



JUDICIAL COUNCIL OF CALIFORNIA

TRIBAL COURT-STATE COURT FORUM

www.courts.ca.gov/forum.htm
forum@jud.ca.gov

Request for ADA accommodations should be made at least three business days before the meeting and directed to: JCCAccessCoordinator@jud.ca.gov

TRIBAL COURT-STATE COURT FORUM

NOTICE AND AGENDA OF OPEN MEETING WITH CLOSED SESSION

Open to the Public Unless Indicated as Closed (Cal. Rules of Court, rule 10.75(c), (d), and (e)(1))

THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS

OPEN PORTION OF THIS MEETING IS BEING RECORDED

Date: June 8, 2023
Time: 12:15 – 1:15 p.m.
Public Call-In Number: <https://jcc.granicus.com/player/event/2637> (Listen Only)

Meeting materials for open portions of the meeting 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 open meeting portion of the meeting must submit a written request at least two business days before the meeting. Requests can be e-mailed to fourm@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 April 13, 2023, Tribal Court–State Court 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, 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. Only written comments received by 12:15 p.m. 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

Info 2

Discretionary Tribal Participation Rules and Forms Proposal

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

Info 3

Tribal Diversion Memorandum of Understanding between the Yurok Tribe, the Humboldt County Superior Court, and the Humboldt County District Attorney's Office

Presenters: Hon. Abby Abinanti, Chief Judge of the Yurok Tribal Court, Hon. Joyce Hinrichs, Judge of the Superior Court of California, County of Humboldt

IV. ADJOURNMENT

Adjourn to Closed Session

V. CLOSED SESSION (CAL. RULES OF COURT, RULE 10.75(D))

Item 1

Legislative Update

Closed session under rule 10.75(d)(10) proposed legislation, rules, or forms

Adjourn Closed Session



TRIBAL COURT-STATE COURT FORUM

MINUTES OF OPEN MEETING WITH CLOSED SESSION

April 13, 2023
12:15 - 1:15 p.m.

Advisory Body Members Present: *Hon. Abby Abinanti, Co-chair, Hon. Joyce Hinrichs, Cochair, Hon. Richard Blake, Hon. Leonard Edwards (Ret.), Hon. Ana España, Hon. Tara Flanagan, Mr. Christopher Haug, Hon. Lawrence King, Hon. Patricia Lenzi, Hon. Kristina Lindquist, Hon. Devon Lomayesva, Ms. Merri Lopez-Keifer, Hon. Dorothy McLaughlin, Hon. Stephen Place, Hon. Mark Ralphs, Hon. Victorio Shaw, Hon. Dean Stout, Hon. Alison Tucher, Hon. Christine Williams.*

Advisory Body Members Absent: *Hon. April Attebury, Hon. Joni Hiramoto, Hon. Winston Keh, Hon. Nicholas Mazanec, Hon. April Olson, Ms. Andrea Pella, Ms. Christina Snider, Hon. Allen Sumner, Ms. Stephanie Weldon, Hon. Joseph Wiseman.*

Others Present: *Ms. Vida Castaneda, Ms. Ann Gilmour, Ms. Tracy Kenny, Mr. Ray Mata, Ms. Amanda Morris, Ms. Christy Simons.*

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:18 p.m. and took roll call.

Approval of Minutes

The advisory body reviewed and approved the minutes of the February 9, 2023, Tribal Court-State Court Forum meeting. Motion to approve by Judge Patricia Lenzi and seconded by Judge Richard Blake. The motion carried.

DISCUSSION AND ACTION ITEMS (ITEMS 1-2)

Item 1

Cochairs Report

Judge Abinanti briefed committee members on her presentation at the recent Judicial Council meeting. No questions were raised, and the committee is prepared to launch into the next year.

Judge Hinrichs also briefed committee members on the recent Juvenile Judges Administrative Forum held on March 30th. No questions or comments were made on the presentation. Judges who did not attend can request the materials from the assembly. Judge Stout gave his appreciation to those who contributed to the event.

Item 2

Missing in California Indian Country Regional Events

Presenter: Merri Lopez-Keifer, Director, Office of Native American Affairs, Office of Attorney General Rob Bonta, California Department of Justice

Merri Lopez-Keifer shared details about the upcoming event Missing in California Indian Country, Northern Region. The event will include resources for the community to report a missing loved one. Local and Tribal law enforcement will be there to try to determine if they have been reported missing before. There will be questions and answers panels before and after lunch. Other regional event dates and locations to be announced shortly.

A D J O U R N M E N T

There being no further open meeting business, the meeting was adjourned at 12:43.

C L O S E D S E S S I O N

Item 1

Legislative Update

Closed session under rule 10.75(d)(10) proposed legislation, rules, or forms

Presenter: Tracy Kenney, Supervising Attorney, Office of Governmental Affairs, CFCC

Adjourned closed session at 1:25 p.m.

Approved by the advisory body on June 8, 2023.



Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688

Telephone 415-865-4200 · Fax 415-865-4205

M E M O R A N D U M

Date

June 5, 2023

Action Requested

Please Review

To

Tribal Court - State Court Forum

Deadline

N/A.

From

Ann Gilmour

Contact

Ann Gilmour, Attorney

415-865-4207 phone

ann.gilmour@jud.ca.gov

Subject

Discretionary Tribal Participation Rule and
Form Proposal - Post Comment

The Discretionary Tribal Participation rule and form proposal jointly developed by the Forum and the Juvenile and Family Law Advisory Committee circulated for public comment from March 31 through May 12th.

Attached for review are the draft Report to the Judicial Council, revised draft rules and form, and draft comment that contains the language of all the comments and the proposed responses.

The major issues raised in the comments and proposed responses to them are set out below

Move the substance of the proposal be in the ICWA rules (as circulated for public comment) to the juvenile rules

Several commenters made this suggestion including the Alliance for Children's Rights, the California Tribal Families Coalition, and the Superior Court for the County of San Diego, and the Sacramento County Counsel's Office.

There were several concerns. The Alliance for Children's Rights and the California Tribal Families Coalition were concerned that putting the discretionary tribal participation in cases

where ICWA does not apply in the same rule that governs “proceedings after notice” in cases governed by ICWA and specifically placing it with the subdivision concerning tribal right of intervention when ICWA applies could be confusing and muddy the waters concerning tribal rights of intervention protected by the federal ICWA and state law.

Another concern with placement raised by the San Diego Court is that the ICWA rules, including rule 5.482 apply to proceedings arising under the Family Code and Probate Code when ICWA applies whereas the statutory underpinnings of discretionary tribal participation – sections 306.6, 346, 676 and 16001.9 of the Welfare and Institutions Code – apply only to juvenile proceedings.

Based on these comments the proposal was revised to place the bulk of the language governing discretionary tribal participation into rule 5.530. Rule 5.482 now only has a cross reference to the new provision of rule 5.530 as suggested by the California Tribal Families Coalition.

Revisions *Request for Tribal Participation (form ICWA-042)*:

- Added reference to section 25 U.S.C. 1903(8) definition of Indian tribe in paragraph 1 of the form where it references “federally recognized tribe”;
- Added language to allow the form to be used for cases involving multiple children; and
- Added an item 5 to allow an attachment with more information to be included.

One commenter suggested that the wording in items 3 (a) through (c) should be changed from “requesting **leave** to participate” to “requesting to participate”. Staff seek the committees input on how to respond.

Statutory Underpinnings

The Orange County Bar Association agreed with the proposal, but also suggested that there was weak statutory underpinning and that the issue would be better addressed by the legislature than a rule of court.

Timing of Proposal

The California Tribal Families Coalition suggested that stakeholders be given more time to consider the substance of this rule. In discussions with California Tribal Families Coalition staff to clarify these concerns it appears that there is some concern that the upcoming decision from the Supreme Court of the United States in *Brackeen v. Haaland* may have some impact, particularly with the line between “racial” and “political” relationships between tribes and members of their communities.

We also understand that depending on the outcome in *Brackeen*, there may be a legislative response in California that could touch upon the subjects addressed by this proposal as well as other ICWA related issues that may require changes to Judicial Council rules and forms.

Judicial Council policy generally disfavors multiple changes to rules and forms as these are burdensome for the courts. It is anticipated that the decision in *Brackeen* will come down before the end June. Proposals to amend rules and forms effective January 1, 2024, must be finalized and ready to move forward by early in July.

If the *Brackeen* decision does not substantially change existing law then, subject to the committee's direction, it may be possible to move this proposal forward for a January 1, 2024, effective date. If the *Brackeen* decision will substantially alter existing law or if a California legislative response is anticipated, it may be more prudent to defer this proposal to a later cycle.



Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.:

For business meeting on: September 27, 2023

Title

Indian Child Welfare Act (ICWA):
Discretionary Tribal Participation

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042

Recommended by

Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Joyce Hinrichs, Cochair

Family and Juvenile Law Advisory
Committee

Hon. Stephanie E. Hulse, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type

Action Required

Effective Date

January 1, 2024

Date of Report

June 5, 2023

Contact

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

Executive Summary

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend that, effective January 1, 2024, the Judicial Council amend California Rules of Court, rules 5.484 and 5.530, and approve *Request for Tribal Participation* (form ICWA-042). These rules and this form clarify the process and set standards consistent with California statutes for the court’s exercise of discretion to permit the participation of a tribe in juvenile cases involving a child affiliated with the tribe, despite no statutory right to participate or intervene under the Indian Child Welfare Act (ICWA) and section 224.4 of the Welfare and Institutions Code. As discussed in more detail below, although California law set out in the Welfare and Institutions Code protects the relationship between tribes and their children beyond the scope of ICWA and permits tribal participation in juvenile cases in various situations where ICWA does

not apply, tribal leaders and other advocates report that courts often decline to permit tribes to participate in juvenile cases if ICWA does not apply.

Recommendation

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend that the Judicial Council, effective January 1, 2024:

1. Amend California Rules of Court¹, rules 5.482 and 5.530 to clarify the process for tribes seeking to participate in juvenile cases where ICWA does not apply; and
2. Approve *Request for Tribal Participation* (form ICWA-042) for a tribe seeking permission to participate in a juvenile case.

The proposed amended rules and new form are attached at pages 10–12.

Relevant Previous Council Action

The federal Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) was enacted in 1978 and establishes minimum federal standards that apply in all state court proceedings involving an Indian child where the child could be involuntarily placed in the custody of a nonparent, or where the parental rights of a parent could be terminated. The Judicial Council has acted numerous times to implement and improve compliance with ICWA, including:

- 1995 amendments to former rules 1431, 1432, and 1463 to assure proper notice consistent with ICWA and adoption of former rule 1439;
- 1998 amendments to former rule 1439 and forms JV-100 and JV-110 to better identify Indian children and comply with ICWA; and
- 2000 and 2005 amendments to former rule 1439 and revisions to various juvenile and family law forms to clarify when and how notice should be given under ICWA.

In 2006, California enacted SB 678 to substantially incorporate provisions of ICWA into the Family Code, Probate Code, and Welfare and Institutions Code. Following enactment of SB 678, the Judicial Council adopted implementing rules of court and forms.² In 2019, substantial revisions were made to these rules of court and forms to align with statutory changes in

¹ All further references to rules are to the California Rules of Court unless otherwise noted.

² That rules and forms proposal was adopted by the Judicial Council at a meeting on October 26, 2007 (agenda item A27) and is available at www.courts.ca.gov/documents/102607ItemA27.pdf.

Assembly Bill 3176 (Waldron; Stats. 2018, ch. 833), as well as changes to governing federal regulations and guidelines.³

Analysis/Rationale

ICWA provides certain legal rights to federally recognized Indian tribes with respect to child custody proceedings involving an Indian child, defined as any unmarried person who is under age 18 and is either (1) a member of an Indian tribe, or (2) eligible for membership in an Indian tribe and who is the biological child of a member of an Indian tribe. Among the rights that ICWA recognizes is the tribe's right to intervene in the case at any time. When ICWA applies, but the tribe chooses not to intervene, California Rules of Court, rule 5.534(e)(2) still provides the child's tribe with certain rights to participate in a case involving an Indian child.

The California Legislature has also acted to protect the relationship between Native American and Indian children⁴ and their tribes and tribal communities. In section 224 of the Welfare and Institutions Code⁵, the Legislature states that California is committed to “protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with [ICWA] and other applicable state and federal law, designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.” California law goes beyond ICWA in several relevant ways. Section 306.6⁶ authorizes the court to permit a tribe not recognized to have tribal status under federal law (also known as an “unrecognized tribe”) to participate in dependency proceedings. In 2019, the Legislature amended section 16001.9 (often referred to as the Foster Care Bill of Rights) to include protections for the cultural and political connection of all Native American and Indian children in foster care.⁷ These protections are separate and apart from the requirements of ICWA.

This proposal addresses three specific categories of cases where ICWA may not apply, but where either the tribal group or the child may have a right to some manner of tribal participation in a

³ Assembly Bill 3176 available at:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB3176. Updated federal regulations available at: <https://www.ecfr.gov/current/title-25/chapter-I/subchapter-D/part-23>. Updated federal guidelines available at: <https://www.federalregister.gov/documents/2015/02/25/2015-03925/guidelines-for-state-courts-and-agencies-in-indian-child-custody-proceedings>. Judicial Council rules and forms proposal implementing these changes available at: <https://jcc.legistar.com/View.ashx?M=F&ID=7684873&GUID=52B4C6B1-F704-458F-BF42-EB1AA4F82000>

⁴ The term “Indian child” is used for children who meet the definition of Indian child in ICWA. The term Native American child is used for children who are affiliated with a tribe but do not meet the definition of Indian child.

⁵ All further unspecified statutory references are to the Welfare and Institutions Code.

⁶ Added by *SB 678 (Stats. 2006, ch. 838)* which wove many provisions of ICWA into the Welfare and Institutions Code, the Family Code, and the Probate Code.

⁷ See *AB-175 (Stats. 2019, ch. 416)*.

juvenile case: (1) cases involving Indian children who are in the juvenile court because of an act that would be a crime if it were committed by an adult or as to whom ICWA does not apply for some other reason; (2) cases involving children from unrecognized tribes; and (3) children whose parents are members of tribes and are considered part of the tribal community, but who do not meet the definition of Indian child, often referred to as “heritage cases.”

In each of these situations, the law recognizes a relationship between the tribe and the child notwithstanding that ICWA does not apply. Section 306.6 specifically provides the court with discretion to allow a child’s unrecognized tribe to participate in dependency proceedings. Sections 346 and 676 permit juvenile courts to allow anyone with a “direct and legitimate interest” in a case to be admitted to a juvenile court hearing.⁸ Several courts have adopted standing orders under the authority of these sections to create a presumption that tribes be permitted to participate in proceedings involving children affiliated with the tribe.⁹

This proposal would provide guidance for the exercise of that discretion and the role of a tribe when it is permitted to participate. The role set out in the proposed rule is consistent with section 306.6 and rule 5.534(e)(2) which addresses participation of non-intervening tribes in ICWA cases.

Juvenile Justice Cases

Indian children who are placed into foster care are entitled to all the same rights as other foster children under section 16001.9 (commonly referred to as the Foster Care Bill of Rights),¹⁰ and have unique protections for their cultural and political identity as Indian children. These protections for the cultural and political rights of Indian children in foster care apply equally whether they are placed in foster care under sections 300 (the juvenile dependency code section) or 601 or 602 (the juvenile justice code sections)—even though ICWA does not apply to most juvenile justice cases. These protections include the right to:

1. A placement that upholds the prevailing social and cultural standards of the child’s Indian community, including, but not limited to, family, social, and political ties (§ 16001.9(a)(1));

⁸ Section 346 is available at:

https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=9. Section 676 is available at https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=17.

⁹ See the Order of the Superior Court of California, County of San Diego “In the Matter of: Tribal Participation in Juvenile Dependency and Juvenile Justice Cases Not Governed by the Indian Child Welfare Act” available at: https://www.sdcourt.ca.gov/sites/default/files/sdcourt/juvenile3/policiesproceduresandprotocols/juypoliciesproceduresandprotocolsforms/order_author_tribes.pdf and Rule 9.1 of Local Rules of Superior Court of California, County of Inyo referencing standing orders dealing with this issue <https://www.inyo.courts.ca.gov/system/files?file=localrules.pdf>

¹⁰ Available at:

https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC§ionNum=16001.9.

2. Be provided with names and contact information for representatives of the child's Indian tribe and to communicate with these individuals privately (§ 16001.9(a)(11));
3. Have contact with tribal members and members of the child's Indian community consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe (§ 16001.9(a)(14));
4. Engage in traditional Native American religious practices (§ 16001.9(a)(15));
5. Have probation personnel who have received instruction on ICWA and on cultural competency and sensitivity relating to, and best practices for, providing adequate care to Indian children in out-of-home care (§ 16001.9(a)(20));
6. Have recognition of the child's political affiliation with an Indian tribe or Alaskan village, including a determination of the child's membership or citizenship in an Indian tribe or Alaskan village; receive assistance in becoming a member of an Indian tribe or Alaskan village in which the child is eligible for membership or citizenship, receive all benefits and privileges that flow from membership or citizenship in an Indian tribe or Alaskan village, and be free from discrimination based on the child's political affiliation with an Indian tribe or Alaskan village (§ 16001.9(a)(21));
7. Have a representative of the child's Indian tribe in attendance during hearings (§ 16001.9(a)(34)); and
8. Have a case plan that includes protecting the essential tribal relations and best interests of the Indian child by assisting the child in establishing, developing, and maintaining political, cultural, and social relationships with the child's Indian tribe and Indian community (§ 16001.9(a)(37)).

These provisions recognize a strong beneficial relationship between an Indian child and the child's tribe including in juvenile justice cases.

Unrecognized tribes

Section 306.6¹¹ permits the court to allow an unrecognized tribe from which a child is descended to participate in a dependency proceeding. In addition, section 16001.9, as amended in 2019, provides protection to certain rights of all children in foster care that may be particularly important to those children who identify as Native American, and will apply even if their tribe is not federally recognized. These include the right to:

¹¹ Available at:
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC§ionNum=306.6.

1. Receive adequate clothing, grooming, and hygiene products that respect the child's culture and ethnicity (§ 16001.9(a)(3));
2. Be placed with a relative or nonrelative extended family member if an appropriate and willing individual is available (§ 16001.9(a)(5));
3. Attend religious services, activities, and ceremonies of the child's choice, including, but not limited to, engaging in traditional Native American religious practices (§ 16001.9(a)(15)); and
4. Participate in extracurricular, cultural, racial, ethnic, personal enrichment, and social activities (§ 16001.9(a)(16)).

Section 306.6 states that:

(d) This section is intended to assist the court in making decisions that are in the best interest of the child by permitting a tribe in the circumstances set out in subdivision (a) to inform the court and parties to the proceeding about placement options for the child within the child's extended family or the tribal community, services and programs available to the child and the child's parents as Indians, and other unique interests the child or the child's parents may have as Indians. This section shall not be construed to make the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), or any state law implementing the Indian Child Welfare Act, applicable to the proceedings, or to limit the court's discretion to permit other interested persons to participate in these or any other proceedings.

(e) The court shall, on a case-by-case basis, make a determination if this section is applicable and may request information from the tribe, or the entity claiming to be a tribe, from which the child is descended for the purposes of making this determination, if the child would otherwise be an Indian child pursuant to subdivision (a).

Heritage cases

Sometimes a child's parents are members of a tribe, but the child is not a member or eligible for membership. This can be because the tribe's membership rolls are closed, or because the child does not meet one or more of the tribe's specific membership criteria. These children may still live on tribal lands, be eligible for tribal services, and be considered members of the tribal community.

Under section 16001.9, these children have the same rights as described above for children from unrecognized tribes to maintain their cultural and political connections to the tribe.

Protection of these rights is furthered by the participation of the tribe with which the child and family are affiliated, notwithstanding that the child does not meet the definition of Indian child

under ICWA. Sections 346 and 676¹² permit the judicial officer presiding over a case to admit to a hearing such persons as are deemed to have a direct and legitimate interest in the case or work of the court. As discussed above, several courts have adopted local standing orders creating a presumption that tribes have a direct and legitimate interest in cases involving their children.

The Proposal

This proposal responds to a concern identified by tribal advocates and leaders that courts often will not allow a tribe to participate in a juvenile case if ICWA does not apply. It advances the Judicial Council's goals of access to justice for Native American and Indian children and their tribes by protecting the rights to maintain cultural and political connections discussed above. This proposal would provide guidance and ensure consistency in accordance with the statutes discussed above, in cases falling within these three categories where ICWA does not mandate, but state laws allow tribal participation in a juvenile case. Tribes, particularly unrecognized tribes, often have limited resources. They may participate in court via a tribal representative rather than an attorney. It can be challenging for tribal advocates to draft requests for orders without additional guidance. This proposal would create a process and provide a form for tribes to use when they want to participate in actions involving their children when ICWA does not apply. It provides presumptions that are consistent with state policies in furthering tribal participation.

The proposal would:

- Amend rule 5.482, which currently implements section 204.4 governing tribal intervention in cases where ICWA mandates apply by adding a subsection directing parties to the new subsection of rule 5.530 in situations where the tribe does not have a right of intervention because ICWA does not apply, but the court has discretion to allow the tribe to participate in a juvenile proceeding;
- Amend rule 5.530, which governs who may be present at a juvenile hearing to add subdivision (g) governing discretionary tribal participation in the three situations discussed above; and
- Adopt a new optional form, *Request for Tribal Participation* (ICWA-042).

These revisions would address tribal participation in the three situations discussed above where ICWA does not mandate, but where state laws allow, tribal participation. Each of the three case types is set forth in a separate paragraph because each relies on different sections of the Welfare and Institutions Code that provide slightly different protections to Native American and Indian children and their tribes. Each of the first three paragraphs of new subdivision (g) of rule 5.530 would establish a presumption that a child's tribe should be permitted to participate. A fourth

¹² Available at:

https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=WIC&division=2.&title=&part=1.&chapter=2.&article=9.

paragraph lists, for tribes whose request to participate has been granted, the actions they may take to participate in the proceedings. This list mirrors the extent of participation that the Legislature has established in section 306.6 for unrecognized tribes and the council has provided in rule 5.534(e)(2) for tribes in ICWA cases that choose not to intervene.

The committees also recommend a new, optional form that tribes may use to make a request to participate in a case.¹³

Policy implications

The rule would create a presumption that a tribe should be permitted to participate in a proceeding where the court has discretion to permit such participation absent a finding by the court that the tribe's participation would not assist the court in making decisions that are in the best interest of the child.

The committees believe that this presumption is consistent with the intent of the Legislature in enacting sections 224, 306.6 and 16001.9. In section 224 of the Welfare and Institutions Code, the legislature states that California is committed to “protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.) and other applicable state and federal law, designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.” California law goes beyond ICWA in several relevant ways. Section 306.6 authorizes a “...tribe not recognized to have tribal status under federal law” (also known as an “unrecognized tribe”) to participate in dependency proceedings. In 2019 the legislature amended section 16001.9 to include protections for the cultural and political connection of all Native American and Indian children in foster care.¹⁴ These protections are separate and apart from the requirements of ICWA.

As discussed above, tribal leaders and representatives report that when ICWA does not apply to a case, courts often deny tribal requests to participate. This is not consistent with the protections for the legal relationships set out in California law.

Comments

The proposal circulated for public comment from March 31 through May 12, 2023, as part of the spring 2023 invitation-to-comment cycle. It was sent to the standard mailing list for family and juvenile law proposals that includes appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks,

¹³ The proposed form must be signed under penalty of perjury because asserts facts that the court is asked to rely upon in deciding whether to permit tribal participation. Because the law does not specifically require a signature under penalty of perjury the committees are considering whether to retain this requirement.

¹⁴ See *AB-175 (Stats. 2019, ch. 416)*.

attorneys, family law facilitators and self-help center staff, legal services attorneys, social workers, probation officers, Court Appointed Special Advocate (CASA) programs, and other juvenile and family law professionals. It was also sent to tribal leaders, tribal advocates, and tribal attorneys and distributed through the California Department of Social Services Office of Tribal Affairs list serve to reach those with an interest in the Indian Child Welfare Act and tribal issues.

Six comments were received. None of the comments opposed the proposal. Four did not take a position; one approved if amended; and one approved of the proposal.

The Superior Court for the County of San Diego approved if amended. The amendments suggested by the court to clarify that the provisions apply only in juvenile cases and other minor language changes were adopted.

The Orange County Bar Association approved the proposal. California Indian Legal Services suggested minor revisions to the form which were adopted.

A concern was expressed by several commenters including the Alliance for Children's Rights, the California Tribal Families Coalition, and the Sacramento County Counsel's Office that the substance of the rule would be better placed in rule 5.530 which governs who can be present at and participate in juvenile proceedings rather than as a subdivision of rule 5.482. Commenters were concerned that placement within rule 5.482 might cause confusion because that rule governs cases where the Indian Child Welfare Act applies, and the rule applies to cases arising under the Family and Probate Codes as well as to cases arising under the Welfare and Institutions Code. The committees agreed that because the content of the new rule applies to only juvenile cases where the ICWA does not apply, and there is discretion for the juvenile court to permit a tribe to participate rather than there being a right of tribal intervention, placement within the ICWA rules could create confusion.

The main substantive changes made in response to the comments was to move the provisions governing discretionary tribal participation from rule 5.482(d) to the newly created subdivision (g) of rule 5.530, although rule 5.482 was revised to create a cross-reference to rule 5.530(g) as suggested by the Alliance for Children's Rights.

The full text of all comments and the committees' responses are in the chart attached at pages 13–23.

Alternatives considered

The committees considered whether educational resources or job aids would be sufficient to address the issues raised by tribal leaders and advocates. Given the complexity of the legal issues and the importance of the interests and rights of tribal children and tribes that are at stake, the committees decided that rules and forms were the best way to protect those rights and interests and bring consistency to the exercise of discretion across courts.

Fiscal and Operational Impacts

The committees do not anticipate fiscal or operational impacts beyond the updating of systems to reflect the new form and perhaps some training on the new process. By providing greater clarity and creating a process and form, the committees believe that this proposal will ultimately reduce contested motions.

Attachments and Links

1. Cal. Rules of Court, rules 5.482 and 5.530, at pages 10–11.
2. Forms ICWA-042, at page 12.
3. Chart of comments, at pages 13–23.

Rules 5.482 and 5.530 of the California Rules of Court would be amended, effective January 1, 2024, to read:

1 **Rule 5.482. Proceedings after notice**

2
3 (a)–(c) * * *

4
5 (d) **Intervention**

6
7 (1) The Indian child’s tribe and Indian custodian are entitled to intervene, orally or
8 in writing, at any point in the proceedings. The tribe may, but is not required to,
9 file with the court the *Notice of Designation of Tribal Representative in a Court*
10 *Proceeding Involving an Indian Child* (form ICWA-040) to give notice of its
11 intent to intervene.

12 (2) A tribe that is not entitled to intervene that seeks court authorization to
13 participate in juvenile proceedings may request permission to participate in the
14 proceedings in accordance with rule 5.530 (g).

15
16 (e)–(g) * * *

17
18 **Rule 5.530. Persons present**

19
20 (a)–(f) * * *

21
22 (g) **Discretionary tribal participation (§§ 224, 306.6, 346, 676, 827, 16001.9)**

23
24 When there is discretion to allow a tribe to participate in a juvenile case, the tribe
25 may request permission to participate in the proceedings using the *Request for*
26 *Tribal Participation* (form ICWA-042) and the court should exercise its discretion
27 as follows:

28
29 (1) In a proceeding involving an Indian child, the child’s tribe may request
30 permission to participate in the proceedings under section 346 or 676 of the
31 Welfare and Institutions Code. Consistent with sections 224 and 16001.9 of the
32 Welfare and Institutions Code, there is a presumption that the tribe has a direct
33 and legitimate interest in the proceedings under section 346 or 676 of the
34 Welfare and Institutions Code and the request should be approved absent a
35 finding by the court that the tribe’s participation would not assist the court in
36 making decisions that are in the best interest of the child.

37
38 (2) In a proceeding involving a child described by section 306.6 of the Welfare and
39 Institutions Code, the tribe from which the child is descended may request
40 permission to participate in the proceedings. Consistent with sections 224 and
41 16001.9 of the Welfare and Institutions Code, the request should be approved

1 absent a finding by the court that the tribe's participation would not assist the
2 court in making decisions that are in the best interest of the child.

3
4 (3) When a child does not meet the definition of an Indian child but either of the
5 child's parents is a member of a tribe and the tribe wishes to participate in
6 juvenile proceedings involving the child, the tribe may request permission to
7 participate in the proceedings under section 346 or 676 of the Welfare and
8 Institutions Code. Consistent with sections 224 and 16001.9 of the Welfare and
9 Institutions Code, there is a presumption that the tribe has a direct and
10 legitimate interest in the proceedings under section 346 or 676 of the Welfare
11 and Institutions Code and the request should be approved absent a finding by
12 the court that the tribe's participation would not assist the court in making
13 decisions that are in the best interest of the child.

14
15 (4) Upon approval of a request, the court shall instruct the tribe as to the
16 confidentiality of the proceedings and although the tribe does not become a
17 party, unless the court orders otherwise, the tribe is authorized to:

- 18
19 (i) Be present at the hearing;
20
21 (ii) Address the court;
22
23 (iii) Request and receive notices of hearings;
24
25 (iv) Request to examine court documents relating to the proceeding
26 consistent with section 827 of the Welfare and Institutions Code;
27
28 (v) Present information to the court that is relevant to the proceeding;
29
30 (vi) Submit written reports and recommendations to the court; and
31
32 (vii) Perform other duties and responsibilities as requested or
33 approved by the court.
34

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (name):	FOR COURT USE ONLY DRAFT Not approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILD(REN)'S NAME(S):	
REQUEST FOR TRIBAL PARTICIPATION	CASE NUMBER: RELATED CASES (if any):

TO ALL PARTIES:

1. The (name of tribe): _____ is a federally recognized tribe
 (25 U.S.C. § 1903(8)) a tribe not recognized to have tribal status under federal law. (Welfare and Institutions Code section 306.6.)

2. The above named child or children are (select one):
- a. Member(s) of the tribe;
 - b. Eligible for membership in the tribe and the biological child(ren) of a member; or
 - c. Otherwise affiliated with the tribe and considered member(s) of the tribal community.

3. The tribe is (select one):
- a. requesting leave to participate in the proceedings involving an Indian child but to which ICWA does not apply. (Welfare and Institutions Code sections 346 and 676.)
 - b. requesting leave to participate in the proceedings involving a child who would otherwise be an Indian child but for the status of the child's tribe. (Welfare and Institutions Code section 306.6.)
 - c. requesting leave to participate in the proceedings involving a child who is affiliated with the tribe but does not meet the definition of an Indian child. (Welfare and Institutions Code sections 346 and 676.)

4. The tribe requests that notice of all proceedings be sent to:

Name:

Title:

Address:

City:

State:

Zip Code:

Telephone:

Fax:

Email:

5. Check here and attach Attachment to Judicial Council Form (form MC-025) to provide more information.

Date: _____

 (TYPE OR PRINT NAME)



 (SIGNATURE)

SPR23-32

Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Alliance for Children’s Rights Kristin Power, Vice President, Policy and Advocacy	N/I	<p>Does the proposal adequately address the stated purpose?</p> <p>As currently drafted, the proposal does not adequately address its stated purpose. The proposal states the purpose is to “provide guidance and ensure consistency” in discretionary tribal participation in three instances. However, because of where the new language is proposed within the California Rules of Court, the new language may create confusion and inconsistency for tribes who have a federal and state statutory right to formally intervene in cases governed by ICWA. The proposed rule would add language to Rule 5.482(d), in Chapter 2 of the Rules of Court, and provides guidance in instances when ICWA applies. However, the proposed language primarily provides guidance for instances when ICWA does not apply. We recommend the language be placed elsewhere in the Rules of Court so as not to cause confusion with intervention rules. For example, the proposed language drafted as 5.482(d)(2) may better fit directly in Rule 5.530 because that rule pertains to all persons present for juvenile court proceedings.</p> <p>We propose that if Judicial Council is going to adopt this request, which is to move proposed rule 5.482(d)(2) to fit under Rule 5.530, language should be added to Rule 5.482(d) that refers those not familiar with ICWA who happen to land in this section, to also review</p>	<p>The committees agree and have moved the substance of the proposal to rule 5.530 as recommended.</p> <p>The proposal was revised in response to this comment.</p>

SPR23-32

Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			<p>Rule 5.530 for guidance to promote clarity and transparency.</p> <p>Recommended Language: Rule 5.482 (d)(2) A tribe that is not entitled to intervene that seeks court authorization to participate in proceedings may request permission to participate in the proceedings in accordance with Rule 5.530.</p> <p>We further recommend, regardless of the status of the drafted 5.482(d)(2) language, that the proposed language “When the Indian Child Welfare Act applies, Tt” in 5.482(d)(1), is not included. We think this is unnecessarily limiting language and could have unintended consequences in practice.</p>	<p>The proposal was revised in response to this comment.</p> <p>The proposal was revised in response to this comment.</p> <p>The proposal was revised in response to this comment.</p>
2.	California Tribal Families Coalition Michelle Castagne, Co-Executive Director	N/I	<p>Request for Specific Comments</p> <p><i>1. Does the proposal adequately address the stated purpose?</i></p> <p>As currently drafted, the proposal does not adequately address its stated purpose. The proposal states the purpose is to “provide guidance and ensure consistency” in tribal intervention in juvenile court proceedings and discretionary tribal participation in three specific instances. However, because of where the new language is proposed within the California Rules of Court, the new language may create confusion and inconsistency for tribes who have a federal and state statutory right to formally intervene in cases governed by the Indian Child Welfare Act (ICWA). The proposed rule would add language to Rule</p>	

SPR23-32

Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			<p>5.482(d) which is in Chapter 2 of the Rules of Court and provides guidance in instances when ICWA applies. However, the proposed language primarily provides guidance for instances when ICWA does not apply. If the proposed language moves forward, we recommend it be placed elsewhere in the Rules of Court so as not to cause confusion with rules governing tribal intervention. For example, the proposed language drafted as 5.482(d)(2) may better fit directly in Rule 5.530 because that rule pertains to all persons present for juvenile court proceedings.</p> <p>We further recommend, regardless of the status of the drafted 5.482(d)(2) language, the proposed language “When the Indian Child Welfare Act applies, Tt” in 5.482(d)(1), does not move forward. This is unnecessary limiting language.</p> <p>Overall, CTFC member tribes have not yet reached consensus on the substance of the amendments proposed in 5.482(d)(2). So, we ask the Tribal Court-State Court Forum and Family and Juvenile Law Advisory Committee to allow more time for stakeholder feedback and tribal consultation before amending the Rules of Court. As the Invitation to Comment states, the proposed rule concerns complex legal issues and important interests and rights of tribes are at stake. We ask the Forum and Committee to instead reconsider creating the alternatives listed in the Invitation to Comment including educational resources and job aids as an</p>	<p>The proposal will be revised in response to this comment.</p> <p>The proposal is revised in response to this comment.</p> <p>The committees considered this request but determined that it was important to move forward with this proposal.</p>

SPR23-32

Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			important first step to address the issues raised by tribal leaders and advocates that this rule aims to address.	
3.	California Indian Legal Services Hannah Reed, Staff Attorney This should be comment #2	N/I	For the ICWA-042 Form: - Paragraph 1 should add a code reference to the box “federally recognized tribe” – e.g., “is a federally recognized tribe pursuant to the definition in 25 U.S.C. 1903(8).” - I think there should be a Paragraph 5 allowing the Tribe to attach an addendum for other information, like some other Judicial Council forms do.	The form was revised in response to this comment. The form was revised in response to this comment.
4.	Orange County Bar Association, Michael A. Gregg, President	A	While the proposed additions to the Rule of Court address the stated purpose, the presumption regarding the tribe’s interest seems to have weak statutory underpinnings and would be better addressed by the Legislature than via a change to the Rules of Court.	The committees considered whether there was sufficient statutory authority to support the proposed rules and determined that the proposed rules were consistent with legislative intent.
5.	Sacramento County Counsel’s Office Katherine Covert, Supervising Deputy County Counsel	N/I	Question: Does the proposal appropriately address the stated purpose? The proposals generally address the state purpose of providing discretionary tribal participation in dependency proceedings. However, there are some areas that could be clarified to provide the juvenile court participants clarity in its application. Rule 5.482: Proceedings after notice As to subsection (d) Intervention and tribal participation, overall: The subsections of rule 5.482 could be further broken down between intervention in subsection (d) and tribal participation in subsection (e), which would	The proposal was revised to clarify the difference between intervention as of right in situations where ICWA applies and discretionary participation when ICWA does not apply, however this was done by moving the substance

SPR23-32

Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			<p>require other subsequent subsections to be re-identified. Or subsection (d) could be divided into (d)(1) for intervention and (d)(2) for participation. Such a division would provide greater clarity to distinguish between intervention consistent with and pursuant to ICWA being applicable and participation when ICWA does not apply, but there is a tribe that would like to participate in the proceedings and the court has determined it is in the child’s best interest.</p> <p>As to (d)(2)(A): A further clarification could be made in the currently written proposed section of (d)(2)(A). The proposed language is: “(A) In cases involving an Indian child...” On page two, at footnote one, discussing the background for this proposed rule of court, the footnote states that, “The term “Indian child” is used for children who meet the definition of Indian child in ICWA. The term Native American child is used for children who are affiliated with a tribe but do not meet the definition of Indian child.” Applying this distinction to (d)(2)(A) would change the proposed wording to, “(A) In cases involving a Native American child,” since this specific subsection is for tribal participation due to ICWA not being applicable.</p> <p>As to subsections (d)(2)(A), (B), and (C): In subsections (d)(2)(A), (B), and (C), the proposed language indicates that tribal participation for non-Indian child cases is “Consistent with sections 224 and 16001.9 of the Welfare and Institutions Code....” It would</p>	<p>of the rule governing discretionary tribal participation to the new subdivision (g) of rule 5.530 rather than further subsections in rule 5.482(d) as suggested by the commenter.</p> <p>Contrary to the commenters suggestion that this subsection is not intended to apply to children who meet the definition of Indian child, this specific subsection is intended to address cases involving an Indian child but to which ICWA does not apply for instance because the proceedings are based upon an act which would be considered a crime if committed by an adult. In these situations where an Indian child is involved in a juvenile justice case to which ICWA does not apply, the unique rights of the Indian child under WIC 16001.9 still apply.</p>

SPR23-32

Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			<p>be more accurate to indicate that the “principles embodied” (or similar language) in 224 and 16001.9 are being applied to tribal participation when an Indian child is not involved. This is so because section 224 applies to an “Indian child” and an “Indian tribe,” as defined per section 224.1. Similarly, the subsections of WIC section 16001.9 cited in the proposed rule apply to “Indian tribes” and “Indian children” as defined in WIC section 224.1.</p> <p>Additionally, these subsections create a presumption that tribal participation outweighs a child’s best interests, which is not found in the law. Juvenile court law (commencing at WIC section 202) is primarily focused on the child’s best interest, therefore, having the court affirmatively and independently make a finding that it is in the child’s best interest for the tribe to participate would be consistent with California law. The court should then make findings that: 1) the tribe has an interest in participating and 2) that it is in the child’s best interest for the tribe to participate.</p> <p>As to subsection (d)(2)(D): Additional clarifications could be made in (d)(2)(D) regarding the specifics of tribal participation. The introductory sentence of (D) could be clarified by stating, “(D) Upon approval of a request, a tribe becomes a participant to the proceedings and unless the court orders otherwise, the tribe is authorized to...”</p> <p>As to (D)(iv), a clarification that upon a tribe’s request to examine court documents relating to a</p>	<p>The committees considered this comment but did not believe the revision was necessary.</p> <p>Section 16001.9 applies to all Native American children as well as to those meeting the definition of Indian child under ICWA, although the rights afforded are slightly different.</p> <p>This comment misreads the proposal. The proposal does not create a presumption that outweighs the child’s best interest. The rule specifically states that the request should be approved “...absent a finding by the court that the tribe’s participation would not assist the court in making decisions that are in the best interest of the child.” Therefore, if the court finds that tribal participation is not in the child’s best interest, the court can deny the request to participate.</p>

SPR23-32

Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			<p>proceeding, a court order would be necessary to for the tribe to examine the court documents so as not to violate WIC section 827(f), which applies only to a child who is a member of or who is eligible for membership in that tribe. As to (D)(vi), allowing the tribe to submit written reports and recommendations to the court, it would be helpful to clarify whether the tribe would be responsible for disseminating that information to all parties or whether the court would then be responsible for disseminating the written reports and/or recommendations to all parties within a specific time frame.</p> <p>Rule 5.530: Persons present As to Rule 5.530, Persons present, in the newly proposed subsection (g), it appears there is a contradiction because the proposed wording states, “When a proceeding not governed by the Indian Child Welfare Act involves an Indian child.” If an Indian child were involved, then the proceeding would be governed by the Indian Child Welfare Act. A clarification of this proposed language would be to either strike “an Indian child” or to instead use “a Native American child,” which is consistent with the definition of terms in footnote one, on page two, of the proposal.</p> <p>ICWA-042: Request for Tribal Participation The proposed new form, ICWA-042, Request for Tribal Participation, also generally meets with the proposed purpose of allowing tribes</p>	<p>The proposal has been revised in response to this comment to specify that this request is subject to Welfare and Institutions Code section 827.</p> <p>In most juvenile justice proceedings, the Indian Child Welfare Act does not apply even if the proceedings involve an Indian child.</p>

SPR23-32

Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			<p>who have an interest in a matter to participate. In section (3) of the forms, each subsection for (a), (b), and (c) state “requesting leave to participate” and then the specific reason why the tribe is requesting permission to participate. It is confusing to state “requesting leave” and would be clear to state “requesting to participate” on each section.</p>	<p>The committees considered this comment but did not agree that “requesting leave” is confusing.</p>
6.	<p>Superior Court of California, County of San Diego Mike Roddy, Executive Officer</p>	AM	<ul style="list-style-type: none"> • Does the proposal appropriately address the stated purpose? Yes. • Would the proposal provide cost savings? If so, please quantify. Probably. The proposal saves juvenile courts the time and effort that would be required to develop these forms on their own or to include all the new required findings and orders in their case management systems. • 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? In addition to those already mentioned, courts would need to inform their judicial officers and their justice partners (child welfare agency, probation department, tribal agencies, attorney offices, CASA offices, et al.) of the amended rules of court and the new form. 	<p>No response required.</p> <p>No response required.</p> <p>No response required.</p>

SPR23-32

Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			<ul style="list-style-type: none"> • Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes. • How well would this proposal work in courts of different sizes? This proposal would work fine in the San Diego Superior Court (a large court). Additional comments: <ul style="list-style-type: none"> • Consider whether rule 5.482 should address the applicability or inapplicability of the new tribal participation provisions to the proceedings listed in rule 5.480(3), (4), (5) (proceedings under the Family Code and Probate Code). • Rule 5.482(d)(2)(D)(iv) authorizes non-party tribes to “Request to examine court documents relating to the proceeding.” Should courts require non-party tribes to file petitions for access under WIC § 827 if and when they make such a request? • Consider whether rule 5.482(d) should include a provision requiring the court, upon approval of a request, to admonish the tribe about the confidentiality of the proceedings? 	<p>No response required.</p> <p>No response required.</p> <p>This concern will be addressed if the substance of the proposal is moved to rule 5.530 as discussed above which clarifies that the discretionary tribal participation is limited to juvenile proceedings and does not apply in Family Law or Probate proceedings.</p> <p>The proposal has been revised in response to this comment to confirm that requests are subject to Welfare and Institutions Code section 827.</p> <p>The proposal was revised in response to this comment.</p>

SPR23-32

Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			<ul style="list-style-type: none">• ICWA-042, item 2 – If one ICWA-042 form can be used for more than one child (“child or children”), then consider whether the blank box for “CHILD’S NAME” above the title of the form should be changed to “CHILD(REN)’S NAME(S).” Alternatively, consider instructing users to complete a separate form for each child, and change the first line to “The above named <u>child</u> or children are <u>is</u> (select one).”	The proposal was revised in response to this comment to allow use of the form for more than one child.

MEMORANDUM OF UNDERSTANDING

BETWEEN THE YUROK TRIBE, THE HUMBOLDT COUNTY SUPERIOR COURT, AND THE HUMBOLDT COUNTY DISTRICT ATTORNEY'S OFFICE TO IMPLEMENT YUROK TRIBAL DIVERSION

BACKGROUND & PURPOSE

The Yurok Tribe is a federally recognized Indian Tribe with aboriginal territory including lands now within the boundaries of Del Norte County and Humboldt County in the State of California. The Yurok Tribal Court ("Tribal Court") hears Yurok Wellness Court cases involving adult Yurok Tribal members facing criminal prosecution ("defendants") by the Humboldt County District Attorney's Office ("District Attorney") in the Humboldt County Superior Court ("Superior Court").

The Tribal Court conducts risk and needs assessments and develops responsive Wellness Plans for defendants seeking entry to the Yurok Wellness Court. Wellness Plans include Yurok cultural engagement, treatment referrals for addiction and mental health treatment, vocational and educational development, job placement, and housing assistance. The Tribal Court has the capacity to supervise defendants with home visits, alcohol and drug monitoring, and court hearings. The Tribal Court coordinates with other community and local government agencies to meet defendants' individual needs and ensure public safety.

The District Attorney possesses the authority to postpone certain misdemeanor and felony prosecutions and to dismiss criminal charges pursuant to stipulated agreements with defendants ("informal diversion"). The Superior Court is authorized to grant misdemeanor diversion to defendants pursuant to California Penal Code Section 1001.95. Diversions pursuant to District Attorney agreements and Superior Court orders may include participation in available community programs, including the Yurok Wellness Court.

Representatives from the Tribal Court, the Superior Court, and the District Attorney's office convened to develop procedures for diversion of criminal cases to the Yurok Wellness Court ("Tribal Diversion"). The following memorandum of understanding ("Agreement") to implement Yurok Tribal Diversion is intended to increase Yurok Tribal members' access to culturally appropriate interventions, reduce recidivism for defendants, reduce hearings and filing in Superior Court, and increase responsibility and accountability in our shared community.

AGREEMENT

The Tribal Court, the Superior Court and the District Attorney AGREE to the following:

(a) Upon accusation of a misdemeanor or felony offense, a defendant may be eligible for pretrial Tribal Diversion pursuant to this Agreement if the defendant meets all criteria specified in subsections (b) and (c).

(b) (1) The Tribal Court, having entered into this Agreement with the District Attorney and Superior Court to implement Tribal Diversion, has determined the defendant is eligible for services offered by the Tribal Court and likely to benefit from those services. The Tribal Court may choose not to accept a defendant into Tribal Diversion for any reason.

(2) The defendant consents to diversion and waives the right to a speedy trial and speedy preliminary hearing.

(3) The defendant agrees to comply with the terms and conditions of a Wellness Plan developed by the Tribal Court as a condition of diversion.

(c) A defendant may enter into a Tribal Diversion agreement for felony or misdemeanor charged offenses, subject to the following:

(1) A defendant is not eligible for Tribal Diversion pursuant to this agreement for the following charged offenses:

(A) A violent felony, as defined in California Penal Code section 667.5(c);

(B) A serious felony, as defined in California Penal Code section 1192.7(c);

(C) Involuntary manslaughter;

(D) Vehicular manslaughter;

(E) A violation of California Penal Code section 236.1;

(F) A violation of California Penal Code section 266e;

(G) A violation of California Penal Code sections 266h or 266i;

(H) A violation of California Penal Code section 267;

(I) A violation of California Penal Code sections 288.2, 288.3, or 288.4;

(J) A violation of law involving pornography as defined in California Penal Code sections 311.1 et seq;

(K) An offense for which a person, if convicted, would be required to register pursuant to California Penal Code Section 290;

(L) A felony violation of child abuse, as defined in California Penal Code sections 273a–d;

(M) A felony violation of California Penal Code section 273.5(a); and

(N) A violation of Vehicle Code sections 23152 or 23153.

(2) A defendant is not eligible for Tribal Diversion pursuant to this agreement for the following charged offenses if the District Attorney objects in writing to defense counsel within 30 days of receiving the defendant’s Wellness Plan in the District Attorney’s main email at districtattorney@co.humboldt.ca.us:

(A) Any felony offense not listed in subsection (c)(1) of this agreement;

(B) A misdemeanor violation of California Penal Code section 273.5;

(C) A violation of California Penal Code section 243(e)(1); and

(D) A violation of California Penal Code section 646.9.

(3) If no objection is made by the District Attorney, Tribal Diversion for misdemeanor or felony offenses shall be initiated by filing an Informal Agreement to Dismiss Criminal Charges Upon Tribal Wellness Plan Completion (“Stipulated Agreement”) in the Superior Court.

(4) A defendant may be eligible for misdemeanor Tribal Diversion pursuant to California Penal Code Section 1001.95, over objection, or in the absence of a response from the District Attorney within 30 days of receipt of the defendant’s Tribal Wellness Plan, as follows:

(A) Upon receipt of an objection in writing to defense counsel, or in the absence of a response from the District Attorney within 30 days of receiving the defendant’s Tribal Wellness Plan, defense counsel may file a Petition for Misdemeanor Tribal Diversion, a Proposed Order, and a request for hearing in the Superior Court.

(B) Upon receipt of a Petition for Misdemeanor Tribal Diversion, the Superior Court shall hold a hearing to determine whether Tribal Diversion is appropriate pursuant to California Penal Code Section 1001.95 based on the defendant’s specific situation and issue an Order granting or denying entry to Tribal Diversion.

(5) Any Stipulated Agreement to enter Tribal Diversion or Order granting misdemeanor Tribal Diversion shall include or incorporate:

(A) The alleged violation(s) of law being diverted (“the charges”);

(B) The Tribal Wellness Plan;

(C) The period of time allocated for diversion or postponement of criminal charges (“the diversion period”) and a final review date;

(D) Notice to the defendant:

(i) That modifications of the Wellness Plan may be made by the Tribal Court as set forth in subsection (d)(4);

(ii) Of possible consequences of termination as set forth in section (e);

(iii) Of the duty to inform the Tribal Court and defense counsel of all changes to their contact information during the diversion period as set forth in subsection (d)(5);

(E) Notice to the District Attorney and defense counsel of service obligations set forth in subsection (d)(6); and

(F) Signatures of the Tribal Court, the defendant, defense counsel, and if a Stipulated Agreement, the District Attorney.

(d) As used in this Agreement, "pretrial diversion" means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process, from the point at which a person is charged until adjudication, to allow the defendant to participate in a Wellness Plan, subject to the following:

(1) The initial period of diversion or postponement shall be no longer than two years. This period may be extended beyond two years, pursuant to a subsequent agreement by all parties, to meet the treatment needs of the defendant.

(2) Upon request, the Superior Court shall conduct a hearing to determine whether restitution, as defined in California Penal Code Section 1202.4(f), is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of diversion. However, a defendant's inability to pay restitution due to indigence or mental disorder shall not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion.

(3) The Tribal Court shall provide regular monthly reports to defense counsel and the District Attorney on the defendant's progress in the Wellness Plan.

(4) At any time during the period of diversion or postponement, the Tribal Court may impose sanctions for violations of the Wellness Plan. Sanctions may include, but are not limited to, modifications of the Wellness Plan and termination from the Tribal Court.

(5) The defendant shall inform the Tribal Court and defense counsel of all changes in residence during the period of diversion or postponement.

(6) The Tribal Court shall receive service as follows:

(A) In cases diverted pursuant to a Stipulated Agreement:

(i) The District Attorney shall serve all District Attorney filings on the Tribal Court via email to wellness@yuroktribe.nsn.us and shall file proof of service in the Superior Court; and

(ii) Defense counsel shall serve all defense filings and Superior Court Orders, including Minute Orders, on the Tribal via email to wellness@yuroktribe.nsn.us and shall file proof of service in the Superior Court.

(B) In cases diverted pursuant to California Penal Code Section 1001.95, defense counsel shall serve all filings and Superior Court Orders, including Minute Orders, on the Tribal Court via email to wellness@yuroktribe.nsn.us and shall file proof of service in the Superior Court.

(e) The District Attorney may file a Motion to Modify or Terminate the diversion, and may request a hearing and reinstatement of criminal proceedings, in the following circumstances:

(1) In cases diverted pursuant to Stipulated Agreement, when the defendant is charged with any criminal offense during the postponement period not known to the District Attorney prior to the Stipulated Agreement.

(2) In cases diverted pursuant to California Penal Code Section 1001.95, if:

(A) The defendant is charged with an additional misdemeanor, allegedly committed during the pretrial diversion, that reflects the defendant's propensity for violence or a concern for public safety.

(B) The defendant is charged with an additional felony allegedly committed during the pretrial diversion.

(3) Upon notice that a defendant has been terminated from the Tribal Court.

(f) At the end of the diversion or postponement period, or upon notice from the Tribal Court that a defendant has successfully completed the Wellness Plan, a hearing shall be held in the Superior Court, during which:

(1) In cases diverted pursuant to Stipulated Agreement, the District Attorney shall submit an Order of Dismissal and the Superior Court shall dismiss all charges diverted; or

(2) In cases diverted pursuant to California Penal Code Section 1001.95, the Superior Court shall dismiss all charges diverted.

(g) No statement, or information procured therefrom, made by the defendant in connection with the determination of their eligibility for diversion, and no statement, or information procured therefrom, made by the defendant, subsequent to the granting of diversion or while participating in such program, and no information contained in any report made with respect thereto, and no statement or other information concerning the defendant's participation in such program shall be admissible in any action or proceeding. However, if a defendant is recommended for termination

for cause, information regarding their participation in such program may be used for purposes of the termination proceedings.

(h) The Tribal Court and the defendant's treatment providers, shall, to the extent not prohibited by federal law, have access to the defendant's records, including progress reports, during the defendant's time in diversion, as needed, for the purpose of monitoring the defendant's progress in, and compliance with, the Wellness Plan.

INFORMATION SHARING

The Tribal Court will obtain written releases of information to gather information regarding defendants and to facilitate reporting to the District Attorney and defense counsel. All parties shall maintain strict confidentiality over physical and electronic case files and defendant information, subject to releases of information, and applicable federal, Tribal, and state laws.

CONTACT INFORMATION

Yurok Tribal Court

Contact: Amber Miller, Yurok Tribal Court, Staff Attorney

Email: amiller@yuroktribe.nsn.us or wellness@yuroktribe.nsn.us

Physical Address: 230 Klamath Boulevard, Klamath, California 95548

Mailing Address: PO Box 1027, Klamath, California 95548

Telephone: (707) 482-1350

Humboldt County Superior Court

Contact: Honorable Gregory J. Kreis, Presiding Judge

Email: gjkreis@humboldtcourt.ca.gov

Contact: Meara Hattan, Humboldt County Superior Court Executive Officer

Email: mearah@humboldtcourt.ca.gov

Address: 825 Fifth Street, Eureka, California 95501

Telephone: (707) 445-7256

Humboldt County District Attorney's Office

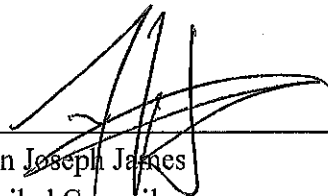
Contact: Stacey Eads, Humboldt County District Attorney

Address: 825 Fifth Street, 4th Floor, Eureka, California 95501

Email: districtattorney@co.humboldt.ca.us

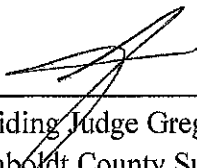
Telephone: (707) 445-7411

SIGNATURES




Chairman Joseph James
Yurok Tribal Council

5/24/25
Date



Presiding Judge Gregory J. Kreis
Humboldt County Superior Court

5/24/23
Date



District Attorney Stacey Eads
Humboldt County District Attorney's Office

5/24/2023
Date