but rather puts an active duty on the state to follow the federal law.

One of the most important requirements for the state is that of notice.[25] The law states,

> 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 pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, that the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such a proceeding.[26]

These requirements run for the length of the proceeding from the first hearing to the final placement provisions for a child being adopted.[27] Once the state has an inkling that the child who is subject to the proceeding is an Indian child, the state must investigate the child and her

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[21] Jones, Tilden and Gaines-Stoner, 59-64.
[22] 25 U.S.C. §1911
[23] 25 U.S.C. §1911(b)
[24] *Id.*
[25] 25 U.S.C. §1912(a)
[26] *Id*.
[27] *See* CAL. FAM. CODE §180(c).

family to determine what tribe or tribes the state must notify.[28] Because all other rights under ICWA for the tribe are contingent on the tribe's awareness that one of its children is in state court, notice is of paramount importance. Without notice, the tribe cannot move to intervene and advocate for ICWA compliance or move to transfer the proceedings back to tribal court. As discussed above, lack of notice was one of the hallmarks of earlier state removal of Indian children.

Regardless of whether a tribe chooses to intervene or move to transfer the proceedings, if the case stays in the state court, the state then has to follow the requirements of ICWA. For example, the state then has has higher burdens of proof before placing a child in foster care or terminating parental rights,[29] and must demonstrate it made "active efforts" to keep the child with her family.[30] Finally, when the state does go place the child in foster care or with an adoptive family, it must follow specific placement provisions for where the child is placed.[31] All of these requirements are attempts to ensure the child is not cut off from his tribe.

Notification is the first step the state must take in a potential ICWA case. Notification is a fairly simple step, but it does require extra paperwork and research. The state must notify the child's tribe or potential tribe. A child qualifies as an Indian child under the ICWA if he is a "member of an Indian tribe" or is "eligible for membership and is the biological child of a

[28] CAL RULES OF COURT 5.481(a)(4)(2009)(because this article is primarily concerned with issues about notification in California, the article will primarily look to how the ICWA is enforced in California. The ICWA is enforced using different standards across the 50 states, despite the *Holyfield* decision urging uniform application of the law. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 46 (1989)).
[29] 25 U.S.C. §1912(e),(f)(foster care placement must be supported by clear and convincing evidence that "continued custody of the child by the parent" "is likely to result in serious emotion or physical damage to the child." Termination of parental rights must be supported by evidence beyond a reasonable doubt of the same standard).
[30] 25 U.S.C. §1912(d).
[31] 25 U.S.C. §1915.

member of an Indian tribe."[32] Only a tribe can determine membership and the child and parent are not required to prove membership through an enrollment number or card.[33]

At times, because of the information provided, the child's tribal affiliation may be vague, but if there is any indication of the affiliation, for example, Anishinaabe[34] or Sioux[35] or Cherokee,[36] the state must find all of the information about the child's family and then notify all of the federally recognized tribes which may have an interest in the child. The state must also notify the regional BIA office. Unfortunately, the state does not always collect all of the necessary information, and the parent does not always know the information. In addition, when the state does collect the information, it is not always listed on the forms correctly. For instance, the switching of paternal and maternal grandparent names is a common mistake.[37]

The ICWA is a unique law, where the federal government has had to intervene in what is traditionally a state law area, family law. Without the intervention, however, even more children would be placed in non-Indian homes. While the violations testified to in the ICWA hearings were primarily done by state actors, they were also a continuation of a long history of federal and state assimilationist policies.[38] To stem this tide, the federal government had to step in to attempt reverse this particular offense.

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[32] 25 U.S.C. §1903(4).
[33] *In re N.E.G.P*, 245 Mich.App. 126, 134 (2001)(citing *In re JW*, 498 N.W.2d 417, 422 (Iowa App., 1993); *In re Junious M*., 144 Cal.App.3d 786 (1983)).
[34] *See Id* at 133("On remand, petitioner must provide proper notice to the Anishinabee [sic] tribe")(While the judge may not have been clear, it does seem that the state in this case would have to notify all federally recognized Anishinaabe tribes, which may number more than 25).
[35] *In re S.K*., 2007 WL 4295700*6 (Cal.App.2 Dist., 2007) (when the parent claimed Blackfeet, Sioux and Cherokee ancestry, the court notified 1 Blackfeet tribe, 16 Sioux tribes and 3 Cherokee tribes).
[36] See Section V, infra.
[37] *See eg In re Serenity B.*, 2007 WL 2297835, *4 (Cal.App. 5 Dist., 2007). When a tribe determines membership based on either maternal or paternal descendency, this could prove to be a serious mistake.
[38] *See* Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race and Citizenship, 1790-1880* (University of Nebraska Press, 2007); David Getches, Charles F. Wilkinson, Robert A. Williams Jr., *Cases and Materials on Federal Indian Law* (West Publishing, 1998) 140-216.

III. Identity and ICWA

Because the application of ICWA is based on the definition of who is an Indian child, identity necessarily arises in that context. The law states that a child must be a member, or eligible for membership and the biological child of a member. However, since tribes are the sole judge of membership, state courts are not supposed to make determinations about tribal membership.[39] For example, enrollment in a tribe is not a prerequisite to membership in a tribe.[40] The parent need not prove his or her membership through a card or enrollment number. Rather, the tribe must determine whether the child is a member, the parent is a member, and if the child is eligible for membership.

Some states have rejected this process and have taken the decision of whether a child is an Indian child under ICWA out of the hands of the tribe.[41] The judicially created exception to ICWA, the existing Indian family doctrine,[42] puts the decision of whether a child is an Indian into the hands of the state. While the child may qualify as an Indian child under the statute, the state will determine that the child is not from an Indian family, or that the family is not Indian "enough" to qualify for the protections of ICWA. [43] This judicially created exception

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[39] *See Santa Clara Pueblo v Martinez*, 436 U.S. 49 (1978)(tribal membership is a completely internal decision); *In re Junious M.*, 144 Cal.App.3d 786; 193 Cal.Rptr. 40, 43 (1983).

[40] See *In re I.E.M.*, 592 N.W.2d 751, 755-6 (Mich.App., 1999)("Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.")(citing Guidelines for State Courts; Indian Custody Proceedings, 44 Fed. Reg. 67584, 86 (1979); *United States v. Broncheau*, 597 F.2d 1260, 1263 (C.A.9, 1979).

[42] *See, In re Baby Boy L.*, 643 P.2d 168, 175 (Kan., 1982)("In this case Baby Boy L. is only 5/16ths Kiowa Indian, has never been removed from an Indian family and so long as the mother is alive to object, would probably never become a part of the [father's] or any other Indian family. While it is true that this Act could have been more clearly and precisely drawn, we are of the opinion that to apply the Act to a factual situation such as the one before us would be to violate the policy and intent of Congress rather than uphold them.").; *In re Bridget R.*, 49 Cal.App. 4th 1483 (Cal.App. 2 Dist, 1996*); In re Santos Y.*, 92 Cal.App.4th 1274 (Cal.App. 2 Dist., 2001), *but cf* In re Vincent M., 150 Cal.App.4th 1247 (Cal.App. 6 Dist., 2007); CAL.WELF. & INST.CODE § 224 (California appellate courts are split on the EIF, despite California's statutory attempt to eliminate it).

[43] *See In re Baby Boy C.*, 27, A.D.3d 34, 43-44 (NY, 2005)(surveying the states which have both adopted and rejected the IEF); *See also*, Novaline Wilson, "Tribal Consequences of Urban Indian Relocation: Case Examination of the Exisiting Indian Family Exception & Adoptive Placement Under the Indian Child Welfare Act," *Indigenous Law and Policy Working Paper 2007-04*, March, 2007 (available at

undermines the purpose and intent of the ICWA by inserting state court decision making into the determination of who is an Indian child.[44]

While the existing Indian family doctrine is applied by the courts, it is possible that an informal EIF exception also exists before a case even gets to court. State agencies and social workers are in some ways the gatekeepers to the ICWA. The notice work that must be done for an Indian child falls on the social workers and various family service departments in the state. While the agency or department has the obligation to notify a tribe if it believes or has reason to believe the case involves an Indian child, in reality it appears that the social worker may rely on his understanding of who is a "real" Indian before serving notice. Based on the social workers own experience,[45] certain parents may not have enough information to convince the social worker of their tribal affiliation.

Tribes themselves are facing real questions of membership and citizenship on a daily basis, as they continue to deal with the federal assimilationist requirements of blood quantum, or rolls compiled by federal agents intent on limiting the number of Indians and promoting assimilationist policies. The tribe discussed most in this article, the Cherokee Nation of Oklahoma, has been faced with at least one vexing citizenship question that has been in and out of the courts since the Treaty of 1866.[46] The questions of who is an Indian, how tribe identifies its members and who gets to make the decision are difficult but completely internal for each

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http://www.law.msu.edu/indigenous/papers/2007-04.pdf); Toni Hahn Davis, "The Existing Indian Family Exception to the Indian Child Welfare Act," *North Dakota Law Review* 69 (1993): 465-496; Lorie M. Graham, "The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine, *American Indian Law Review* 23 (1998): 1- 54.

[44] *See In re Miller,* 554 N.W.2d 32, 36 (1996); Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act*. Native American Rights Fund, 2007, 2-4 (a majority of states now reject the EIF)(also available at http://narf.org/icwa/index.htm).

[45] *See infra* Section V.

[46] *See eg, Cherokee Nation v. Whitmire,* 223 U.S. 108 (1912); *Vann v. Kempthorne,* 534 F.3d 741 (2008); *Allen v. Cherokee Nation Tribal Council,* JAT-04-09 (Cherokee, 2006)(all litigating the issue of the Cherokee Freedmen and their citizenship status within the Cherokee Nation).

tribe. State social workers do not need an extensive background in tribal law, tribal sovereignty and tribal self-determination, but they do need to understand the requirement of *internal* tribal decision making regarding membership.

However, when a parent identifies as Indian for the purpose of ICWA protections, state agencies and workers become necessarily involved in issues of Indian identity. When parents are unable to provide detailed information about their own tribal affiliation, the state social worker must do the investigation and inquiry. Sometimes grandparents are able to fill in the blanks, but often times the information is lost. If a parent is unaware and unable to name their own tribe, or can give only vague references to an Indian past, the state worker may become frustrated with having to notify any number of tribes with limited information,[47] or with information the state worker believes is false.

Since it is the state's responsibility to notify the tribes, are the states, particularly California, enforcing an existing Indian family doctrine within its state agency? Social workers provided with a basic understanding of ICWA as a remedy for past wrongs for children taken from tribal communities, may have an impression that ICWA has limited application outside of a reservation or tribal community. There is little wide scale discussion of the issues facing urban Indians and the ICWA, though the 1974 Congressional hearings did include testimony from parties from major cities.[48] These stories are generally left out of the narrative of the purpose and history of ICWA. Therefore, when children are removed from parents in major cities due to extreme abuse and neglect, with a vague indication from the parent that they might be Indian,[49]

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[47] *See In re MacKenzie W.*, 2007 WL 405666 (Cal.App. 4 Dist. 2007).

[48] *See Indian Child Welfare Program*, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 2d. Sess. (April 8&9, 1974) 159-170(Testimony of Esther Mays, Detroit, MI; Victoria Gokee, Milwaukee, WI.

[49] *See eg In re Jose G.*, 2007 WL 4444444 (Cal. App. 2 Dist., 2008)(Mother "stated that she was uncertain whether she had American Indian heritage. The maternal grandmother stated that the family had Cherokee Indian heritage and was registered, but she did not have the registration card."); *In re Miracle M.*, 160 Cal.App.4th 834 (Cal.App. 2

their story may not fit with the social worker's understanding of ICWA, regardless of its mandate. This may explain the complete lack of notice compliance,[50] or the extremely poor job of notification done by state social workers. Notice may depend on whether the state agency believes the child is Indian. If the agency believes the parent's statement that the child might be an Indian child is a gambit, designed to slow down the process, motivation to notify the tribe drops considerably.

These are necessarily suppositions because motivations are rarely explained in court cases, but they are based on a nationwide study of ICWA cases for one year. Based on this research, it seems apparent that in California the state workers and judges are increasingly frustrated with certain aspects of the ICWA—specifically with having to notify multiple tribes of a potential Indian child when none of the child's relatives can say with accuracy which tribe to contact. The cases out of California demonstrate a serious notice compliance problem which has not improved much over the years.

IV. California's ICWA Notice Problem

Interestingly, California has fairly strict notice requirements, codified in both the family code and rules of court.[51] The courts require notice whenever the state agency "knows or has

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Dist., 2008)(Father could not be reached, paternal aunt said the maternal great grandmother was a Cherokee Indian, but she did not know if she was registered. Mother's maternal grandmother told the state they were descended from Mayans.); *In re Roland B.*, 2008 WL 344717 (Cal.App. 4 Dist., 2008)(When the mother was asked about ICWA, she said her "'ancestors or grandparents' were originally from Oklahoma. In addition, she completed an ICWA questionnaire in which she claimed to be of Cherokee descent but not enrolled in any tribe.")

[50] *See eg In re A.M.*, 2008 WL 217644 (Cal.App. 2 Dist., 2007) (appeal uncontested by Department of Children and Family Services); *In re Nathan A.*, 2007 WL 4180569 (Cal.App. 2 Dist., 2007)(Department concedes notice was insufficient).

[51] CAL. FAM. CODE §180; CAL. RULES OF COURT 5.480-5.482; *see also In re Kahlen W.*, 233 Cal.App.3rd 1414, 1421-2 (1991).

reason to believe the child is an Indian child."[52] In addition, the state has an ongoing, continuing duty of inquiry throughout the case to determine if the child is an Indian child.[53] Every child, parent, Indian custodian or guardianship in certain court actions[54] must be asked by the state if the child may be an Indian child, and the state must fill out the Indian Child Inquiry Attachment form.[55] Every parent, guardian or Indian custodian in certain court actions[56] must themselves fill out an additional form, the Parental Notification of Indian Status.[57] Notice must be send to the tribe to notify the tribe of the case, inquire as to the status of the child, and notify the tribe that it has the right to intervene.[58] Notice must be sent by registered mail, return receipt requested.[59] The parent has the right to bring up ICWA issues at any time during the proceedings, including at the appellate level even if it was not brought up at the trial level.[60]

California has two forms for juvenile dependency petition, JV-100 and JV-110.[61] Both are mandatory for the court, though it appears the social worker can choose which form to use.

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[52] *In re Kahlen*, 223 Cal.App. 3rd at 1422; CAL. FAM. CODE §180(c); CAL.RULES OF COURT 5.481(a)(4)("If the social worker, probation officer, licensed adoption agency, adoption service provider, investigator, or petitioner knows or has reason to know that an Indian child is or may be involved, that person or entity must make further inquiry").

[53] CAL. RULES OF COURT 5.481(a) ("The court, court-connected investigator, and party seeking a foster-care placement, guardianship, conservatorship, custody placement under Family Code section 3041, declaration freeing a child from the custody or control of one or both parents, termination of parental rights, or adoption have an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all proceedings identified in rule 5.480").

[54] *Id.* ("foster-care placement, guardianship, conservatorship, custody placement under Family Code section 3041").

[55] CAL. RULES OF COURT 5.481(a)(1); Form-ICWA-010(A)(available at http://www.courtinfo.ca.gov/forms/).

[56] CAL. RULES OF COURT 5.481(a)(2).

[57] Parental Notification of Indian Status, Form-ICWA-020 (available at http://www.courtinfo.ca.gov/forms/)(It appears some courts may still use form JV-130, which is similar to ICWA-020. ICWA-020, however, has a line for tribal identification for every box except "I have no Indian ancestry as far as I know," where JV-130 does not have a line under "I may have Indian ancestry" and does not ask about tribal affiliation for other family members.).

[58] *In re Kahlen*,233 Cal.App. 3rd at 1422 ("However, the statute and all cases applying the Act unequivocally require *actual notice* to the tribe of both the proceedings *and of the right to intervene*")(emphasis in original)(citation omitted); CAL. FAM. CODE §180(b)(5)(a list of information required on an ICWA notice).

[59] *Id.* at 1421; 25 U.S.C. §1912(a).

[60] *In re Samuel P*. 99 Cal.App.4th 1259, 1267 (Cal.App. 6 Dist., 2002).

[61] Form JV-100; Form JV-110 (available at http://www.courtinfo.ca.gov/forms/).

Form JV-100 requires a social worker to fill out a separate form, the ICWA-010(A)[62] which indicates whether an inquiry was done to determine if the child is an Indian under the ICWA and provides eight different boxes for the social worker to check.[63] These boxes include choices that the child is or may be a member or eligible for membership in an Indian tribe, that the parents or grandparents are members of a tribe, that the child lives in a predominantly Indian community, that the child receives assistance from IHS or tribal TANF, or that the child has no known Indian ancestry. Form JV-110 simply has two boxes, "Child may be a member of, or eligible for, membership in a federally recognized Indian tribe" and "Child may be of Indian ancestry."[64] There is no box to say the child is not an Indian, or to affirm an inquiry was made. Leaving the boxes blank may indicate the child is not an Indian, but it may also indicate that the worker did not make an inquiry. In addition, JV-110 appears to be one form for multiple children with the same parents while JV-100 is for an individual child. However, California Court Rules now require ICWA-010(A) regardless of which form the worker chooses.[65]

In addition to the forms the worker must fill out when a filing a dependency petition, the parents must fill out the ICWA-020 form every time a child might be placed in foster care.[66] This form inquires of the parent whether the child "may have Indian ancestry," whether the child is a member or is eligible for membership, whether the parents or grandparents are eligible for membership, if the child lives in a predominately Indian community and whether the child or family has received HIS services[67] Checking box E, "The child may have Indian ancestry" is

[62] Form JV-100 ("2. I have asked about Indian ancestry for this child and have completed and attached the required *Indian Child Inquiry Attachment*, form ICWA-010(A)"); Form ICWA-010(A)(available at http://www.courtinfo.ca.gov/forms/).
[63] Form ICWA-010(A).
[64] Form JV-110.
[65] CAL. RULES OF COURT 5.481(a)(1).
[66] CAL. RULES OF COURT 5.664(d)(3); *see also In re HB*, 161 Cal.App.4th 115, 121 (Cal.App. 2 Dist.,2008).
[67] Form ICWA-020(A)(available at http://www.courtinfo.ca.gov/forms/).

enough for a California court to be on notice that ICWA may apply, and requires the state to inquire further as to the child's potential status as an Indian child.[68]

Finally, California's notice form sent to tribes and other required parties is ten pages long. Form ICWA-030 has room for information about the parents, grandparents, and great-grandparents.[69] Optional information includes whether a member of the family attended "an Indian school," received treatment from an IHS clinic, or lived on a reservation. The form also has boxes for relatives on the "1906 Final Roll," the "Roll of 1924" or the "California Judgment Roll," with no additional explanation. While this makes sense due to the large number of Cherokee affiliation cases in California,[70] the social worker would have to know that the 1906 Final Roll is likely the Dawes Roll used as a base roll for the Cherokee Nation of Oklahoma, among others. The worker would also have to know that the Roll of 1924 is a roll specific to the Eastern Band of Cherokee Indians.

Though the ICWA has a two step rule to determining if the child qualifies as an Indian child under the Act, the California courts leave that determination up to the tribe. ICWA applies if the child is a member of an Indian tribe *or* if the child is eligible for membership and the biological child of a member of an Indian tribe. However, the state cannot argue that because the parent is not a member of the tribe, or cannot demonstrate tribal membership, the child will not qualify under ICWA.[71] The parent does not need to prove tribal membership to the state to

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[68] Form JV-130 used to be the state form for Parental Notification of Indian Status (available at http://www.alpine.courts.ca.gov/LinkClick.aspx?fileticket=%2FvWsjK1SRfI%3D&tabid=89&mid=415). Interestingly, JV-130 focused on the parent's status, such as "I may have Indian ancestry," where the new ICWA-020(A) is focused on the child's status, "The child may have Indian ancestry."

[69] Form ICWA-030 (available at http://www.courtinfo.ca.gov/forms/).

[70] *See supra* Section V.

[71] *In re Samuel P.*, 99 Cal.App.4th 1259, 1266 (2002)("The Department argues that there was no information indicating that the mother herself was a tribal member; therefore the children could not be Indian children within the meaning of the ICWA. However, the Indian status of the child need not be certain to invoke the notice requirement.")(internal citations omitted).

invoke the notice requirements of the ICWA. The tribe will determine if the child is an Indian child.

Under California law, failure to provide notice is prejudicial failure, and requires reversal and remand.[72] Some California courts have gone on to hold that "without discharging their duty to provide the notice required under the ICWA, state courts do not have jurisdiction to proceed with the dependency proceedings."[73] However, California, and some other states,[74] have developed a streamlined way to handle poor notice cases, a limited remand. The appellate court will uphold either the termination or placement decision, but remand the case for the sole purpose of notifying the tribe.[75]

While were no appellate cases from 2007-2008 where a tribe is notified and then goes on litigate other issues, remanding for notice after the proceeding is completed leaves a number of problematic issues. For example, by the time tribe has been notified of the completion of the case involving a potential Indian child, that child has been in foster care or pre-adoptive placement. This placement may or may not comply with the placement preferences outlined in the ICWA.[76] In addition, due to a provision in the BIA Guidelines which provides that late transfer requests may be denied,[77] the tribe may have a difficult time assuming jurisdiction over

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[72] *Id.* at 1266.
[73] *Id.* at 1266; *but see In re Jonathon S.*, 129 Cal.App.4th 334, 342 ("We concur, however, with those courts that have held that an ICWA notice violation is not jurisdictional.")(The court did, however, reverse the order terminating parental rights and order a limited remand for the purpose of complying with the ICWA notice requirements).
[74] *See In re I.E.M.*, 592 N.W.2d 751 (Mich.App. 1999); *In re Justin S.* 150 Cal.App.4th 1426, fn 7 (Cal.App. 6 Dist. 2007).
[75] *See In re Francisco W.* 139 Cal.App.4th 695, 704 (2006)(conditional reversals for notice compliance "is legally authorized, consistent with the best interests of children, and in keeping with the fundamental principles of appellate practice."); *In re Justin S.* 150 Cal.App.4th 1426 (Cal.App. 6 Dist., 2007)(listing cases approving of conditional reversals in ICWA notice cases).
[76] 25 U.S.C. §1915.
[77] Bureau of Indian Affairs, *Guidelines for State Courts; Indian Custody Proceedings* C.3 44 Fed. Reg. 67584 (1979)("Good cause not to transfer this proceeding may exist if any of the following circumstances exists: (i). The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the

the case. Unless and until the tribe confirms the child is an Indian child, the state court will not be following the other provisions of ICWA, such as active efforts prior to termination, or the higher beyond a reasonable doubt burden for termination.

In 2007, a California Court of Appeals partially published an ICWA notice decision reprimanding the Department of Children and Family services for its complete lack of ICWA notice compliance.[78] The case, *In re Justin L.*, involved extreme abuse by the mother, but the Court of Appeals was still required to remand the case for the sole purpose of notice under the ICWA statutes. The mother in this case claimed affiliation with Blackfeet, "Chocktaw" and Cherokee tribes. The Court wrote,

> We are growing weary of appeals in which the only error is the Department's failure to comply with ICWA. Remand for the limited purpose of the ICWA compliance is all too common. ICWA's requirements are not new. Yet the prevalence of inadequate notice remains disturbingly high. This case presents a particularly egregious example of the practice of flouting ICWA. The Department concedes it sent no notices, notwithstanding the juvenile court's specific order that it do so. And, we have been given no indication that the Department has attempted to mitigate the damage it caused in failing to attend to ICWA's dictates by sending notices while this proceeding was pending.[79]

In an unpublished decision in 2007, the 4th District Appellate Court took the trial court to task for "disparaging" the work of the Appellate Court.[80] In this case the mother claimed Cherokee, Blackfeet, Crow and Algonquin affiliation. The Court found that for the second time, the Department of Public Social Services (DPSS) failed to properly notify the tribes which might be considered Cherokee, Blackfeet, Crow or Algonquin. The Court found that "in the absence of nearly all significant information about MacKenzie's ancestry we must conclude that the tribes

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petition promptly after receiving notice of the hearing.")(Conceivably the "and" should protect a tribe which received late notice).

[78] *In re Justin L.*, 165 Cal.App.4th 1406 (Cal.App. 2 Dist., 2007).

[79] *Id* at 1410.

[80] *In re MacKenzie W.*, 2007 WL 405666, fn2 (Cal.App. 4 Dist., 2007).

were deprived of any meaningful opportunity to determine whether [] is an Indian child."[81] The Court continued to take the trial court to task, stating that "with the myriad cases that have been published on this subject it is virtually incomprehensible and extremely frustrating that this court should find itself in the position of having to reverse an order for a second time to remedy the slap-dash approach to ICWA compliance perpetrated by the DPSS and sanctioned by an imprudent juvenile court."[82]

This unfortunately is not a new development for California. In 2002 the Appellate Court lamented the same problem with notice compliance.[83] In that case, the state sent the wrong forms certified mail rather than registered, did not request a return receipt and sent the notice to the Santa Ynez Tribal Health Clinic.[84] The Court went on to hold that

> Over the years, this court has published repeatedly to emphasize the importance of ICWA notice compliance. Indeed, with one exception, every opinion cited herein comes from this court. Nevertheless, we still encounter deficient records such as the one in this appeal. Therefore, in yet another effort to ensure compliance with the notice requirements of the ICWA, we will set forth our expectations. We hold that a party, such as the Department here, who seeks the foster are placement of or termination of parental rights to a child who may be eligible for Indian child status, must do the following or face the strong likelihood of reversal on appeal to this court.[85]

In a cost benefit analysis, the limited remand used by the California courts may have made it easier for the state not to notify the tribe and comply only when the case comes back on appeal.

V. A Year of California Notice Cases

[81] *Id* at *4.
[82] *Id.*
[83] *In re H.A.*, 103 Cal.App.4th 1206 (Cal.App. 5 Dist., 2002)
[84] *Id* at 1211-13
[85] *Id* at 1214 (the Court goes on to detail the necessary forms and proof the Department must file to be in compliance).

The *Justin L.* court was not wrong. California has a clear and systemic problem with ICWA notice cases in its court system. Surveying ICWA cases using the Westlaw database provides some interesting data. Using both published and unpublished cases[86] under the allstates database, searching with the term "Indian Child Welfare Act" and limiting the time frame from January 1, 2007 through February 29, 2008, the result is 414 appellate or state supreme court cases. Of those, 48 do not involve ICWA other than as a citation or case reference. 308 of the 366 relevant cases come out of California, with only 58 relevant cases coming from all other states combined.[87] After sorting every case[88] in to "Notice and Affirm,"[89] "Notice and Remand,"[90] "Other ICWA Issue and Affirm"[91] and "Other ICWA Issue and Remand"[92] it is possible to see just how many California ICWA cases deal with notice. Nationwide 235 of the 366 cases dealt with notice issues, 64% of all cases. However, in California, 226 of all cases

[86] A vast majority of ICWA cases from all jurisdictions are unreported. Using only reported cases would both be statistically insignificant and unrepresentative of the number of ICWA cases in the court systems. This article does attempt to cite primarily to reported cases.

[87] There were a total of 344 California cases and 70 cases from other states, though 36 of the California cases and 12 of the other state cases were not relevant to ICWA. No ICWA issue was litigated, nor was there an Indian child involved in the proceeding.

[88] There were five cases total which could not be sorted into one of these categories. The two in California involved Indian children, but ICWA was not litigated. *In re J.M.*, 2007 WL 1675021 (Cal App 4, June, 2007)(involving an Indian child and the Cherokee nation intervened, but ICWA was not litigated). *In re Cody P.* 2007 WL 1068239 (Cal.App. 1 Dist., 2007)(involving an Indian child who was Choctaw eligible, but did not litigate ICWA). Because these cases involved Indian children, they were not irrelevant in the way the 48 non-ICWA cases were. However, they also did not easily fit into the four categories. They are the misc. cases.

[89] In these cases, notice may be one of a few ICWA issues litigated, usually including inquiry into the status of the Indian child.

[90] In these cases, the courts remanded the case for the state to properly follow ICWA notice procedures. It is possible there were other reasons for remand, but notice was always at least one reason, and usually the only reason.

[91] These cases can include any other ICWA issue, including inquiry into status of Indian child, active efforts requirements, and tribal intervention and transfer. It should be noted that these cases are not necessarily pro-tribe because it is affirming. Rather, the court is simply affirming the lower court decision, which may or may not be pro-tribal.

[92] These cases can include any other ICWA issue, including inquiry into status of Indian child, active efforts requirements, and tribal intervention and transfer. It should be noted that these cases are not necessarily anti-tribal interests because the court is reversing. Rather, the court is reversing the lower court decision, which may or may not have been anti-tribal interests.

were notice cases, 73% of the California cases.[93] Notice cases includes cases where the parent brings the claim that notice was insufficient; it does not necessarily mean that the notice *was* insufficient. However, 137 of the 226 California notice cases had to be remanded for compliance with ICWA notice, which means that sixty percent of the time the appellate court considered notice to be insufficient. Conversely, only 14 other California ICWA cases had to be remanded or reversed, usually for inquiry purposes. This is only four percent of the total California ICWA cases.

However, there was something additional of note with the California cases. One tribe more than any other kept appearing in the California cases, whether the case ended up being remanded or not. Out of 308 California cases, the parent or grandparent claimed Cherokee affiliation in 143 cases, in other words, 46% of all California cases.[94] The second closest affiliation was Blackfeet with 41 cases, followed by Apache with 33 cases. Tribal affiliations which might be reasonably expected in the California court system were barely present: "Rancheria" was only in 7 cases, Navajo in 12, Hopi in none and Yaqui in 11. There was also a trend toward vague or Anglicized tribal names, so while there were 16 Sioux cases, there were only 2 Lakota cases. 7 Chippewa cases, though only 1 Ottawa and 2 Potawatomi.[95]

In California, parents claiming Cherokee affiliation are litigating ICWA at a far higher rate than any other tribe. However, what these parents are litigating is almost entirely notice. Of the 143 cases dealing with potentially Cherokee Indian children, only twenty cases do *not* deal with a notice issue. This means that in the subset of California Cherokee ICWA cases, 85% of

[93] *In re Justin S.*, 150 Cal.App.4th 1426, 1433 (Cal.App. 6 Dist., 2007)("[i]t appears to this court that the failure to comply with ICWA notice requirements may result in more reversals in dependence cases than any other reason, perhaps more than all other reasons combined . . .").

[94] The parent may claim Cherokee affiliation in addition to other tribal affiliation. See eg. *In re G.S.R.*, 159 Cal.App.1202, 1210 (Cal.App.4th, 2007)(mother told the court "she had Indian heritage from several tribes, including the Apache, Navaho, Cherokee and, possibly, Chumash (or some other tribe beginning with 'Ch.')").

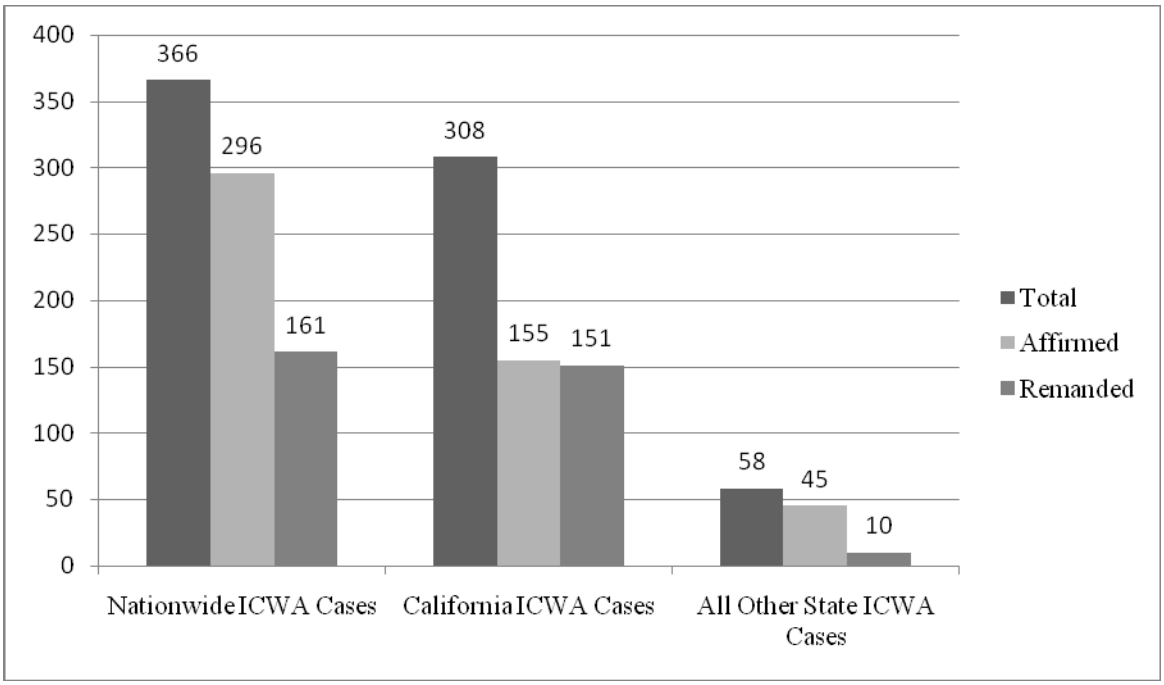
[95] For tribal affiliations, these numbers were determined through a search of the Westlaw database adding the name of the tribe to "Indian Child Welfare Act within the California database (ca-cs-all), with the same limiting dates.

the time the problem at issue in the case was notice, almost 13% higher than the overall California rate. And while 44% of all California cases are remanded for notice compliance, 57% of California Cherokee cases are remanded for notice compliance.

So while it may be up for discussion whether the parents claiming Cherokee affiliation have an honest belief of that affiliation,[96] it could also be argued the state agencies have issues with Cherokee affiliation. Cherokee cases are both brought up as notice cases more often and remanded for notice compliance more often than non-Cherokee California ICWA cases. Social workers faced with a vague Cherokee affiliation seem less likely to comply with ICWA notice requirements than when faced with specific tribal affiliation provided by a parent or relative. Regardless of the California courts continued statements that the state has the ongoing obligation to properly inquire and notice tribes, it seems possible that the burden is still on parents to prove to the social workers that they are "real" Indians.

All ICWA Cases, Affirmed or Remanded

[96] *See* Kevin Noble Maillard, "The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law," *Michigan Journal Race and Law* 12 (2007): 380-1 (a brief discussion of the "Indian Grandmother Complex," citing Vine Deloria, *Custer Died for Your Sins* (1988)(There is probably an argument that the high number of Cherokee affiliation claims made in California ICWA cases may fit this description, though the motivations probably differ. Parents about to lose their children may be motivated by the belief that the claim of Indian affiliation will stop the termination process, rather than the motivations contemplated by Maillard and Deloria.)


400
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Nationwide ICWA Cases
California ICWA Cases
All Other State ICWA Cases
Total
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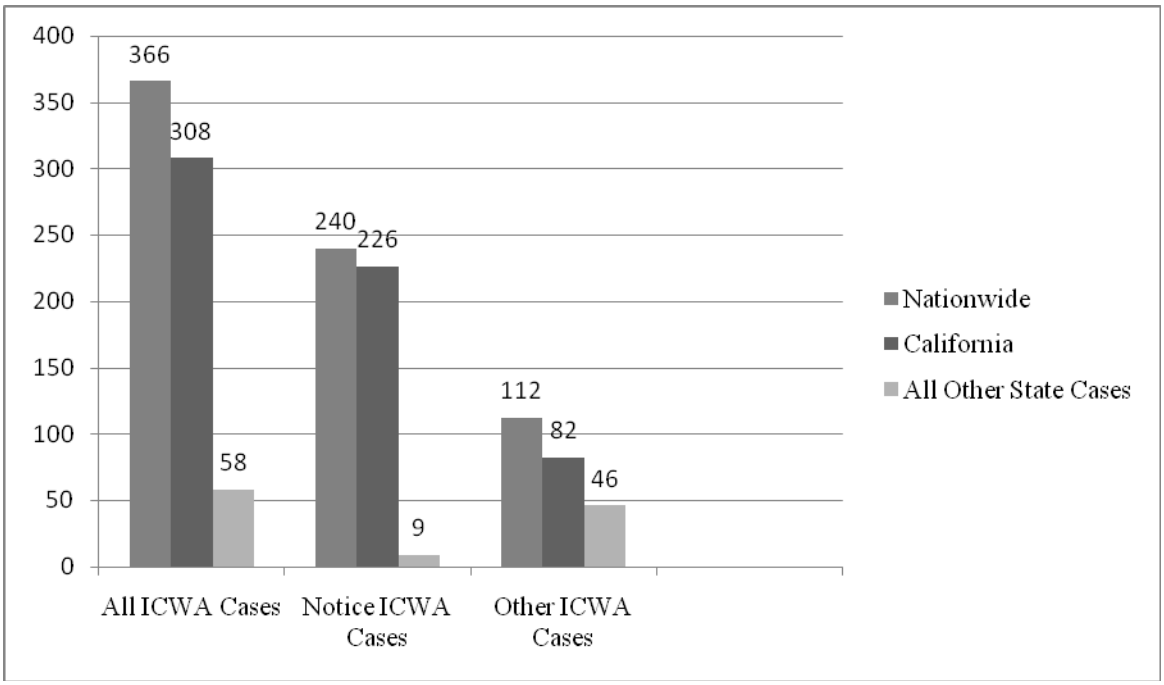
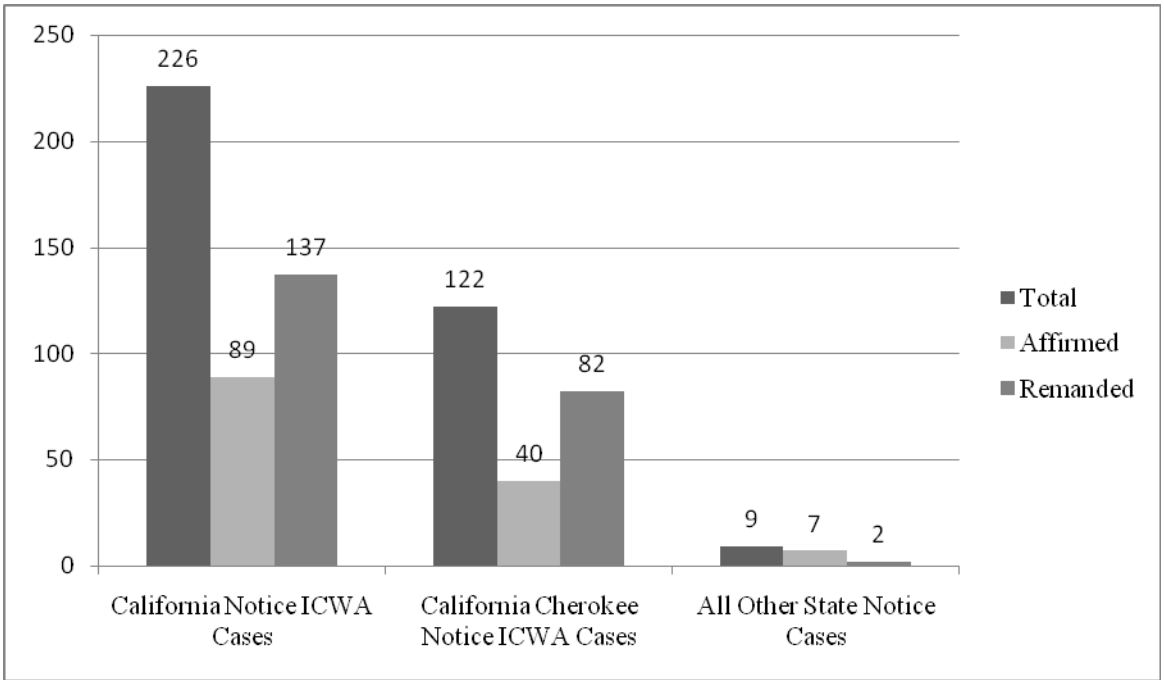
Remanded

ICWA Notice Cases



ICWA Notice Cases, Affirmed and Remanded



Case Data Set

	Notice and Affirm	Notice and Overturn	Total Notice Cases	OII* and Affirm	OII and Remand/Overturn	Misc.	Total Number of ICWA Cases
All State Cases	96	139	235	104	22	5	366
All California Cases	89	137	226	66	14	2	308
California Cherokee Cases	40	82	122	16	4	1	143
All Non-CA Cases	7	2	9	38	8	3	58

*OII: Other ICWA Issues

Implications of the Cherokee Notice Problems

There are a number of different issues the Cherokee notice problems bring up. For example, while the state continues to provide insufficient notice multiple times in one case, the three federally recognized Cherokee tribes are receiving more 150 notices from the California system in one year. In addition, a vast majority of the time the tribes reply that the child at question is not an Indian child. In fact, in only three cases did one of the federally recognized Cherokee tribes reply the child was a Cherokee child.[97] And in only one of those cases did the Cherokee Nation of Oklahoma intervene.[98] While the notice noncompliance is a major problem, at the same time it does not appear that there are a large number of children who are members of the Cherokee tribe in the California court system.

Particularly since so many of the parents claim Cherokee identity over every other tribal nation, the question does arise as to whether the parent actually has Cherokee affiliation. In addition, the Cherokee tribes limited affirmative response to these California cases further raising questions about parental identification as Cherokee. This response rate likely informs state agency motivation, given how many times they notice the Cherokee tribes to find the child is not, in fact, an Indian child. This is a difficult distinction, however, since it is impossible to know for certain whether a person is eligible for enrollment and cannot communicate the information to the state or if the person decided to check a box to check on a form to delay the removal proceedings. This is not a distinction the state agency ought to be making. California requires notice regardless of the motivation, or perceived motivation, behind the parent's actions.

[97] *In re Jordan A.*, 2007 WL 1275821 (Cal.App. 5th Dist., 2007)(Because of the facts of the case, the Cherokee Nation identified Jordan A.'s half brother as a potential Cherokee child. This case was a "notice and affirm" as to Jordan A. who did not receive any notice compliance after his maternal grandmother stated her grandmother was a "full blooded Indian."); *In re Leah W.*, 2007 WL 2259069 (Cal. App. 1 Dist., 2007); *In re J.M.*, 2007 WL 1675201 (Cal.App. 4 Dist., 2007)

[98] *In re J.M.*, 2007 WL 1675201 (Cal.App. 4 Dist., 2007)

However, the cases seem to indicate that the state is making the distinction, as the state's noncompliance with notice requirements is at its strongest when faced with vague Cherokee affiliation.

While the vague Cherokee affiliation cases usually have limited facts for the state agency to work with, the notice deficiencies often have nothing to do with the limited facts. For example, in one case a father claimed he was Cherokee, thought the transcript of the trial court indicates he could not indicate a specific Cherokee tribe, nor a state where his tribe was located. Later in the proceeding, the father stated "Arkansas," though not in response to any question.[99] The case was remanded for proper notice compliance since the Department send the notices without return receipt requested, misaddressed the notice to the Eastern Band of Cherokee Indians, and did not notice either the Cherokee Nation of Oklahoma or the United Keetoowah Band of Cherokee.[100] In addition, the department left off the father's birth place and date, even though that information was on file, and failed to further inquire as to information about the father's parents or grandparents.[101]

In another case the maternal grandfather, when asked if there was any "Indian heritage," responded "'A little bit. Not much. About a quarter,' through his mother and father. He did not name any particular tribe. . . . Father said he also had Indian heritage through his father. Father believed the tribe was Cherokee."[102] However, the court had to remand this case as well because of notice noncompliance. The Department of Children's Services sent one notice to the BIA, did

[99] *In re Dorothy F*., 2007 WL 1970064, *2 (2007).
[100] *Id.* at *5-6.
[101] *Id.* at *7.
[102] I*n re Shannon C.*, 2007 WL 4201261, *9 (Cal.App. 4th Dist., 2007)

not indicate possible Cherokee affiliation, did not comply with the notice time required (10 days before the hearing[103]) and did not send any notices to any tribes.[104]

When one mother claimed Apache and Cherokee affiliation, the Department of Child and Family Services sent notices misspelling the children's names, did not list where the children were born, and did not list any of the grandparents names.[105] The Court remanded for proper ICWA notice compliance. In a separate case, when the mother claimed Cherokee and Sioux affiliation, notice was only sent to Apache tribes.[106] There are California Cherokee notice cases which had to be remanded for compliance with ICWA. In most of them, parental vagueness about affiliation is usually not the source of the notice problem. Rather, the state simply gets notice wrong, even when the necessary information is on file at the state. [107]

On the other hand, when the state complies with notice with the information it has, the court will uphold the case in the face of a notice challenge. For example, where the mother and father independently claimed Cherokee affiliation, and where the state sent at least two proper notices to the three federally recognized Cherokee tribes, the court upheld notice given "parental inaction, refusal of relatives to provide information, denial of Indian heritage by both grandmothers and appellant's statement to the court that the information on the notice form was

[103] 25 USC §19
[104] *In re Shannon C.* 2007 WL 4201261 at *11.
[105] *In re A.M.* 2008 WL 217644 *1 (Cal.App.2 Dist., 2008)
[106] *In re T.B.*, 2007 WL 3026538, *23 (Cal.App. 5 Dist., 2007).
[107] *See eg In re Elizabeth B.* 2007 WL 2506018, fn 2 (Cal.App. 3 Dist., 2007)(Father informed social worker of Cherokee affiliation, no notice was sent); *In re Elizabeth L*, 2007 WL 2452673, *5 (Cal.App. 1 Dist., 2007)("Department argues that 'most all of the information' provided to it was contained in the notice, it effectively concedes that ICWA notice requirements were not satisfied. For example, the Department concedes that the notice contained no information about the mother's Indian ancestry. The Department also concedes the notice was not mailed to all Cherokee tribes or to the correct entities, addresses, and tribal agents.").

correct."[108] Unfortunately, half as many California Cherokee notice cases are deemed compliant (40) as are deemed noncompliant (82).

What may be the most troubling ramification of these numbers is the potential for an existing Indian family doctrine existing outside the scope of litigation in California. As discussed earlier, the state agencies are, in effect, the gatekeeper behind the ICWA. Since the state is tasked with notifying tribes of the potential Indian child in a case, the more likely it is the child is an Indian child based on a state social worker's perceptions of the family's "Indianness," the more likely the social worker will send a notice. The less likely the family is perceived to be "Indian," the less likely the social worker sends a proper notice. More than half of all California notice cases involve the assertion of Cherokee affiliation. More than half of those must be remanded for compliance with ICWA. While there are other egregious cases of notice noncompliance in cases where the parent is able to name a specific tribe and relative, it is simply more likely the problem will occur when the parent claims Cherokee affiliation.

VI. Conclusion

Determining the effectiveness of ICWA is difficult based on the limited amount of data available about the Act. Without significant resources, researchers are limited to what is available online and in case law. However, even with those limitations, it is possible to come to some tentative conclusions about the ICWA in state courts. ICWA cases involving notice are highly litigated, but almost only in California. Outside of California, notice cases are rarely litigated. There is a problem with the notice procedure in California. Even with state court rules

[108] *In re Willie S.*, 2007 WL 2834599 *10 (Cal.App. 3rd Dist., 2007); *See also In re Lucas H.* 2007 WL 2696859 (Cal.App. 6 Dist., 2007).

mandating inquiry and notice, and with lengthy forms for state social workers to fill out, state agencies seem willing to concede notice noncompliance regularly.

Motivations for this are not clear, though the usual arguments of money, resources and time are not enough. This finding, combined with the determination that parents claiming Cherokee affiliation are more than half of all California ICWA cases, leads to a different possible motivation. If a state agency does not believe that a parent is Indian, and the state agency believes that more often of parents claiming Cherokee affiliation, and the agency does not notice a tribe when it does not believe the parent, the state agency is, in effect, enforcing its own form of the existing Indian family doctrine. Given that parents claiming Cherokee affiliation are so rarely determined to be members of a Cherokee tribe, even when notice is done correctly, this reinforces the state agency's doubt as to the parent's motivation for claiming it.

Regardless of motivations, however, it is imperative that the California system figure out a way to comply with ICWA notice procedures. If done correctly the first time, the state, the courts, the children and the tribes all benefit. The children are not in legal limbo, waiting for the state to act properly. The tribes are not overrun with incomplete and faulty notices from California. The state and the court system do not need to spend all of their time on notice appeals. The motivation not to comply with notice provisions must be strong, but ultimately notice compliance is both more efficient and compassionate.