JUDICIAL COUNCIL OF CALIFORNIA

TRIBAL COURT–STATE COURT FORUM

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TRIBAL COURT–STATE COURT FORUM

NOTICE AND AGENDA OF OPEN MEETING

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1) and (e)(1))
THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS
THIS MEETING IS BEING RECORDED

Date:	December 12, 2019
Time:	12:15-1:15 p.m.
Public Call-in Number:	877-820-7831; Passcode; passcode 4133250 (Listen Only)

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Members of the public seeking to make an audio recording of the meeting must submit a written request at least two business days before the meeting. Requests can be e-mailed to forum@jud.ca.gov.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

Approval of Minutes
Approve minutes of the October 10, 2019, Tribal Court–State Court Forum meeting.

II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(1))

This meeting will be conducted by electronic means with a listen only conference line available for the public. As such, the public may submit comments for this meeting only in writing. In accordance with California Rules of Court, rule 10.75(k)(1), written comments pertaining to any agenda item of a regularly noticed open meeting can be submitted up to one complete business day before the meeting. For this specific meeting, comments should be e-mailed to forum@jud.ca.gov or mailed or delivered to 455 Golden Gate Avenue, San Francisco, CA 94102, attention: Ann Gilmour. Only written comments received by 12:15 p.m. on December 11, 2019 will be provided to advisory body members prior to the start of the meeting.

III. INFORMATION ONLY ITEMS (NO ACTION REQUIRED)

Info 1

Cochairs Report

- Approval of Minutes for October 10, 2019 Meeting

Info 2
An American Genocide: The United States and the California Indian Catastrophe, 1846-1873
Presenter: Dr. Benjamin Madley, Associate Professor, Department of History, University of California, Los Angeles

Info 3
Final Legislative, BIA Comments and 2019 RUPRO report. Discussion of 2020 RUPRO and Legislative Proposals
Presenter: Ann Gilmour, Attorney, Judicial Council Center for Families, Children & the Courts

Info 4
Recent and Upcoming Conferences
Presenter: Vida Castaneda, Senior Analyst, Judicial Council Center for Families, Children & the Courts

Action 1
Discussion of 2020 RUPRO and Legislative Proposals
Presenter: Ann Gilmour

IV. ADJOURNMENT

Adjourn

TRIBAL COURT–STATE COURT FORUM

MINUTES OF OPEN MEETING

October 10, 2019
12:15-1:15 p.m.

Advisory Body Members Present:	*Hon. Abby Abinanti, Co-chair, Hon. Suzanne Kingsbury, Cochair,* Hon. Erin Alexander, Hon. April Attebury, Hon Richard Blake, Hon. Leona Colegrove, Hon. Gregory Elvine-Kreis, Hon. Patricia Guerrero, Hon. Lawrence King, Hon. Patricia Lenzi, Hon. Devon Lomayesva, Hon. Cindy Smith, Hon. Sunshine Sykes, Hon. Robert Trentacosta, Hon. Mark Vezzola, Hon. Claudette White, Hon. Joseph Wiseman.
Advisory Body Members Absent:	Hon. Hilary Chittick, Hon. Gail Dekreon, Hon. Leonard Edwards (Ret.), Ms. Heather Hostler, Hon. Mark Juhas, Hon. Kristina Kalka, Commissioner Jayne Lee, Hon. Gilbert Ochoa, Hon. Michael Sachs, Ms. Christina Snider, Hon. Juan Ulloa, Hon. Christine Williams, Hon. Sarah Works.
Others Present:	Ms. Vida Castaneda, Ms. Audrey Fancy, Ms. Ann Gilmour, Ms. Joy Ricardo, Mr. Gregory Tanaka

OPEN MEETING

Call to Order and Roll Call
The co-chairs called the meeting to order at 12:19 p.m.

Approval of Minutes
The Forum unanimously approved the August 8, 2019 meeting minutes.

DISCUSSION AND ACTION ITEMS (ITEMS 1–5)

Info 1
CoChairs Report

- Welcome to new members & update that appointments are filled.
- Approval of Minutes of August 8, 2019 Meeting

Info 2 – New Online Training Module for DV Advocates
Presenter: Gregory S. Tanaka, Supervising Attorney, Judicial Council Center for Families, Children and the Courts

The Forum was provided with an overview of the new online training module for Domestic Advocates via webex. Important needs were identified for ongoing training for Tribal Advocates

accessing and navigating the state courts system in cases of domestic violence, sexual assault and stalking. The training module has been created on the entire process of accessing these systems with specific considerations paid to advocates working with Native Americans to address their specific needs. That course is available at:
http://www2.courtinfo.ca.gov/dvro/story_html5.html

Info 3 – Update on Child Welfare Council Activities
Presenter: Judge Claudette White, Chief Judge of the San Manuel Tribal Court

Judge Claudette White is an appointed member and only Native American member of the California Child Welfare Council. She would like to encourage her colleagues to join the council or attend their meetings. The focus of the Child Welfare Council is children in foster care and it provides useful information and resources that could be utilized by members of the Forum. Forum members asked how they could get involved with the Child Welfare Council and keep informed about upcoming meetings and activities. Judge White explained that staff to the Child Welfare Council, Chris Cleary, could add individuals to the mailing list for information. This might be an issue for further discussion at the Forum in person meeting in March.

Info 4 – Update on Rules and Forms Proposals, recent legislation and comments on Federal Register
Presenter: Ann Gilmour, Attorney, Judicial Council Center for Families, Children and the Courts

Ann Gilmour updated the Forum on changes to the Rules of Court and multiple forms pertaining to ICWA that were approved during the Judicial Council's September 24, 2019 meeting. These will go into effect on January 1, 2020. AB175 that recognizes the rights of all Indian children in foster care and other bills followed by the Forum have been signed into law by Governor Newsom and will begin taking effect in the coming months.

Comments on an updated communication system/data base between the State of California and Native American Tribes will be drafted in the next few weeks. Any comments or contributions are welcome.

Info 5
Recent and Upcoming Conferences
Presenter: Vida Castaneda, Senior Analyst, Judicial Council Center for Families, Children & the Courts

- Thank you to everyone who participated in the first annual Northern California Judges' Dinner Event on October 3rd and the second Bay Area ICWA Symposium on October 4th. We have received positive feedback from both events.
- October 4, 2019 - December 14, 2019: The San Francisco Arts Commission will be featuring the "Continuing the Thread: Celebrating our Interwoven Histories, Identities and Contributions" events throughout San Francisco. These events are connected to

celebrating the 50th anniversary of the occupation of Alcatraz, Native American Heritage Month and the removal of the Early Days statue from Civic Center. For more information please visit sfartscommission.org

- October 16-18, 2019: The 2019 National Tribal Judicial and Court Personnel Conference will be held in Prior Lake, Minnesota at the Mystic Lake Hotel and Casino. The conference will be celebrating 50 years of NAICJA.
- A reminder to check The California Association of Collaborative Courts conference website at CA2C.org about updated information for their conference to be held October 28 – 30, 2019 at the Holiday Inn in downtown Sacramento.
- November 22-24, 2019: San Diego State University in Partnership with the
- Southern California Warrior Spirit Family will host the California Genocide Conference: The Genocide, Oppression, Resilience, and Sovereignty of the First Peoples of California. This conference will be held at San Diego State University.
- Beyond the Bench 25, hosted by the CFCC, will take place in San Diego on December 17 –18, 2019 with pre-conference events on December 16, 2019. Registration is now open, please visit the link: www.courts.ca.gov/btb25.htm There will be workshops related to tribal issues and communities featured in the pre-conference and conference events.

Next Forum call is December 12, 2019.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:11 p.m.

Pending approval by the advisory body on December 12, 2019.

Information Item 2:

An American Genocide: The United States and the California Indian Catastrophe, 1846-1873

Presenter: Dr. Benjamin Madley, Associate Professor, Department of History, University of California, Los Angeles

An American Genocide

The United States and the California Indian Catastrophe, 1846-1873

Benjamin Madley

The first full account of the government-sanctioned genocide of California Indians under United States rule

Between 1846 and 1873, California's Indian population plunged from perhaps 150,000 to 30,000. Benjamin Madley is the first historian to uncover the full extent of the slaughter, the involvement of state and federal officials, the taxpayer dollars that supported the violence, indigenous resistance, who did the killing, and why the killings ended. This deeply researched book is a comprehensive and chilling history of an American genocide.

Madley describes pre-contact California and precursors to the genocide before explaining how the Gold Rush stirred vigilante violence against California Indians. He narrates the rise of a state-sanctioned killing machine and the broad societal, judicial, and political support for genocide. Many participated: vigilantes, volunteer state militiamen, U.S. Army soldiers, U.S. congressmen, California governors, and others. The state and federal governments spent at least $1,700,000 on campaigns against California Indians. Besides evaluating government officials' culpability, Madley considers why the slaughter constituted genocide and how other possible genocides within and beyond the Americas might be investigated using the methods presented in this groundbreaking book.

Benjamin Madley is associate professor of history, University of California, Los Angeles, where he focuses on Native America, the United States, and genocide in world history. He lives in Los Angeles, CA.

OPINION

Op-Ed: It's time to acknowledge the genocide of California's Indians

A mural in a downtown Los Angeles alleyway depicts a Native American woman known as Toypurina, a co-leader in a revolt against the San Gabriel Mission in 1785. (Los Angeles Times)

By BENJAMIN MADLEY

MAY 22, 2016
5 AM

Between 1846 and 1870, California's Indian population plunged from perhaps 150,000 to 30,000. Diseases, dislocation and starvation caused many of these deaths, but the near-annihilation of the

California Indians was not the unavoidable result of two civilizations coming into contact for the first time. It was genocide, sanctioned and facilitated by California officials.

Neither the U.S. government nor the state of California has acknowledged that the California Indian catastrophe fits the two-part legal definition of genocide set forth by the United Nations Genocide Convention in 1948. According to the convention, perpetrators must first demonstrate their "intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such." Second, they must commit one of the five genocidal acts listed in the convention: "Killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group."

It is not an exaggeration to say that California legislators also established a state-sponsored killing machine.

California's Legislature first convened in 1850, and one of its initial orders of business was banning all Indians from voting, barring those with "one-half of Indian blood" or more from giving evidence for or against whites in criminal cases, and denying Indians the right to serve as jurors. California legislators later banned Indians from serving as attorneys. In combination, these laws largely shut Indians out of participation in and protection by the state legal system. This amounted to a virtual grant of impunity to those who attacked them.

That same year, state legislators endorsed unfree Indian labor by legalizing white custody of Indian minors and Indian prisoner leasing. In 1860, they extended the 1850 act to legalize “indenture” of “any Indian.” These laws triggered a boom in violent kidnappings while separating men and women during peak reproductive years, both of which accelerated the decline of the California Indian population. Some Indians were treated as disposable laborers. One lawyer recalled: “Los Angeles had its slave mart [and] thousands of honest, useful people were absolutely destroyed in this way.” Between 1850 and 1870, L.A.’s Indian population fell from 3,693 to 219.

It is not an exaggeration to say that California legislators also established a state-sponsored killing machine. California governors called out or authorized no fewer than 24 state militia expeditions between 1850 and 1861, which killed at least 1,340 California Indians. State legislators also passed three bills in the 1850s that raised up to $1.51 million to fund these operations — a great deal of money at the time — for past and future anti-Indian militia operations. By demonstrating that the state would not punish Indian killers, but instead reward them, militia expeditions helped inspire vigilantes to kill at least 6,460 California Indians between 1846 and 1873.

The U.S. Army and their auxiliaries also killed at least 1,680 California Indians between 1846 and 1873. Meanwhile, in 1852, state politicians and U.S. senators stopped the establishment of permanent federal reservations in California, thus denying California Indians land while exposing them to danger.

State endorsement of genocide was only thinly veiled. In 1851, California Gov. Peter Burnett declared that “a war of extermination will continue to be waged … until the Indian race becomes extinct.” In 1852, U.S. Sen. John Weller — who became California’s governor in 1858 — went further. He told his colleagues in the Senate that California Indians “will be exterminated before the onward march of the white man,” arguing that “the interest of the white man demands their extinction.”

Beyond premeditated, systematic killings of California Indians, other acts of genocide proliferated too. Many rapes and beatings occurred, and these meet the U.N. Genocide Convention's definition of "causing serious bodily harm" to victims on the basis of their group identity and with the intent to destroy the group. The sustained military and civilian policy of demolishing California Indian villages and their food stores while driving Indians into inhospitable mountain regions amounted to "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Because malnutrition and exposure predictably lowered the birthrate, some state and federal decision-makers also appear guilty of "imposing measures intended to prevent births within the group."

Finally, the state of California, slave raiders and federal officials were all involved in "forcibly transferring children of the group to another group." Thousands of California Indian children suffered such forced transfers. By breaking up families and communities, forced removals constituted "imposing measures intended to prevent births within the group." In effect, the state legalized abduction and enslavement of Indian minors; slavers exploited indenture laws and federal officials prevented U.S. Army intervention to protect the victims.

The issue of genocide in California poses explosive political, economic and educational questions for the state, California's tribes and individual California Indians. It is up to them — not academics like me — to determine the best way forward.

Will state officials tender public apologies, as Presidents Ronald Reagan and George H.W. Bush did in the 1980s for the relocation and internment of some 120,000 Japanese Americans during World War II? Should state officials offer compensation, along the lines of the more than $1.6 billion

Congress paid to 82,210 of these Japanese Americans and their heirs? Might California officials decrease or altogether eliminate their cut of California Indians' annual gaming revenues ($7.3 billion in 2014) as a way of paying reparations? Should the state return control to California Indian communities of state lands where genocidal events took place? Should the state stop commemorating the supporters and perpetrators of this genocide, including Burnett, Kit Carson and John C. Frémont? Will the genocide against California Indians join the Armenian genocide and the Holocaust in public school curricula and public discourse?

These are crucial questions. What's beyond doubt is that the state and the federal government should acknowledge the genocide that took place in California.

Decency demands that even long after the deaths of the victims, we preserve the truth of what befell them, so that their memory can be honored and the repetition of similar crimes deterred. Justice demands that even long after the perpetrators have vanished, we document the crimes that they and their advocates have too often concealed or denied. Finally, historical veracity demands that we acknowledge this state-sponsored catastrophe in all its varied aspects and causes, in order to better understand formative events in both California Indian and California state history.

Benjamin Madley is assistant professor of history at UCLA and the author of "An American Genocide: The United States and the California Indian Catastrophe, 1846-1873." He will present this work at Skylight Books on May 25.

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OPINION OP-ED

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OPINION

Editorial: We've seen enough. Trump should be impeached

Dec. 7, 2019

Information Item 3:

Final Legislative, BIA Comments and 2019 RUPRO report. Discussion of 2020 RUPRO and Legislative Proposals

Presenter: Ann Gilmour, Attorney, Judicial Council Center for Families, Children & the Courts

Judicial Council of California

455 Golden Gate Ave.
San Francisco, CA
94102-3688

Meeting Agenda

Judicial Council

Meeting materials are available through the hyperlinks in this document.

Open to the Public Unless Indicated as Closed (Cal. Rules of Court, rule 10.6(a))

Requests for ADA accommodation should be directed to JCCAccessCoordinator@jud.ca.gov

Tuesday, September 24, 2019 | **9:00 AM** | **Sacramento**

19-195

Rules and Forms | Indian Child Welfare Act (ICWA): Implementation of Assembly Bill 3176 for Indian Children (Action Required)

Summary:

The Tribal Court-State Court Forum and the Family and Juvenile Law Advisory Committee recommend adopting a new rule of court, amending 16 other rules, creating 3 new forms for Indian Child Welfare Act (ICWA) proceedings, and revising 27 forms for ICWA and juvenile court dependency proceedings to comply with statutory changes in Assembly Bill 3176 (Waldron; Stats. 2018, ch. 833), as well as changes to governing federal regulations and guidelines. The proposal also addresses technical amendments and corrections and responds to several appellate court decisions regarding ICWA rules and forms.

Full Proposal available at: https://jcc.legistar.com/View.ashx?M=F&ID=7684873&GUID=52B4C6B1-F704-458F-BF42-EB1AA4F82000

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TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

November 6, 2019

Mrs. Evangeline M. Campbell
Bureau of Indian Affairs, U.S. Department
of the Interior
1849 C Street NW, MS 3645
Washington, DC 20240

Submitted via email: Evangeline.Campbell@bia.gov

Subject: Comments for OMB Control Number 1076-0186

Dear Mrs. Campbell:

Enclosed please find comments approved for submission by the Judicial Council of California.

Should you have any questions or require additional information, please contact me at 916-323-3121.

Sincerely,

Cory T. Jasperson
Director, Governmental Affairs

CTJ/AL/yc-s
Enclosure
cc: Mr. Martin Hoshino, Administrative Director, Judicial Council of California
Ms. Ann Gilmour, Attorney, Center for Families, Children and the Courts

JUDICIAL COUNCIL COMMENTS ON OMB CONTROL NUMBER: 1076-0186

TITLE OF COLLECTION: INDIAN CHILD WELFARE ACT PROCEEDINGS IN STATE

The Indian Child Welfare Act (ICWA) and its implementing federal regulations (25 C.F.R. § 23) require state courts and agencies to collect various kinds of information and provide that information to tribes, the Secretary of the Interior, and the Bureau of Indian Affairs (BIA).

Federal regulations (25 C.F.R. § 23.107(a)) affirmatively require state courts to inquire whether any participant in a child-custody proceeding within the scope of ICWA knows or has reason to know that the child is an Indian child. If there is reason to know but insufficient evidence to determine the child's status, the court must require evidence that the agency or other party used due diligence to work with all tribes with which the child may be affiliated to verify the child's status.

In addition, 25 C.F.R. § 23.111 requires notice to the tribe when it is known or there is reason to know that the child is an Indian child. The notice must contain information that the agency is required to collect: the child's name, birthdate, and birthplace; all known names (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and tribal enrollment numbers, if known; the names, birthdates, birthplaces, and tribal enrollment information of other direct lineal ancestors of the child, such as grandparents; and the name of each Indian tribe of which the child is a member (or may be eligible for membership if a biological parent is a member).

This information must be provided to the Secretary of the Interior or the BIA, as well as to the relevant tribes. Under 25 C.F.R. § 23.11, when the identities of tribes and parents are known, copies of notices sent directly to them by the petitioner must be sent to the appropriate regional director of the BIA. When the identities of tribes and parents or Indian custodians are unknown to the petitioner, ICWA (25 U.S.C. § 1901) requires notice to the Secretary so that the Secretary can assist in identifying and locating the tribes, parents, and Indian custodians entitled to notice (see also 25 C.F.R. § 23.11(c) & (d)).

The active role envisioned by ICWA for the Secretary of the Interior and the BIA is premised on "the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people" (25 U.S.C. § 1901). ICWA envisions that the federal government will take an active role in ensuring that the requirements of the act are fulfilled, and that the connections between Indian children and their families and tribes that ICWA is intended to protect are preserved. Other examples of information that must be collected and provided to the Secretary or the BIA are provided in section 1915(e), which requires a record of each placement of an Indian child,[1] and section 1951, which requires that information be maintained and provided to the Secretary concerning any final decree of adoption of an Indian child, including (1) the name and tribal affiliation of the child, (2) the names and addresses of the biological parents, (3) the names and addresses of the adoptive parents, and (4) the identity of any agency having files or information relating to such adoptive placement.[2]

The information collection is essential to the proper functions of the BIA, as the agency primarily charged with fulfilling the federal trust responsibility to Indian tribes and children. ICWA envisions the Secretary of the Interior and the BIA playing an active and meaningful role in ensuring that ICWA mandates are fulfilled. ICWA and the federal regulations specifically require the BIA to facilitate the

[1] See also 25 C.F.R. § 23.141.

[2] See also 25 C.F.R. § 23.140.

implementation of ICWA by state courts and agencies by providing assistance in identifying, contacting, and notifying tribes (25 USC § 1913(a); 25 CFR § 23.105); identifying qualified expert witnesses (25 CFR § 23.81); identifying language interpreters (25 CFR § 23.82); and locating an Indian child's biological parents, if the child has been adopted and that adoption has been terminated (25 CFR § 23.83).

In practice, at least in California, the BIA does not currently provide meaningful assistance to state courts or agencies in any of these areas. Most significantly, tribal contact information maintained by the BIA and published on the BIA website and in the federal register—information that is relied on by state courts and agencies—is often out of date or inaccurate. This means that tribes are not being contacted and not receiving notices of cases involving their children, which results in appeals and delays. Opportunities to heal Indian families are missed. Permanency and healing for children are delayed. Indian children are unnecessarily lost to their communities and lose their cultural and political identity as Indian children.

The quality, utility, and clarity of information could be maximized and the burden of collecting this information minimized if the BIA were to adopt a database or other system that would:

- Allow tribes to direct which departments should be contacted to verify a child's status (a tribe may wish to direct these queries to the tribal enrollment, ICWA, or some other department);
- Allow tribes to update their contact information continually and include important information about the tribe, such as whether the tribe has a tribal court exercising child welfare jurisdiction, and if so the contact information for the court;
- Allow tribes to identify individuals whom the tribe recognizes as qualified to serve as an expert witness in ICWA cases involving that tribe's children;
- Allow state agencies and courts to input family information (including historical tribal affiliation information) that would generate a list of tribes that need to be contacted based on that information and current accurate contact information for those tribes;
- Potentially allow for the exchange of case information among state agencies and courts and tribes in lieu of notice by mail, at the option of the tribe;
- Potentially maintain a database of adoption orders maintained under 25 USC § 1951 so that the Secretary of the Interior can meaningfully fulfill the responsibility of ensuring that adopted Indian children are able to obtain the information necessary to gain tribal enrollment and benefits;
- Maintain all information collected in a database, and ensure that tribes and agencies that are interacting with families and children can obtain the information they may need to assist and work with families and children who may come in contact with agencies from multiple states; and
- Clearly identify staff within BIA, state agencies, and courts to contact to obtain meaningful assistance in identifying and connecting with tribes.

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TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

September 19, 2019

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
Indian Affairs, U.S. Department of the Interior
1849 C. Street N.W., MS 3642
Washington, DC 20240

Submitted via email: consultation@bia.gov

Subject: Comments for RIN 1076-AF46

Dear Ms. Appel:

Enclosed please find comments approved for submission by the Judicial Council of California.

Should you have any questions or require additional information, please contact me at 916-323-3121.

Sincerely,

Cory T. Jasperson
Director, Governmental Affairs

CTJ/AL/yc-s
Enclosure
cc: Mr. Martin Hoshino, Administrative Director, Judicial Council of California
Ms. Ann Gilmour, Attorney, Center for Families, Children and the Courts

Comments from Judicial Council of California for RIN 1076-AF46:

There is agreement that the process for updating and publishing a list of tribal courts should be simplified so that the list can be as accurate and up to date as possible. However, it is the recommendation of the Judicial Council of California, based on study and review of the Tribal Court–State Court Forum, that the Bureau of Indian Affairs (Bureau) should be publishing and updating a more comprehensive list of tribal courts throughout the country rather than the very limited list of tribal courts that is currently being published and that is being proposed. The proposed rule would deal only with Courts of Indian Offenses and would not include a comprehensive list of tribal courts throughout the country, which the Judicial Council views as insufficient.

There are generally three types of tribal courts in the United States. There are tribal courts established under tribal constitutions adopted under the Indian Reorganization Act, courts of Indian Offenses established under the Code of Federal Regulations ("CFR courts"), and traditional or customary courts such as those existing in many of the Pueblos.[1] Currently the list of CFR courts published under 25 C.F.R. § 11.100 lists only 12 courts serving Indian country of certain specified tribes. There are many more tribal courts than just these CFR courts. For example, a list maintained by the Tribal Law and Policy Institute contains 331 tribal courts in addition to the CFR courts.[2] It is not clear how up to date or accurate the information on this list is. In a random sampling of 20 of the links to tribal court websites contained in the directory, only 8, or just under half, were not working. Also, the list of tribal courts for the state of Washington set out in this list does not correspond to the list of tribal courts maintained by the Washington court system itself.[3] Nor does the information concerning tribal courts in Arizona correspond with the list of tribal courts and contact information maintained by Arizona government agencies.[4] Likewise, the National American Indian Court Judges Association also maintains a National Directory of Tribal Justice Systems,[5] but again, it does not appear that this resource is regularly maintained or updated. Currently the link is not available. These are just examples illustrating the complications that state courts and agencies may have in trying to determine whether a tribe has a tribal court, what type of jurisdiction that tribal court exercises, and how to contact that tribal court when there is no authoritative list of tribal courts maintained by the Bureau.

This challenge is pertinent considering the regulations recently enacted by the Bureau concerning the Indian Child Welfare Act (25 C.F.R. part 23) that, among other things, mandate that state

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[1] *Cohen's Handbook of Federal Indian Law* (LexisNexis 2005), pp. 265 et seq.

[2] Tribal Court Clearinghouse, www.tribal-institute.org/lists/justice.htm.

[3] Washington State Court Directory: Tribal Courts, www.courts.wa.gov/court_dir/orgs/134.html.

[4] Arizona Health Care Cost Containment System (Arizona's Medicaid agency), Arizona Tribal Court Contact List, www.azahcccs.gov/AmericanIndians/Downloads/Procedures/tribal-court-contact-list.pdf.

[5] www.naicja.org/our-programs/directory.

courts and agencies contact tribal courts when tribal children and families come into the state court system.

25 C.F.R. § 23.2 defines "tribal court" broadly:

> Tribal court means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.

25 C.F.R. § 23.110 mandates the following:

> Subject to 25 U.S.C. § 1919 (Agreements between States and Indian Tribes) and § 23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:
>
> (a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.
>
> (b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

In addition, 25 C.F.R. § 23.116 imposes a mandate on state courts to interact with tribal courts whenever a petition to transfer a proceeding to tribal court is made in a child custody proceeding governed by the Indian Child Welfare Act:

> Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

Agencies and courts in California may come into contact with families and children affiliated with tribes throughout the country. State agencies and courts do not have ready access to information about the governmental status of reservation lands and whether any tribe has successfully petitioned to resume exclusive jurisdiction over child welfare matters. This

information is within the knowledge of the tribe and the federal government, more specifically the Bureau.

When the Indian Child Welfare Act was enacted in 1978, for the first time a duty was imposed on state courts to send notice to a child's Indian tribe when the child was involved in state court child custody proceedings covered by the act. (25 U.S.C. § 1912(a).) In recognition of the fact that state courts did not have the necessary expertise to ensure notice was properly provided to the tribes, as part of the initial regulations enacted following ICWA, the Bureau undertook to create, maintain, and publish in the Federal Register a list of agents for service of these notices. Now that federal regulations create a similar obligation to give notice to tribal courts of certain state court proceedings, the Bureau should create, maintain, and publish a comprehensive list of tribal courts and their contact information to which state courts and agencies can have ready access in the same way it undertook to create, maintain, and publish a list of agents for service of ICWA notices.

In further recognition of the particular challenges that state courts and agencies may have in complying with certain requirements of ICWA and the special expertise that the Bureau has in these issues, subpart H of the ICWA regulations (25 C.F.R. §§ 23.81–23.83) mandates that the Secretary of the Interior or designee or area director for the Bureau provide assistance to state courts and parties in identifying qualified expert witnesses to serve in ICWA cases, identifying interpreters to serve in such cases, and locating the biological parents or prior Indian custodians of an adopted Indian child whose adoption has been terminated. In addition, 25 C.F.R. § 23.105 stipulates that if a court or agency is having difficulty contacting a tribe, it "should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, DC." Overall, these provisions are designed to reduce the burden on state courts and agencies and help ensure compliance with the requirements of ICWA. They also reflect the federal government's trust responsibility to Indian children, parents, Indian custodians, and tribes to ensure that ICWA mandates are fulfilled.

The failure of the Bureau to maintain and provide to state courts and agencies a list of tribal courts and contact information for those courts imposes an undue burden on state courts and agencies in fulfilling ICWA mandates and is an abdication of the federal government's responsibilities to Indian children, parents, Indian custodians, and tribes. If state courts and agencies are not able to easily determine whether there is a tribal court they should be contacting, and how to contact that court, it is much more likely that state courts and agencies will mistakenly maintain jurisdiction over cases that should be dismissed under 25 U.S.C. § 1911(a) and 25 C.F.R. § 23.110, that cases will be disrupted, and that Indian tribes and tribal courts will be deprived of their right to exercise jurisdiction over child custody cases.

The Bureau should compile information on which reservations are subject to the exclusive child welfare jurisdiction of a tribe and which tribes have tribal courts—and include the contact information for those courts—and make this information readily available to state agencies and courts as part of the assistance to state courts mandated by subpart H of the ICWA regulations. Doing so will facilitate state court compliance, improve accuracy and efficiency, reduce the

burden on state courts, and fulfill the federal government's trust responsibility to Indian people and tribes.

JUDICIAL COUNCIL OF CALIFORNIA
GOVERNMENTAL AFFAIRS
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TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

August 28, 2019

Office of Management and Budget's Desk Officer for the
Department of the Interior

Submitted via email: OIRA _ Submission@omb.eop.gov

Subject: Comments for OMB Control Number 1076-0111

Enclosed please find comments approved for submission by the Judicial Council of California.

Should you have any questions or require additional information, please contact me at 916-323-3121.

Sincerely,

Cory T. Jasperson
Director, Governmental Affairs

CTJ/AL/yc-s
Enclosure
cc: Ms. Evangeline M. Campbell
Mr. Martin Hoshino, Administrative Director, Judicial Council of California
Ms. Ann Gilmour, Attorney, Center for Families, Children and the Courts

Comments for OMB Control Number 1076-0111:

1. Payment for Appointed Counsel Should Include Appointed Counsel for Tribes.

When the Indian Child Welfare Act (ICWA) was enacted in 1978 it recognized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." (25 U.S.C. § 1901(3).)

ICWA provided tribes with most of the substantive rights of other parties to Indian child custody proceedings involving Indian children. However, the promise of ICWA to allow tribes to exercise their sovereignty and jurisdiction over child custody proceedings involving their children is undermined by the failure to provide appointed counsel for tribes, a resource that is provided to all other parties to a child custody proceeding.

As noted by the Bureau of Indian Affairs (Bureau) in its final rule on the ICWA regulations published in the Federal Register on June 14, 2016 (81 Fed.Reg. 38778–38875, hereafter "Final Rule"), since its passage in 1978, implementation and interpretation of the act across and even within states has been inconsistent, resulting in disparate application of the act. (Final Rule, at p. 38778.)

In fulfillment of the federal government's acknowledged trust responsibility to Indian tribes and people (25 U.S.C. § 1901(2)), the act creates minimum federal standards for the removal of Indian children from their families and the placement of these children in foster or adoptive homes, and confirms tribal interest in and jurisdiction over child custody proceedings involving Indian children. (25 U.S.C. § 1902; Final Rule, at p. 38779.) However, unlike other federal statutes setting standards for state courts to follow in child welfare cases, the act contains no enforcement mechanism and imposes no federal accountability on state courts or agencies. Attorneys for agencies, parents, and children are charged with advocating for their clients and may not advocate for proper application and enforcement of the provisions of the act.

This means that in practice, it falls to tribes to fight for the full, consistent, and robust application of the act, yet tribes are the only parties to the child custody proceeding who are not entitled to appointed counsel. This has placed a heavy and unfair burden on tribes throughout the country. Many tribes are small, with limited staff and budgets, yet they are expected to engage in child custody proceedings involving Indian children, many of whom are involved in child custody proceedings in states throughout the country. This severely restricts tribes' ability to fully participate in these cases. Many of the failures in ICWA implementation identified by the Bureau and discussed in the Final Rule are a direct result of this inability of tribes to fully participate to uphold ICWA requirements.

The provisions for payment of appointed counsel in ICWA cases should be expanded to include counsel for tribes that can demonstrate a financial need. If payment for appointed counsel is

expanded, the process for appointment of counsel for tribes should be consistent with tribal sovereignty and autonomy.

2. Procedures for Claiming Payment for Appointed Counsel Should Be Simplified.

Since its enactment in 1978, the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) has provided that the federal government pay for appointed counsel for Indian parents involved in state court child custody proceedings governed by ICWA when relevant state laws do not provide for payment:

"In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to [section 13 of this title]." (25. U.S.C. §1912(b))

Section 1912(b) is implemented in the Federal Regulations at 25 C.F.R. § 23.13. In the request for comment, it states that the Bureau receives two requests for payment from state courts per year under the section and estimates that the total annual time burden on state courts for these requests is six hours. Two applications for funding annually from throughout the country indicates that very little use is being made of the procedures set out in the regulations. Further, given the number of reported appeals from the Interior Board of Indian Appeals (IBIA) concerning denials of requests for funding under part 23.13, it appears that the current regulations are not achieving their purpose. The Bureau may wish to revise the regulations to clarify them and adopt forms to assist courts and attorneys.

Since 1982 there have been at least 18 reported IBIA appeals concerning denials of requests for certification or payment of attorney fees under part 23.13. Eight of these appeals originated in the Bureau's Pacific Region. Most of the discussion in these appeals relates to confusion as to whether the appeal should be taken to the IBIA or to the Assistant Secretary. The regulations set out different procedures if the appeal is from denial of certification of eligibility for payment or a denial of a request for payment itself. This is confusing on its face as evidenced by the appeals.

Substantively, the overwhelming basis for denials (of either certification or payment) is lack of available funding. This was at least one of the underlying reasons for denial in six of the cases. In five of the reported cases the reason for denial was confusion over the procedural requirements of the regulations.

This background reflects a need to revise the procedures set out in 25 C.F.R. § 23.13 to clarify the requirements and create forms related to payment of appointed counsel in ICWA cases. It

also reflects the need for congress to appropriate realistic funding. Unless these steps are taken, requests for reimbursement for the costs of appointed counsel will continue to be an exercise in frustration resulting in fruitless appeals that do nothing to meet the Bureau's responsibility to Indian children.

Action Item 1:

Discussion of 2020 RUPRO and Legislative Proposals

Presenter: Ann Gilmour

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
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MEMORANDUM

Date
October 18, 2019

To
Fam/Juv and Forum ERISA Legislation Group

From
Ann Gilmour

Subject
Recognition of Tribal Court divorce/disso orders under ERISA

Action Requested
Please Review

Deadline
N/A

Contact
Ann Gilmour
415-865-4207 phone
ann.gilmour@jud.ca.gov

As part of its mandate to improve efficiencies in recognition of orders across the jurisdictional boundaries of tribal and state courts, several years ago the Forum looked at issues surrounding recognition of tribal court orders in domestic relations actions that included division of pension assets governed by the federal Employee Retirement Income Security Act of 1974 (ERISA).

Background:
There are currently more than 20 tribal courts operating in California, and over 300 nationwide. Tribal courts in California hear a variety of case types including child abuse and neglect cases; domestic violence and harassment protective orders; domestic relations (e.g., divorce and dissolution); contract disputes and other civil cases for money judgments; unlawful detainers, property disputes, nuisance abatements, and possession of tribal lands; name changes; and civil harassment protective orders.

The subject matter jurisdiction of each tribal court is defined by the tribe that establishes it. The extent to which tribes may exercise personal jurisdiction over individual litigants is defined in federal law. As a general rule, tribes may exercise full civil and criminal jurisdiction over Indians within the tribe's reservation or trust lands ("Indian Country"). In general, tribes may exercise

civil jurisdiction over non-Indians only where the non-Indians have entered into consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

One area where tribal jurisdiction has been strongly acknowledged is domestic relations. Litigants may choose to resolve their disputes in tribal court for a variety of reasons. Tribal courts are generally much less formal and much less expensive than state court.

While tribes are recognized as sovereign, they are not "states" for the purpose of the full faith and credit requirements of article IV of the U.S. Constitution. There is general consensus (but no United States Supreme Court authority) that tribes are not covered by the federal full faith and credit statute (28 U.S.C. § 1738). In Wilson v. Marchington (9th Cir. 1997) 127 F.3d 805, the Ninth Circuit Court of Appeals determined that, as a general matter, the recognition of a tribal court order within the United States federal courts was governed by the principles of comity and not subject to the full faith and credit requirement of the Constitution or title 28 United States Code section 1738. Nevertheless, a number of specific federal and state laws mandate full faith and credit for and between tribal and state courts in specific types of actions.

Some tribal courts in California issue domestic relations orders including divorce and dissolution decrees. For these domestic relations orders to be thorough and effective, tribal courts must be able to address division of assets, including pension benefits governed by the federal Employee Retirement Income Security Act of 1974 (ERISA). In 2011 the U.S. Department of Labor issued guidance on when a domestic relations order issued under tribal law would be a "judgment, decree or order …made pursuant to a State domestic relations law within the meaning of federal law."[1] That guidance concluded that:

> In the Department's view, a tribal court order may constitute a "judgment, decree or order . . . made pursuant to State domestic relations law" for purposes of ERISA section 206(d)(3)(B)(ii), if it is treated or recognized as such by the law of a State that could issue a valid domestic relations order with respect to the participant and alternate payee.

Section 206(d)(3)(B)(ii) or ERISA is codified as 29 U.S.C. §1056(d)(3)(B)(ii).

The result of the guidance issued by the U.S. Department of Labor is that for a tribal court divorce or dissolution order to effectively distribute pension benefits governed by ERISA, it must be registered with the state court, and state law must recognize the order as a judgement, decree or order made pursuant to State domestic relations law. The Department of Labor

[1] Available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2011-03a

specifically approved of the model that had been incorporated into Oregon statute at Oregon Revised Statutes §24.115(4)[2]. The Oregon legislation is found in the statute governing recognition and enforcement of foreign orders and states:

> A foreign judgment of a tribal court of a federally recognized Indian tribe that is filed in a circuit court under this section, and that otherwise complies with 26 U.S.C. 414(p) as a domestic relations order as defined in 26 U.S.C. 414(p), is a domestic relations order made pursuant to the domestic relations laws of this state for the purposes of 26 U.S.C. 414(p). [1979 c.577 §2; 1985 c.343 §5; 1987 c.586 §14; 1995 c.273 §13; 2003 c.576 §180; 2007 c.663 §1; 2011 c.595 §32]

One of the goals of the Forum is to ensure that litigants and courts are not put to unnecessary burden and expense regarding recognition and enforcement of tribal court orders. In 2012, the Judicial Council proposed legislation that eventually became the *Tribal Court Civil Money Judgment Act* (Stats. 2014, Ch. 243; SB 406, Evans), and added sections 1730-1741 to the California Code of Civil Procedure to clarify and simplify the process for recognition and enforcement of tribal court civil judgments consistent with the mandate set out in rule 10.60 (b) of the California Rules of Court to make recommendations concerning the recognition and enforcement of court orders that cross jurisdictional lines.

Recently, parties obtained a divorce order from a California tribal court. The order divided assets, including a pension plan governed by ERISA. When the parties sought to have the order enforced on the pension plan administrator, the pension plan administrator questioned whether the tribal court order could be a QDRO even if it was registered with a California court under the *Tribal Court Civil Money Judgment Act*, in the absence of California legislation similar to that in Oregon – explicitly recognizing a tribal court order as a domestic relations order of the state. As a result, the parties, the tribe and the pension plan administrator were put to considerable time and expense resolving the issue so that the order could be recognized and enforced.

Originally, the Forum and the Family and Juvenile Law Advisory Committee considered enacting legislation that mirrored that in Oregon. A number of issues were raised with that proposal including whether it would be more appropriate to address this in the Family Code, whether the *Tribal Court Civil Money Judgment Act* applies at all to family court orders, whether the state court should require evidence that the pension plan administrator was joined or noticed in the tribal court proceeding, etc.

After much discussion, it was decided to try a new approach with a goal of creating a simple mechanism for recognizing a tribal court order that would minimize the cost and expense to the

[2] Available at https://www.oregonlaws.org/ors/24.115

parties, and minimize the involvement of the state court in what is essentially a tribal court matter.

Attached is a new Invitation to Comment and new legislative language, as well as some further background materials.

U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

February 2, 2011

Stephen B. Waller
Miller Stratvert Law Offices
500 Marquette N.W., Suite 1100
Albuquerque, NM 87102

2011-03A
ERISA SEC.
206(d)(3)

Dear Mr. Waller:

This is in response to your letter on behalf of PNM Resources, Inc., requesting guidance regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). In particular, you ask whether a domestic relations order issued under tribal law by a Family Court of the Navajo Nation, a federally-recognized Native American tribe, would be a "judgment, decree, or order . . . made pursuant to a State domestic relations law" within the meaning of section 206(d)(3)(B)(ii) of ERISA.

You represent that PNM Resources, Inc., its affiliates and subsidiaries (collectively "PNM") sponsor and administer various employee pension benefit plans (Plans) for their employees. The Plans have formal procedures in place to determine the qualified status of domestic relations orders. Employees of PNM who participate in the Plans reside throughout the State of New Mexico. New Mexico residents include members of twenty-two federally-recognized Native American tribes. Some of PNM's employees are people who are part of the Navajo Nation.

PNM received multiple draft domestic relations orders issued by the Family Court of the Navajo Nation. The Family Court of the Navajo Nation is a "tribal court" for the peoples comprising the Navajo Nation. PNM has determined that the draft orders, other than having been issued by a tribal court, are in compliance with the procedures adopted by the PNM Plans for determining the qualified status of domestic relations orders issued pursuant to State domestic relations laws.

Section 206(d)(1) of ERISA generally requires that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) of ERISA states that section 206(d)(1) applies to an assignment or alienation of benefits pursuant to a domestic relations order, unless the order is determined to be a "qualified domestic relations order" (QDRO). Section 206(d)(3)(A) further provides that pension plans must provide for the payment of benefits in accordance with the applicable requirements of any QDRO.[1]

[1] Section 514(a) of ERISA generally preempts all State laws insofar as they relate to employee benefit plans covered by Title I of ERISA. However, section 514(b)(7) states that preemption under section 514(a) does not apply to QDROs within the meaning of ERISA section 206(d)(3)(B)(i).

Section 206(d)(3)(B)(i) of ERISA defines the term QDRO for purposes of section 206(d)(3) as a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan," and which meets the requirements of section 206(d)(3)(C) and (D).

The term "domestic relations order" is defined in section 206(d)(3)(B)(ii) as "any judgment, decree, or order (including approval of a property settlement agreement) which – (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to a State domestic relations law (including a community property law)."

Section 3(10) of ERISA provides that "[t]he term 'State' includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone."

Section 206(d)(3)(G) of ERISA requires the plan administrator to determine whether a domestic relations order received by the plan is qualified, and to administer distributions under such qualified orders, pursuant to reasonable procedures established by the plan. When a pension plan receives an order requiring that all or part of the benefits payable with respect to a participant be distributed to an alternate payee, the plan administrator must determine that the judgment, decree, or order is a domestic relations order within the meaning of section 206(d)(3)(B)(ii) of ERISA - i.e., that it relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of the participant, and that it is made pursuant to a State domestic relations law by a State authority with jurisdiction over such matters.

A principal purpose of ERISA section 206(d)(3) is to permit the division of marital property on divorce in accordance with the directions of the State authority with jurisdiction to achieve an appropriate disposition of property upon the dissolution of a marriage, as defined under State law. Nothing in ERISA section 206(d)(3) requires that a domestic relations order be issued by a State court. Rather, the Department has previously concluded that a division of marital property in accordance with the proper final order of any State authority recognized within the State's jurisdiction as being empowered to achieve such a division of property pursuant to State domestic relations law (including community property law) would be considered a "judgment, decree, or order" for purposes of ERISA section 206(d)(3)(B)(ii). *See also* EBSA Frequently Asked Questions About Qualified Domestic Relations Orders (available at www.dol.gov/ebsa/faqs/faq_qdro.html).

Federal law, however, does not generally treat Indian tribes as States, or as agencies or instrumentalities of States. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002). *See also Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2nd Cir. 1996) ("[T]ribes are not States under OSHA"). The definition of "State" at section 3(10) of ERISA does not include Indian tribes.[2] In addition, although the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901 *et. seq.*, grants Indian tribes jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, no such federal statute exists with respect to the recognition of domestic relations orders of tribal courts involving divorce and the division of marital property on divorce.

We note, nonetheless, that some States have adopted laws to address tribal court jurisdictional issues relating to domestic relations orders. *E.g.,* Oregon Revised Statutes 24.115(4). In the Department's view, a tribal court order may constitute a "judgment, decree or order . . . made pursuant to State domestic relations law" for purposes of ERISA section 206(d)(3)(B)(ii), if it is treated or recognized as such by the law of a State that could issue a valid domestic relations order with respect to the participant and alternate payee.

We are unable to conclude that the instant orders, which involve individuals residing in New Mexico, are "domestic relations orders" within the meaning of ERISA section 206(d)(3)(B)(ii). Neither your submission nor our review of New Mexico law indicates that New Mexico recognizes or treats orders of the Family Court of the Navajo Nation as orders issued pursuant to New Mexico state domestic relations law.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions. This letter relates solely to the application of the provisions of Title I of ERISA.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

[2] Congress recently amended the definition of "governmental plan" at ERISA section 3(32) to expressly include certain plans maintained by Indian tribal governments. Pub. L. 109-280, 120 Stat. 780 (Aug. 17, 2006). Before this amendment, the term "governmental plan" was limited to plans established or maintained by the "Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Family Law: Proposed Legislation for Recognition of Tribal Court Orders Relating to the Division of Marital Assets

Proposed Rules, Forms, Standards, or Statutes
Statutory Amendments to Provide for Recognition of Tribal Court dissolution orders.

Proposed by
California Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne M. Kingsbury, Cochair

Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested
Review and submit comments by_____

Proposed Effective Date
January 1, 2022

Contact
Ann Gilmour, 415-865-4207
ann.gilmour@jud.ca.gov

Executive Summary and Origin

As a result of comments from tribal court judges and advocates, the California Tribal Court–State Court Forum (Forum) and the Family and Juvenile Law Advisory Committee (Committee) recommend that the Judicial Council sponsor legislation to add section 2611 to the Family Code and add subsection 1736(c) to the California Code of Civil Procedure to ensure that valid divorce or dissolution judgments issued by tribal courts, that include division of pension assets are effective and in particular are recognized as meeting the requirements of the Employee Retirement Income Security Act of 1974 (ERISA).

Background

California is home to more people of Indian ancestry than any other state in the nation. Currently there are 109 federally recognized tribes in California, second only to the number of tribes in the

state of Alaska. Each tribe is sovereign, with powers of internal self-government, including the authority to develop and operate a court system. At least twenty tribal courts are currently operating in California, and several other courts are under development.

Tribal courts in California hear a variety of case types including child abuse and neglect cases; domestic violence protective orders; domestic relations (e.g., divorce and dissolution); contract disputes and other civil cases for money judgments; unlawful detainers, property disputes, nuisance abatements, and possession of tribal lands; name changes; and, civil harassment protective orders.

Some tribal courts in California issue domestic relations orders including divorce and dissolution decrees. For these domestic relations orders to be thorough and effective, tribal courts must be able to address division of assets, including pension benefits governed by the federal Employee Retirement Income Security Act of 1974 (ERISA). In 2011 the U.S. Department of Labor issued guidance on when a domestic relations order issued under tribal law would be a "judgment, decree or order …made pursuant to a State domestic relations law within the meaning of federal law."[1] That guidance concluded that:

> In the Department's view, a tribal court order may constitute a "judgment, decree or order . . . made pursuant to State domestic relations law" for purposes of ERISA section 206(d)(3)(B)(ii), if it is treated or recognized as such by the law of a State that could issue a valid domestic relations order with respect to the participant and alternate payee.

Section 206(d)(3)(B)(ii) or ERISA is codified as 29 U.S.C. §1056(d)(3)(B)(ii).

The result of the guidance issued by the U.S. Department of Labor is that for a tribal court divorce or dissolution order to effectively distribute pension benefits governed by ERISA, state law must recognize the order as a judgement, decree or order made pursuant to State domestic relations law. The Department of Labor specifically approved of the model that had been incorporated into Oregon statute at Oregon Revised Statutes §24.115(4)[2].

In 2012, the Judicial Council proposed legislation that eventually became the *Tribal Court Civil Money Judgment Act* (Stats. 2014, Ch. 243; SB 406, Evans), and added sections 1730-1741 to the California Code of Civil Procedure to clarify and simplify the process for recognition and enforcement of tribal court civil judgments consistent with the mandate set out in rule 10.60 (b) of the California Rules of Court to make recommendations concerning the recognition and enforcement of court orders that cross jurisdictional lines.

California law does not currently explicitly recognize judgments or orders from tribal courts (or foreign courts for that matter) that divide pension assets as made pursuant to State domestic

[1] Available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2011-03a
[2] Available at https://www.oregonlaws.org/ors/24.115

relations law as mandated by ERISA. Further, current California law has no mechanism to simply "recognize" a tribal court order. Therefore, in order for a party to have an ERISA DRO (Domestic Relations Order) accepted, they currently are having to "register" the order. This creates a multitude of additional issues both for the litigants as well as the courts.

For the litigants, they are then required to pay approximately $910.00 (two first appearance fees ((currently $870.00)), pay for a certified copy ((currently $20.00)), pay the fee for a bench officer's signature ((currently $20.00))), as well as complete the necessary registration paperwork.

Once registration is complete, the California court then becomes responsible for that order requiring court and staff time.

The Family Code contemplates recognition and enforcement of foreign custody orders under the Uniform Child Custody Jurisdiction Act ("UCCJA") and foreign support orders and paternity judgments under the Uniform Interstate Family Support Act ("UIFSA")[3]. The Foreign-Country Money Judgments Act[4] excludes from its coverage any judgment arising from a divorce, support, or maintenance judgment rendered in connection with domestic relations. The Tribal Court Civil Money Judgment Act[5] does not have a blanket exclusion for domestic relations judgments but does exclude judgments for which federal or state law already provide for recognition including the Full Faith and Credit for Child Support Orders Act (28 U.S.C. §1738B) and the Uniform Interstate Family Support Act.[6] Registration of these orders can be inconsistent, cumbersome, expensive, and is not required by federal law.

The Proposal

This proposal seeks to address an ongoing gap in the law by creating a simplified process to register an otherwise valid order of a tribal court dividing pension assets to have that order recognized for ERISA purposes.

The proposal would add subsection (c) to section 1736 of the California Code of Civil Procedure establishing a simplified proceeding for the recognition of a tribal court order that relates to the provision of child support, spousal support payments, or marital property rights to a spouse, former spouse, or child or other dependent from a pension plan covered by ERISA and adding section 2611 to the Family Code specifying that an order so filed and recognized is a domestic

[3] The Uniform Child Custody and Jurisdiction Act is incorporated into the Family Code at §§3400 *et seq*.The Uniform Interstate Family Support Act is found at §§5700.101 *et seq*.
[4] §§1713-1725 of the California Code of Civil Procedure
[5] For a very helpful overview of these issues see "Making Foreign Divorce Judgments, Orders, and Decrees Valid and Enforceable California Court Orders", Divorcesource.com Peter M. Walzer, Esq. available at https://www.divorcesource.com/ds/california/making-foreign-divorce-judgments-orders-and-decrees-valid-and-enforceable-california-court-orders-4276.shtml
[6] Part 6 (commencing with Section 5700.101) of Division 9 of the Family Code.

relations order made pursuant to the domestic relations laws of this state for the purposes of ERISA.

The Judicial Council will be required to create rules and forms to implement the legislation. Consistent with the legislation, these rules and forms would require the filing of a joint petition which would avoid the problem of potential collateral attack on the orders.

Alternatives Considered

The Forum and Committee initially considered simply adding language to the Tribal Court Civil Money Judgement Act similar to that found in Oregon Revised Statutes 24.115(4), referenced by the U.S. Department of Labor in advisory opinion 2011-03A.[7] After much discussion, the Forum and Committee concluded that registration of the order under the Tribal Court Civil Money Judgment Act was unnecessarily cumbersome and expensive to achieve the goal of having the tribal court orders recognized under ERISA and that a simplified filing process was a better way of achieving this goal with less expense on litigants and less burden on the state courts.

Fiscal and Operational Impacts

No implementation costs are anticipated. It is expected that proposal will improve efficiencies by ensuring that parties can effectively resolve dissolution issues in tribal court and not have to take pension issues to a different venue. While the simplified filing process contemplates that there will be no filing fee and may require adjustments to court processes, it should avoid the state court having to engage in protracted hearings and enforcement of the orders and thus ultimately reduce the burdens on the state courts.

[7] Oregon Revised Statutes 24.115(4) is available at: https://www.oregonlaws.org/ors/24.115

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Is the proposal broad enough to encompass all kinds of pensions?
- Should the proposal be broader to encompass different kinds of pension plans such as those in the calpers system?
- Should the proposal be broader to encompass orders from foreign countries or sister states?
- Is it a problem if the orders can only be recognized through a joint petition? Do we need to have a process for recognition if one party refuses to join the petition?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would __ months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Please provide a link to reference documents such as statutes rather than attaching them

The Code of Civil Procedure and Family Code would be amended, effective January 1, 2022, to read:

SECTION 1. Add Section 2611 to Division 7, Part 5 of the Family Code as follows:

2611. (a) A final order of a tribal court that relates to the provision of child support, spousal support payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant in a pension plan covered by 29 U.S.C. §1056 that is filed in accordance with section 1736(c) of the California Code of Civil Procedure and that otherwise complies with the requirements of 29 U.S.C. §1056 is a domestic relations order made pursuant to the domestic relations laws of this state for the purposes of 29 U.S.C. §1056.

(b) The filing of the tribal court order does not confer any jurisdiction on a court of this state to modify or enforce the tribal court order.

SEC. 2. Section 1736 of Chapter 3 of Title 11 of Part 3 of the California Code of Civil Procedure is amended by adding subsection (c):

(c) A proceeding for the recognition of a tribal court order that relates to the provision of child support, spousal support payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant of a pension plan covered by 29 U.S.C. §1056 shall be commenced by a filing a joint petition in a form to be prescribed by the Judicial Council signed under oath by both parties to the proceeding. The petition shall include a certified copy of the order to be recognized, the name and current address of each party and the issuing tribal court's name and mailing address.

SEC 3. The Judicial Council shall create rules and forms as necessary to implement this statute.

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
December 3, 2019

To
Family and Juvenile Law Advisory Committee
Tribal Court-State Court Forum

From
Ann Gilmour, Attorney
Center for Families Children & the Courts

Subject
RUPRO Proposal for Consents to voluntary temporary custody arrangements under ICWA

Action Requested
Please Review

Deadline
N/A

Contact
Ann Gilmour
415-865-4207 phone
ann.gilmour@jud.ca.gov

The Indian Child Welfare Act sets out certain requirements for the validity of any consent by an Indian parent or custodian to the foster care or adoptive placement of an Indian child:

25 U.S.C. § 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents
Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent
Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody
In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

Prior to the enactment of the federal ICWA regulations in 2016, the interpretation of ICWA requirements in California had been that there was no "foster care placement" in a juvenile case until disposition. Any removal of a child prior to disposition was an emergency removal under ICWA and not subject to the procedural requirements of the act. As a result, the only action taken by the Judicial Council to implement the consent requirements of section 1913 of ICWA is the ADOPT-225 *Parent of Indian Child Agrees to End Parental Rights.*

The federal regulations clarified and narrowed the scope of an emergency removal and also defined the terms "voluntary" and "involuntary" and clarified that a "foster care placement" includes "…any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator…".

In 2018 the California legislature enacted AB 3176 to align California law with the new federal ICWA regulations. Section 36 of AB 3176 required the Judicial Council to adopt any forms or rules of court necessary to implement this act. It also incorporated into California law the provisions of the regulations defining voluntary and involuntary proceedings and foster care placement. In addition, revisions were made to section 16507.4(b) of the Welfare and Institutions Act that governs an out-of-home placement of a minor by mutual decision between a child's parent, Indian custodian or guardian and a child welfare agency without adjudication by the juvenile court. These revisions reiterated the need for these voluntary placements to comply with the requirements of section 1913 of ICWA when an Indian child is involved.

The California Department of Social Services and several County Counsel's office have indicated that there needs to be a process for getting the consents to placement under section 16507.4(b) certified by a judge as required. The challenge with getting these before a judge is that these placements take place before a petition has been filed. Thus, there is no court file

already in place. Staff propose addressing this issue in rule 5.514 which sets out the requirements for juvenile intake programs. Currently the rule requires these intake programs to address settlement of various matters, provide for a program of informal supervision under section 301 and 654 of the WIC. Staff propose to add here a requirement that the intake programs establish a process for taking a consent from an Indian parent or custodian before a judge in compliance with ICWA.

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INVITATION TO COMMENT

[ITC prefix as assigned]-__

Title
Indian Child Welfare Act: Consent to Temporary Custody of an Indian Child

Proposed Rules, Forms, Standards, or Statutes
Approve form ICWA-101, *Consent to Temporary Custody of an Indian Child*

Proposed by
Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne N. Kingsbury, Cochair
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair
Probate and Mental Health Advisory Committee
Hon. Jayne Chong-Soon Lee, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Ann Gilmour, 415-865-4207
ann.gilmour@jud.ca.gov

Executive Summary and Origin

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend adopting, effective January 1, 2021 a new mandatory form to be used to take a consent from an Indian parent or custodian to the temporary custodial placement of an Indian child in accordance with 25 U.S.C. § 1913, 25 C.F.R. §§ 23.125-23.127 and Welfare and Institutions Code section 16507.4 (b)(3).

Background

The Indian Child Welfare Act (ICWA) sets out certain requirements for a valid consent from an Indian parent or custodian to the foster care placement of or termination of parental rights to an Indian child.[1] Prior to the enactment of comprehensive federal ICWA regulations in 2016, it had been understood that there was no actual "foster care placement" being made for the purposes of

[1] Set out in 25 U.S.C. § 1913.

ICWA until the court made an order granting care and custody of the child to someone other than the child's Indian parent or custodian. Thus, the voluntary consent provisions of ICWA had only been implemented in relation to the termination of parental rights in the ADOPT-225 *Parent of Indian Child Agrees to End Parental Rights* form. In 2018, the California legislature adopted AB 3176 which amended various provisions of the Welfare and Institutions Code to align California law with the requirements of the federal ICWA regulations. AB 3176 included various revisions to section 16507.4(b)(3) of the Welfare and Institutions Code governing voluntary out-of-home placements of a minor that has not been adjudicated by the juvenile court. In particular AB 3176 confirmed that voluntary out-of-home placements under section 16507.4(b)(3) must comply with the consent requirements of ICWA whenever an Indian child is involved.

Tribal advocates have also indicated that the lack of a form for the consent of an Indian parent or custodian to the temporary custody of an Indian child that can be used in guardianship proceedings under the Probate Code is also a problem. Tribal advocates have been asked to draft forms that meet the ICWA requirements but are uncomfortable doing so as they are not always familiar with California law. A form that could be used across all case types governed by ICWA would be useful to litigants and the courts.

The Proposal

The proposal would, effective January 1, 2021, amend rule 5.514(b) of the California Rules of Court that requires courts to establish intake procedures in juvenile cases that include a program for informal supervision by requiring these procedures to include a process for taking a consent from an Indian parent or custodian consistent with the requirements of ICWA, and adopt a new form ICWA-101 *Parent or Custodian of Indian Child Agrees to Temporary Custody*.

Alternatives Considered

The forum and committees considered limiting the proposal only to juvenile cases governed by welfare and institutions code section 16507.4(b)(3) but determined that a form applicable across all case types governed by ICWA would be useful to litigants and the courts.

Fiscal and Operational Impacts

There may be some fiscal impact in implementing the new rule and form, however it is required to comply with the law.

Request for Specific Comments

This box is mandatory. In addition to comments on the proposal as a whole, the advisory committees and forum are interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Does the proposed form cover all of the topics that should be covered?

The advisory committees and form also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 6 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Rule 5.514 at page 4; and
2. Form ICWA-101 *Parent or Custodian of Indian Child Agrees to Temporary Custody* at pages 5-6.

Rule 5.514 of the California Rules of Court is amended effective January 1, 2021 to read:

Rule 5.514. Intake; guidelines

(a) Role of juvenile court

It is the duty of the presiding judge of the juvenile court to initiate meetings and cooperate with the probation department, welfare department, prosecuting attorney, law enforcement, and other persons and agencies performing an intake function. The goal of the intake meetings is to establish and maintain a fair and efficient intake program designed to promote swift and objective evaluation of the circumstances of any referral and to pursue an appropriate course of action.

(b) Purpose of intake program

The intake program must be designed to:

(1) Provide for settlement at intake of:

(A) Matters over which the juvenile court has no jurisdiction;

(B) Matters in which there is insufficient evidence to support a petition; and

(C) Matters that are suitable for referral to a nonjudicial agency or program available in the community;

(2) Provide for a program of informal supervision of the child under sections 301 and 654;

(3) Establish a process for taking a consent from an Indian parent or custodian to a placement of an Indian child under section 16507.4 (b) before a judge in accordance with section 16507.4(b)(3) using form ICWA-101 *Parent or Custodian of Indian Child Agrees to Temporary Custody*; and

(~~3~~4) Provide for the commencement of proceedings in the juvenile court only when necessary for the welfare of the child or protection of the public.

(c) ***

(d) ***

(e) ***

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MEMORANDUM

Date
November 26, 2019

To
Family and Juvenile Law Advisory Committee
Probate and Mental Health Advisory Committee
Tribal Court - State Court Forum

From
Ann Gilmour, Attorney
Center for Families Children and the Courts

Subject
Rules and Forms Proposal for remote appearances by Tribes

Action Requested
Please Review

Deadline
N/A

Contact
Ann Gilmour
Center for Families, Children & the Courts
415-865-4207 phone
ann.gilmour@jud.ca.gov

The California tribal population consists of a significant number of members of tribes not based in California. More than half of the Native Americans living in California are members of tribes located outside of California.[1]

Under both state and federal law, Indian tribes have a legal right to participate in "child custody proceedings" involving Indian children who are members or eligible for membership in the tribe.[2] Both state and federal law recognize the importance of fostering and continuing an Indian child's relationship with the child's tribe and tribal community. In practice, tribe's ability to

[1] See Native American Statistical Abstract: Population Characteristics at http://www.courts.ca.gov/documents/Tribal-ResearchUpdate-NAStats.pdf

[2] As used here, "child custody proceeding" refers to the definition of that term in section 1903 of the *Indian Child Welfare Act* and section 224.1 of the California *Welfare and Institutions Code*.

participate in proceedings involving their children is often inhibited by resource limitations. If a child's tribe is located out of county or out of state, personal appearance in court proceedings may not be possible. When tribes cannot participate in court proceedings involving their children, this can negatively impact the case and increase the risks of ICWA related appeals. Removing barriers to full and effective tribal participation in child welfare proceedings involving Indian children could improve ICWA compliance and reduce appeals. Tribal representatives report that while some courts generally allow tribal representatives to appear by telephone, others do not.

The federal regulations adopted in 2013 provided at 25 C.F.R. §23.133:

> §23.133 Should courts allow participation by alternative methods?
> If it possesses the capability, the court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

AB 686 revised section 224.2 of the Welfare and Institutions Code by adding subsection (k) as follows:

> (k) The Judicial Council, by July 1, 2021, shall adopt rules of court to allow for telephonic or other remote appearance options by an Indian child's tribe in proceedings where the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.) may apply. Telephonic or other computerized remote access for court appearances established under this subdivision shall not be subject to fees.

In implementing the requirements of this section, an initial issue is whether the rule should apply to ICWA cases arising under the Probate and Family codes as well as to those arising under the Welfare and Institutions Code.

In the Legislative Counsel's Digest for AB 686 it states:

> This bill would require the Judicial Council to establish a rule of court that would authorize the use of telephonic or other remote access by an Indian child's tribe in proceedings where ICWA apply. The bill would prohibit the charging of a fee for the telephonic or remote access.

This seems to indicate an intent to apply the requirement to all cases governed by ICWA, not just those arising under the Welfare and Institutions Code. Further, it's placement in section 224.2 of

the Welfare and Institutions Code is consistent with broad application. Section 177(a) of the Family Code incorporates by reference sections 224.2 to 224.6 of the Welfare and Institutions Code. Section 1459.5(b) of the Probate Code incorporates by reference sections 224.3 to 224.6 of the Welfare and Institutions Code. However, when section 1459.5 was adopted as part of SB 678 in 2006, what is now 224.2 was 224.3. What was 224.3 dealing with inquiry was revised and renumbered as 224.2 by AB 3176 in 2019.

Staff therefore propose including this new provision among the ICWA rules and forms rather than the Juvenile rules, with a cross reference from the Juvenile rules to help ensure that participants in Juvenile proceedings are aware of the requirements. The proposal would therefore revise rules 5.482 to add a new subdivision (g) authorizing an Indian child's tribe to appear at any hearing by telephone or other computerized remote means consistent with Welfare and Institutions Code section 224.2(k). It would further revise Rule 5.531 which governs standards for appearance by telephone in juvenile cases by adding reference to section 224.2 (k) and the requirement to allow an Indian child's tribe to appear by telephone or other computerized remote means at no charge and to reference new rule 5.482(g).

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INVITATION TO COMMENT

[ITC prefix as assigned]-__

Title
Indian Child Welfare Act – Remote Appearance by an Indian child's Tribe in Indian Child Welfare Act Proceedings

Proposed Rules, Forms, Standards, or Statutes
Amend rules 5.482 abd 5.531 of the California Rules of Court

Proposed by
Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne N. Kingsbury, Cochair
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair
Probate and Mental Health Advisory Committee
Hon. Jayne Chong-Soon Lee, Chair

Action Requested
Review and submit comments by June 9, 2020.

Proposed Effective Date
January 1, 2021

Contact
Ann Gilmour, 415-865-4207
ann.gilmour@jud.ca.gov

Executive Summary and Origin

The Tribal Court–State Court Forum, the Family and Juvenile Law Advisory Committee and the Probate and Mental Health Advisory Committee recommend that the Judicial Council amend rules 5.482 and 5.531 of the California Rules of Court effective January 1, 2021 to permit an Indian child's tribe to participate by telephone or other computerized remote means in any hearing in a proceeding governed by the Indian Child Welfare Act (ICWA) as required by section 224.2 (k) of the Welfare and Institutions Code.

Background

On October 2, 2019, Governor Newsom signed Assembly Bill No. 686. This bill revised section 224.2 of the Welfare and Institutions Code by adding subsection (k) as follows:

(k) The Judicial Council, by July 1, 2021, shall adopt rules of court to allow for telephonic or other remote appearance options by an Indian child's tribe in proceedings where the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.) may apply. Telephonic or other computerized remote access for court appearances established under this subdivision shall not be subject to fees.

The Proposal

The proposal would implement the requirements of AB 686 by amending rules 5.482 and 5.531 of the California Rules of Court to require courts to permit an Indian child's tribe to appear at any hearing by telephone or other computerized remote means in any proceeding governed by the Indian Child Welfare Act and further stipulating that no fee could be charged to the tribe for this remote appearance.

Specifically, the proposal would add a new subsection (g) to rule 5.482 and revise rule 5.531 (b) governing appearances by telephone in juvenile cases to cross reference rule 5.482 (g).

The proposal is urgently needed respond to a recent change in the law.

Alternatives Considered

The forum and committees considered whether the requirements of new Welfare and Institutions Code section 224.2(k) applied only in juvenile cases or applied more broadly to all case types governed by ICWA. The forum and committees noted that the legislative counsel's digest for AB 686 states that the bill "…would require the Judicial Council to establish a rule of court that would authorize the use of telephonic or other remote access by an Indian child's tribe in proceedings where ICWA apply. The bill would prohibit the charging of a fee for the telephonic or remote access." Further section 224.2 of the Welfare and Institutions Code was renumbered in in 2019 under AB 3176. Prior to 2019 section 224.2 was numbered 224.3, and under section 177(a) of the Family Code and section 1459.5(b) of the Probate Code, section 224.3 (as enacted as part of SB 678 in 2006) is incorporated by reference into family and probate codes respectively. Accordingly, the forum and committees concluded that the rule authorizing remote appearances for tribes in cases governed by ICWA should apply broadly to all ICWA case types and not be restricted to juvenile cases.

Fiscal and Operational Impacts

There may be fiscal and operational impacts. Never the less the legislature has mandated that tribes be permitted to appear remotely at no charge in ICWA cases.

Request for Specific Comments

This box is mandatory. In addition to comments on the proposal as a whole, the forum and advisory committees are interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The forum and advisory committees also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would _6_ months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Amended rules 5.482 and 5.531 of the California Rules of Court attached as pages 4-5.

Rules 5.482 and 5.531 are revised effective January 1, 2021 to read:

Rule 5.482. Proceedings after notice

(a) * * *

(b) * * *

(c) * * *

(d) * * *

(e) * * *

(f) * * *

(g) Tribal appearance by telephone or other remote means

In any proceeding governed by the Indian Child Welfare Act involving an Indian child, the child's tribe may, upon request, appear at any hearing by telephone or other computerized remote means. No fee may be charged to the tribe for such telephonic or other remote appearance.

Rule 5.531. Appearance by telephone (§§ 224.2(k); 388; Pen. Code § 2625)

(a) Application

The standards in (b) apply to any appearance or participation in court by telephone, videoconference, or other digital or electronic means authorized by law.

(b) Standards for local procedures or protocols

Local procedures or protocols must be developed to ensure the fairness and confidentiality of any proceeding in which a party is permitted by statute, rule of court, or judicial discretion to appear by telephone. These procedures or protocols must, at a minimum:

(1) Allow an Indian child's tribe to appear by telephone or other computerized remote means at no charge in accordance with rule 5.482 (g);

(2) Ensure that the party appearing by telephone can participate in the hearing in real time, with no delay in aural or, if any, visual transmission or reception;

Rules 5.482 and 5.531 are revised effective January 1, 2021 to read:

(~~2~~3) Ensure that the statements of participants are audible to all other participants and court staff and that the statements made by a participant are identified as being made by that participant;

(~~3~~4) Ensure that the proceedings remain confidential as required by law;

(~~4~~5) Establish a deadline of no more than three court days before the proceeding for notice to the court by the party or party's attorney (if any) of that party's intent to appear by telephone, and permit that notice to be conveyed by any method reasonably calculated to reach the court, including telephone, fax, or other electronic means;

(~~5~~6) Permit the party, on a showing of good cause, to appear by telephone even if he or she did not provide timely notice of intent to appear by telephone;

(~~6~~7) Permit a party to appear in person for a proceeding at the time and place for which the proceeding was noticed, even if that party had previously notified the court of an intent to appear by telephone;

(~~7~~8) Ensure that any hearing at which a party appears by telephone is recorded and reported to the same extent and in the same manner as if he or she had been physically present;

(~~8~~9) Ensure that the party appearing by telephone is able to communicate confidentially with his or her attorney (if any) during the proceeding and provide timely notice to all parties of the steps necessary to secure confidential communication; and

(~~9~~10) Provide for the development of the technological capacity to accommodate appearances by telephone that comply with the requirements of this rule.

(c) No independent right

Nothing in this rule confers on any person an independent right to appear by telephone, videoconference, or other electronic means in any proceeding.

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INVITATION TO COMMENT

[ITC prefix as assigned]-__

Title
Indian Child Welfare Act: Tribal Information Sheet

Proposed Rules, Forms, Standards, or Statutes
Amend rule 5.522 of the California Rules of Court; Approve form ICWA-100, *Tribal Information Form*

Proposed by
Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne N. Kingsbury, Cochair
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair
Probate and Mental Health Advisory Committee
Hon. Jayne Chong-Soon Lee, Chair

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

Contact
Ann Gilmour, 415-865-4207
ann.gilmour@jud.ca.gov

Executive Summary and Origin

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend adopting, effective January 1, 2021 a new optional form to be used by an Indian child's tribe to provide information to the court on issues of relevance and the tribe's position on these issues in cases governed by the Indian Child Welfare Act.

Background

California is home to more people of Indian ancestry than any other state in the nation. Currently there are 109 federally recognized tribes in California, second only to the number of tribes in the state of Alaska. California's Indian population includes a large number of people affiliated with out-of-state tribes or tribes whose territories and primary headquarters are based in neighboring

states, such as the Washoe, Fort Mojave, Chemehuevi, Colorado River, and Quechan tribes.[1] Tribes within California are often located in remote areas, often making travel to court locations burdensome. Tribal resources and staffing vary greatly, but many tribes have only one full time staff person devoted to child welfare cases, and that individual may have active cases in multiple counties and states. Under the federal Indian Child Welfare Act (ICWA) and corresponding California statutes, an Indian child's tribe has a right to participate in cases governed by ICWA and proper implementation of and compliance with ICWA envisions tribal input on a number of key issues. However, as noted in the ICWA Compliance Task Force Report to the California Attorney General's Bureau of Children's Justice (2017), many tribes find it difficult to exercise their right to fully participate in ICWA cases. Of particular concern are the rights of "… lower income tribes, as they often do not have resources to retain legal counsel, travel and be present at all hearings or even pay fees associated with telephonic appearances…".[2] Rule 5.534(e) recognizes various rights of a tribal representative including the write to submit written reports and recommendations to the court whether or not the tribe intervenes in the case, however, tribes located out of state, or unrepresented by counsel may be unfamiliar with California court procedures and an optional form may encourage them to exercise their right to submit information more often.

If the tribe's position on key ICWA issues is not known as a case progresses this can have negative consequences on the case. For instance, if the court is not aware of the tribe's position on permanency planning until after reunification services have been terminated, this can cause unnecessary conflicts and disruptions in placement.

California has a high number of appeals related to the Indian Child Welfare Act.[3] Some of these appeals might be avoided if tribal input could be consistently obtained throughout the life of a case.

The Proposal

The proposal seeks to remedy the problem created by these barriers to tribal input on key ICWA issues by establishing an optional form ICWA-100 *Tribal Information Form* that can be used by an Indian Child's tribe to submit information to the court on key issues and revising rule 5.552 to authorize an Indian tribe to file this form and other documents by fax. The form is similar to the existing JV-290 *Caregiver Information Form.*

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[1] Judicial Council of Cal., Center for Families, Children & Cts., "Native American Statistical Abstract: Population Characteristics" *Research Update* (Mar. 2012), *www.courts.ca.gov/documents/Tribal-ResearchUpdate-NAStats.pdf* and California Indian Tribal Homelands and Trust Land Map, *www.water.ca.gov/tribal/docs/maps/CaliforniaIndianTribalHomelands24x30_20110719.pdf*.

[2] ICWA Compliance Task Force Report to the California Attorney General's Bureau of Children's Justice (2017) at page 41. Available at: https://www.caltribalfamilies.org/wp-content/uploads/2019/06/ICWAComplianceTaskForceFinalReport2017-1.pdf

[3] In 2016, California had 114 appeals related to ICWA. (Professor Kathryn E. Fort, "2016 ICWA Appellate Cases by the Numbers" *Turtle Talk* [Indigenous Law and Policy Center Blog], Michigan State University College of Law, January 4, 2017, *https://turtletalk.wordpress.com/2017/01/04/2016-icwa-appellate-cases-by-the-numbers/*.)

By removing barriers to tribal participation in ICWA cases and facilitating tribal input on key issues, the proposal should reduce delays and appeals in ICWA cases and improve ICWA compliance.

Alternatives Considered

The committees and forum considered taking no action but determined that the creation of this optional form would be of significant benefit to the courts, tribes, and justice partners. Education, training, guidelines, or best practices are not viable alternatives to the creation of an optional form because ICWA not only applies in different case types, it often involves tribes from out of state that may have limited familiarity with California law and practice. Tribes may be involved in cases in different counties arising in Probate, Family or Juvenile Court. A consistent, simple form for statewide use will facilitate tribal participation in all of these cases.

Fiscal and Operational Impacts

There may be some fiscal impact in incorporating a new form into court and justice partner systems. It is anticipated that any impact will be outweighed by a reduction in delays, continuances and appeals by improving tribal participation throughout the life of an ICWA case.

Request for Specific Comments

This box is mandatory. In addition to comments on the proposal as a whole, the advisory committees and forum are interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Does the proposed form cover all of the topics that should be covered?

The advisory committees and form also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 6 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Rule 5.552 at pages 4-5; and
2. Form ICWA-100 *Tribal Information Sheet* at pages 6-7.

Rule 5.522 is revised effective January 1, 2021 to read:

Rule 5.522. Remote filing

(a) Applicability and definitions

(1) This rule applies to juvenile court proceedings in courts that permit fax or electronic filing by local rule.

(2) As used in this rule, "fax," "fax transmission," "fax machine," and "fax filing" are defined in rule 2.301. A fax machine also includes any electronic device capable of receiving a fax transmission, as defined in rule 2.301.

(3) As used in this rule, "electronic filing" is defined in rule 2.250. Rule 2.250 also defines other terms used in this rule related to electronic filing, such as "document," "electronic filer," and "electronic filing service provider."

(b) Electronic filing

A court may allow for the electronic filing of documents in juvenile proceedings in accordance with section 212.5.

(c) Fax filing

(1) *Juvenile court documents that may be filed by fax*

The following documents may be filed in juvenile court by the use of a fax machine: petitions filed under sections 300, 342, 387, 388, 601, 602, 777, and 778. ICWA-100 *Tribal Information Forms.* Other documents may be filed by the use of a fax machine if permitted by local rule as specified in (a).

(2) *Persons and agencies that may file by fax*

Only the following persons and agencies may file documents by the use of a fax machine, as stated in (c)(1):

(A) Any named party to the proceeding;

(B) Any attorney of record in the proceeding;

(C) The county child welfare department;

(D) The probation department;

(E) The office of the district attorney;

Rule 5.522 is revised effective January 1, 2021 to read:

(F) The office of the county counsel; ~~and~~

(G) A Court Appointed Special Advocate (CASA) volunteer appointed in the case~~.~~; and

(H) An Indian tribe.

(3) ***

(4) ***

(5) ***

(6) ***

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME: CHILD'S NAME: HEARING DATE AND TIME:	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
TRIBAL INFORMATION FORM	CASE NUMBER:

To the representative of the Indian Child's Tribe: You may submit written information to the court and you may attend hearings. You may use this optional form to provide written information to the court. Please type or print clearly in ink and submit the original and eight copies of the form to the court clerk's office at least five calendar days (or seven calendar days if filing by mail) before the hearing. Be aware that other individuals involved in the case have access to this information.

1. a. Child's name:
   b. Child's date of birth: c. Child's age:

2. Tribal Information
   a. Name of tribe:
   b. Name of tribe's representative(s) authorize to represent the tribe in this case:
   c. Contact information
      Address:
      Telephone:
      Fax:
      Email:

   Notices, reports, orders and other documents concerning this case ☐ may ☐ may not be served by email at the above address.

3. Hearing Information
   This Tribal Information Form is submitted for the *(insert type of hearing)* scheduled for *(insert date of hearing).*

4. Communication
   a. Since the last hearing, there ☐ has ☐ has not been ongoing consultation and communication between the agency/petitioner and the tribe. Further comments:

   b. The agency ☐ has ☐ has not meaningfully consulted with the tribe on the ☐ appropriate service, ☐ case planning, ☐ placement of the child(ren), and ☐ permanency planning for the child(ren) and integrated the tribe's views and recommendations into the case. Further comments:

5. Case Planning/Services/Active Efforts
   a. ☐ Since the last hearing, the tribe ☐ has ☐ has not been consulted on the appropriate services to be provided to the parent(s) and child. Further comments:

CHILD'S NAME:	CASE NUMBER:

b. ☐ The tribe's position is that the parent(s) and child ☐ have ☐ have not been provided with meaningful, culturally appropriate, remedial services and programs designed to prevent the break-up of family. Further comments:

c. ☐ The tribe recommends that the following programs and services be integrated into the parent(s) and child's case plan:

d. ☐ The tribe's position is that the parent(s) ☐ are ☐ are not making progress, and that services ☐ should ☐ should not be continued. Futther comments:

6. ☐ Placement (where the child(ren) is/are in out of home placement)

a. The tribe ☐ is ☐ is not in agreement with the child(ren)'s current placement.

b. The child(ren)'s current placement ☐ does ☐ does not comply with the placement preferences of the Indian Child Welfare Act. Further comments:

c. The tribe requests that the child(ren) be placed with *(insert name)*. This placement is preferable because .

7. ☐ Permanency Planning (where the child(ren) is/are in out of home placement)

a. The tribe ☐ has ☐ has not been consulted regarding the appropriate permanent plan for the child(ren) should reunification with the parent(s)/Indian custodian fail.

b. The agency ☐ has ☐ has not discussed with the tribe tribal customary adoption as a permanency option should reunification with the parent(s)/Indian custodian fail. Further comments:

8. Other information:

9. ☐ If you need more space to respond to any section on this form, or have other information that you wish to share with court please check this box and attach additional pages.

Number of pages attached:

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF TRIBAL REPRESENTATIVE WHO HAS COMPLETED THIS FORM)