OREGON JUDICIAL DEPARTMENT
Office of the State Court Administrator

September 17, 2019

Senator Floyd Prozanski, Chair
Senate Interim Committee on Judiciary
Representative Jennifer Williamson, Chair
House Interim Committee on Judiciary
900 Court St. NE, Room 331
Salem, OR 97301

Re: Overview of Indian Child Welfare Act and Intersection with Oregon Law: Oregon Judicial Department's Compliance Efforts

Dear Chair Prozanski, Chair Williamson, members of the Senate and House Interim Committee on Judiciary:

Thank you for the opportunity to provide information about the Oregon Judicial Department's compliance efforts with the Indian Child Welfare Act (ICWA). As stated in ORS 419B.090(6), the Oregon Judicial Department (OJD) understands and recognizes the value of the Indian Child Welfare Act. Accordingly, OJD engages in numerous efforts to ensure compliance with both the spirit and letter of the law, which is incorporated into various statutes in the Juvenile Code. *See, e.g.*, ORS 419B.100; ORS 419B.340; ORS 419B.878.

As you already know, in 1978, Congress enacted ICWA to address "the rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Choctaw Indians Band v.* Holyfield, 490 US 30, 32, 109 S.Ct. 1597 (1989).

Today, Native American children continue to be removed at a disproportionally higher rate than other children. For instance, the latest data in Oregon shows that Native American children are placed into foster care at 2.2 times the rate one would expect based on their share of the general population. 2017 Child Welfare Data Book, https://www.oregon.gov/DHS/ABOUTDHS/LegislativeInformation/2017-Child-Welfare-Data-Book.pdf.

The Oregon Judicial Department, and its courts and programs, have an important role in ensuring compliance with ICWA so that Native American children, families, and tribes are able to preserve their culture and history.

To ensure compliance, OJD engages in various efforts that include education and training of judges and justice system partners, providing useful resources and tools, review of cases to ensure compliance, and fostering relationships with child welfare stakeholders and the nine Federally recognized tribes in Oregon.

Education and training efforts. OJD's Juvenile Court Improvement Program (JCIP) is responsible for, among other things, educating and training juvenile court judges and other justice system partners.[1] JCIP provides education and training through its annual Through the Eyes of the Child Conference as well as other specialized trainings on subjects covering ICWA. For instance, when the Bureau of Indian Affairs issued new guidelines and regulations for ICWA, JCIP provided trainings on the new guidelines and regulations.[2]

JCIP also collaborates to prepare individuals to be qualified expert witnesses, as is required by law in cases in which the state seeks to effect a foster care placement. Section 1912(e) of the Act provides that the court cannot authorize a foster care placement until the court determines "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The court's determination must be supported by clear and convincing evidence and must include the testimony of a qualified expert witness. 25 U.S.C. §1912(e). JCIP works with DHS and DOJ to provide Qualified Expert Witness (QEW) trainings to various individuals and tribal members to explain the Oregon court process, the need for qualified expert witnesses, and the role of the qualified expert witness in the proceedings. Through

[1] To view JCIP's website, see https://www.courts.oregon.gov/programs/jcip/Pages/default.aspx.

[2] To view recording of BIA Regulations webinar provided by JCIP, see https://www.courts.oregon.gov/programs/jcip/media/OJD.ICWA.BIA.1.25.17.WEB/player.html.

those collaborative efforts, JCIP has helped increase the number of recognized qualified experts to 50 individuals. Because of its success, the Oregon team was asked to present a training at the National Indian Child Welfare Act Conference on Oregon's QEW process.

Resources and tools. In addition to providing education and training, JCIP also develops model court forms for judges that incorporate the determinations required by ICWA. The model court forms, which are located on JCIP's website, are useful tools for juvenile court judges to ensure that their judgments include the findings and determinations required by ICWA. (Please see Attachment A—Model Court Form for Shelter Hearing).[3] JCIP has also created a Juvenile Dependency bench card. (Please see Attachment B—Juvenile Dependency Benchcard Series). Furthermore, JCIP provides technical assistance and support to a variety of work groups.

Judicial and JCIP compliance reviews. OJD judges engage in compliance reviews in the normal course of presiding over juvenile dependency cases, in which the court must ensure that the state and other parties comply with state and Federal statutes. Additionally, Oregon appellate courts have provided guidance on the provisions of ICWA in reviewing the decisions of the trial courts. *See, e.g.*, *Dept. of Human Services v. J.G.*, 206 Or App 500, 317 P3d 936 (2014) (reviewing the establishment of a durable (non-permanent) guardianship over an Indian child to ensure that the department had made active efforts to make it possible for the child to return to the mother's care).

Further, JCIP periodically engages in its own compliance reviews. For example, in the last assessment in 2016, DHS provided JCIP a list of ICWA cases filed in the previous quarter so that JCIP staff could review the court hearings to determine whether a qualified expert witness was present and whether the court had made the specific findings required by ICWA. (Please see Attachment C – JCIP 2016 File Review – ICWA Sample Results).

Fostering relationships. In addition to our education and training efforts and providing useful tools and resources to ensure compliance with ICWA, OJD understands the importance of establishing relationships and working collaboratively with tribes. In 2016, OJD entered into a memorandum of understanding with the nine Federally recognized tribes in Oregon to create the

[3] For other model court forms, please visit JCIP website, Model Court Forms, located at: https://www.courts.oregon.gov/programs/jcip/ModelCourtForms/Pages/default.aspx.

Tribal Court State Court Forum. (Please see Attachment D – Memorandum of Understanding). The Forum, which is made up of nine state court judges and nine tribal court judges, meets to identify issues of mutual concern and work to address those issues to improve the administration of justice for all individuals appearing both in Oregon state courts and tribal courts.[4] The Forum's efforts helped change Uniform Trial Court Rule 3.170, the rule regulating lawyers who are not licensed in Oregon to appear in courts in Oregon, allowing lawyers who represent an Indian tribe, parent, or Indian custodian to appear without having to pay a fee or associate with local counsel. (Please see Attachment F – Copy of UTCR 3.170). The Tribal Court State Court Forum is currently focusing on improving law enforcement compliance with tribal court protection orders.

In addition, JCIP encourages and supports tribal judge attendance and participation in our Juvenile Judges Conferences as well as providing support and encouragement for our judges to engage in tribal court visits.

These are a few examples of Oregon Judicial Department's efforts to ensure compliance with ICWA. If you have any questions or would like further information on any of these efforts or additional efforts, please feel free to contact me directly at Valerie.Colas@ojd.state.or.us. Thank for your time.

Sincerely,

/s/ Valerie Colas

Valerie Colas
Access to Justice Counsel
Tribal Court State Court Staff Counsel
Office of the State Court Administrator
Oregon Judicial Department

[4] Please see attachment E for a timeline of the Forum's work.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR _____ COUNTY

In the Matter of:	)	Case Number: _____
	)	
_____	)	**SHELTER ORDER -ICWA**
A Child.	)	(ORS 419B.180 et seq.)

This matter came before the Court on: _____, 20_____.

Persons appearing:

Legal Father *(name)*:	Attorney:
Putative Father *(name)*:	Attorney:
Mother:	Attorney:
Child:	Attorney:
Tribe:	Tribal Atty/Rep:

CASA:	Deputy D.A:
Guardian:	Assist. Atty Gen'l:
DHS Caseworker:	Other:
Guardian Ad Litem:	Other:

DHS Documentation: The Department of Human Services (DHS) ☐ **did** ☐ **did not** provide the Court with the documentation required by ORS 419B.185.

Evidence Considered:
☐ Stipulations by the parties.
☐ The exhibits admitted by the Court.
☐ The testimony of the witness(es) at the hearing.
☐ The following facts and/or law, of which the Court has taken judicial notice: _____
_____
_____.

☐ Other: _____
_____

☐ The Findings made below are based on clear and convincing evidence, because the child is an "Indian child" under the Indian Child Welfare Act. 25 USC § 1901-63.

1. INDIAN CHILD WELFARE ACT (ICWA) - FINDINGS AND ORDER:

☐ The ICWA applies to this case, because the Court ☐ **has determined** ☐ **has reason to know** that the child is an "Indian child" under the ICWA, and is an enrolled member of, or is eligible for membership in, the following tribe(s): _____, 25 USC § 1903(4). The tribe(s) ☐ **has been** ☐ **has not been** notified of this proceeding, as required by 25 USC § 1912(a). This Court ☐ **has** ☐ **does not have** jurisdiction under 25 USC § 1911 to proceed with the case.

Additional findings/orders: _____
_____

2. NOTICE FINDINGS

►**Parties:**

☐ All parties **were** ☐ **were not notified**, and DHS shall make diligent efforts to notify the following of all future hearings: _____

☐ Mother ☐ Father ☐ Guardian(s) was provided the notice of obligations and rights required by ORS 419B.117.

►**Foster Parent(s)/Care Provider(s)**

☐ The child is in substitute care, and DHS ☐ **did** ☐ **did not** give the foster parent(s)/current care provider(s) notice of the hearing.

☐ The foster parent(s)/current care provider(s) **did not attend** the hearing.

☐ The foster parent(s)/current care provider(s) **attended** the hearing and had an opportunity to be heard.

►**Grandparent(s):**

☐ DHS ☐ **made** ☐ **did not make** diligent efforts to identify, obtain contact information for, and notify all grandparents of the hearing.

☐ No grandparents attended the hearing, *or*.

The following grandparents attended the hearing and had an opportunity to be heard:

Maternal:

☐ grandmother ☐ grandfather

Paternal

☐ grandmother ☐ grandfather

☐ The grandparents who attended the hearing were informed of the date of a future hearing.

☐ DHS **did not** give the grandparents notice of the hearing because: _____.

☐ For good cause shown, the court relieves DHS of the responsibility to provide notice of this hearing.

3. UCCJEA DETERMINATION

This Court ☐ has ☐ does not have jurisdiction under the UCCJEA (ORS 109.701 to 109.834) to make "a child custody determination."

4. ACTIVE EFFORTS FINDINGS

In light of the circumstances of the child and the parent(s), having considered the child's health and safety to be the paramount concerns, and having considered whether placement of the child and referral to the Strengthening, Preserving and Reunifying Families Program is in the child's best interest (ORS 418.595) the Court finds that:

►☐ DHS **has made** active efforts to provide services and/or other support to prevent or eliminate the need for removal of the child from the home and to make it possible for the child to safely return home. ORS 419B.185(1). The efforts to prevent removal/to safely return the child home include the following:

_____

_____

_____

_____

☐ Description of active efforts is attached as Exhibit ____, and is adopted as the Court's written findings.

►☐ The Court **considers DHS to have made active efforts** to prevent or eliminate the need for protective custody even though no services were provided because no services would have eliminated the need for protective custody. ORS 419B.185(1).

► ☐ DHS **has not made** active efforts, to provide services and/or other support to prevent or eliminate the need for removal and make it possible for the child to safely return home. ORS 419B.185(1).

5. IN-HOME PLACEMENT

☐ The Court has considered the child's health and safety and whether the provision of reasonable services can prevent or eliminate the need to separate the family and finds that placement in the child's home is in the child's best interest and for the child's welfare.

6. PLACEMENT IN SUBSTITUTE CARE

► **Expert Testimony or Emergency Jurisdiction:**

☐ Based on evidence that included the testimony of an expert witness within the meaning of ORS 419B.340(7), the Court finds that the child cannot be safely returned home/maintained in the home and that the continued custody of the child by the parent(s), or Indian custodian(s), is likely to result in serious emotional or physical damage to the child. 25 USC §1912(e); ORS 419B.185(1)..

OR:

☐ This Court has temporary emergency removal/placement jurisdiction under 25 USC § 1922 because removal is necessary to prevent imminent physical damage or harm to the child. ***(Another shelter hearing is required within 30 days.)***

THEREFORE, placement or continuation in substitute care is in the child's best interest and for the child's welfare (*provide additional reasons to support the finding*):_____
_____
_____

►**Placement Preferences:**

☐ The Court finds that the selected placement ☐ **does comply** ☐ **does not comply** with the placement preference(s) established by 25 USC §1915.

☐ The Court further finds that the selected placement ☐ **is** ☐ **is not** the least restrictive, most family-like setting that meets the health and safety needs of the child and in reasonable proximity to the child's home.
Additional findings: _____
_____.

► **Diligent Efforts**

Relative Placement

☐ The child is in substitute care, and DHS ☐ has ☐ has not made diligent efforts to place the child with a relative/person who has a caregiver relationship with the child, as required by ORS 419B.192.
☐ DHS has decided to place the child with a relative/person who has a caregiver relationship with the child, but that placement is not in the child's best interest, because: _____
_____.

Sibling Placement

☐ The child has one or more siblings and is in substitute care. DHS ☐ has made ☐ has not made diligent efforts to place the child with a sibling, as required by ORS 419B.192. ☐ Placement together is not in the best interest of the child or sibling.

► **Visitation Findings:**

_____

7. RESTRAINING ORDER FINDINGS

☐ The Court finds that the requirements for entry of a restraining order under ORS 419B.845 are satisfied in this case and that entry of a restraining order against: _____ is for the child's welfare and in the child's best interest. ☐ The restraining order is attached.

8. SCHOOL OF ORIGIN.

☐ The court finds **it is** in the child's best interest to attend the child's school of origin.

☐ The court finds **it is not** in the child's best interest to attend the child's school of origin or any other school in the child's district of origin.

THE COURT ORDERS:

►**CASA:** ☐ CASA is appointed to represent the child.

►**Attorneys:** ☐ Attorneys are appointed as follows: Mother: _____
Father: _____ Child/ren: _____

► **Temporary custody:**

☐ The child is placed in the temporary custody of DHS for care, placement and supervision, pursuant to ORS 419B.809(5) ☐ in substitute care ☐ in home, subject to the following conditions:

_____

_____

☐ The child is placed in the custody of ☐ mother ☐ father ☐ guardian, subject to the following conditions:

_____

_____

☐ The child is placed in the temporary custody of: _____

►**Visitation:** The first visit must occur within ☐ one week ☐ 48 hours ☐ other: _____
Additional requirements:_____
☐ Visits not appropriate at this time

►**DHS Disclosure of Records and Reports**

Under ORS 419A.255(4)(a)(C), the Court consents to the use and disclosure of records, reports, materials or documents in the record of the case or the supplemental confidential file by DHS if such use and disclosure is reasonably necessary to perform its official duties related to the involvement of the child with the juvenile court.

THIS CASE WILL NEXT BE REVIEWED:

APPEARANCE TYPE:	DATE:	TIME:
By the court for second shelter hearing on:		
By the court for **initial appearance** on:		
By the court for **settlement conference** on:		
By the court for **pre trial conference** on:		
By the court for **trial** on:		
Readiness Appearance Set For:		
Other:		

►The 60-day deadline for resolving the petition in this case is: _____, 20_____. ORS 419B.305(1).

All parties in attendance were notified of these court dates and are ordered to appear.

DATED: _____.

_____
CIRCUIT JUDGE

_____
Print, Type or Stamp Name of Judge

Indians and being knowledgeable in the Tribe's customs?

4. If you are professional, what is your education and experience? Describe your knowledge of the prevailing social and cultural standards and child rearing practices of child's Tribe.

Will continued custody of the child by a parent or Indian custodian likely result in serious emotional or physical damage to the child?

5. Do you have current knowledge of the case and, if so, how did you acquire this knowledge?

6. Is it culturally appropriate in the child's Tribe to (insert allegations of petition)?

7. At the time of removal, was the child at risk of serious physical or emotional risk or harm?

8. Did DHS provide active efforts (1) to prevent the removal of the child, (2) to make it possible for the child to return home and (3) to maintain the child's ties to the child's Tribe?

9. Will returning the child home today to his/her parents or Indian custodian likely result in serious physical and/or emotional risk or harm?

10. Does the child's Tribe support the current out-of-home placement of the child?

Questions?

Contact the Juvenile Court Improvement Program, 503.986.6403

JCIP

Juvenile Dependency Benchcard Series

ICWA: Shelter and Jurisdiction

If the court knows or has reason to know that the child is an "Indian child" under the Indian Child Welfare Act, the ICWA protections must be applied. The Tribe determines membership. If there are multiple Tribes, the court must provide the Tribes an opportunity to determine which Tribe should be designated for the child.

1. Did DHS give the parents and Tribe 10 days notice of the dependency proceeding and of the right to intervene in the case? The court may hold a hearing without the 10 day notice if there is a basis for emergency jurisdiction (see item 7), however, proof of the notice must be provided at the next hearing. *See* 25 C.F.R. §23.111 for notice requirements.

2. Does a Tribe have exclusive jurisdiction because the child resides or is domiciled on a reservation or is a ward of a Tribal court?

3. If state has concurrent jurisdiction, does the Tribe or the parent want the case transferred to the Tribal court? This can happen at any stage of the proceeding.

CARD 1.1 ICWA: Shelter and Jurisdiction

For use with JCIP Model Form JF2i, 3, 4 and 4B

4. If the Tribe intervenes, it becomes a legal party. The Tribe maintains the right to participate as an interested party or intervene at any point in the case.

5. All of the court's findings must be made by clear and convincing evidence.

6. If the child is to be placed in substitute care, the court must qualify and take testimony from a "Qualified Expert Witness" and make a finding that continued custody by parent is likely to result in serious emotional or physical damage to child. This is a requirement at shelter and jurisdiction.

7. The court can exercise temporary emergency jurisdiction over a child without expert testimony if DHS establishes and the court finds that the child is in "imminent danger of physical damage or harm." A second hearing with expert testimony must occur within 30 days or when new information indicates the emergency has ended.

8. Determine if DHS made active efforts to (1) prevent removal; (2) return the child to the parent. Active efforts must be documented in detail in the record. DHS should provide documentation of their active efforts.

9. Determine whether the placement is appropriate. The placement must be the least restrictive which most approximates a family and in which the child's special needs may be met, in reasonable proximity to the child's home. In addition, a preference shall be given to placement with the Tribe's placement preference if established by resolution, or as follows: a member of the child's extended family, a foster home approved or specified by the Tribe, an Indian foster home, or an institution approved by a Tribe or operated by an Indian Tribe or organization with a program to meet child's needs. If any party asserts good cause to deviate from the placement preferences, that party bears the burden of proof.

Questions for Qualified Expert Witness

A Qualified Expert Witness is a witness who is uniquely qualified to testify regarding cultural aspects involved in the decision to remove or place, or to terminate parental rights involving Indian children as defined in ICWA. The QEW offers specialized knowledge to assist the Court in understanding and interpreting cultural child-rearing customs to help the court ensure that there will not be bias in the interpretation of information or behavior. QEW testimony is required when a foster care placement is ordered. 25 U.S.C. §1912 (e). This includes shelter, jurisdiction, guardianship and termination of parental rights hearings. The social worker regularly assigned to the child may not serve as a QEW.

Does the witness qualify as an expert?

1. Are you a member of the child's Tribe? Are you recognized by the Tribe as being knowledgeable about the Tribe's customs as they pertain to family organization and child rearing?

2. Are you a member of another Tribe? Are you recognized by the child's Tribe as a qualified expert witness based on your knowledge of the child's Tribe's customs as they pertain to family organization and child rearing?

3. If you are not a member of any Indian Tribe, what is your connection with the child's Tribe?

    a. Describe your experience in the delivery of child and family services to Indians.

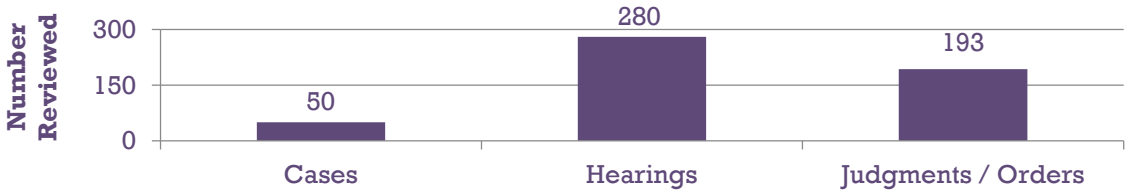
    b. Describe your familiarity with the social and cultural customs and practices of the child's Tribe with respect to child rearing.

    c. Does the child's Tribe recognize you as having substantial experience in the delivery of child and family services to

JCIP 2016 File Review – ICWA Sample Results

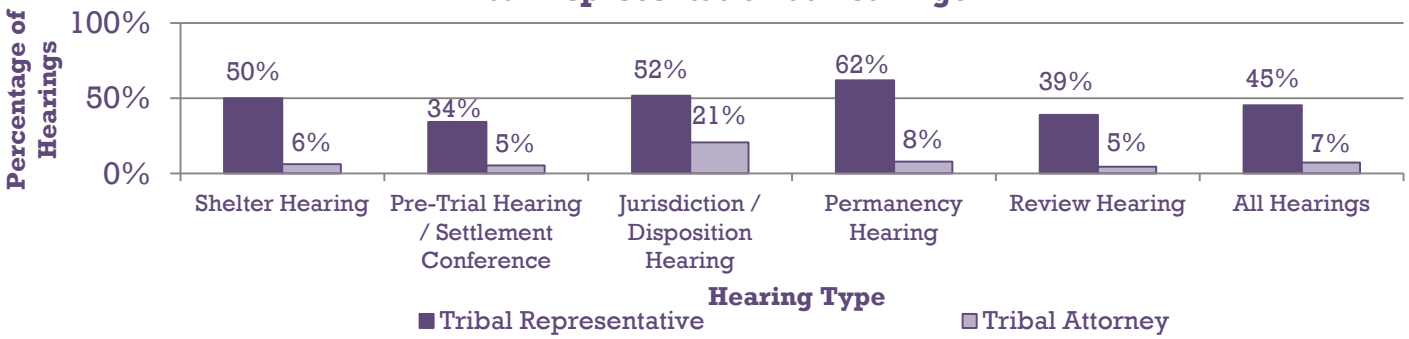
Oregon's Juvenile Court Improvement Program (JCIP) undertook a file review in 2016 on two samples of cases: a Standard Sample drawn from all dependency cases open at some point in 2015, and an ICWA Sample drawn from cases identified by DHS as subject to the Indian Child Welfare Act. This document summarizes results from the ICWA Sample.

Cases, Hearings, and Judgments Reviewed



The ICWA Sample included **50 cases** randomly selected from a list of cases that were open during 2015 and identified by DHS as subject to ICWA. The ICWA Sample review covered 280 court hearings held and 193 judgments and orders entered on the 50 cases after 1/1/15.

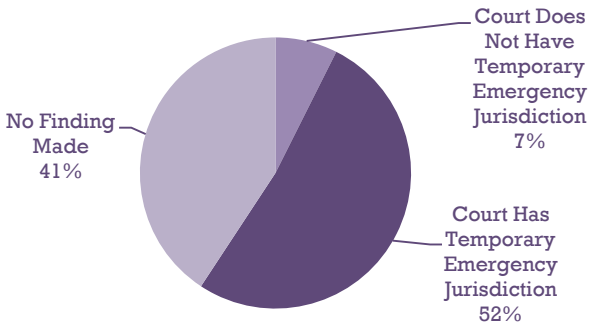
Tribal Representation at Hearings



A representative for the **child's tribe was present** (either in person or by phone) **at 45% of all hearings** reviewed, and a **tribal attorney was present at 7% of all hearings** reviewed. In some of the cases where the tribe was not present, the tribe may have chosen not to participate in the case.

Temporary Emergency Jurisdiction Findings*

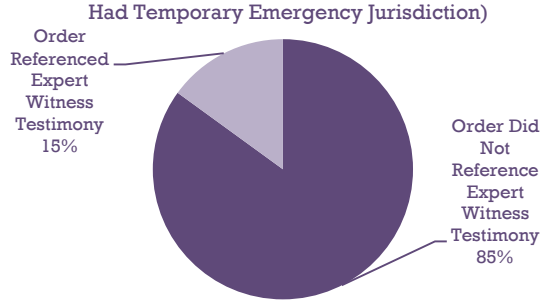
(Shelter Judgments and Orders with a Finding That ICWA



Of reviewed shelter judgments and orders that had a finding that ICWA applied to the case, **52%** had a finding that the court **had temporary emergency jurisdiction**. All but two of the remaining orders had no finding regarding temporary emergency jurisdiction.

Expert Witness Testimony at Non-Emergency Shelter Hearings*

(Shelter Judgments and Orders That Had a Finding That ICWA Applied to the Case But Did Not Have a Finding That the Court Had Temporary Emergency Jurisdiction)



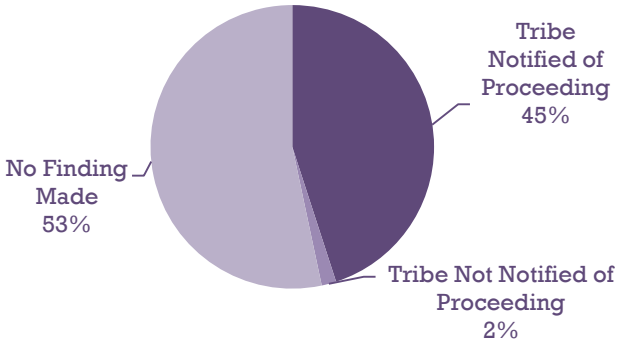
Of the thirteen shelter judgments and orders where the court found that ICWA applied but did not find temporary emergency jurisdiction, **two referenced expert witness testimony.** Ten of the thirteen orders indicated that the child was placed in substitute care.

*In interpreting data related to findings, it is important to note that the file review considered only what was written on the judgment or order, and did not include any findings that were stated aloud in court but were not written on the judgment or order.

JCIP 2016 File Review – ICWA Sample Results

Notice to Tribe of Child Custody Proceeding*

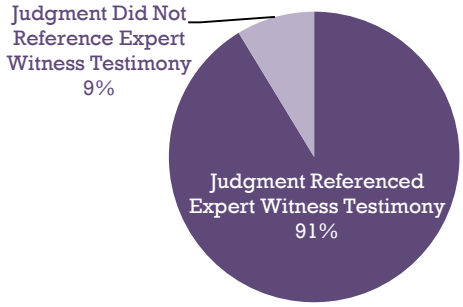
(Shelter, Jurisdiction, and Disposition Judgments and Orders with a Finding That ICWA Applied to the Case)



Only **45% of shelter, jurisdiction, disposition, and jurisdiction/disposition judgments and orders** that had a finding that ICWA applied to the case also **had a finding that the tribe received notice of the child custody proceeding.** In most of the remaining cases, there was no finding as to whether the tribe was notified.

Expert Witness Testimony at Jurisdiction and Disposition*

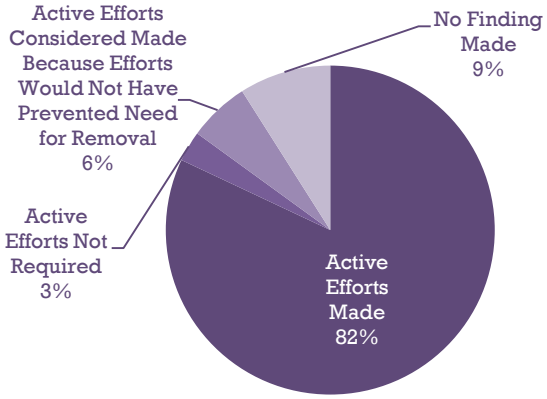
(ICWA Jurisdiction and Disposition Judgments and Orders with a Finding That ICWA Applied to the Case)



Ninety-one percent of jurisdiction, disposition, and jurisdiction/disposition judgments and orders with a finding that ICWA applied to the case (21 out of 23) **referenced expert witness testimony.** This contrasts with most non-emergency shelter orders not referencing expert witness testimony.

Active Efforts Findings*

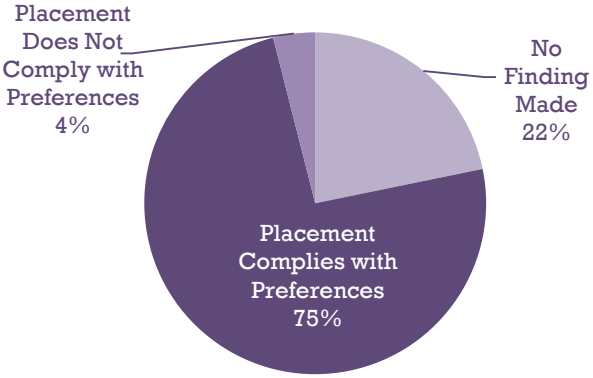
(Judgments and Orders Where Active Efforts Findings Applied)



The court found that **active efforts were made on 82% of judgments and orders** where active efforts applied. **Nine percent of such judgments had no finding regarding active efforts**, and on the other eleven percent the court found that active efforts weren't required or wouldn't have prevented the need for removal. **There were no judgments** in the ICWA Sample **with a finding that active efforts were required but were <u>not</u> made.**

Placement Preference Findings*

(Judgments and Orders with a Finding That ICWA Applied and an Indication That the Child Was Placed in Substitute Care)



Note: Due to rounding, the percentages in the chart above do not sum to 100%.

Of the 83 shelter, jurisdiction, disposition, and permanency judgments and orders that indicated that the child was placed in substitute care, **75% had a finding that the placement complied with the ICWA placement preferences**. Of the remaining 21 judgments, **18 had no finding** regarding placement preferences, and only **three had a finding that the child's placement did not follow the ICWA placement preferences.**

*In interpreting data related to findings, it is important to note that the file review considered only what was written on the judgment or order, and did not include any findings that were stated aloud in court but were not written on the judgment or order.

TRIBAL COURT/STATE COURT FORUM
Memorandum of Understanding
Between
The Oregon Judicial Department
and
The Nine Federally Recognized Tribes of Oregon

This Memorandum of Understanding (MOU) sets forth the terms and understanding between the Oregon Judicial Department and the Nine Federally Recognized Tribes of Oregon to establish an ongoing forum of state, tribal and federal judiciaries.

Background

Oregon has nine federally recognized Indian tribes: the Burns Paiute Tribe; the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; the Confederated Tribes of Grand Ronde; the Confederated Tribes of Siletz Indians; the Confederated Tribes of the Umatilla Indian Reservation; the Confederated Tribes of Warm Springs; the Coquille Indian Tribe; the Cow Creek Band of Umpqua Tribe of Indians; and The Klamath Tribes. Oregon also has 36 Circuit Courts and six Federal Courts including one US District Court in four locations, one Bankruptcy Court and one Ninth Circuit Court of Appeals. State, Federal and tribal courts have a range of common responsibilities. However, at times, they can misunderstand, misinterpret and disagree about issues important to each jurisdiction. These parallel and sometimes overlapping responsibilities require open communication between court systems. In August of 2015, six Tribal judges, twelve Circuit Court Judges and one Federal Judge convened to discuss cross jurisdictional issues affecting all of their systems. At the conclusion of their meeting, they unanimously expressed a need for an ongoing forum to continue the work.

Purpose

The Tribal Court/State Court Forum will create and institutionalize a collaborative relationship between judicial systems in Oregon, identify cross-jurisdictional legal issues affecting the people served by those systems, and improve the administration of justice of all our peoples. It will allow judges and court representatives to gain knowledge of their various court procedures and practices, identify strategies and facilitate improvements in their interactions, and allow them to coordinate and share resources, educational opportunities and materials.

Membership

The membership of the forum shall consist of equal representation of nine state court representatives from diverse locations and nine tribal representatives. One state court judge and one tribal court judge shall serve as co-chairs of the forum. The co-chairs can designate an attorney representative with knowledge of Indian Law and a federal court representative to serve as members of the forum.

Meetings

The forum will meet up to two times each year and will alternate between tribal and state locations.

Funding

This MOU is not a commitment of funds.

Duration

This MOU is at-will and may be modified by mutual consent of the members. This MOU shall become effective upon signature by the authorized officials listed below and will remain in effect until modified or terminated by any one of the partners by mutual consent.

Non-Binding

The parties understand that this MOU is not legally binding on them but is designed to reflect an understanding of the way in which they can effectively cooperate to create a tribal/state court forum in Oregon. Nothing in the MOU restricts any party from exercising independent judgment or discretion given it under applicable statutes, regulations, or other sources.

OREGON JUDICIAL DEPARTMENT
SIGNED
SEPTEMBER 29, 2016
CHIEF JUSTICE BALMER

CONFEDERATED TRIBES OF WARM SPRINGS
PENDING BEFORE TRIBAL COUNCIL

BURNS PAIUTE TRIBE
SIGNED
AUGUST 22, 2016
CHARLOTTE RODERIQUE, TRIBAL COUNCIL

COQUILLE INDIAN TRIBE
PENDING BEFORE TRIBAL COUNCIL

CONFEDERATED TRIBES OF THE UMATILLA INDIANS
SIGNED
SEPTEMBER 26, 2016
JUDGE WILLIAM D. JOHNSON

COW CREEK BAND OF UMPQUA TRIBE INDIANS
SIGNED
NOT DATED
MICHAEL RONDEAU

CONFEDERATED TRIBES OF GRAND RONDE
SIGNED
NOT DATED
JUDGE DAVID SHAW

THE KLAMATH TRIBES
SIGNED
NOT DATED
JUDGE JEREMY BRAVE-HEART

CONFEDERATED TRIBES OF COOS, LOWER UMPQUA, AND SIUSLAW INDIANS
SIGNED
NOT DATED
JUDGE J.D. WILLIAMS

CONFEDERATED TRIBES OF SILETZ INDIANS
SIGNED
NOT DATED
JUDGE CALVIN GANTENBEIN

Tribal Court/State Court Judicial Forum

August- October 2015

The Tribal & State Court Judges Convening was held on August 12, 2015 in Salem.

Attendees heard from an ICWA panel, a VAWA panel, learned about other states' collaborative efforts, and discussed forming a tribal court/state court forum in Oregon.

A proposal for the creation of a Tribal Court/State Court Forum was delivered to Oregon's Chief Justice and to Oregon's nine federally recognized tribes.

September/October 2016

The first Tribal Court/State Court Forum was held in Chiloquin, OR.

On the agenda was a tour of the Klamath Tribes, review and approval of the proposed UTCR changes, a presentation on child support issues, and discussion of protection orders and family court orders.

A Memorandum of Understanding between OJD and the nine federally recognized tribes was signed.

A proposed rule change to UTCR 3.170 (pro hac vice) was drafted and presented before the UTCR Committee and Supreme Court Public Meeting.

June 2017

The second Tribal Court/State Court Forum was held in Portland, OR.

On the agenda was a presentation from Urban Indian Services, discussion from the protection orders enforcement workgroup, information about the transfer of juvenile cases, and collaborative problem solving on interjurisdictional drug courts.

The UTCR 3.170 proposed rule change was approved by the Supreme Court and went into effect August 1, 2017.

The Forum hosted a screening of the film "Tribal Justice" on November 7, 2017 and facilitated a discussion panel after the film.

July 2018

The third Tribal Court/State Court Forum will be held in Warm Springs, OR.

On the agenda is a tour of the Warm Springs museum and tribal court, discussion of full faith and credit for protection orders, with presentations from the Confederated Tribes of the Umatilla and the Confederated Tribes of Warm Springs, as well as law enforcement, attorneys, and others.

A webinar training for law enforcement on full faith and credit for protection orders will be recorded and distributed in fall 2018.

July 2018

Attachment E

MEMORANDUM

TO: UTCR Committee

FROM: Amy Benedum, JFCPD Program Analyst
On behalf of: Oregon Tribal/State Judicial Forum

SUBJECT: Proposed Change to UTCR 3.170

DATE: August 1, 2016

The Indian Child Welfare Act, 25 U.S.C. §1911(c), gives Indian tribes the right to intervene in and participate in any state child custody proceeding involving an Indian child from that tribe. Intervention has been held in numerous cases to be critical for a Tribe to present its position and protect its interest in tribal member children. Unfortunately, while the ICWA confers this right on Tribes, it does not provide any funding to carry it out. It is difficult for many Tribes to find or allocate the resources necessary to participate in every ICWA case that is identified; no dedicated sources of funding exist.

This problem is particularly acute for out-of-state ICWA cases. Indian tribes from other states seeking to exercise their rights by intervening and participating in Oregon child custody proceedings encounter a high burden due to provisions in UTCR 3.170, which requires non-Oregon attorneys to associate with Oregon attorneys and pay a fee to appear *pro hac vice*. The expense for out-of-state Tribes can be substantial, and as a result Tribes sometimes decide not to intervene in an out-of-state ICWA case because they cannot afford the expense of hiring a local attorney in addition to their tribal attorney and paying a $500 fee to the Oregon State Bar. This result undermines the intent and purpose of the ICWA, which is designed to encourage tribal participation in ICWA proceedings.

A partial solution to this issue came from *State ex rel. Juv. Dept. v. Shuey*, 119 Or App 185, 199, 850 P.2d 378 (1993), which concluded that a Tribe can intervene in a state court ICWA proceeding without legal counsel and that the Tribe's critical interest in participating in such proceedings outweighs and preempts the State's interest in having legal counsel represent parties in judicial proceedings. While this ruling is a partial solution to the problem of affording out-of-state legal counsel, it raises other issues. An Indian tribe is most often represented in ICWA proceedings by tribal social workers or case workers. Those employees may know the facts of the case, but they do not know court procedure or the law, and they are at a serious disadvantage in arguing procedural or legal issues before the court. Non-lawyer participation makes the court's job more difficult because of the lack of knowledge. Two years ago, the Indian Law Section of the Oregon State Bar proposed a change to UTCR 3.170 to address the issue, as they believed that Oregon courts would be better served by having a lawyer versed in Indian law and knowledgeable about the Tribe participate in the case, even if that lawyer may not be completely knowledgeable about local legal practice.

The Indian Law Section proposed two changes to UTCR 3.170 to overcome the burden of out-of-state Tribes participating in child custody cases in Oregon. First, their proposed rule change would allow out-of-state legal counsel to participate in a narrow range of ICWA proceedings without associating with local legal counsel. Tribes may still choose to associate with local legal counsel, but they are no longer required to do so. Second, the Section proposed that the application fee of $500 set out at 3.170(6) be waived because it is unnecessary and burdensome. It was the Section's belief that the fee is an improper burden on the right of a Tribe to intervene in a child custody proceeding under the ICWA.

The Tribal/State Judicial Consortium supports these proposed rule changes to UTCR 3.170. It is clear that the intent of the ICWA is to have Indian tribes intervening in state court proceedings involving their tribal children, and any burdens to that intervention found in state law should be changed. The Tribal/State Judicial Consortium believes that these proposed rule changes will increase participation in Oregon ICWA proceedings by out-of-state tribes, and would raise the level of practice in such proceedings by having legal counsel, rather than social service staff, represent the intervening Tribe's interests.

The Tribal/State Judicial Consortium recommends that UTCR 3.170 be amended by adding the following subsection 9:

(9) An applicant is not required to associate with local counsel pursuant to subsection (1)(c) of this section or pay the fee established by subsection (6) of this section if the applicant establishes to the satisfaction of the Bar that:

(a) The applicant seeks to appear in an Oregon court for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. §1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. §1901 *et seq.*,

(b) The applicant represents an Indian tribe, parent, or Indian custodian, as defined by 25 U.S.C. §1903; and

(c) The Indian child's tribe has executed an affidavit asserting the tribe's intent to intervene and participate in the state court proceeding and affirming the child's membership or eligibility of membership under tribal law.

UTCR 3.170 ASSOCIATION OF OUT-OF-STATE COUNSEL (PRO HAC VICE)

(1) An attorney authorized to practice law before the highest court of record in any state or country ("out-of-state attorney") may appear on behalf of a party in any action, suit, or proceeding pending in this state before a court or administrative body even though that attorney is not licensed to practice law in this state, if the attorney satisfies all of the following requirements:

(a) Show that the attorney is an attorney in good standing in another state or country.

(b) Certify that the attorney is not subject to pending disciplinary proceedings in any other jurisdiction or provide a description of the nature and status of any pending disciplinary proceedings.

(c) Associate with an active member in good standing of the Oregon State Bar ("local attorney") who must participate meaningfully in the matter.

(d) Certify that the attorney will: comply with applicable statutes, law, and procedural rules of the state of Oregon; be familiar with and comply with the disciplinary rules of the Oregon State Bar; and submit to the jurisdiction of the Oregon courts and the Oregon State Bar with respect to acts and omissions occurring during the out-of-state attorney's admission under this rule.

(e) If the attorney will engage in the private practice of law in this state, provide a certificate of insurance covering the attorney's activities in this state and providing professional liability insurance substantially equivalent to the Oregon State Bar Professional Liability Fund plan.

(f) Agree, as a continuing obligation under this rule, to notify the trial court or administrative body promptly of any changes in the out-of-state attorney's insurance or status.

(g) If application will be for an appearance before a court, pay any fees required by subsection (6) below for appearance under this rule. No fee is required if application will be for an appearance before an administrative body.

(2) The information required by subsection (1) of this rule must be presented as follows:

(a) If application will be for an appearance before a court, to the Oregon State Bar (Bar) in a form established by the Bar. The Bar may accomplish the submission of information by requiring a certificate with attachments or other means administratively convenient to the Bar. Upon receipt of all information necessary under subsection (1) of this section and receipt of the fee required by subsection (6) below, the Bar will acknowledge receipt in a form determined by the Bar. In making the acknowledgment, the Bar may attach copies or comment on any submitted material the Bar finds may be appropriate for a court to consider with an application under this section. The local attorney must then submit the Bar's acknowledgment

with any information the Bar includes to the court by motion signed by the local attorney requesting the court to grant application under this section. The court may rely on the acknowledgment of the Bar as a basis to conclude that all information required to be submitted and fees required to be paid for granting an application under this section have been submitted and paid. Bar records on materials it receives under this section will be available to a court on request for two years or such longer period as the Bar considers administratively convenient.

(b) If the application is for an appearance before an administrative body, to the administrator of the agency before which the proceeding will occur or that person's designee or to any other appropriate officer, employee or designee of that agency as set forth by procedures or rules established by that agency. Application may be accomplished by an application certificate with attachments or other means administratively convenient to and established by the agency. Agency records on materials the agency or designee receives under this section will be available to the Bar on request for two years or such longer period as the agency considers administratively convenient.

(3) The court or administrative body shall grant the application by order if the application satisfies the requirements of this rule, unless the court or administrative body determines for good cause shown that granting the application would not be in the best interest of the court or administrative body or the parties. At any time and upon good cause shown, the court or administrative body may revoke the out-of-state attorney's permission to appear in the matter.

(4) Each time a court or administrative body grants an application under this rule or revokes an out-of-state attorney's permission to appear in a matter, the local attorney must provide a notice to the Bar of such occurrence in a manner and within the time determined by the Bar.

(5) This rule applies to all judicial and administrative proceedings in this state. When a court or administrative body grants an application for approval to appear under this rule, the authorization allows that individual attorney to appear in all proceedings for a single case that occur within a year after the application is granted. Applications will not be granted for firms. There must be separate application and approval for any of the following: appearance by another out-of-state attorney representing the same or any other party; representation by the same out-of-state attorney in this state on another matter; any appearance that occurs later than that one-year period. The Bar or an administrative body may establish such abbreviated procedures and requirements as Bar or body finds administratively convenient to limit unnecessary submission of duplicate information by an attorney who has already had application granted to appear in one proceeding and is seeking to appear in other proceedings or to renew an application at the end of a current one-year grant for a case.

(6) Except as otherwise provided in this rule, for each application under this rule to appear before a court, the applicant must pay to the Bar a fee of $500 at the time of submission of information under subsection (2) of this section, including when application is sought to renew an application at the end of a current one-year grant for a case. The fee will not be refundable.

(7) Subject to the following, the Bar or any administrative agency acting under this section may use electronic means to accomplish acts required or authorized under this section:

(a) The Bar shall provide acknowledgment under paragraph (2)(a) of this rule for court purposes by electronic means only upon approval of the State Court Administrator.

(b) No administrative agency may provide electronic means of notifying the Bar of a grant of application or revocation under this section without prior approval of the Bar.

(8) An applicant is not required to pay the fee established by subsection (6) of this section if the applicant establishes to the satisfaction of the Bar that the applicant is employed by a government body and will be representing that government body in an official capacity in the proceeding that will be the subject of the application.

(9) An applicant is not required to associate with local counsel pursuant to subsection (1)(c) of this section or pay the fee established by subsection (6) of this section if the applicant establishes to the satisfaction of the Bar that:

(a) The Applicant seeks to appear in an Oregon court for the limited purpose of participating in a child custody proceeding as defined by 25 USC § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 USC § 1901 *et seq*.;

(b) The applicant represents an Indian tribe, parent, or Indian custodian, as defined by 25 USC § 1903; and

(c) One of the following:

(i) If the applicant represents an Indian tribe, the Indian child's tribe has executed an affidavit asserting the tribe's intent to intervene and participate in the state court proceeding and affirming the child's membership or eligibility of membership under tribal law; or

(ii) If the applicant represents a parent or Indian custodian, the tribe has affirmed the child's membership or eligibility of membership under tribal law.

As amended August 1, 2017