

# House Bill 2364

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of House Interim Committee on Judiciary for Oregon State Bar Indian Law Section)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Provides that laws, official acts, rules and regulations of federally recognized American Indian tribal governments be judicially noticed.

Provides that certain records, reports, statements and data compilations of federally recognized American Indian tribal government are not hearsay for purposes of rules of evidence.

Provides that notarial act has same effect as though performed by notarial officer of this state if performed by certain persons under authority granted by federally recognized American Indian tribal government.

## A BILL FOR AN ACT

1  
2 Relating to American Indian tribal governments; creating new provisions; and amending ORS 40.090  
3 and 40.460.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 40.090 is amended to read:

6 40.090. Law judicially noticed is defined as:

7 (1) The decisional, constitutional and public statutory law of Oregon, the United States, **any**  
8 **federally recognized American Indian tribal government** and any state, territory or other juris-  
9 diction of the United States.

10 (2) Public and private official acts of the legislative, executive and judicial departments of this  
11 state, the United States, **any federally recognized American Indian tribal government** and any  
12 other state, territory or other jurisdiction of the United States.

13 (3) Rules of professional conduct for members of the Oregon State Bar.

14 (4) Regulations, ordinances and similar legislative enactments issued by or under the authority  
15 of the United States, **any federally recognized American Indian tribal government** or any state,  
16 territory or possession of the United States.

17 (5) Rules of court of any court of this state or any court of record of the United States, **of any**  
18 **federally recognized American Indian tribal government** or of any state, territory or other ju-  
19 risdiction of the United States.

20 (6) The law of an organization of nations and of foreign nations and public entities in foreign  
21 nations.

22 (7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this  
23 state, or a right derived therefrom. As used in this subsection, "comprehensive plan" has the  
24 meaning given that term by ORS 197.015.

25 **SECTION 2.** ORS 40.460 is amended to read:

26 40.460. The following are not excluded by ORS 40.455, even though the declarant is available  
27 as a witness:

28 (1) (Reserved.)

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 (2) A statement relating to a startling event or condition made while the declarant was under  
 2 the stress of excitement caused by the event or condition.

3 (3) A statement of the declarant's then existing state of mind, emotion, sensation or physical  
 4 condition, such as intent, plan, motive, design, mental feeling, pain or bodily health, but not includ-  
 5 ing a statement of memory or belief to prove the fact remembered or believed unless it relates to  
 6 the execution, revocation, identification, or terms of the declarant's will.

7 (4) Statements made for purposes of medical diagnosis or treatment and describing medical his-  
 8 tory, or past or present symptoms, pain or sensations, or the inception or general character of the  
 9 cause [of] **or** external source thereof insofar as reasonably pertinent to diagnosis or treatment.

10 (5) A memorandum or record concerning a matter about which a witness once had knowledge  
 11 but now has insufficient recollection to enable the witness to testify fully and accurately, shown to  
 12 have been made or adopted by the witness when the matter was fresh in the memory of the witness  
 13 and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into  
 14 evidence but may not itself be received as an exhibit unless offered by an adverse party.

15 (6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions,  
 16 opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person  
 17 with knowledge, if kept in the course of a regularly conducted business activity, and if it was the  
 18 regular practice of that business activity to make the memorandum, report, record, or data compi-  
 19 lation, all as shown by the testimony of the custodian or other qualified witness, unless the source  
 20 of information or the method of circumstances of preparation indicate lack of trustworthiness. The  
 21 term "business" as used in this subsection includes business, institution, association, profession, oc-  
 22 cupation, and calling of every kind, whether or not conducted for profit.

23 (7) Evidence that a matter is not included in the memoranda, reports, records, or data compila-  
 24 tions, and in any form, kept in accordance with the provisions of subsection (6) of this section, to  
 25 prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a  
 26 memorandum, report, record, or data compilation was regularly made and preserved, unless the  
 27 sources of information or other circumstances indicate lack of trustworthiness.

28 (8) Records, reports, statements[,] or data compilations, in any form, of public offices or agencies,  
 29 **including federally recognized American Indian tribal governments**, setting forth:

30 (a) The activities of the office or agency;

31 (b) Matters observed pursuant to duty imposed by law as to which matters there was a duty to  
 32 report, excluding [*however*], in criminal cases, matters observed by police officers and other law  
 33 enforcement personnel; or

34 (c) In civil actions and proceedings and against the government in criminal cases, factual  
 35 findings, resulting from an investigation made pursuant to authority granted by law, unless the  
 36 sources of information or other circumstances indicate lack of trustworthiness.

37 (9) Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the  
 38 report thereof was made to a public office, **including a federally recognized American Indian**  
 39 **tribal government**, pursuant to requirements of law.

40 (10) To prove the absence of a record, report, statement[,] or data compilation, in any form, or  
 41 the nonoccurrence or nonexistence of a matter of which a record, report, statement[,] or data com-  
 42 pilation, in any form, was regularly made and preserved by a public office or agency, **including a**  
 43 **federally recognized American Indian tribal government**, evidence in the form of a certification  
 44 in accordance with ORS 40.510, or testimony, that diligent search failed to disclose the record, re-  
 45 port, statement[,] or data compilation, or entry.

1 (11) Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood  
 2 or marriage, or other similar facts of personal or family history, contained in a regularly kept record  
 3 of a religious organization.

4 (12) A statement of fact contained in a certificate that the maker performed a marriage or other  
 5 ceremony or administered a sacrament, made by a member of the clergy, **a public official, an official**  
 6 **of a federally recognized American Indian tribal government** or **any** other person authorized  
 7 by the rules or practices of a religious organization or by law to perform the act certified, and  
 8 purporting to have been issued at the time of the act or within a reasonable time thereafter.

9 (13) Statements of facts concerning personal or family history contained in family bibles,  
 10 genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts,  
 11 or tombstones, or the like.

12 (14) The record of a document purporting to establish or affect an interest in property, as proof  
 13 of content of the original recorded document and its execution and delivery by each person by whom  
 14 it purports to have been executed, if the record is a record of a public office, **including a federally**  
 15 **recognized American Indian tribal government**, and an applicable statute authorizes the record-  
 16 ing of documents of that kind in that office.

17 (15) A statement contained in a document purporting to establish or affect an interest in prop-  
 18 erty if the matter stated was relevant to the purpose of the document, unless dealings with the  
 19 property since the document was made have been inconsistent with the truth of the statement or  
 20 the purport of the document.

21 (16) Statements in a document in existence 20 years or more the authenticity of which is es-  
 22 tablished.

23 (17) Market quotations, tabulations, lists, directories, or other published compilations, generally  
 24 used and relied upon by the public or by persons in particular occupations.

25 (18) (Reserved.)

26 (18a)(a) A complaint of sexual misconduct, complaint of abuse as defined in ORS 107.705 or  
 27 419B.005, complaint of abuse of an elderly person, as those terms are defined in ORS 124.050, or a  
 28 complaint relating to a violation of ORS 163.205 or 164.015 in which a person 65 years of age or  
 29 older is the victim, made by the witness after the commission of the alleged misconduct or abuse  
 30 at issue. Except as provided in paragraph (b) of this subsection, such evidence must be confined to  
 31 the fact that the complaint was made.

32 (b) A statement made by a person concerning an act of abuse as defined in ORS 107.705 or  
 33 419B.005, a statement made by a person concerning an act of abuse of an elderly person, as those  
 34 terms are defined in ORS 124.050, or a statement made by a person concerning a violation of ORS  
 35 163.205 or 164.015 in which a person 65 years of age or older is the victim, is not excluded by ORS  
 36 40.455 if the declarant either testifies at the proceeding and is subject to cross-examination, or is  
 37 unavailable as a witness but was chronologically or mentally under 12 years of age when the  
 38 statement was made or was 65 years of age or older when the statement was made. However, if a  
 39 declarant is unavailable, the statement may be admitted in evidence only if the proponent estab-  
 40 lishes that the time, content and circumstances of the statement provide indicia of reliability, and  
 41 in a criminal trial that there is corroborative evidence of the act of abuse and of the alleged  
 42 perpetrator's opportunity to participate in the conduct and that the statement possesses indicia of  
 43 reliability as is constitutionally required to be admitted. No statement may be admitted under this  
 44 paragraph unless the proponent of the statement makes known to the adverse party the proponent's  
 45 intention to offer the statement and the particulars of the statement no later than 15 days before

1 trial, except for good cause shown. For purposes of this paragraph, in addition to those situations  
 2 described in ORS 40.465 (1), the declarant shall be considered “unavailable” if the declarant has a  
 3 substantial lack of memory of the subject matter of the statement, is presently incompetent to tes-  
 4 tify, is unable to communicate about the abuse or sexual conduct because of fear or other similar  
 5 reason or is substantially likely, as established by expert testimony, to suffer lasting severe emo-  
 6 tional trauma from testifying. Unless otherwise agreed by the parties, the court shall examine the  
 7 declarant in chambers and on the record or outside the presence of the jury and on the record. The  
 8 examination shall be conducted immediately prior to the commencement of the trial in the presence  
 9 of the attorney and the legal guardian or other suitable person as designated by the court. If the  
 10 declarant is found to be unavailable, the court shall then determine the admissibility of the evidence.  
 11 The determinations shall be appealable under ORS 138.060 (1)(c) or (2)(a). The purpose of the ex-  
 12 amination shall be to aid the court in making its findings regarding the availability of the declarant  
 13 as a witness and the reliability of the statement of the declarant. In determining whether a state-  
 14 ment possesses indicia of reliability under this paragraph, the court may consider, but is not limited  
 15 to, the following factors:

16 (A) The personal knowledge of the declarant of the event;

17 (B) The age and maturity of the declarant or extent of disability if the declarant is a person  
 18 with developmental disabilities;

19 (C) Certainty that the statement was made, including the credibility of the person testifying  
 20 about the statement and any motive the person may have to falsify or distort the statement;

21 (D) Any apparent motive the declarant may have to falsify or distort the event, including bias,  
 22 corruption or coercion;

23 (E) The timing of the statement of the declarant;

24 (F) Whether more than one person heard the statement;

25 (G) Whether the declarant was suffering pain or distress when making the statement;

26 (H) Whether the declarant’s young age or disability makes it unlikely that the declarant fabri-  
 27 cated a statement that represents a graphic, detailed account beyond the knowledge and experience  
 28 of the declarant;

29 (I) Whether the statement has internal consistency or coherence and uses terminology appro-  
 30 priate to the declarant’s age or to the extent of the declarant’s disability if the declarant is a person  
 31 with developmental disabilities;

32 (J) Whether the statement is spontaneous or directly responsive to questions; and

33 (K) Whether the statement was elicited by leading questions.

34 (c) This subsection applies to all civil, criminal and juvenile proceedings.

35 (d) This subsection applies to a child declarant, a declarant who is an elderly person as defined  
 36 in ORS 124.050 or an adult declarant with developmental disabilities. For the purposes of this sub-  
 37 section, “developmental disabilities” means any disability attributable to mental retardation, autism,  
 38 cerebral palsy, epilepsy or other disabling neurological condition that requires training or support  
 39 similar to that required by persons with mental retardation, if either of the following apply:

40 (A) The disability originates before the person attains 22 years of age, or if the disability is at-  
 41 tributable to mental retardation the condition is manifested before the person attains 18 years of  
 42 age, the disability can be expected to continue indefinitely, and the disability constitutes a sub-  
 43 stantial handicap to the ability of the person to function in society.

44 (B) The disability results in a significant subaverage general intellectual functioning with con-  
 45 current deficits in adaptive behavior that are manifested during the developmental period.

1 (19) Reputation among members of a person's family by blood, adoption or marriage, or among  
2 a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce,  
3 death, legitimacy, relationship by blood or adoption or marriage, ancestry, or other similar fact of  
4 a person's personal or family history.

5 (20) Reputation in a community, arising before the controversy, as to boundaries of or customs  
6 affecting lands in the community, and reputation as to events of general history important to the  
7 community or state or nation in which located.

8 (21) Reputation of a person's character among associates of the person or in the community.

9 (22) Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a  
10 plea of no contest, adjudging a person guilty of a crime other than a traffic offense, to prove any  
11 fact essential to sustain the judgment, but not including, when offered by the government in a  
12 criminal prosecution for purposes other than impeachment, judgments against persons other than the  
13 accused. The pendency of an appeal may be shown but does not affect admissibility.

14 (23) Judgments as proof of matters of personal, family or general history, or boundaries, essen-  
15 tial to the judgment, if the same would be provable by evidence of reputation.

16 (24) Notwithstanding the limits contained in subsection (18a) of this section, in any proceeding  
17 in which a child under 12 years of age at the time of trial, or a person with developmental disabili-  
18 ties as described in subsection (18a)(d) of this section, may be called as a witness to testify con-  
19 cerning an act of abuse, as defined in ORS 419B.005, or sexual conduct performed with or on the  
20 child or person with developmental disabilities by another, the testimony of the child or person with  
21 developmental disabilities taken by contemporaneous examination and cross-examination in another  
22 place under the supervision of the trial judge and communicated to the courtroom by closed-circuit  
23 television or other audiovisual means. Testimony will be allowed as provided in this subsection only  
24 if the court finds that there is a substantial likelihood, established by expert testimony, that the  
25 child or person with developmental disabilities will suffer severe emotional or psychological harm  
26 if required to testify in open court. If the court makes such a finding, the court, on motion of a  
27 party, the child, the person with developmental disabilities or the court in a civil proceeding, or on  
28 motion of the district attorney, the child or the person with developmental disabilities in a criminal  
29 or juvenile proceeding, may order that the testimony of the child or the person with developmental  
30 disabilities be taken as described in this subsection. Only the judge, the attorneys for the parties,  
31 the parties, individuals necessary to operate the equipment and any individual the court finds would  
32 contribute to the welfare and well-being of the child or person with developmental disabilities may  
33 be present during the testimony of the child or person with developmental disabilities.

34 (25)(a) Any document containing data prepared or recorded by the Oregon State Police pursuant  
35 to ORS 813.160 (1)(b)(C) or (E), or pursuant to ORS 475.235 (4), if the document is produced by data  
36 retrieval from the Law Enforcement Data System or other computer system maintained and operated  
37 by the Oregon State Police, and the person retrieving the data attests that the information was re-  
38 trieved directly from the system and that the document accurately reflects the data retrieved.

39 (b) Any document containing data prepared or recorded by the Oregon State Police that is  
40 produced by data retrieval from the Law Enforcement Data System or other computer system  
41 maintained and operated by the Oregon State Police and that is electronically transmitted through  
42 public or private computer networks under an electronic signature adopted by the Oregon State  
43 Police if the person receiving the data attests that the document accurately reflects the data re-  
44 ceived.

45 (c) Notwithstanding any statute or rule to the contrary, in any criminal case in which docu-

1 ments are introduced under the provisions of this subsection, the defendant may subpoena the ana-  
 2 lyst, as defined in ORS 475.235 (6), or other person that generated or keeps the original document  
 3 for the purpose of testifying at the preliminary hearing and trial of the issue. Except as provided  
 4 in ORS 44.550 to 44.566, no charge shall be made to the defendant for the appearance of the analyst  
 5 or other person.

6 (26)(a) A statement that purports to narrate, describe, report or explain an incident of domestic  
 7 violence, as defined in ORS 135.230, made by a victim of the domestic violence within 24 hours after  
 8 the incident occurred, if the statement:

9 (A) Was recorded, either electronically or in writing, or was made to a peace officer as defined  
 10 in ORS 161.015, corrections officer, youth correction officer, parole and probation officer, emergency  
 11 medical technician or firefighter; and

12 (B) Has sufficient indicia of reliability.

13 (b) In determining whether a statement has sufficient indicia of reliability under paragraph (a)  
 14 of this subsection, the court shall consider all circumstances surrounding the statement. The court  
 15 may consider, but is not limited to, the following factors in determining whether a statement has  
 16 sufficient indicia of reliability:

17 (A) The personal knowledge of the declarant.

18 (B) Whether the statement is corroborated by evidence other than statements that are subject  
 19 to admission only pursuant to this subsection.

20 (C) The timing of the statement.

21 (D) Whether the statement was elicited by leading questions.

22 (E) Subsequent statements made by the declarant. Recantation by a declarant is not sufficient  
 23 reason for denying admission of a statement under this subsection in the absence of other factors  
 24 indicating unreliability.

25 (27) A report prepared by a forensic scientist that contains the results of a presumptive test  
 26 conducted by the forensic scientist as described in ORS 475.235, if the forensic scientist attests that  
 27 the report accurately reflects the results of the presumptive test.

28 (28)(a) A statement not specifically covered by any of the foregoing exceptions but having  
 29 equivalent circumstantial guarantees of trustworthiness, if the court determines that:

30 (A) The statement is relevant;

31 (B) The statement is more probative on the point for which it is offered than any other evidence  
 32 that the proponent can procure through reasonable efforts; and

33 (C) The general purposes of the Oregon Evidence Code and the interests of justice will best be  
 34 served by admission of the statement into evidence.

35 (b) A statement may not be admitted under this subsection unless the proponent of it makes  
 36 known to the adverse party the intention to offer the statement and the particulars of it, including  
 37 the name and address of the declarant, sufficiently in advance of the trial or hearing, or as soon as  
 38 practicable after it becomes apparent that such statement is probative of the issues at hand, to  
 39 provide the adverse party with a fair opportunity to prepare to meet it.

40 **SECTION 3. Section 4 of this 2007 Act is added to and made a part of ORS 194.505 to**  
 41 **194.595.**

42 **SECTION 4. (1) A notarial act has the same effect under the law of this state as though**  
 43 **performed by a notarial officer of this state if performed anywhere by any of the following**  
 44 **persons under authority granted by a federally recognized American Indian tribal govern-**  
 45 **ment located within the United States:**

1       **(a) A notary public of the tribal government.**

2       **(b) A judge, clerk or deputy clerk of any court of the tribal government.**

3       **(c) Any other person authorized by the law of the tribal government to perform notarial**  
4 **acts.**

5       **(2) The signature and title of a person performing a notarial act under this section are**  
6 **prima facie evidence that the signature is genuine and that the person holds the designated**  
7 **title.**

8       **(3) The signature and title of an officer listed in subsection (1)(a) or (b) of this section**  
9 **conclusively establish the authority of a holder of that title to perform a notarial act.**

10