

II. Historical Context

The ICWA significantly impacts proceedings involving the custody of Indian children. In most situations, the Act calls for the placement of Indian children within a specified order of preference, providing for higher evidentiary standards and mandating extensive notice procedures. Child custody proceedings and other actions pursuant to state law can be invalidated for failure to follow the ICWA's procedural requirements. Understanding some basic principles of Indian law may help to place the ICWA within a legal context. This section provides the reader with a brief background of general Indian law principles, and also several statistics which underscore the relevance of the Act in California.

A. Basic Principles of Indian Law

Described as “domestic, dependent nations,” Indian tribes possess a unique status in American law as sovereign entities predating the U.S. Constitution.⁶ Through the U.S. Constitution, Congress has the exclusive authority to regulate commerce with Indian tribes.⁷ In general, tribal sovereignty is limited by overriding federal authority only to the extent expressly authorized by Congress, or where inconsistent with a tribe's legal status.⁸ Consequently, states are preempted from exercising any authority over Indian tribes where doing so would clash with federal authority or policy.⁹ In recent years the U.S. Supreme Court's approach has somewhat narrowed the scope of tribal sovereignty with regards to a tribe's ability to exercise power in Indian country over non-tribal members.¹⁰

Despite this trend, the federal government must still exercise its plenary power over Indian tribes consistent with certain federal obligations. The relationship between the U.S. and tribes has been characterized as that of a guardian and ward, with the U.S. having a trust responsibility and with tribes as the beneficiaries thereof.¹¹ Tribes and the U.S. have a political relationship between nations, not a relationship based on any racial classification of Native Americans.¹² Because of this unique relationship, Congress can treat Native Americans differently from other racial or ethnic groups without running afoul of traditional equal protection rules.¹³ Indeed, tribes are seen as “distinct, independent political communities.”¹⁴

As an incident to sovereignty, tribes have the inherent authority to regulate domestic relations among their members.¹⁵ Tribes also have the authority to regulate other important

⁶ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12-13 (1831).

⁷ U.S. CONST., art. I, § 8, cl. 3.

⁸ See generally *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *United States v. Wheeler*, 435 U.S. 313 (1978); *Montana v. United States*, 450 U.S. 544 (1981).

⁹ *Worcester v. Georgia*, 31 U.S. 6 Pet. 515 (1832); *Williams v. Lee*, 358 U.S. 217 (1959); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

¹⁰ *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001).

¹¹ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831).

¹² See generally *Morton v. Mancari*, 417 U.S. 535 (1974).

¹³ *Id.*

¹⁴ *Worcester v. Georgia*, 31 U.S. 515, 518 (1832).

¹⁵ See, e.g., *Fisher v. District Court*, 424 U.S. 382 (1976) (authority to grant on-reservation adoption); *Nofire v. United States*, 164 U.S. 657 (1897) (authority to grant marriage license); *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978) (authority to divide marital property).

internal matters, such as tribal membership.¹⁶ In many ways, the ICWA is simply the codification of a tribe's legal rights as they existed before passage of the Act.

In 2006, the California legislature adopted Senate Bill 678 ("SB 678"), codifying the ICWA and many provisions of the BIA Guidelines into state law.¹⁷ The clarification of the state's role in ICWA proceedings has marked a significant step forward in California's application of the Act. To further clarify application of the ICWA, the California Rules of Court were expanded to provide practitioners with a more detailed interpretation of the Act's many procedural requirements.¹⁸

⇒ **PRACTICE TIP:** *The ICWA attempts to eliminate culturally-biased "best interest" subjectivity by imposing minimum standards for state court proceedings. As a matter of federal law, if these standards are met, the best interest of an Indian child will be advanced. If they are not, then the action is not in the best interest of the Indian child. A basic premise of the Act is that an Indian child has an interest in establishing and maintaining a connection with his or her family and tribe. Also premised within the Act is the belief that tribes, as distinct political entities, have an interest in protecting tribal children and tribal children's rights as members. It is misguided to view the interest of the tribe as opposed to that of the child, or to view the application of the Act as only in the tribe's interest. In truth, an Indian child's interest and the interest of his or her tribe are intertwined.*

B. Native Americans in California

California tribes are numerous and diverse, reflecting a rich past. Unsurprisingly, all have been extensively impacted by various colonialism and expansion activities. Among the most commonly documented are the spread of Spanish missions, the Gold Rush, the federal government's refusal to ratify the 18 signed treaties with California tribes in 1852, the advent of rancherias, and the Indian boarding school system.¹⁹ All of these, along with a multitude of local raids, regional conflicts, and wars, have molded a history of attrition from which tribes are still emerging.

The BIA currently recognizes 110 California tribes.²⁰ Some of these tribes are among the most sophisticated tribes in the United States. However, of the federally-recognized tribes, a significant number also represent formerly terminated tribes which have only been restored in recent years via litigation or legislation. Termination is the process by which Congress ceases to recognize a tribe's government, distributes tribal assets and terminates the federal government's trust relationship with the tribe. Between 1954 and 1966, Congress terminated over 100 tribes, most of them in Oregon and California. A shift in federal policy ended the termination era and ushered in a period of critical examination of the termination process, which in turn resulted in a number of lawsuits.

¹⁶ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

¹⁷ S. 678 (2005-2006 Reg. Sess.); 2006 Cal. Stats. ch. 838.

¹⁸ CAL. RULES OF COURT, Title 5, Div. 2, Ch. 2 (2009).

¹⁹ See, Professor Edward D. Castillo, California Native American Heritage Commission, *Short Overview of California Indian History* (1998), <http://ceres.ca.gov/nahc/califindian.html> (last visited April 30, 2010).

²⁰ 74 Fed. Reg. 40218.

One example of a restoration lawsuit that has impacted a number of California tribes is the class action lawsuit *Hardwick v. U.S.*²¹ This litigation, settled in the 1980's, resulted in the restoration of 17 terminated California tribes. The litigation reinstated federal recognition and confirmed reservation boundaries.²² Since the 1980's, 11 additional California tribes have been restored either through litigation or legislative acts. However, since tribal operations and governing structures had been interrupted for twenty to forty years or more, it is not uncommon to encounter restored tribes that are in various stages of organization.²³

Although the BIA recognizes 110 California tribes, there are many more tribes in the state. California is home to approximately 50 unrecognized tribes and 10 tribes terminated in the 1950's and 1960's who are eligible for restoration.²⁴ Today, over 80 Indian reservations (often known as rancherias) encompass approximately 452,567 acres in California. Federally-recognized tribes which do not have reservation lands or any land holdings are known as "landless" tribes. Membership rolls for California tribes range from under 25 people for smaller tribes to the Yurok Tribe with nearly 5,000 members.²⁵

In addition, a large number of Native Americans in California belong to out-of-state tribes. Many of these individuals are from tribes whose families were originally moved to California during the "relocation" era of the 1950's, when assimilation was regarded as the proper federal policy.²⁶ According to the 2000 Census, 333,346 individuals in California identified as being American Indian or Alaskan Native, representing 1% of the state's population, and 627,562 additional individuals identified as being American Indian/Alaskan Native in combination with at least one other race.²⁷ California has the highest American Indian/Alaskan Native population of any state in the nation.²⁸ Los Angeles has the largest American Indian/Alaskan Native population of any city in the country with 150,000 reporting such heritage alone or in combination with another race.²⁹ In fact, the majority of the state's current Indian population represents Indian people from out-of-state tribes who have relocated.³⁰

²¹ 1994 WL 721578 (N.D. Cal. 1994).

²² See ADVISORY COUNCIL ON CALIFORNIA INDIAN POLICY, FINAL REPORTS AND RECOMMENDATIONS TO THE CONGRESS OF THE UNITED STATES PURSUANT TO PUBLIC LAW 102-416, "The ACCIP Termination Report: The Continuing Destructive Effects of the Termination Policy on California Indians," Chapter 5, 32 n.111 (September 1997).

²³ See § IV(B)(1) of this Benchguide for a discussion of federal recognition.

²⁴ See ADVISORY COUNCIL ON CALIFORNIA INDIAN POLICY, FINAL REPORTS AND RECOMMENDATIONS TO THE CONGRESS OF THE UNITED STATES PURSUANT TO PUBLIC LAW 102-416, "Executive Summary September, 1997," 16 (September 1997).

²⁵ California Indian Assistance Program, 2004 Field Directory of the California Indian Community, Dep't of Hous. & Comty. Dev. (2004).

²⁶ See ADVISORY COUNCIL ON CALIFORNIA INDIAN POLICY, FINAL REPORTS AND RECOMMENDATIONS TO THE CONGRESS OF THE UNITED STATES PURSUANT TO PUBLIC LAW 102-416, "The ACCIP Historical Overview Report: The Special Circumstances of California Indians," 15 (September 1997).

²⁷ *Census 2000 PHC-T-18. American Indian and Alaska Native Tribes in California: 2000*, <http://www.census.gov/population/www/cen2000/briefs/phc-t18/tables/tab019.pdf> (last visited April 30, 2010).

²⁸ (ST-99-46) *States Ranked by American Indian and Alaska Native Population, July 1, 1999*, Population Estimates Program, Population Division, U.S. Census Bureau, Washington, DC 20233, <http://www.census.gov/population/estimates/state/rank/aiea.txt>, (August 30, 2000).

²⁹ *More Than 300 Counties Now "Majority-Minority,"* U.S. Census Bureau News, <http://www.census.gov/Press-Release/www/releases/archives/population/010482.html>, (August 9, 2007).

³⁰ Stella Ogunwole, U.S. Census Bureau, *We the People: American Indians and Alaska Natives in the United*

Many myths have developed regarding the growth of Indian gaming in California. There is a common perception that all tribes have casinos and as a consequence all Indians are now wealthy. In fact, out of the 110 federally-recognized tribes in California, just over half of them operate casinos.³¹ Furthermore, the profitability of these economic enterprises varies widely depending primarily on the location of each tribe's casino. A recent national study indicates that while economic indicators have improved for on-reservation Indians in the decade between 1990 and 2000, and more significantly for gaming tribes than non-gaming tribes, Indians on reservations are still economically disadvantaged in comparison to the United States' population as a whole. For example, the average household income for Indians is still less than half that of the general population, the Indian family poverty rate is three times higher than the national average, the unemployment rate is twice as high for Indians, and Indians have half the college graduation rate of the general population.³²

⇒ **PRACTICE TIP:** *A federally-recognized tribe is a tribe for all purposes of the ICWA, whether located in California or in another state. Under California law, a court may allow a non-federally-recognized tribe to participate in a dependency proceeding involving a child who would otherwise be an Indian child under Section 1903(4) of the ICWA.*³³

States, <http://www.census.gov/prod/2006pubs/censr-28.pdf> (February 2006) and *Census 2000 PHC-T-18. American Indian and Alaska Native Tribes in California: 2000*, <http://www.census.gov/population/www/cen2000/briefs/phc-t18/tables/tab019.pdf> (last visited April 30, 2010).

³¹ See 500Nations.com, *California Indian Casinos*, (1999-2010), www.500nations.com/California_Casinos.asp (last visited April 30, 2010).

³² See, Jonathan B. Taylor and Joseph P. Kalt, *The Harvard Project on American Indian Economic Development, American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses* (Harvard University 2005).

³³ FAM. CODE § 185; WELF. & INST. CODE § 306.6.