

OREGON INDIAN CHILD WELFARE ACT (ORICWA)

Oregon Laws 2020 ch. 14



2021 JUDICIAL BENCHBOOK



SUPPORTED BY CASEY FAMILY PROGRAMS & OREGON JUDICIAL DEPARTMENT JUVENILE COURT IMPROVEMENT PROGRAM



FOREWARD

How this Benchbook was Created

In the first special session of 2020, the Oregon Legislative Assembly unanimously passed the Oregon Indian Child Welfare Act (ORICWA). Shortly thereafter, with the support of the Oregon Judicial Department Juvenile Court Improvement Program and Casey Family Programs, a workgroup convened to draft a guide to the new law.

The workgroup, coordinated by consultant Addie Smith met over six times to determine the best way to present the new law and to ensure the accuracy of the text. Members spent countless hours reviewing drafts, discussing issues of interpretation, and improving the readability of this benchbook. A special thanks to Tiffany Keast, Inge Wells, and Megan Hassen for their intensive edits and revisions, as well as Alison Roblin for her copyediting.

We hope you find this benchbook both approachable and informative in your work with Indian children and their families.



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Chapter 1: Context

Congress passed the Indian Child Welfare Act (ICWA) in 1978 in response to “an alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and...an alarmingly high percentage of such children [being] placed in non-Indian foster and adoptive homes and institutions[.]” 25 USC §1901(4). Congress found that Indian children who grow up in non-Indian homes lose touch with their cultural and spiritual roots. ICWA aims to address these concerns and to ensure that Indian children are only removed from their parents after significant efforts have been made to maintain them in their family and, if removal becomes necessary, to ensure that Indian children are placed in homes that keep them connected to their family, tribe, and culture. In 2016, for the first time since ICWA’s passage, the Department of Interior, Bureau of Indian Affairs, promulgated binding federal regulations and released updated guidelines meant to complement ICWA.

In spite of the federal law and new guidance, Oregon Department of Human Services (ODHS) data has continued to show a disproportionate placement of American Indian and Alaska Native (AI/AN) children in foster care.¹ To address this issue and at the request of Oregon tribes, in 2018, the ODHS Tribal Affairs Unit formed an ICWA compliance committee. That committee was broken into three subcommittees: 1) staff training; 2) case evaluation and review; and 3) state ICWA legislation. In preparation for the 2020 legislative session, ODHS, in partnership with the Legislative Assembly, transitioned the state ICWA legislation work group to a work group hosted by the interim House Committee on the Judiciary. The work group brought together key state agencies, tribal partners, and other relevant stakeholders, including national experts, in a series of meetings. At those meetings, the work group:

- reviewed federal laws, regulations and guidelines related to Indian child welfare as well as corresponding Oregon laws, rules, and policies;
- assessed laws passed by sister states to promote ICWA compliance;
- tracked relevant litigation and case law;
- discussed key data and relevant best practices; and
- drafted a legislative concept (known as “ORICWA”).

After reviewing the product of this workgroup, the Oregon State Legislature passed ORICWA during the first special session in 2020. Its policy is to:

- “protect the health and safety of Indian children and the stability and security of Indian tribes and families by promoting practices designed to prevent the removal of Indian children from their families and, if removal is necessary and lawful, to prioritize the placement of an Indian child with the Indian child’s extended family and tribal community;”
- “recognize the inherent jurisdiction of Indian tribes to make decisions regarding the custody of Indian children;” and

¹ In Oregon in 2019, American Indian and Alaska Native (AI/AN) children were over-represented in the Oregon foster care system: although AI/AN children make up 1.6 percent of the child population, they are 4.5 percent of the children in foster care in Oregon. ODHS, 2019 Child Welfare Data Book available here: <https://www.oregon.gov/dhs/CHILDREN/CHILD-ABUSE/Documents/2019%20Child%20Welfare%20Data%20Book.pdf>.

- “recognize the importance of ensuring that Indian children and Indian families receive appropriate services to obviate the need to remove an Indian child from the Indian child’s home and, if removal is necessary and lawful, to effect the child’s safe return home.”

ORICWA Oregon Laws 2020. ch. 14 § 1.

To fulfill those goals, ORICWA “create[s] additional safeguards for Indian children to address disproportionate rates of removal, to improve the treatment of and services provided to Indian children and Indian families in the child welfare system and to ensure that Indian children who must be removed are placed with Indian families, communities and cultures.” ORICWA Oregon Laws 2020. ch. 14 § 1.

This Benchbook provides assistance to Oregon judges applying the new [Oregon Indian Child Welfare Act \(ORICWA\), Oregon Laws 2020, ch. 14](#), the federal [Indian Child Welfare Act of 1978 \(ICWA or “Act”\), 25 USC § 1901 - 1963](#), the binding [federal ICWA regulations, Indian Child Welfare Act, 25 CFR pt. 23 \(June 14, 2016\)](#), and the nonbinding but often helpful guidance provided by the US Department of the Interior, Bureau of Indian Affairs (BIA) in its [Guidelines for State Courts and Agencies In Indian Child Custody Proceedings \(December 12, 2016\)](#). This Benchbook has 5 Chapters. This chapter, the introduction, provides background and sets the stage for the Benchbook. Chapter 2 covers foundational concepts of ORICWA/ICWA including: the definition of an Indian Child, who qualifies as a parent or Indian custodian, which tribe is the child’s tribe and thus a party to ORICWA proceedings, and the definition of the best interest of the Indian child. Chapter 3 describes the common ORICWA/ICWA hearing requirements, including inquiry, notice, active efforts, qualified expert witnesses, and placement preferences. Chapter 4 provides detailed information to help the judge determine whether the state or tribal court has jurisdiction over the matter. Finally, Chapter 5 describes in detail which hearing elements from Chapter 3 apply at each of the common ORS Chapter 419B hearings. For ease of reference, this chapter has hyperlinks throughout that take the reader back to the corresponding foundational concepts and hearing elements described chapters 2 and 3.

A Note about Legal Authorities

ICWA is the federal law that governs child welfare proceedings involving Indian children in state courts across the country. Pursuant to 25 USC § 1921, states may provide more protection to Indian families, and that is what ORICWA sets out to do. Specifically, ORICWA enhances and clarifies the federal law, by embedding it into state law and providing additional guidance to Oregon courts making decisions about Indian children and their families. As with all state laws, it is binding in state courts and governs how Oregon courts and ODHS handle child welfare cases involving Indian children. In addition, the federal government promulgated new binding federal regulations governing state court implementation of ICWA and corresponding non-binding guidance in the 2016 Guidelines.

This guide focuses on ORICWA because, regardless of other authorities, ORICWA is state law passed by Oregon’s legislature for the protection of Oregon’s Indian children. When in question, both ICWA and its regulations state that in any case where state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian, the Court shall apply the higher standard. 25 USC § 1921. Both federal authorities are also clear that the federal standards are the minimum standards for Indian families and that where a state authority provides higher standards, as ORICWA does, that state authority governs. *Id.* Finally, although the BIA’s 2016 Guidelines do not have the authority of state law, the Guidelines may be used to clarify questions not answered by ORICWA, ICWA, or the regulations.

There is an addendum to this Benchbook, which includes a topical list of Oregon’s case law interpreting ICWA. Because those cases were decided before the passage of ORICWA, their application to cases currently before the Court will require careful analysis.

A Note about Terms

This Benchbook use the term “Indian” repeatedly instead of “Native American” or “American Indian/Alaska Native.” That is because ORICWA and ICWA use the term “Indian,” starting with the state and federal acts’ official titles. For example, in order for the Act and state law to apply, the Court must find that there is reason to know that the child is an “Indian child,” the term “Indian tribe” has specific legal meaning, and ORICWA and ICWA extend specific rights to “Indian custodians” which is a legal term of art. For consistency, this guide uses the Acts’ terminology; Oregon state courts should do the same.

Additionally, throughout this Benchbook, actions are required of ODHS specifically, even though the phrasing of ORICWA/ICWA may be more broad (e.g., “the petitioner,” “the individual seeking removal,” “the individual seeking protective custody”). Because in the vast majority of ORS Chapter 419B cases the individual that fulfills those roles is ODHS, “ODHS” has been used for simplicity. If, however, another actor takes any of the specified actions, the subsequent actions required of ODHS would be the responsibility of that individual.

Chapter 2: ORICWA Basics

Information included in this chapter is foundational to ORICWA's requirements and relevant to any ORS Chapter 419B proceedings that involve an Indian child. When particular topics defined below are relevant, this Benchbook will hyperlink the reader back to the relevant portion of this chapter for reference.

“Reason to Know” a Child is an “Indian Child”

When the Court has reason to know the child in the case is an Indian child, it must proceed as if ORICWA applies.

Definition of Indian child

An “Indian child” is any unmarried person under the age of 18 who is either:

- A member or citizen of an Indian tribe; **or**
- Eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.

ORICWA Oregon Laws 2020. ch. 14 § 2(4).

Only a tribe can determine whether a child is its member or eligible for membership. ORICWA Oregon Laws 2020. ch. 14 § 2(8).

An “Indian tribe” is any tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided by the Department of the Interior, including Alaska Native Villages. A complete list of recognized tribes is published in the Federal Register each year and is available here: <https://www.federalregister.gov/documents/2020/01/30/2020-01707/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of>. ORICWA Oregon Laws 2020. ch. 14 § 2(6).

When a Court has “reason to know” that a child is an “Indian child”

- Any individual present in the proceeding informs the Court that
 - the child is an Indian child; or
 - information has been discovered indicating that the child is an Indian child;
- The child indicates to the Court that the child is an Indian child;
- The Court is informed that the domicile or residence of the child, the child’s parent or the child’s Indian custodian is on a reservation or in an Alaska Native village;
- The Court is informed that the child is or has been a ward of a tribal court;
- The Court is informed that the child or the child’s parent possesses an identification card or other record indicating membership in an Indian tribe;
- Testimony or documents presented to the Court indicate in any way that the child may be an Indian child; or
- Any other indicia provided to the Court, or within the Court’s knowledge, indicate that the child is an Indian child.

ORICWA Oregon Laws 2020. ch. 14 § 15(4).

Practice tip: “Reason to know” is meant to be a low bar, and the Court should order ODHS to follow up on any information indicating that the child or the family of the child has tribal heritage.

Application of ORICWA

ORICWA applies to proceedings throughout ORS Chapter 419B when the child meets ORICWA's definition of "Indian child".

If the Court has "reason to know" the child is an Indian child but does not have sufficient evidence to determine whether the child actually meets the definition of "Indian child," the Court must:

- Treat the child as an Indian child and apply ORICWA's provisions to the matter; and
- Order ODHS to submit a report, declaration, or testimony on the record demonstrating that it used "due diligence" to identify and work with all of the tribes identified by the sources detailed above to verify whether the child is an "Indian child" as defined by ORICWA.

If the Court has "reason to know" the child is an Indian child and there is sufficient evidence to show that the child is an Indian child:

- the Court must enter a finding that the child is an "Indian child" and apply ORICWA/ICWA to the case until evidence is presented that indicates the child no longer qualifies as an Indian child under ICWA/ORICWA.

If there was reason to know that the child is an Indian child, but ODHS presents evidence that it has 1) exercised due diligence to contact all possible affiliated tribes; and 2) the child is not an Indian child:

- the Court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
- the Court should instruct each party to inform the Court immediately if the party later receives information that provides reason to know the child is an Indian child.

If there has never been and continues to be no reason to know that a child is an Indian child:

- the Court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
- the Court must instruct each party to inform the Court immediately if the party later receives information that provides reason to know the child is an Indian child.

ORICWA Oregon Laws 2020. ch. 14 § 15 (3)(b) & (5)(a).

Practice Tip: Due Diligence to Determine Whether a Child is an Indian Child

“Due diligence” on the part of ODHS in investigating whether the child is an Indian child is not defined by ORICWA or ICWA, but the Court, in making a determination as to whether ODHS used “due diligence,” may wish to consider whether ODHS took the following actions:

- ◆ Asking the family about their tribal heritage.
- ◆ Asking the family about the child’s birthplace, the child’s residence/domicile, and whether the child has ever been involved in Tribal Court.
- ◆ If any family member is an enrolled tribal member, gathering their enrollment number, ID or any other verification of membership that they may have.
- ◆ Collecting information on family heritage, including:
 - maiden, married, former, or alias names of all identified individuals; and
 - date of birth **and** place of birth.
- ◆ Working with all known extended family to gather as much family history as possible.
- ◆ Working with the family and extended family to completely fill out the ODHS Verification of American Indian/Alaska Native Heritage Form (CF 1270);
 - Completing that form for all possible parents.
- ◆ Completing an absent parent search, if necessary.
- ◆ Sending information gathered to all relevant tribes if affiliation is unclear (for example, if the child identifies as Paiute, inquiry must be sent to the Big Pine Paiute Tribe of the Owens Valley, Bishop Paiute, and Burns Paiute).
- ◆ If the family identifies a tribe not included in the federal register, contacting the ODHS Tribal Affairs unit and/or BIA regional office for assistance (for example, the family may identify as Cayuse, and, although Cayuse is not an affiliation that will show up in a search of federally recognized tribes, the Confederated Tribes of the Umatilla Reservation (which is federally recognized) is comprised of the Cayuse, Umatilla and Walla Walla people).
- ◆ Ensuring that the tribe received the ODHS Verification of American Indian/Alaska Native Heritage form.
- ◆ Promptly responding to a tribe’s request for more information or specific information.
- ◆ Following up with those involved, including the tribe or potential tribe, if there is no initial response to inquiries about whether the child is an Indian child.

The Indian Child’s Tribe

The “Indian child’s tribe” has automatic party status under ORICWA. ORICWA contains provisions to determine which tribe is the “Indian child’s tribe” when there are multiple tribes of which the child is or may be a member. The Court also has discretion to make additional tribes parties to the case or to allow additional tribes to participate in the case in an advisory capacity.

Party Status

The “Indian child’s tribe” has automatic party status under ORICWA, but a tribe may withdraw as a party at any time by notifying the Court orally or in writing. ORICWA Oregon Laws 2020. ch. 14 § 28(1)(a)(H) (ORS 419B.875(1)(a)(H)); ORICWA Oregon Laws 2020. ch. 14 § 19(3).

Which tribe is the “Indian child’s tribe”?

- If the Indian child is a member of or is eligible for membership in only one tribe, that tribe is the Indian child’s tribe for purposes of party status.
- If the Indian child is a member of one tribe but eligible for membership in other tribes, the tribe of which the Indian child is a member is the Indian child’s tribe for purposes of party status.
 - If the Indian child is a member of more than one tribe, or if the Indian child is not a member of any tribe but is eligible for membership in more than one tribe, the “Indian child’s tribe” is the tribe designated by agreement between the tribes; **or**, if the tribes are unable to agree on the designation, the tribe designated by the Court.

ORICWA Oregon Laws 2020. ch. 14 § 8(1).

Court Designation of the Indian child’s Tribe

When the child is eligible for membership in more than one tribe and it is necessary for the Court to designate the tribe (see above), the Court must hold a hearing to determine with which tribe the Indian child has the more significant contacts.

In making this determination, the Court must consider:

- The preference of the Indian child’s parent;
- The duration of the Indian child’s current or prior domicile or residence on or near the reservation of each tribe;
- The tribal membership of the Indian child’s custodial parent or Indian custodian;
- The interests asserted by each tribe;
- Whether a tribe has previously adjudicated a case involving the Indian child; and
- If the Court determines that the Indian child is of sufficient age and capacity to meaningfully self-identify, the self-identification of the Indian child.

ORICWA Oregon Laws 2020. ch. 14 § 8(2).

After determining which tribe is the “Indian child’s tribe,” the Court may, in its discretion, permit additional tribes to participate in the matter, either as parties or as non-parties in an “advisory capacity.” ORICWA Oregon Laws 2020. ch. 14 § 8(3).

Practice Tip: “Advisory Capacity” is not defined by ORICWA, and what tribal participation in an “advisory capacity” will consist of is at the discretion of the Court.

Best Interest of the Indian Child

In any case where ORICWA applies, when the Court must make a determination of the best interest of the child, the Court must apply the “best interest of the Indian child” standard as defined in ORICWA.

When making a best interest of the Indian child determination in a proceeding under ORS Chapter 419B, the Court must, in consultation with the Indian child’s tribe, consider the following:

- The protection of the safety, well-being, development, and stability of the Indian child;
- The prevention of unnecessary out-of-home placement of the Indian child;

- The prioritization of placement of the Indian child in accordance with the placement preferences of ORICWA;
- The value to the Indian child of establishing, developing, or maintaining a political, cultural, social, and spiritual relationship with the Indian child's tribe and tribal community; and
- The importance to the Indian child of their tribe's ability to maintain its existence and integrity in promoting the stability and security of Indian children and families.

ORICWA Oregon Laws 2020. ch. 14 § 5.

When, under ORS Chapter 419B, are best interest of the Indian child determinations required?

- ◆ When considering who may intervene in a proceeding. ORS 419B.116.
- ◆ When issuing a protective custody order. ORS 419B.150.
- ◆ At a shelter hearing, when authorizing removal of the child from the home. ORS 419B.185.
- ◆ When committing a child to the custody of ODHS and/or reviewing the placement of a child. ORS 419B.337 & ORS 419B.349.
- ◆ When placing a child in a guardianship or modifying or vacating a guardianship. ORS 419B.365, ORS 419B.366, & ORS 419B.368.
- ◆ At review hearings. ORS 419B.449.
- ◆ At permanency hearings. ORS 419B.476.
- ◆ When reinstating parental rights. ORS 419B.532.
- ◆ When emancipating a minor. ORS 419B.558.
- ◆ For the court to allow a consolidated matter. ORS 419B.806.
- ◆ When issuing a child abuse restraining order. ORS 419B.845.
- ◆ When making a determination about grandparent visitation. ORS 419B.876.

Note: Under ORICWA and ORS 419B.500 the Best interest of the Indian Child is **not** a required finding for a termination of parental rights. Oregon Laws 2020. ch. 14 § 48.

The Best Interest of the Indian Child *may not* be taken into consideration when making a determination of "good cause" to deny transfer to Tribal Court. ORICWA Oregon Laws 2020. ch. 14 § 13(3)(d)(F).

Who Qualifies as a Parent

*A parent does not need to be an Indian or a member of an Indian tribe in order for ORICWA to apply. ORICWA applies to **all** cases involving an Indian child regardless of whether the child's parent (or parents) is a member or citizen of, or is eligible for membership in, an Indian tribe.*

Definition of Parent

- ORICWA defines parent as any of the following:
 - A biological parent of an Indian child.
 - An Indian who has lawfully adopted an Indian child (including tribal adoptions).
 - A father whose parentage has been acknowledged or established.

ORICWA Oregon Laws 2020. ch. 14 § 2(9).

How can a father acknowledge or establish parentage?

- A father can acknowledge or establish parentage in any of the following ways:
 - Under ORS 109.065.
 - Under tribal law.

- In accordance with tribal customs.
- If “openly proclaimed” by the man to the Court, to the Indian child’s family, to ODHS, or to an Oregon licensed adoption agency.

ORICWA Oregon Laws 2020. ch. 14 § 4.

Custody

Where “custody” or “continued custody” is used in ORICWA and ICWA, definitions unique to those statutes apply.

Custody

An individual has custody of an Indian child under ORICWA if the individual has physical custody or legal custody of the Indian child under state law, tribal law, or tribal custom. ORICWA Oregon Laws 2020. ch. 14 § 3(1).

Continued Custody

An Indian child’s [parent](#) has continued custody if the parent currently has or previously had custody (as defined above) of the child. ORICWA Oregon Laws 2020. ch. 14 § 3(2).

The following individuals are presumed to have continued custody of a child:

- The Indian child’s biological mother.
- A man who is married to the Indian child’s biological mother.
- A man whose parentage has been acknowledged or established (as discussed above).

ORICWA Oregon Laws 2020. ch. 14 § 3(3).

Indian Custodian

Under ORICWA and ICWA, Indian custodians, as defined below, are guaranteed many of the same protections as those individuals who qualify as parents. This definition is intended to account for cultural custodianship.

An “Indian Custodian” is an Indian or a member of a federally recognized tribe who is not the child’s parent, but who has “custody” (as defined above) of the Indian child or to whom temporary physical care, custody, and control of the child has been transferred by the Indian child’s parents. ORICWA Oregon Laws 2020. ch. 14 § 2(5).

Practice Tip: Rights of Indian Custodians

Indian Custodians are guaranteed many of the same protections under ORICWA as parents. When a case involves an Indian Custodian, the Court must pay close attention to ensure their rights are protected throughout the proceeding.

Representation

Under ORICWA, all children, and any parent who meets the Public Defense Services Commission (PDSC) guidelines, are entitled to a Court-appointed attorney. Tribes may be represented by anyone, regardless of whether they are licensed attorneys. Parents and tribes may be represented by an attorney who is not a member of the Oregon State Bar without that attorney associating with

local counsel if the attorney meets the specific standards set by the Oregon State Bar for the purposes of ICWA representation.

Parents and Indian Custodians

If there is reason to know the child is an Indian child, and the parent or Indian custodian is determined to be financially eligible under the policies, procedures, standards, and guidelines of the PDSC, and the parent or Indian custodian requests counsel, the Court shall appoint suitable counsel to represent the parent or Indian custodian. ORICWA Oregon Laws 2020. ch. 14 § 20(1)(b); UTCR 3.170(9). An attorney who is not a member of the Oregon State Bar may appear in any proceeding involving an Indian child on behalf of a parent without associating with local counsel if the attorney establishes, to the satisfaction of the Oregon State Bar, as described below, that they represent the parent and that the child's tribe has affirmed the Indian child's membership or eligibility for membership. ORICWA Oregon Laws 2020. ch. 14 §§ 19(2) & UTCR 3.170(9).

Children

If there is reason to know the child is an Indian child, the Court shall appoint counsel to represent the child, unless already represented. ORICWA Oregon Laws 2020. ch. 14 § 20(1)(a).

Tribes

A tribe that is a party to a proceeding may be represented by any individual regardless of whether that individual is licensed to practice law. ORICWA Oregon Laws 2020. ch. 14 § 19(1). An attorney who is not a member of the Oregon State Bar may appear in any proceeding involving an Indian child on behalf of the child's tribe without associating with local counsel if the attorney establishes to the satisfaction of the Oregon State Bar, as described below, that they represent the tribe and that the tribe has affirmed the child's membership or eligibility for membership. ORICWA Oregon Laws 2020. ch. 14 § 19(2); UTCR 3.170(9).

Practice Tip: Pro Hac Vice Details

An attorney who is not a member of the Oregon State Bar applying for *pro hac vice* admission on a case is not required to associate with local counsel or pay the *pro hac vice* fee if the applicant establishes to the satisfaction of the Bar that:

- ◆ The applicant seeks to appear in an Oregon Court for the limited purpose of participating in a child custody proceeding where ICWA applies;
- ◆ The applicant represents an Indian tribe, parent, or Indian custodian; and
- ◆ If the applicant represents an Indian tribe,
 - the Indian child's tribe has executed an affidavit asserting the tribe's intent to intervene and participate in the state Court proceeding and affirming the child's membership or eligibility of membership; or
- ◆ If the applicant represents a parent or Indian custodian,
 - the tribe has affirmed the child's membership or eligibility for membership.

OSB Instructions for Out-of-State attorneys in ICWA proceedings are available here:

<https://www.osbar.org/prohacvice>

Right to Examine Documents

All parties have a right to examine documents not excepted by state or federal law.

In any ORS Chapter 419B proceeding where ORICWA applies, each party has the right to timely examine all documents held by ODHS that are not otherwise subject to discovery exceptions under

ORS 419B.881 or protected from disclosure by other state or federal law. ORICWA Oregon Laws
2020. ch. 14 § 21.

Chapter 3: ORICWA Hearing Elements

Certain elements are crucial to the application of ORICWA/ICWA at various specified proceedings throughout a dependency or TPR case. These include inquiry, notice, active efforts, qualified expert witnesses, and placement preferences.² This section provides detailed descriptions of those elements. When these elements are required at a specific proceeding, Chapter 5: Hearing Requirements will hyperlink the reader back here for reference.

Inquiry

In order to determine whether ORICWA/ICWA applies, the Court must inquire whether parties in all cases under 419B have reason to know the child is an Indian child and assess whether ODHS has made a good faith effort to determine whether there is any reason to know a child is an Indian child.

Emergency Inquiry

Before ODHS takes the child into protective custody, it is required to make a good faith effort to determine whether there is reason to know that a child is an Indian child and contact by telephone, electronic mail, facsimile or other means of immediate communication any tribe of which the child is or may be a member to determine the child's affiliation.

Note: This emergency inquiry is a separate requirement from ODHS' requirements to conduct a full, formal inquiry and to provide formal notice to all parties entitled to notice.

ORICWA Oregon Laws 2020. ch. 14 § 15(1).

When is inquiry by the Court required under ORICWA?

- ◆ When a Protective Custody Order is issued (Emergency Inquiry)
- ◆ Shelter Hearing (Emergency Inquiry)
- ◆ Jurisdiction Trial
- ◆ Disposition Hearing
- ◆ Review Hearing
- ◆ Permanency Hearing
- ◆ Guardianship Hearing
- ◆ Termination of Parental Rights Trial
- ◆ Adoption Hearing

Inquiry

At the commencement of the hearings designated below, the Court must:

- ask the parties, on the record, whether they have reason to know the child is an Indian child, and;
- assess whether ODHS has made a good faith effort to inquire into whether there is reason to know the child is an Indian child, by, at the least, consulting with:
 - The child;
 - The child's parent or parents;

² An additional crucial element to ORICWA/ICWA is the heightened burden of proof at each hearing in a dependency or termination of parental rights case. These are specified and described in detail for each hearing in Chapter 5.

- Any person having custody of the child or with whom the child resides;
- Extended family members of the child;
- Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
- Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORICWA Oregon Laws 2020. ch. 14 § 15(2).

*If there is “reason to know” the child is an Indian child, the Court must apply ORICWA/ICWA to the case unless and until it makes a determination that the child is **not** an Indian child.*

Practice Tip: Common mistakes the department makes with respect to inquiry and notice

- ◆ Failing to ask about tribal heritage, follow up with notice and inquiry, or file notice and inquiry documents with the court.
- ◆ Not sending inquiry and notice to the Designated Tribal Agent for Service of ICWA Notice at the tribe.
- ◆ Not sending inquiry and notice to all potential tribes (for example, if a child identifies as “Cherokee,” notice must be sent to Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians).
- ◆ Misunderstanding a parent or child or misspelling a tribe's name, and then making an improper determination that it is not a federally recognized tribe or sending notice to the wrong tribe.
- ◆ Not sending enough information in the inquiry and notice documents to a tribe for it to make a determination of the child's eligibility for membership.
 - Not collecting additional information after a tribe has responded that they require more information to make a determination of the child's eligibility for membership.
 - Not working closely with extended relatives and trusted adults in the child's life to gather this information.

Notice

When there is reason to know a child is an Indian child, before any designated hearings (defined below/as set forth in chapter 5), ODHS must send notice of the proceeding to any tribe the child may be a member of or eligible for membership in, the child's parent(s), and, if applicable, the child's Indian Custodian (if ODHS cannot determine the identity or location of any of those parties, it must send the notice to a Bureau of Indian Affairs regional office). ORICWA provides very specific requirements for what each notice must contain.

Emergency Notification (Protective Custody Order and Shelter Hearing)

If there is reason to know that a child is an Indian child and the nature of the emergency allows, ODHS must provide emergency notification of the child's removal to any tribe of which the child is or may be a member or eligible for membership. Notification must be by telephone, electronic mail, facsimile or other means of immediate communication, and must include the basis for the child's removal; the time, date, and place of the initial hearing; and a statement that the tribe, as a party to the proceeding under ORS 419B.875, has the right to participate in the proceeding.

Note: This requirement does not absolve ODHS from fulfilling the full formal inquiry and notice requirements described below. ORICWA Oregon Laws 2020. ch. 14 § 16(1).

When is Notice required under ORICWA?

- ◆ When a Protective Custody Order is issued (Emergency Notification)
- ◆ Shelter Hearing (Emergency Notification)
- ◆ Jurisdiction Trial
- ◆ Guardianship Hearing
- ◆ Termination of Parental Rights Trial

Notice

In all non-emergency proceedings where notice is required (as set forth in chapter 5) if there is reason to know a child is an Indian child, the party providing notice must:

- Promptly send notice by registered or certified mail, with return receipt requested to:
 - Each tribe of which the child may be a member or eligible for membership;
 - The child's parents and/or the child's Indian custodian; and
 - If the identification or location of the parent or Indian Custodian cannot be ascertained, the appropriate BIA Regional Director listed here:
<https://www.govinfo.gov/app/details/CFR-2001-title25-vol1/CFR-2001-title25-vol1-sec23-11>
- File an original or a copy of each notice sent with the court, together with any return receipts or other proof of service.

ORICWA Oregon Laws 2020. ch. 14 § 16(2).

The Court cannot convene the noticed hearing until at least 10 days after the last party required to be notified is notified, unless the noticed hearing is to review the child's removal and potential return to the parent or Indian custodian. Upon request, the Court shall grant the Indian child's parent, Indian custodian, or tribe a continuance of the noticed hearing of up to 20 additional days (for up to a total of up to 30 days) from the date upon which notice is received by the last individual notified.

ORICWA Oregon Laws 2020. ch. 14 § 16(5).

Practice Tip: Designated Tribal Agent for Service of ICWA Notice

Each year, the BIA collects information from each tribe on who will serve as its Designated Tribal Agent for Service of ICWA Notice. To comply with the ORICWA inquiry and notice requirements, ODHS must send the notice to the appropriate designated individual.

- ◆ A complete list is available in the CFR, here:
<https://www.federalregister.gov/documents/2019/05/09/2019-09611/indian-child-welfare-act-designated-tribal-agents-for-service-of-notice>
- ◆ A searchable database is available here: <https://www.bia.gov/bia/ois/dhs/icwa>

ORICWA Oregon Laws 2020. ch. 14 § 16(2).

Active Efforts

If there is reason to know a child is an Indian child, “active efforts” to reunify the family replace the “reasonable efforts” requirement of ORS Chapter 419B; thus, at various hearings throughout the case, ODHS must prove that it has either provided active efforts to prevent the Indian child’s removal or has provided active efforts to reunite the Indian child with their family. For a finding of active efforts to be made, the efforts must be documented in detail in writing and on the record.

Purpose

Active efforts are, depending on the type of hearing, either intended to maintain an Indian child with the Indian child’s family, or intended to reunite an Indian child with the Indian child’s family. ORICWA Oregon Laws 2020. ch. 14 § 18(1).

When must the Court assess whether active efforts to reunify have been provided?

- ◆ Shelter Hearing
- ◆ Disposition Hearing
- ◆ Review Hearings
- ◆ Permanency Hearing
- ◆ Guardianship Hearing
- ◆ Termination of Parental Rights Trial

Note: When an active efforts finding is required at a hearing, this Benchbook provides the specifics relative to that hearing (see Chapter 5: Hearing Requirements). This section provides an overall definition of active efforts to aid in those individual determinations.

Requirements

“Active efforts” is a higher standard than “reasonable efforts,” and the efforts made must be affirmative, active, thorough, and timely. ORICWA Oregon Laws 2020. ch. 14 § 18(1) – (3).

Active efforts must:

- Include assisting the Indian child’s parent, parents or Indian custodian through the steps of a case plan and assisting with accessing or developing the resources necessary to satisfy the case plan;
- Include providing assistance in a manner consistent with the prevailing social and cultural standards and way of life of the Indian child’s tribe;
- Be conducted in partnership with the Indian child and the Indian child’s parents, extended family members, Indian custodians, and tribe; and
- Be tailored to the facts and circumstances of the case.

ORICWA Oregon Laws 2020. ch. 14 § 18(4).

Documentation and Inclusion in Orders and Judgments

ODHS’s efforts must be documented in detail in writing and on the record, and the Court must include in its judgments and orders its determination of whether ODHS made “active efforts” and what those efforts consisted of. ORICWA Oregon Laws 2020. ch. 14 § 18(4)(a).

Practice Tip: Active Efforts Examples

- ◆ Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on reunification as the most desirable goal;
- ◆ Identifying appropriate services and helping the Indian child's parents overcome barriers to reunification, including actively assisting the parents in obtaining the identified services;
- ◆ Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, resolution of placement issues, reviews, or other case management related meetings;
- ◆ Conducting or causing to be conducted a diligent search for the Indian child's extended family members, contacting and consulting with the Indian child's extended family members and adult relatives to provide family structure and support for the Indian child and the Indian child's parents;
- ◆ Offering and employing culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the Indian child's tribe;
- ◆ Taking steps to keep the Indian child and the Indian child's siblings together whenever possible;
- ◆ Supporting regular visits with the Indian child's parent or Indian custodian in the most natural setting possible, as well as trial home visits during any period of removal, consistent with the need to ensure the health, safety, and welfare of the Indian child;
- ◆ Identifying community resources, including housing, financial assistance, employment training, transportation, mental health, health care, substance abuse prevention and treatment, parent training, transportation, and peer support services; and actively assisting the Indian child's parents or, when appropriate, the Indian child's extended family members, in utilizing and accessing those resources;
- ◆ Monitoring progress and participation of the Indian child's parents, Indian custodian, or extended family members in the services as described above;
- ◆ Considering alternative options to address the needs of the Indian child's parents and, where appropriate, the Indian child's extended family members, if the services as described in this subsection are not available;
- ◆ Providing post-reunification services and monitoring for the duration of the Court's jurisdiction; and
- ◆ Any other efforts that are appropriate to the Indian child's circumstances.

Note: The Nine federally recognized Tribes in Oregon and OJD put together an Active Efforts Principles and Expectations Guide that offers insight into this requirement of ORICWA. It was last revised in 2010, which was before the passage of ORICWA (this should be taken into account when using this document):

https://www.oregon.gov/gov/policy/Documents/LRCD/Meeting7_042116/Indian_Child_Welfare_Act/Active_Efforts_Principles_and_Expectations.pdf

Qualified Expert Witness

When a qualified expert witness is required, an individual identified by the tribe must testify as to whether the child's "continued custody" by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. If the tribe does not provide an individual to testify, a person who has substantial experience in the delivery of services to Indian families and who has substantial knowledge of the cultural standards and child rearing practices within the Indian child's tribe, or a person who has substantial experience in the delivery of services to Indian families and who has substantial knowledge of the cultural standards and child rearing practices within tribes with cultural similarities to the child's tribe, may testify as a qualified expert witness, subject to a determination by the Court that the person is qualified to so testify. No ODHS employee may serve as a qualified expert witness.

When is a Qualified Expert Witness required under ORICWA?

- ◆ Jurisdiction Trial
- ◆ Review Hearing, but only if the child was in the parent's physical custody at the time of the hearing and the Court orders the child placed in substitute care
- ◆ Guardianship Hearing
- ◆ Termination of Parental Rights Trial

Criteria for a Qualified Expert Witness

A person is a qualified expert witness if the Indian child's tribe has designated the person as being qualified to testify as to their prevailing social and cultural standards.

If the tribe has not designated such a person, the following individuals, in order of priority, may testify as a qualified expert witness:

- A member of the Indian child's tribe or another person of the tribe's choice who is recognized by the tribe as knowledgeable about tribal customs regarding family organization or child rearing practices;
- A person having substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe; or
- Any person having substantial experience in the delivery of child and family services to Indians and knowledge of prevailing social and cultural standards and child rearing practices in Indian tribes with cultural similarities to the child's tribe.

ORICWA Oregon Laws 2020. ch. 14 § 17(3) & (4).

Note: No petitioning party, employee of the petitioning party, or employee of ODHS may serve as a qualified expert witness. ORICWA Oregon Laws 2020. ch. 14 § 17(6).

ODHS must file a declaration with the court describing the efforts the petitioner made to identify a qualified expert witness. Those efforts must include contacting the Indian child's tribe and requesting that the tribe identify one or more individuals meeting the required criteria, and if necessary, requesting the assistance of the BIA in locating individuals who meet the required criteria. ORICWA Oregon Laws 2020. ch. 14 § 17(1).

Required Testimony

When a qualified expert witness is required, at least one person designated as a qualified expert witness must testify regarding:

- Whether the Indian child's continued custody by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child; and
- The prevailing social and cultural standards and child rearing practices of the Indian child's tribe.

ORICWA Oregon Laws 2020. ch. 14 § 17(2).

In addition to testimony from a qualified expert witness, the Court may hear supplemental testimony from other professionals having substantial education and experience in the area of the professional's specialty on these topics to support the necessary determinations. ORICWA Oregon Laws 2020. ch. 14 § 17(5).

Practice Tip: Locating a QEW

The Tribal Affairs Office at ODHS has a process for locating appropriate QEWs for an ORICWA/ICWA case. The contact for that unit is:

<https://www.oregon.gov/dhs/ABOUTDHS/TRIBES/Pages/Contacts.aspx>

Placement Preferences

When an Indian child is placed outside the home, the Court must ensure that the placement is in accordance with the placement preferences designated by the child's tribe. If the tribe does not have such preferences, ORICWA and ICWA provide placement preferences that must be followed. An Indian child can be placed outside the placement preferences only if a party establishes good cause to deviate from those preferences. What constitutes good cause, and limitations on good cause, are specified by ORICWA.

Substitute Care Placement Requirements and Preferences

A child who is being placed in substitute care must be placed in the least restrictive setting that:

- Most closely approximates a family, taking into consideration sibling attachment;
- Allows the Indian child's special needs, if any, to be met;
- Is in reasonable proximity to the Indian child's home, extended family, or siblings; and
- Is in accordance with the order of preference established by the Indian child's tribe.

If the Indian child's tribe has not established placement preferences, the child must be placed according to the following order of preference:

- A member of the Indian child's extended family (defined below);
- A foster home licensed, approved or specified by the Indian child's tribe;
- A foster home licensed or approved by a licensing authority in this state and in which one or more of the licensed or approved foster parents is an Indian; or
- An institution for children that has a program suitable to meet the Indian child's needs and is approved by an Indian tribe or operated by an Indian organization.

ORICWA Oregon Laws 2020. ch. 14 § 23(1).

Guardianship Placement Preferences

An Indian child being placed in a guardianship must be placed in accordance with the order of preference established by the Indian child's tribe.

If the Indian child's tribe has not established guardianship placement preferences, the Indian child must be placed in the following order of preference:

- With a member of the Indian child's extended family;
- With other members of the Indian child's tribe; or
- With other Indian families.

ORICWA Oregon Laws 2020. ch. 14 § 23(2).

Adoptive Placement Preferences

ORICWA is silent on adoption placement preferences; therefore, the placement preferences of ICWA apply and require that the child be placed in accordance with the order of preference established by the Indian child's tribe.

If the Indian child's tribe has not established adoptive placement preferences, the Indian child shall be placed with, in order of preference:

- A member of the child's extended family;
- Other members of the Indian child's tribe; or
- Other Indian families.

ICWA 25 USC § 1915(a).

Definition of Extended Family

Extended family as used in ORICWA is defined by the law or custom of the Indian child's tribe. If there is no tribal law or custom definition available, "extended family" means: A person over 18 who is the Indian child's grandparent, aunt, uncle, brother, brother-in-law, sister, sister-in-law, niece, nephew, first cousin, second cousin, or stepparent. ORICWA Oregon Laws 2020. ch. 14 § 2(2).

Practice Tip: When is review of placement in accordance with ORICWA placement preferences required?

- Shelter Hearing
- Dispositional Hearing
- Review Hearing
- Permanency Hearing
- Guardianship Hearing
- Adoption Hearing under ORS 419B.529

Placement Outside of the Placement Preferences

A party may move the Court to make a placement contrary to the placement preferences. The motion must detail the facts or circumstances establishing good cause for such placement (if any party objects to the motion, the Court must hold an evidentiary hearing). ORICWA Oregon Laws 2020. ch. 14 § 23(4)(a) & (b).

The Court must then determine whether the moving party has demonstrated by clear and convincing evidence that "good cause" exists to depart from the placement preferences. The court must issue a written order of its decision on the motion.

A good cause finding may be based on:

- The preferences of the Indian child;
- The presence of a sibling attachment that cannot be maintained through placement consistent with the placement preferences;
- Any extraordinary physical, mental or emotional needs of the Indian child that require specialized treatment services if, despite active efforts, those services are unavailable in the community with families who meet the placement preferences; or
- Whether, despite a diligent search, a placement meeting the placement preferences is unavailable, as determined by the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

A good cause finding may not be based on:

- The socioeconomic conditions of the Indian child's tribe;
- Any perception of the tribal social services or judicial systems;
- The distance between a placement located on or near a reservation and the Indian child's parent when that placement meets the placement preferences under this section;
- The ordinary bonding or attachment between the Indian child and a nonpreferred placement arising from time spent in the nonpreferred placement.

If a parent has reviewed the placement options for their child that are in compliance with the placement preferences and has a preference outside those options, the Court may consider but not rely solely upon that recommendation when making a good cause determination.

ORICWA Oregon Laws 2020. ch. 14 § 23(4)(c) & (d).

Placements Contrary to Section 23(1) or (2)

If any party asserts or the court has reason to believe a child has been placed contrary to the placement preferences provided above, the court must decide whether there has been a violation of Section 23(1) or (2). ORICWA Oregon Laws 2020. ch. 14 § 23(3). If it finds a violation, the court must "invalidate" the placement of the child, and the proceeding that led to the violation must be "vacated." If the child is placed out of home, the court shall order the child immediately returned to the parent or Indian custodian. The court must also set a hearing to re-litigate the facts regarding the removal of the child and subsequent placement. ORICWA Oregon Laws 2020. ch. 14 § 22(2).

Chapter 4: State vs. Tribal Jurisdiction

Under ORICWA, the Juvenile Court has temporary exclusive jurisdiction to order protective custody or enter a shelter order. Much like the UCCJEA, however, each time the Court has a case involving an Indian child, it must analyze whether the state court has jurisdiction or whether there is tribal jurisdiction pursuant to ORICWA. This analysis turns on: the child's domicile, whether the child is a ward of a Tribal Court, which tribe the child is a member of or eligible for membership in, whether that tribe is subject to Public Law 83-280, and whether that tribe has an agreement with the state granting it default jurisdiction. Much like the UCCJEA, if the state court declines jurisdiction in favor of transfer to Tribal Court, it should coordinate with the Tribal Court to facilitate that court's assumption of jurisdiction.

Determining Jurisdiction

Temporary Exclusive Jurisdiction

The Juvenile Court has "temporary exclusive jurisdiction" over an Indian child who is taken into protective custody under ORS 419B.150 or 419B.152. ORICWA Oregon Laws 2020. ch. 14 § 12(4).

Assessing Jurisdiction

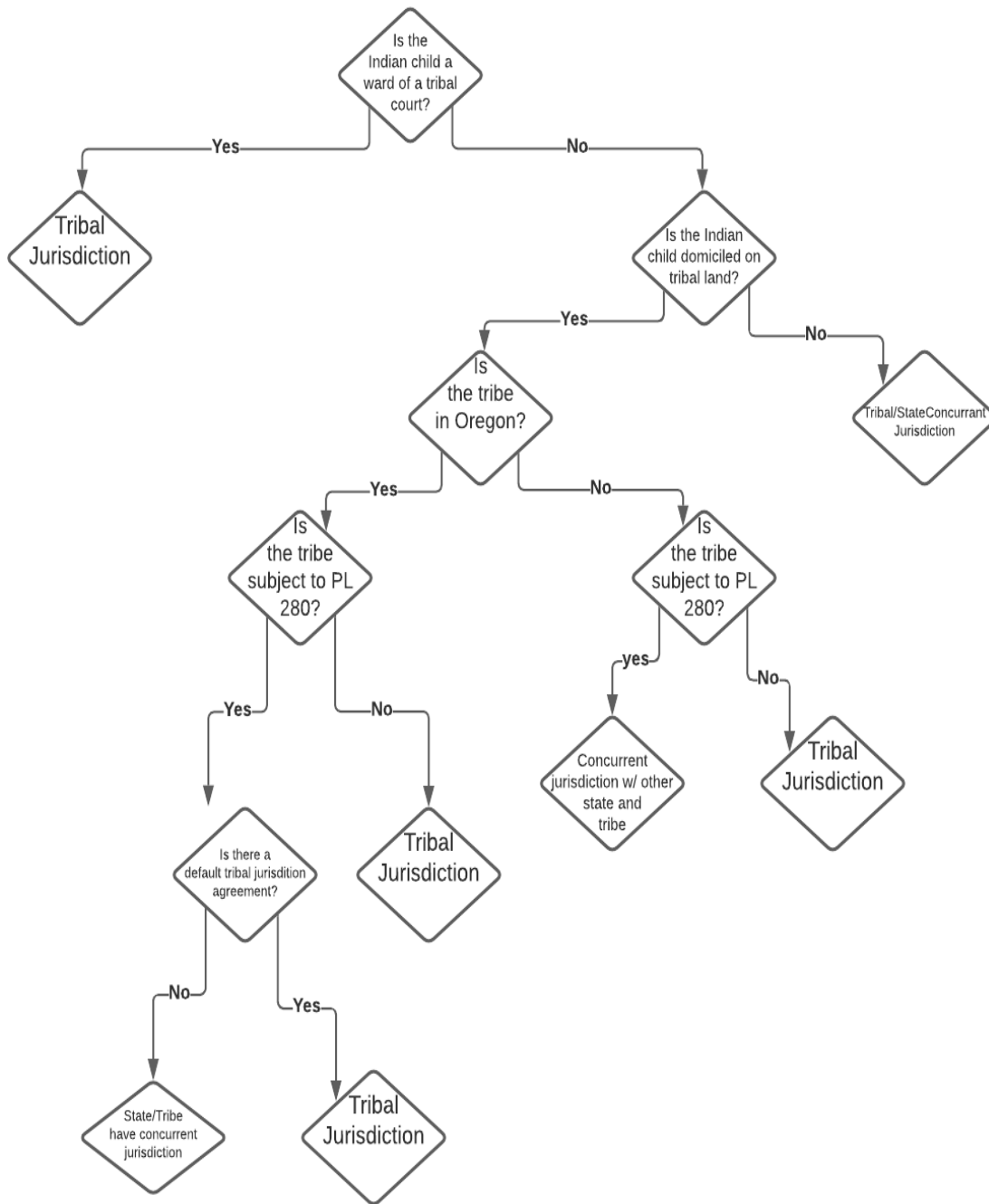
The Juvenile Court must determine residence and domicile of the child and whether the child is a ward of the Tribal Court. This information should be provided in the UCCJEA allegations provided in the petition and also in the DHS report for the shelter hearing. If insufficient information is provided by the parties, the Court must communicate with the Tribal Court to the extent necessary to make the determinations. ORICWA Oregon Laws 2020. ch. 14 § 9 & 12.

Under ORICWA, a person's domicile is the place the person regards as home, where the person intends to remain, or to which, if absent, the person intends to return; and an Indian child's domicile is, in order of priority, the domicile of:

- The Indian child's parents or, if the Indian child's parents do not have the same domicile, the Indian child's parent who has physical custody of the Indian child;
- The Indian child's Indian custodian; or
- The Indian child's guardian.

ORICWA Oregon Laws 2020. ch. 14 § 6.

After determining the Indian child's domicile and whether they have been a ward of Tribal Court, the Court must perform a jurisdictional analysis. A jurisdictional flow chart is provided below to assist in that analysis:



Default Agreements

An Indian tribe subject to Public Law 83-280 may limit the Juvenile Court’s exercise of jurisdiction by entering into a tribal-state agreement providing it with default jurisdiction. This Benchbook refers to these as “default agreements.” ORICWA Oregon Laws 2020. ch. 14 §§ 10(3) & 12(3)(a).

Practice Tip: What is Public Law 280 and why does it affect jurisdiction?

Typically, tribal land is under the concurrent jurisdiction of the federal government and the tribe. Under Public Law 83-280 (commonly referred to as Public Law 280 or PL 280), Congress transferred extensive criminal and civil jurisdiction on tribal land from the federal government to state governments in six states (five states initially - California, Minnesota, Nebraska, Oregon, and Wisconsin; and then Alaska upon statehood). This significantly changed the division of legal authority among tribal, federal, and state governments. Public Law 280 also permitted the other states to acquire jurisdiction at their option. As related to child welfare, under Public Law 280, the state of Oregon has civil jurisdiction that is concurrent with the tribe over all tribal land established before 1968, except the Warm Springs Reservation, which was excluded from this legislation and therefore maintains exclusive jurisdiction, and the Burns Paiute Reservation. *See also, Doe v. Mann (Mann II)*, 415 F3d 1038 (9th Cir 2005), for more information on the role of PL 280 in ICWA cases. (Notably, the 9th Circuit is the only circuit to assess the issue of ICWA jurisdiction in PL 280 states).

What to do if the Tribal Court has Jurisdiction

If the Tribal Court has jurisdiction (because the child is domiciled on a reservation, is a ward of a Tribal Court, or the tribe has a tribal-state agreement that provides the Tribal Court with default jurisdiction), the Juvenile Court must coordinate with the Tribal Court to facilitate the Tribal Court's assumption of jurisdiction. In doing so, the Juvenile Court must:

- Create records of any communications under this subsection;
- Notify the Indian child's parent, Indian custodian, or tribe in advance of each communication;
- Allow the Indian child's parent, Indian custodian, or tribe to participate in any communications; and
 - If the person is unable to participate in a communication, provide the person with an opportunity to present facts and legal arguments supporting the person's position before the Juvenile Court makes a decision regarding jurisdiction; and
- Provide the Indian child's parent, Indian custodian, or tribe with access to the record of the communication.

Note that communications relating to calendars, court records and similar matters may occur without informing the parties or creating a record of the communication. OJD has put together a contact list for the Tribal Courts of Oregon's nine federally recognized tribes. It is available here: https://www.courts.oregon.gov/programs/jcip/Documents/ICWA-Tribal_Contact_Info.pdf.

ORICWA Oregon Laws 2020. ch. 14 § 12(3)(c).

Transfer Hearings

Under ORICWA/ICWA, even when the state Court has concurrent jurisdiction with the Tribal Court, the parent, Indian custodian, or tribe may move to transfer the case to Tribal Court. This request must be granted unless the tribe declines jurisdiction, a parent objects, or the state Court, after a contested hearing, finds by clear and convincing evidence that there is good

cause not to transfer. After transfer has been ordered, the Court must follow certain steps to ensure the case's smooth transition to Tribal Court.

Transfer to Tribal Court may occur at any time during the course of the dependency, guardianship, termination of parental rights, or adoption proceeding. ORICWA Oregon Laws 2020. ch. 14 § 13(1).

In any case where there is reason to know the child is an Indian child, if the parent, Indian custodian or tribe files a motion to transfer:

- The Juvenile Court shall promptly contact the Indian child's tribe and request a timely response as to whether they intend to decline jurisdiction.
- The Juvenile Court may deny the motion to transfer only if:
 - The tribe declines jurisdiction;
 - A parent has objected (unless the objecting parent dies or their parental rights have been terminated); or
 - The Court, after the hearing described below, finds good cause to deny the transfer.

ORICWA Oregon Laws 2020. ch. 14 § 13(2) & (3).

Good Cause Hearing

The Juvenile Court may deny a motion to transfer based on good cause only after conducting a contested hearing. The party objecting to transfer has the burden to prove good cause to deny the transfer by clear and convincing evidence.

When making a determination of good cause, the Court may NOT consider:

- Whether the proceeding is at an advanced stage;
- Whether there has been a prior proceeding involving the Indian child in which a transfer motion was not filed;
- Whether the transfer could affect the placement of the Indian child;
- The Indian child's cultural connections with the tribe or the tribe's reservation;
- The socioeconomic conditions of the Indian child's tribe or any negative perception of tribal or BIA social services or judicial systems; or
- Whether the transfer serves the "best interests of the Indian child."

If the Court decides to deny the transfer based on good cause, the Court must issue a written order explaining the reasons for denying the motion to transfer.

ORICWA Oregon Laws 2020. ch. 14 § 13(4) & (6).

Transfer Requirements

After the Court grants a motion to transfer, the Court must:

- Notify the Tribal Court of the pending dismissal of the dependency or TPR petition;
- Transfer all information, including but not limited to pleadings and records, to the Tribal Court;
- Order ODHS to:
 - Transfer the case and child to tribal custody with the minimum possible disruption of services to the child, and
 - Provide the Indian child's tribe with documentation related to the Indian child's eligibility for state and federal assistance and information about the child's social

history, treatment diagnosis, and services provided, in addition to all other case and service-related data; and

- Dismiss the state Court proceeding upon confirmation from the Tribal Court that it received the transferred information.

ORICWA Oregon Laws 2020. ch. 14 § 14.

Chapter 5: Hearings Guide

This chapter provides a guide to the application of ORICWA/ICWA at each key dependency hearing in 419B. Foundational elements from Chapter 2 and hearing elements from Chapter 3 are referenced throughout this chapter in blue. If you click on a word or phrase in red you will be taken back to the section of Chapters 2 and 3 that provides detailed information about how to correctly implement that provision.

Note: This Benchbook is meant to supplement, but not replace, the full JCIP dependency Benchbook, which is available here:

<https://www.Courts.oregon.gov/programs/jcip/Pages/JuvDepBenchbook.aspx>

Quick Reference

The chart below provides an overview of which ORICWA/ICWA hearing elements apply at each of the key ORS Chapter 419B proceedings.

At protective custody and shelter hearings, the Court must determine whether ORICWA applies to the case (because the child is, or there is “reason to know” the child is, an Indian child); thus, special notice and inquiry elements apply:

Protective Custody Hearing	<ul style="list-style-type: none"> • Emergency Inquiry by ODHS • Emergency Notification by ODHS • Inquiry by the Court • If ORICWA applies: <ul style="list-style-type: none"> ○ ORICWA Standard for Protective Custody
Shelter Hearing	<ul style="list-style-type: none"> • Emergency Inquiry by ODHS • Emergency Notification by ODHS • Inquiry by the Court • If ORICWA applies: <ul style="list-style-type: none"> ○ ORICWA Standard for Removal ○ Active Efforts ○ Placement Preferences

At subsequent hearings, if the Court has determined that ORICWA applies (because the child is, or there is “reason to know” the child is, an Indian child), the following ORICWA elements apply:

Pre-trial Hearing(s)	<ul style="list-style-type: none"> • State vs. tribal jurisdiction • If taking jurisdiction based on admissions: <ul style="list-style-type: none"> ○ Notice by ODHS ○ Heightened Standard of Proof ○ ORICWA Standard for Jurisdiction ○ Qualified Expert Witness ○ Active Efforts
Settlement Conference (Optional)	<ul style="list-style-type: none"> • Settlement conference information to tribe by Court • If taking jurisdiction based on admissions: <ul style="list-style-type: none"> ○ Notice by ODHS ○ Heightened Standard of Proof ○ ORICWA Standard for Jurisdiction ○ Qualified Expert Witness ○ Active Efforts

Jurisdiction Hearing	<ul style="list-style-type: none"> • Notice by ODHS • Heightened Standard of Proof • ORICWA Standard for Jurisdiction • Qualified Expert Witness
Disposition Hearing	<ul style="list-style-type: none"> • Active Efforts • Placement Preferences
Review Hearing	<ul style="list-style-type: none"> • Heightened Standard of Proof • ORICWA Review Hearing Standards • Active Efforts • Placement Preferences
Permanency Hearing	<ul style="list-style-type: none"> • Heightened Standard of Proof • ORICWA Standards to Change the Permanency Plan • Active Efforts • Placement Preferences
Guardianship Hearing (ORS 419B.365)	<ul style="list-style-type: none"> • Notice by ODHS • Heightened Standard of Proof • ORICWA .365 Guardianship Standard • Best Interest of the Indian Child • Qualified Expert Witness • Active Efforts • Placement Preferences
Guardianship Hearing (ORS 419B.366)	<ul style="list-style-type: none"> • Notice by ODHS • Heightened Standard of Proof • ORICWA .366 Guardianship Standard • Best Interest of the Indian Child • Qualified Expert Witness • Active Efforts • Placement Preferences
Termination of Parental Rights (TPR)	<ul style="list-style-type: none"> • Notice by ODHS • Inquiry • Heightened Standard of Proof • ORICWA TPR Standard • Qualified Expert Witness • Active Efforts
Adoption	<ul style="list-style-type: none"> • Inquiry • Placement Preferences

A Note on the Role of the Indian Child’s Tribe

At each hearing where the Court has determined that ORICWA applies (because the child is, or there is “reason to know” the child is, an Indian child) the Indian child’s tribe is a party to the case under ORS 419B.875. The tribe has the rights in ORS 419B.875(2) of a legal party, including the right to notice of the proceeding, to receive discovery, and to fully participate in the hearing.

The tribe may be represented by any individual regardless of whether that individual is licensed to practice law and unique *pro hac vice* rules apply in ORICWA/ICWA proceedings. The Court may also permit other tribes affiliated with the child to participate in the proceeding, either as parties or in

an advisory capacity. ORICWA Oregon Laws 2020. ch. 14 §§ 8,19 & 28(H) (ORS 419B.875(H)). For more information, review the Chapter 2 sections on [The Indian Child's Tribe](#), [Representation](#), and [Right to Review Documents](#), as well as the Chapter 3 section on [Notice](#).

Protective Custody Orders

In Oregon, a child can be removed with or without a protective custody order (PCO).

Protective Custody Orders Snapshot:

- Preliminary Matters
 - Application of ORICWA/ICWA
- Legal Issues and Written Findings
 - Emergency Inquiry and Notification by ODHS
 - ORICWA Standard for Authorizing a Protective Custody Order

Preliminary Matters

Application of ORICWA/ICWA

When ODHS requests a protective custody order, the Court must ask ODHS if there is reason to know that the child is an Indian child. If the Court has [reason to know the child is an Indian child](#), ORICWA must be applied to the proceeding. ORICWA Oregon Laws 2020. ch. 14 §§ 15(2) & 29(3)(a) (ORS 419B.150(3)(a)). For more information, review the Chapter 2 sections on ['Reason to Know' the a child is an 'Indian Child'](#) and [Application of ORICWA](#).

Legal Issues and Findings

Emergency Inquiry and Notification by ODHS

The Court can issue a PCO only if ODHS has complied with the emergency inquiry and notification provisions of ORICWA. Therefore, the Court must assess whether:

- ODHS made a good faith effort to [inquire](#) into whether there is [reason to know that the child is an Indian child](#) by:
 - Asking any family members, witnesses, or others involved in the removal including, if possible, the child, whether there is any indication that the child may be a member of, or eligible for membership in, an Indian tribe.
 - Contacting by telephone, electronic mail, facsimile, or other means of immediate communication any tribe of which the child is or may be a member to determine the child's affiliation.

ORICWA Oregon Laws 2020. ch. 14 §§ 15(1) & (2) & 29(3)(a) (ORS 419B.150(3)(a)). For more information, review the Chapter 3 section on [Inquiry](#).

- If the nature of the emergency allowed, ODHS contacted, by telephone, electronic mail, facsimile, or other means of immediate communication, any tribe with which the child may be affiliated, in order to provide [notice](#) to the tribe of:
 - the basis for the child's removal;
 - the date, time, and place of the shelter hearing; and
 - the tribe's right to participate in the shelter hearing as a party.

ORICWA Oregon Laws 2020. ch. 14 §§ 16(1)(a) & (b) & 29(3)(b) (ORS 419B.150(3)(b)). For more information, review the Chapter 3 section on [Notice](#).

ORICWA Standard for Authorizing a Protective Custody Order (PCO)

To issue a PCO, the Court must determine that:

- protective custody is necessary and the least restrictive means available to “to prevent imminent physical damage or harm to the child”; and
- protective custody it is in the [best interest of the Indian child](#) (as that term is specifically defined by ORICWA).

ORICWA Oregon Laws 2020. ch. 14 §§ 5 & 29(4)(b) (ORS 419B.150(4)(b)); ICWA 25 USC § 1922. For more information, review the Chapter 2 section on [“Best Interest of the Indian Child.”](#)

Practice Tip: Contents of a Declaration or Statement Requesting a Protective Custody Order

A person requesting a PCO must submit a declaration or statement based on information and belief, or a statement under oath, that sets forth with particularity:

- ◆ Why protective custody is necessary and the least restrictive means available to prevent imminent physical damage to the child; and
- ◆ Why protective custody is in the best interest of the Indian Child.

ORICWA Oregon Laws 2020. ch. 14 § 29(5) (ORS 419B.150(4)).

Shelter Hearing

A shelter hearing must occur within 24 hours of, or the next business day following, a child's removal from their home, excluding Saturdays, Sundays and Holidays, to determine whether removal was or remains appropriate and whether efforts were provided to prevent removal.

Shelter Hearing Snapshot:

- Preliminary Matters
 - Application of ORICWA/ICWA
 - Identify Parents and/or Indian Custodian
 - Appoint Counsel
 - Identifying Tribes with which the Child may be Affiliated
- Legal Issues and Written Findings
 - Emergency Inquiry and Notification
 - Residence, Domicile, Wardship, and State vs. Tribal Jurisdiction
 - Standard and Burden of Proof
 - Standard for Removal
 - Active Efforts
 - Placement Preferences
- Timing and Setting the Next Court Dates
 - Setting the Jurisdiction Hearing Date(s): Within 30 Days/Within 60 Days

Note: Courts in Oregon often use the shelter hearing docket for multiple purposes. If a hearing is scheduled on the shelter hearing docket but the Court will be handling pretrial matters, taking admissions, or adjudicating any portion of the petition, the [pre-trial/settlement conference](#) or [jurisdiction trial](#) sections of this chapter apply.

Preliminary Matters

Application of ORICWA/ICWA

At a shelter hearing, the Court must ask all persons present whether there is [reason to know that the child is an Indian child](#). If the Court has [reason to know the child is an Indian child](#), ORICWA/ICWA must be applied to the proceeding. ORICWA Oregon Laws 2020 ch. 14 § 31(1)(a)(A) (ORS 419B.185(1)(a)(A)); ORICWA Oregon Laws 2020. ch. 14 § 15(5). For more information, review the Chapter 2 sections on [Reason to Know the Child is an Indian Child](#).

Identify Parents and/or Indian Custodian

The Court must use the unique definition of [parent](#) to determine those individuals that will be protected by ORICWA as a “[parent](#)” in the case. The Court must also determine whether the child has an “[Indian Custodian](#).” ORICWA Oregon Laws 2020. ch. 14 § 2(5) & (9). For more information, review the Chapter 2 sections on [Who Qualifies as a Parent](#) and [Indian Custodian](#).

Appoint Counsel

Current recommended practice in Oregon is to appoint counsel for the child, each parent, and the Indian custodian prior to the shelter hearing to allow adequate time to prepare. Pursuant to ORICWA, the Court must appoint counsel for the child and, if requested, for qualifying parents and Indian custodians. ORICWA Oregon Laws 2020. ch. 14 § 20. For more information, review the Chapter 2 section on [Representation](#).

Identifying Tribes with which the Child may be Affiliated

- At the shelter hearing, the Court must identify all tribes with which the child is affiliated.
- “[The Indian child’s tribe](#)” is a specific designation under ORICWA/ICWA. This tribe has automatic party status. When there are multiple tribes of which the child is or may be a member, ORICWA creates a series of rules to determine which tribe is “[the Indian child’s tribe](#),” these are described in detail [in Chapter 2](#). The Court also has discretion to make other affiliated tribes parties to the case or to allow them to participate in an advisory capacity.
- If there is sufficient information at the shelter hearing to determine which tribe is “the Indian child’s tribe” and/or to designate the role of any additional interested tribes, then the Court should do so.

ORICWA Oregon Laws 2020. ch. 14 §§ 8 & 28(1)(a)(H) (ORS 419B.875(1)(a)(H)). For more information, review the Chapter 2 section on [The Indian Child’s Tribe](#).

Practice Tip: Shelter Hearing Court Report

When there is reason to know a child is an Indian child, the ODHS shelter hearing report must, in addition to the standard requirements, include the following:

- ◆ Name and address of the Indian child’s parents, and, if any, Indian custodian
 - Efforts made to locate and contact parents, and, if any, Indian custodian
- ◆ Possible tribal affiliations of the child and/or parents
- ◆ Confirmation that emergency notification was provided to any possible affiliated tribes
- ◆ Residence and/or domicile of the child
 - If on a reservation or in a Native Alaska Village, the affiliated tribe
 - Efforts made to contact that tribe for jurisdictional purposes
- ◆ Statement of efforts made to assist the family to ensure that the child may remain in or safely be returned to the custody of the parents or, if any, Indian custodian
- ◆ Why removal is in the “best interest of the Indian child,” as that phrase is defined by ORICWA
- ◆ Why removal is necessary to prevent imminent physical harm to the child

ORICWA Oregon Laws 2020. ch. 14 § 30(2) (ORS 419B.171(2)) & 31(2) (ORS 419B.185(2)).

Legal Issues and Findings

Emergency Inquiry and Notification

- The Court can issue a shelter order only if ODHS has provided information showing that it has complied with the emergency inquiry provision of ORICWA, and, if there is reason to know the child is an Indian child, provided the required notice.
- To determine if emergency inquiry and notification were provided, the Court must assess whether:
 - ODHS made a good faith effort to [inquire](#) as to whether there is [reason to know that the child is an Indian child](#) by, at minimum:
 - Asking any family members, witnesses, or others involved in the removal including, if possible, the child, whether there is any indication that the child may be a member of, or eligible for membership in, an Indian tribe.

ORICWA Oregon Laws 2020. ch. 14 §§15(1) & 31(3)(a) (ORS 419B.185(3)(a)). For more information, review the Chapter 3 section on [Inquiry](#).

- The court must also make written findings that ODHS has complied with the emergency notice provisions of ORICWA, including:
 - If the nature of the emergency allowed, ODHS contacted by telephone, electronic mail, facsimile, or other means of immediate communication, any tribe with which the child may be affiliated to provide [notice](#) to the tribe of:
 - the basis for the child's removal;
 - the date, time, and place of the shelter hearing; and
 - the tribe's right to participate in the shelter hearing as a party.

ORICWA Oregon Laws 2020. ch. 14 §§ 16(1) & 31(3)(b)(A) (ORS 419B.185 (3)(b)(A)). For more information, review the Chapter 3 section on [Notice](#).

Residence, Domicile, Wardship, and State vs. Tribal Jurisdiction

- The Oregon Juvenile Court has temporary exclusive jurisdiction for the purposes of a shelter hearing in all ORICWA cases.
- If the necessary information is available, the Court should:
 - Make determinations as to the child's residence and [domicile](#), and whether they are currently a ward of a Tribal Court.
 - Determine whether the Juvenile Court or instead the Tribal Court, has jurisdictional authority to adjudicate the petition. A guide to on how to determine which government has [jurisdiction](#) over the case is provided in [Chapter 4](#).
 - If the Juvenile Court does not have jurisdictional authority to adjudicate the petition, it must ensure the smooth transition of the case to Tribal Court pursuant to the requirements of ORICWA, described in detail in [Chapter 4](#).

ORICWA Oregon Laws 2020. ch. 14 §§ 9 & 12. For more information, review the [Chapter 4](#) section on [Jurisdiction](#).

Standard and Burden of Proof

The standard of proof is preponderance of the evidence, and the burden is on ODHS to prove that removal is necessary. ORICWA Oregon Laws 2020. ch. 14 § 31(3)(b)(C) (ORS 419B.185(3)(b)(C)); ICWA 25 USC § 1922.

Standard for Removal

The Court can order removal of the child only if the Court finds by a preponderance of the evidence that:

- removal “is necessary to prevent imminent physical damage or harm to the child”; and
- removal is in the [best interest of the Indian child](#) (as that phrase is defined in ORICWA).

If the Court orders the child’s removal, it must also order ODHS to immediately notify the Court if the circumstances necessitating the removal of the Indian child cease to exist; at that point, the Court must hold another shelter hearing to determine whether protective custody remains necessary.

ORICWA Oregon Laws 2020. ch. 14 § 31(3)(b) & (c) (ORS 419B.185(3)(b) & (c)); 25 USC § 1922. For more information, see the Chapter 2 section on [Best Interest of the Indian Child](#).

Active Efforts

The Court can order the child’s removal only if it determines that:

- ODHS has made [active efforts](#) to prevent or eliminate the need for removal of the child from the home and to make it possible for the child to safely return home.
 - ORICWA provides a very specific definition for active efforts and sets a high bar for ODHS, which is described in detail in [Chapter 3](#) and should guide this determination.
 - The Court may consider ODHS to have made [active efforts](#) if no services were provided but the Court concludes that services would not have eliminated the need for protective custody.

The Court must include a brief description of the preventative and reunification efforts made by ODHS in its order.

ORICWA Oregon Laws 2020. ch. 14 §§ 18 & 31(1)(a)(B) & (b) (ORS 419B.185(1)(a)(B) & (b)). For more information, see the Chapter 3 section on [Active Efforts](#).

Placement Preferences

If the child has been removed from the home or continued in out-of-home care, the Court must make written findings as to whether the child has been placed according to the [ORICWA placement preferences](#) including whether:

- ODHS made diligent efforts to place the child in the least restrictive setting that:
 - most closely approximates a family, taking into consideration sibling attachment;
 - allows the Indian child’s special needs, if any, to be met;
 - is in reasonable proximity to the Indian child’s home, extended family, or siblings; and
 - is in accordance with the order of preference established by the Indian child’s tribe, or, if the Indian child’s tribe has not established an order of placement preference, in the following order of preference:
 - With a member of the Indian child’s extended family;
 - In a foster home licensed, approved, or specified by the Indian child’s tribe;
 - In a foster home licensed or approved by a licensing authority in this state and in which one or more of the licensed or approved foster parents is an Indian; or
 - In an institution for children that has a program suitable to meet the Indian child’s needs and is approved by an Indian tribe or operated by an Indian organization.
- The Court’s order must include a written description of the diligent efforts provided by ODHS.

ORICWA Oregon Laws 2020. ch. 14 §§ 23(1), 31(1)(f) (ORS 419B.185(1)(f)) & 32(5) (ORS 419B.192(5)). For more information, review the Chapter 3 section on [Placement Preferences](#).

Practice Tip: Leaving an Indian child in the Physical Custody of their Parent or Crafting a Family Plan

The goals of ORICWA and ICWA are to prevent the unnecessary removal of Indian children from their families, community, and culture. The Court should authorize removal only when necessary, and should encourage ODHS to craft thoughtful and creative safety plans and talk with the family and extended family to determine if there are any possible family plans that can be put in place to keep the child safely in the home and/or with family.

At the shelter hearing, the Court can make an order for temporary custody under ORS 419B.809(5) but leave the child in the physical custody of the parent(s) and/or Indian custodian. In that instance, there is no ORICWA-specific finding, but ODHS should be reminded that they are obligated to provide active efforts to prevent the removal of the child.

Timing and Setting Next Court Dates

Continuing the Protective Custody Order

The court must immediately terminate protective custody if the court finds protective custody is no longer necessary to prevent imminent physical damage or harm. ORS 419B.185(3)(c)(C).

In addition, federal law restricts the court from continuing the removal for more than 30 days **unless** the court determines:

- restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
- the court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; **and**
- It has not been possible to initiate a child custody proceeding as defined in 25 CFR §23.2. 25 CFR §23.113(e).

Jurisdictional trial within 30 or 60 days

If the court finds that protective custody is necessary to prevent imminent physical damage or harm to the child at the shelter hearing, the court must hold a jurisdictional hearing and enter a dispositional order within 30 days unless:

- the child has been returned or the court orders the child to be returned to the child's parent or Indian custodian;
- the court continues the protective order regarding the child for more than 30 days pursuant to ORS 419B.185(3)(d)³; or
- the court grants the child's parent, Indian custodian or tribe an extension of time to prepare for the hearing under section 16(5) (court may grant up to 20 additional days from date notice was received by parent, Indian custodian or tribe). ORS 419B.305(2); ORICWA Oregon Laws 2020. ch. 14 § 34.

If the child remains in the physical custody of their parent, the jurisdictional trial or hearing must begin no later than 60 days after the petition was filed. The Court may set out the hearing

³ Note that the court may only continue a protective custody order under ORS 419B.185(3)(d) to the extent it is also allowed under 25 CFR §23.113(e), set out above under "Continuing the Protective Custody Order".

beyond the 60 days for good cause (written order with factual findings required), although this is not recommended.

- In either circumstance, the jurisdictional trial cannot be set for a date less than 10 days after the last tribe, parent, or [Indian custodian](#) receives [notice](#). However, upon request, the Court must grant the Indian child's parent, [Indian custodian](#), or tribe up to 20 additional days from the date upon which notice was received by the last individual who receives notice if they so request.

ORICWA Oregon Laws 2020. ch. 14 §§ 16(5), 31(3)(d) (ORS 419B.185(3)(d)) & 34(2) & (3) ORS 419B.305(2) & (3); 25 CFR § 23.113.

Pre-trial Hearings

At the first appearance as directed by the summons, the parent or Indian custodian may admit or deny the allegations in the petition. A parent who initially denies the allegations may enter admissions at any subsequent pre-trial hearings (or optional settlement conferences, if offered by the Court at its discretion).

Pre-trial Hearings Snapshot:

- Application of ORICWA
- State vs. Tribal Jurisdiction
- Admissions, and Taking Jurisdiction at the Pre-trial Hearing
 - Notice and Inquiry
 - Colloquy
 - Qualified Expert Witness

Application of ORICWA

If a finding has not yet been made that the child is an Indian child the Court must ask, on the record, each individual present whether they know or have [reason to know the child is an Indian child](#).

If a finding has not yet been made that the child is an Indian child, the Court should also attempt to determine whether the child is an Indian child and ICWA applies.

- If there is sufficient evidence to show that the child is an Indian child:
 - the Court must enter a finding that ORICWA/ICWA applies to the case.
- If there is [reason to know that the child is an Indian child](#):
 - the Court must enter a finding that ORICWA/ICWA be applied unless and until the child is determined to not be an Indian child; and
 - the Court must order ODHS to use due diligence to identify and work with all of the tribes identified to verify whether the child is an Indian child and prepare a report, declaration, or testimony for presentation to the Court at the adjudicatory hearing.
- If at a previous hearing it was established that there was [reason to know that the child was an Indian child](#), but ODHS presents evidence that they have 1) exercised due diligence to contact all possible affiliated tribes; and 2) the child is not an Indian child:
 - the Court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a [reason to know the child is an Indian child](#); and
 - the Court should instruct each party to inform the Court immediately if the party later receives information that provides [reason to know the child is an Indian child](#).
- If there has never been and continues to be no [reason to know that a child is an Indian child](#):
 - the Court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a [reason to know the child is an Indian child](#); and

- the Court must instruct each party to inform the Court immediately if the party later receives information that provides [reason to know the child is an Indian child](#).

ORICWA Oregon Laws 2020. ch. 14 § 35(4)(a) (ORS 419B.310(4)(a)); ORICWA Oregon Laws 2020. ch. 14 §§ 15 & 16. For more information, review the Chapter 2 section on [Reason to Know the child is an Indian Child](#).

State vs. Tribal Jurisdiction

Before ruling on whether the child is within the Court’s dependency jurisdiction under ORS 419B.100(1), the Court must determine the child’s domicile, whether the child is a ward of a Tribal Court, and whether it, or instead a Tribal Court, has jurisdiction over the matter. ORICWA Oregon Laws 2020. ch. 14 § 35(4)(B) (ORS 419B.310(4)(B)); ORICWA Oregon Laws 2020. ch. 14 § 9 & 12. For more information, review the Chapter 4 section on [Jurisdiction](#).

Admissions, and Taking Jurisdiction at the Pre-trial Hearing

Notice and Inquiry

Before the court accepts an admission, the Court must ensure that [inquiry has occurred](#). If there is [reason to know the child is an Indian child](#), the court must also determine whether [notice](#) has been provided and notice timelines have been followed.

The Court must therefore assess whether ODHS:

- has made a good faith effort to [inquire](#) into whether there is [reason to know the child is an Indian child](#), by, at the least, consulting with:
 - The child;
 - The child’s parent or parents;
 - Any person having custody of the child or with whom the child resides;
 - Extended family members of the child;
 - Any other person who may reasonably be expected to have information regarding the child’s membership or eligibility for membership in an Indian tribe; and
 - Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORICWA Oregon Laws 2020. ch. 14 §§ 15(2) & 34(2)(b) (ORICWA 419B.305(2)(b)). For more information, review the Chapter 3 section on [Inquiry](#).

If there is reason to know the child is an Indian child under ORICWA/ICWA, the court must assess whether ODHS:

- promptly sent [notice](#) of the child custody proceeding by registered or certified mail, with return receipt requested, to:
 - Each tribe of which the child may be a member or eligible for membership; and
 - The child’s parents and/or the child’s [Indian custodian](#); or
 - The appropriate BIA Regional Director, if the identity or location of the child’s parents, Indian custodian, or tribe cannot be ascertained.
- filed an original or a copy of each [notice](#) sent with the Court, together with any return receipts or other proof of service; and the notice includes those elements described in the Chapter 3 section on [Notice](#).
- sent copies of the [notices](#) to the appropriate BIA Regional Director, by registered or certified mail, with return receipt requested, or by personal delivery.

ORICWA Oregon Laws 2020. ch. 14 §§ 16 & 34(2)(b) (ORICWA 419B.305(2)(b)). For more information, review the Chapter 3 section on [Notice](#).

Colloquy

The requirements of ORICWA must be considered in the Court's colloquy with the parent or [Indian Custodian](#) entering admissions. Here is a sample colloquy that incorporates the jurisdictional standard from ORICWA:

- ODHS has filed a petition that describes what it thinks is going on with your child and asks me to take jurisdiction over your child.
- If I take jurisdiction, I could give legal custody of your child to ODHS and allow them to place your child in foster care. ODHS would have the authority to decide where your child lives. ODHS would also control when you would be able to visit your child. I could require you to participate in services and take specific actions with the goal of reunifying you with your child.
- It is my understanding that your child is a member of a tribe or eligible for membership in a tribe, or we have reason to know that your child is a member of a tribe or eligible for membership in a tribe. Is that correct?
 - If so, that means that the Oregon Indian Child Welfare Act applies to your case. That is a law that provides additional protections to Native families in the child welfare system.
- Have you read the petition and talked to your attorney about it and the protections of the Oregon Indian Child Welfare Act?
- You have the right to a trial. At the trial, ODHS would try to prove what they've said in the petition and that if you continued to have custody of your child it would likely result in serious emotional or physical damage to the child. They would also have to prove that they worked with you and tried to help you parent your children, but that those services were unsuccessful. They would put on evidence and call witnesses. You, with your lawyer, would have the chance to challenge that evidence, meaning you would have the right to question ODHS's witnesses, call your own witnesses, speak for yourself, and present other evidence about the allegations.
- At the trial, only if I find that ODHS has proven what the petition says, that continued custody of your child with you would likely result in serious emotional or physical damage to the child, and that ODHS has provided services to help prevent the Court from taking custody, would I take jurisdiction and have the authority over you and your child that I've just described.
- Although you have the right to a trial, you don't have to have a trial. You may waive your right to trial and admit to what ODHS is saying in the petition if that's what you want to do. But if you do admit, then I may take jurisdiction over the child.
- Your lawyer tells me you want to make an admission today, is that true? Do you understand that if you admit you will not have a trial—that you are giving up that right—and I will take jurisdiction and have authority over you and your child?
 - If yes, read the allegation and ask the parent if it is true.

Qualified Expert Witness

If the Court is accepting an admission, it must also accept testimony or a declaration from a [qualified expert witness](#) that describes the prevailing social and cultural standards and child rearing practices of the Indian child's tribe and supports the Court's finding that the Indian child's continued custody by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. ORICWA Oregon Laws 2020. ch. 14 §§ 17 & 35(3)(b)(A) (ORS 419B.310(3)(b)(A)).

Settlement Conferences (Optional)

A settlement conference is a hearing held for the purpose of discussion and settlement of the case. A parent who initially denies the allegations may enter admissions at the conclusion of a settlement conference.

Settlement Conference Snapshot

- Explanation of the Settlement Conference Process
- Admissions, and Taking Jurisdiction at the Pre-trial Hearing
 - Notice and Inquiry
 - Colloquy
 - Qualified Expert Witness

Explanation of the Settlement Conference Process

For a settlement conference to be held, *the Court* must provide notice to [the Indian child's tribe](#) that includes: a description of the settlement process; the procedure used to schedule the settlement conference; and the date the next hearing will occur if settlement is not reached. ORICWA Oregon Laws 2020. ch. 14 § 41(4) (ORS 419B.890(4)).

Admissions, and Taking Jurisdiction at the Pre-trial Hearing

Notice and Inquiry

Before the court accepts an admission, the court must ensure that inquiry has occurred. [If there is reason to know the child is an Indian child](#), the court must also determine whether [notice](#) has been provided and notice timelines have been followed.

The Court must therefore assess whether ODHS has made a good faith effort to [inquire](#) into whether there is [reason to know the child is an Indian child](#), by, at the least, consulting with:

- The child;
- The child's parent or parents;
- Any person having custody of the child or with whom the child resides;
- Extended family members of the child;
- Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
- Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORICWA Oregon Laws 2020. ch. 14 §§ 15(2) & 34(2)(b) (ORICWA 419B.305(2)(b)). For more information review the Chapter 3 section on [Inquiry](#).

If there is reason to know the child is an Indian child under ORICWA/ICWA, the court must assess whether ODHS:

- promptly sent [notice](#) of the child custody proceeding by registered or certified mail, with return receipt requested, to:
 - Each tribe of which the child may be a member or eligible for membership; and
 - The child's parents and/or the child's [Indian custodian](#); or
 - The appropriate BIA Regional Director, if the identity or location of the child's parents, Indian custodian, or tribe cannot be ascertained.
- filed an original or a copy of each [notice](#) sent with the Court, together with any return receipts or other proof of service; and the notice includes those elements described in the Chapter 3 section on [Notice](#).

- sent copies of the [notices](#) to the appropriate BIA Regional Director, by registered or certified mail, with return receipt requested, or by personal delivery.

ORICWA Oregon Laws 2020. ch. 14 §§16(2) & 34(2)(b) (ORS 419B.305(2)(b)); For more information review Chapter 3 [Notice](#).

Colloquy

The requirements of ORICWA must be considered in the Court's colloquy with the parent or [Indian Custodian](#) entering admissions. Here is a sample colloquy that incorporates the jurisdictional standard from ORICWA:

- ODHS has filed a petition that describes what it thinks is going on with your child and asks me to take jurisdiction over your child.
- If I take jurisdiction, I could give legal custody of your child to ODHS and allow them to place your child in foster care. ODHS would have the authority to decide where your child lives. ODHS would also control when you would be able to visit your child. I could require you to participate in services and take specific actions with the goal of reunifying you with your child.
- It is my understanding that your child is a member of a tribe or eligible for membership in a tribe, or we have reason to know that your child is a member of a tribe or eligible for membership in a tribe. Is that correct?
 - If so, that means that the Oregon Indian Child Welfare Act applies to your case. That is a law that provides additional protections to Native families in the child welfare system.
- Have you read the petition and talked to your attorney about it and the protections of the Oregon Indian Child Welfare Act?
- You have the right to a trial. At the trial, ODHS would try to prove what they've said in the petition and that if you continued to have custody of your child it would likely result in serious emotional or physical damage to the child. They would also have to prove that they worked with you and tried to help you parent your children, but that those services were unsuccessful. They would put on evidence and call witnesses. You, with your lawyer, would have the chance to challenge that evidence, meaning you would have the right to question ODHS's witnesses, call your own witnesses, speak for yourself, and present other evidence about the allegations.
- At the trial, only if I find that ODHS has proven what the petition says, that continued custody of your child with you would likely result in serious emotional or physical damage to the child, and that ODHS has provided services to help prevent the Court from taking custody, would I take jurisdiction and have the authority over you and your child that I've just described.
- Although you have the right to a trial, you don't have to have a trial. You may waive your right to trial and admit to what ODHS is saying in the petition if that's what you want to do. But if you do admit, then I may take jurisdiction over the child.
- Your lawyer tells me you want to make an admission today, is that true? Do you understand that if you admit you will not have a trial—that you are giving up that right—and I will take jurisdiction and have authority over you and your child?
 - If yes, read the allegation and ask the parent if it is true.

Qualified Expert Witness

If the Court is accepting an admission, it must also accept testimony or a declaration from a [qualified expert witness](#) that describes the prevailing social and cultural standards and child rearing practices of the Indian child's tribe and supports the Court's finding that the Indian child's continued custody by

the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. ORICWA Oregon Laws 2020. ch. 14 §§ 17 & 35(3)(b)(A) (ORS 419B.310(3)(b)(A)).

Jurisdiction Hearing

The purpose of the jurisdiction hearing is to determine if the legal standards for dependency jurisdiction under ORS 419B.100 and ORICWA have been met.

Jurisdiction Hearing Snapshot:

- Legal Issues and Written Findings
 - If not yet determined, Application of ORICWA
 - If not yet determined, State vs. Tribal Jurisdiction
 - Notice and Inquiry
 - Standard of Proof
 - ORICWA Standards for Jurisdiction
 - Qualified Expert Witness

Legal Issues and Findings

Application of ORICWA

If a finding has not yet been made that the child is an Indian child the Court must ask, on the record, each individual present whether they know or have [reason to know the child is an Indian child](#).

If a finding has not yet been made that the child is an Indian child, the Court should also attempt to determine whether the child is an Indian child and ICWA applies.

- If there is sufficient evidence to show that the child is an Indian child:
 - the Court must enter a finding that ORICWA/ICWA applies to the case.
- If there is [reason to know that the child is an Indian child](#):
 - the Court must enter a finding that ORICWA/ICWA be applied unless and until the child is determined to not be an Indian child; and
 - the Court must order ODHS to use due diligence to identify and work with all of the tribes identified to verify whether the child is an Indian child and prepare a report, declaration, or testimony for presentation to the Court at the adjudicatory hearing.
- If at a previous hearing it was established that there was [reason to know that the child was an Indian child](#), but ODHS presents evidence that they have 1) exercised due diligence to contact all possible affiliated tribes; and 2) the child is not an Indian child:
 - the Court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
 - the Court should instruct each party to inform the Court immediately if the party later receives information that provides [reason to know the child is an Indian child](#).
- If there has never been and continues to be no reason to know that a child is an Indian child:
 - the Court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a [reason to know the child is an Indian child](#); and
 - the Court must instruct each party to inform the Court immediately if the party later receives information that provides [reason to know the child is an Indian child](#).

ORICWA Oregon Laws 2020. ch. 14 §§ 15 & 35(4)(a) (ORS 419B.310(4)(a)). For more information review the Chapter 2 section on [Reason to Know a Child is an Indian Child](#).

State vs. Tribal Jurisdiction

Before ruling on whether the child is within the Court's dependency jurisdiction under ORS 419B.100(1), the Court must determine the child's domicile, whether the child is a ward of a Tribal Court, and whether it, or instead a Tribal Court, has jurisdiction over the matter. ORICWA Oregon Laws 2020. ch. 14 §§ 9, 12 & 35(4)(B) (ORS 419B.310 (4)(B)). For more information, review the [Chapter 4](#) section on [Jurisdiction](#).

Notice and Inquiry

The Court may not hold a jurisdictional hearing unless it has determined that ODHS:

- has made a good faith effort to [inquire](#) into whether there is [reason to know the child is an Indian child](#), by, at the least, consulting with:
 - The child;
 - The child's parent or parents;
 - Any person having custody of the child or with whom the child resides;
 - Extended family members of the child;
 - Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
 - Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORICWA Oregon Laws 2020. ch. 14 §§ 15(2) & 34(2)(b) (ORS 419B.305(2)(b)). For more information, review the section of Chapter 3 on [Inquiry](#).

If there is reason to know the child is an Indian child under ORICWA/ICWA, the court may not hold a jurisdictional hearing unless ODHS:

- promptly sent [notice](#) of the proceeding by registered or certified mail, with return receipt requested, to:
 - Each tribe of which the child may be a member or eligible for membership; and
 - The child's parents and/or the child's [Indian custodian](#); or
 - The appropriate BIA Regional Director, if the identity or location of the child's parents, Indian custodian, or tribe cannot be ascertained.
- filed an original or a copy of each [notice](#) sent with the Court, together with any return receipts or other proof of service; and the notice includes those elements described in the [Chapter 3](#) section on [notice](#).
- sent copies of the [notices](#) to the appropriate BIA Regional Director, by registered or certified mail, with return receipt requested, or by personal delivery.

ORICWA Oregon Laws 2020. ch. 14 § 16(2) & 34(2)(b) (ORICWA 419B.305(2)(b)). For more information, review the section of Chapter 3 on [Notice](#).

Standard of Proof

The standard of proof is clear and convincing evidence. The burden of proof is on the party asserting that the child is within the Court's jurisdiction under ORS 419B.100(1). ORICWA Oregon Laws 2020. ch. 14 § 35(3)(a)(B) (ORS 419B.310(3)(a)(B)).

ORICWA Standards for Jurisdiction

To rule that the child is within the Court's dependency jurisdiction, the Court must determine that:

- Due to the pled and proven or admitted circumstances of the child, continued custody of the child by the child's parents [or Indian custodian](#) is likely to result in serious emotional or

physical damage to the Indian child (supported by the testimony or declaration of a [Qualified Expert Witness](#), as discussed below); and

- There is a causal relationship between the particular conditions in the Indian child's home and the likelihood that the Indian child's continued custody by the child's parent or [Indian custodian](#) will result in serious emotional or physical damage to the Indian child. Evidence that shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not, by itself, establish a causal relationship.

ORICWA Oregon Laws 2020. ch. 14 § 35(3)(b) (ORS 419B.310(3)(b)).

Qualified Expert Witness

To rule that the child is within the Court's dependency jurisdiction under ORS 419B.100(1), ODHS must present [Qualified Expert Witness](#) who must testify regarding:

- Whether the Indian child's continued custody by the Indian child's parent or [Indian custodian](#) is likely to result in serious emotional or physical damage to the Indian child; and
- The prevailing social and cultural standards and child rearing practices of the Indian child's tribe.

ORICWA Oregon Laws 2020. ch. 14 §§ 17 & 35(3)(b)(A) (ORS 419B.310(3)(b)(A)). For more information and for who may, and may not, serve as a [Qualified Expert Witness](#), see the Chapter 3 section on [Qualified Expert Witnesses](#).

Disposition

Once the Court has ruled that it has jurisdiction over the child under ORS 419B.100, it is required to address the disposition of the case.

Disposition Snapshot:

- Legal Issues and Written Findings
 - Enrollment
 - Active Efforts
 - Placement Preferences
 - Placement Outside of the Preferences

Legal Issues and Written Findings

Enrollment

Unless the parents object, ODHS must assist the family with enrolling the child in the child's tribe. ORICWA Oregon Laws 2020. ch. 14 § 7. The Court should remind ODHS of this obligation and determine whether the parents object.

Active Efforts

The Court must make written findings and a written determination as to whether ODHS provided [active efforts](#) to prevent or eliminate the need for removal and to reunify the family, including a brief description of those efforts.

- The Court must determine whether ODHS has made [active efforts](#) to prevent or eliminate the removal of the child from the home and to make it possible for the child to safely return home.

- The Court must rule that ODHS made [active efforts](#) if it finds the first contact with the family occurred during an emergency in which the child could not remain at home without being “in jeopardy” even with services provided.
- The Court may rule that ODHS did not make [active efforts](#) to prevent removal but continue that removal if it finds that prevention or reunification efforts could not permit the child to remain at home without being in jeopardy.
- A Court in an ICWA/ORICWA case cannot relieve ODHS from making reunification efforts in an aggravated circumstances case under ORS 419B.340(5).

ORICWA Oregon Laws 2020. ch. 14 §§ 18 & 33 (1)-(4) (ORS 419B.340 (1)-(4)). For more information, review the Chapter 3 section on [Active Efforts](#).

Placement Preferences

The Court may place the child in the legal custody of ODHS for care, placement, and supervision. When doing so, the Court must review the child’s placement for compliance with ORICWA [placement preferences](#) and make any necessary orders to correct deficiencies.

The Court must determine whether ODHS has or will place the child in a home that:

- most closely approximates a family, taking into consideration sibling attachment;
- allows the Indian child’s special needs, if any, to be met; and
- is in reasonable proximity to the Indian child’s home, extended family, or siblings; AND
- is in accordance with the order of preference established by the Indian child’s tribe; OR, if the tribe does not have an established order of preference, in the following order of preference:
 - With a member of the Indian child’s extended family;
 - In a foster home licensed, approved, or specified by the Indian child’s tribe;
 - In a foster home licensed or approved by a licensing authority in this state and in which one or more of the licensed or approved foster parents is an Indian; or
 - In an institution for children that has a program suitable to meet the Indian child’s needs and is approved by an Indian tribe or operated by an Indian organization.

ORICWA Oregon Laws 2020. ch. 14 § 23(1) & 36(3) (ORS 419B.325(3)). For more information, review the Chapter 3 section on [Placement Preferences](#).

Placement Outside of the Preferences

Good cause finding

A party may move the Court for authority to make a placement contrary to the placement preferences. The Court may make such an order only if it determines, and issues a written order memorializing, that good cause exists to depart from the placement preferences.

- If there are objections to the motion, the Court must hold a hearing.
- The standard of proof is **clear and convincing evidence, and the burden of proof is on the party requesting the exception to the placement preferences.**
- ORICWA specifies what may not be considered good cause. These factors are described in detail in the chapter 3 section on [Placement Preferences](#).

ORICWA Oregon Laws 2020. ch. 14 § 23(4). For more information, review the Chapter 3 section on [Placement Preferences](#).

Violation of placement preferences

If any party asserts *or the court has reason to believe* a child has been placed contrary to the placement preferences provided above, the court must make a determination about whether there has been a violation of Section 23(1) or (2). ORICWA Oregon Laws 2020. ch. 14 § 23(3). If it finds a violation, the court must “invalidate” the placement of the child, and the proceeding that led to the violation must be “vacated”. If the child is placed out of home, the court shall order the child immediately returned to the parent or Indian custodian, and any issues determined must be relitigated. ORICWA Oregon Laws 2020. ch. 14 § 22(2).

Review Hearing

*When ODHS has been granted legal custody or guardianship of the child pursuant to a Court order, it is required to provide regular court reports. Upon receiving such a report, the Court may hold a review hearing (under ORS 419B.449), but it **must** hold such a hearing if requested by a party. The purpose of these hearings is to: determine whether the Court should continue jurisdiction and wardship of the child and/or order modifications in the care, placement, and supervision of the child; review the progress of the family and ODHS’s efforts to provide services to make reunification as safe as possible within a reasonable time; consider whether the services to the child are adequate to ensure their health, safety, and well-being; and review the development of the concurrent plan.*

Review Hearing Snapshot

- Legal Issues and Written Findings
 - Continuing In-Home Placement
 - Removing the Indian Child
 - Continuing Out-of-Home Placement
 - Placement Preferences
 - Concurrent Planning

Legal Issues and Written Findings

Continuing In-Home Placement

If the child is in the legal custody of ODHS but the physical custody of the parent at the time of the review hearing, to continue that arrangement, the Court must determine that doing so is necessary and in the best interest of the Indian child. ORICWA Oregon Laws 2020. ch. 14 § 46(4) (419B.449(4)); ORICWA Oregon Laws 2020. ch. 14 § 5. For more information, see the Chapter 2 section on [Best Interest of the Indian child](#).

Removing the Indian Child

If the child is in the legal custody of ODHS but physical custody of their parent, the Court can only order removal and placement in foster care at a review hearing if the following requirements have been met:

- Formal [inquiry](#) and [notice](#) have occurred (and the hearing date is in compliance with the notice timelines);
- Testimony of [a Qualified Expert Witness has been taken](#); and
- ODHS provided [active efforts](#) to prevent removal.

ORICWA Oregon Laws 2020. ch. 14 § 46(5) & 33(1) (ORS 419B.449(5) & ORS 419B.340(1)) . For more information, see the Chapter 3 sections on [Inquiry](#), [Notice](#), [Qualified Expert Witnesses](#), and [Active Efforts](#).

Continuing Out-of-Home Placement

To continue a child's out-of-home placement, the Court must also make a ruling as to whether ODHS has made [active efforts](#) to reunify the family. Note that an active efforts finding is required even after the child's permanency plan has changed from reunification. ORICWA Oregon Laws 2020. ch. 14 § 46(7) (ORS 419B.449(7)).

- Unless the Court finds that returning the child will cause substantial and immediate danger or threat of danger to the child, if the Court finds that [active efforts](#) have not been made, the Court must return the child to their parents.

If the Court finds that [active efforts](#) have not been made, the Court must (1) determine the period of time that ODHS failed to provide active efforts, and (2) order ODHS to provide those services necessary to fulfill the "active efforts" requirement.

ORICWA Oregon Laws 2020. ch. 14 § 46(7) (ORS 419B.449(7)).

Practice Tip: Review Hearings when the Permanency Plan is no longer Reunification

Under ORICWA, ODHS is not relieved of the requirement to provide active efforts to reunify the family when the permanency plan is no longer reunification. ODHS therefore has to continue active efforts to reunify, even as ODHS must also employ reasonable efforts to attain permanency. ORICWA Oregon Laws 2020. ch. 14 § 46(7) (419B.449(7)).

Placement Preferences

If the child has not been placed in line with [ORICWA placement preferences](#), the Court must assess whether ODHS has made "diligent efforts" to try to place the child in line with them or whether an order finding good cause to deviate from the placement preferences has been issued. ORICWA Oregon Laws 2020. ch. 14 §§ 23, 32(5) (ORS 419B.192(5)) & 46(3)(B)(b) (ORS 419B.449(3)(B)(b)). For more information, see the Chapter 3 section on [Placement Preferences](#).

Concurrent Planning

- In addition to the placement preference findings required above, the Court should inquire as to:
 - Whether any potential long-term placement resources in the child's life fulfill ORICWA's guardianship and adoptive placement preferences; and
 - Whether ODHS has made diligent efforts to ensure that any concurrent plan placement resources are in line with ORICWA's guardianship and adoptive placement preferences.

ORICWA Oregon Laws 2020. ch. 14 §§ 23, 32(5) (ORS 419B.192(5)) & 46(6) (ORS 419B.449(6)). For more information see the Chapter 3 section on [Placement Preferences](#).

In addition, if the Court finds that active efforts were not provided, the Court must:

- order ODHS to continue the child's placement according to the placement preferences under section 23 of ORICWA; and
- order ODHS to continue to foster relationships with any individuals identified by ODHS as long-term placement resources meeting the placement preferences.

ORICWA Oregon Laws 2020. ch. 14 §§ 23 & 46(7)(c)(D). For more information see the Chapter 3 section on [Placement Preferences](#).

Permanency Hearing

The purpose of the permanency hearing is to review the case in order to determine the appropriate permanency plan for the child. Permanency plans may include: Reunification, Adoption, Permanent Guardianship (ORS 419B.365), Guardianship (ORS 419B.366), Placement with a Fit and Willing Relative or Another Planned Permanent Living Arrangement (APPLA; for children age 16 and up).

Permanency Hearing Snapshot

- Legal Issues and Written Findings
 - Standard and Burden of Proof
 - Standards to Change or Maintain the Permanency Plan
 - Changing the Plan Away from Reunification
 - Maintaining a Case Plan of Reunification
 - Maintaining a Case Plan Other than Reunification
 - Active Efforts
 - Placement Preferences
 - Concurrent Planning

Legal Issues and Written Findings

Standard and Burden of Proof

The standard of proof to change the permanency plan is clear and convincing evidence. The burden of proof is on the party requesting the change; if no party is requesting a change in plan, the burden of proof is on ODHS. Oregon Laws 2020. ch. 14 § 38(2) (ORS 419B.476(2)).

Standards to Change or Maintain the Permanency Plan

Changing the Plan Away from Reunification

To change the permanency plan away from reunification, the Court must determine that:

- ODHS made [active efforts](#) to make it possible for the Indian child to return home, including a brief description of the active efforts made by the department, and;
- despite the active efforts made, the parent has not made sufficient progress for the child to safely return home; and
- despite the [active efforts](#) made, continued removal of the Indian child is necessary to prevent serious emotional or physical damage to the child.

Oregon Laws 2020. ch. 14 § 38(5).

The Court must include in its permanency judgment a brief description of the [active efforts](#) made by the department. ORICWA Oregon Laws 2020. ch. 14 §§ 18 & 38(2)(a) & (5). For more information, see Chapter 3 section on [Active Efforts](#).

Practice Tip: Changing Permanency Plan to Adoption

Before the Court may change the plan to adoption, the Court must determine whether any of the factors that preclude the filing of a petition termination of parental rights petition outlined in ORS 419B.498(2) exist (the burden of proof is on the party contending any of the factors exist). If they do, the Court cannot change the plan to adoption but may order another plan, such as guardianship, placement with a fit and willing relative, or APPLA. If the Court changes the plan to guardianship, placement with a fit and willing relative, or APPLA, the Court should make findings on the record about why that plan is more appropriate than other permanent placements options. In making these determinations the Court may wish to consider:

- ◆ Which plan will best support a placement in line with the placement preferences of ORICWA (for example, some placements may be unwilling to adopt but willing to serve as guardians);
- ◆ Whether ODHS has engaged in diligent efforts to find a compliant ORICWA placement preference;
- ◆ The position of the tribe;
- ◆ Testimony concerning the culture and traditional child rearing practices of the tribe (for example, many tribes do not believe in terminating parental rights);
- ◆ Whether the Court has found at any stage of the case that ODHS has not provided active efforts.

Maintaining a Case Plan of Reunification

In determining whether a permanency plan of reunification should be maintained, the Court must make findings as to whether:

- ODHS has made [active efforts](#) to make it possible for the ward to safely return home;
- the parent has made sufficient progress to make it possible for the ward to safely return home.

The Court must include a brief description of the [active efforts](#) made by the department. ORICWA Oregon Laws 2020. ch. 14 §§ 18 & 38(2)(a) & (5). For more information, see the Chapter 3 section on [Active Efforts](#).

Maintaining a Case Plan Other than Reunification

To maintain a permanency plan other than reunification, the Court must determine that ODHS has made reasonable efforts to achieve the permanency plan that is in place. The Court must include a brief description of the active and reasonable efforts made by the department. ORICWA Oregon Laws 2020. ch. 14 §§ 18 & 38(2) & (5) (ORS 419B.476 (2) & (5)).

Practice Tip: Active Efforts After a Change in Permanency Plan

At a guardianship hearing, under both ORS 419B.365 and 419B.366, as well as a termination of parental rights trial, the Court is required to find that ODHS provided active efforts to promote reunification of the child with their family for the entire duration of the case, not just until the permanency plan was changed.

Finding that ODHS Did Not Make Active Efforts

If the Court rules that ODHS has not made [active efforts](#), it may not change the plan away from reunification, and:

- It must designate the period of time during which active efforts were not made.
- The Court may not set a date for a subsequent permanency hearing until ODHS has had the opportunity to provide [active efforts](#) for the same number of days ODHS previously failed to provide such efforts, except as otherwise required by ORS 419B.470.

The Court may consider whether further efforts will make it possible to reunify the family within a reasonable time. If the Court answers that question in the affirmative, the Court may:

- Order the parent to participate in specific services for a specific period of time and make specific progress within that period of time.
- Order ODHS to expand the case plan and provide a case progress report within 10 days after the permanency hearing.

Note: In an ORICWA/ICWA case, the Court may not relieve ODHS of the requirement to provide reunification efforts due to aggravated circumstances. ORS 419B.340(5) (the provision related to aggravated circumstances only discusses reasonable efforts.)

ORICWA Oregon Laws 2020. ch. 14 §§ 18, 38(4), (5) & (7) ((ORS 419B.476(4), (5) & (7))). For more information, see the Chapter 3 section on [Active Efforts](#).

Placement Preferences

ORICWA requires the Court to “follow the placement preferences [of ORICWA]” at the permanency hearing. ORICWA Oregon Laws 2020. ch. 14 §§ 23 & 38(7)(a).

If the Court determines that the permanency plan should be something other than to reunify the family, and the placement is known, the Court must determine whether the permanent placement is in line with the applicable [placement preferences](#). For details on the applicable placement preferences for APPLA placements (substitute care), guardianships, and adoptions, and for the requirements that must be followed to place an Indian child outside the placement preferences, see the Chapter 3 section on [Placement Preferences](#).

How this requirement is applicable when the Court changes the permanency plan but the prospective guardian or adoptive placement is unknown is not clear. The Court may wish to advise the parties that compliance with the appropriate ORICWA [placement preferences](#) must be shown at any subsequent guardianship or TPR/adoption proceeding.

Concurrent Planning

- In addition to the placement preference findings required above, the Court should inquire into:
 - Whether any potential long-term placement resources in the child’s life fulfill the appropriate [placement preferences](#); and
 - Whether ODHS has made diligent efforts to ensure that any concurrent placements are in line with ORICWA’s guardianship and adoptive [placement preferences](#).

ORICWA Oregon Laws 2020. ch. 14 §§ 23 & 38(4)(f) (ORS 419B.476(4)(f)).

- If no placements in line with the [ORICWA placement preferences](#) have been identified, the Court may consider ordering ODHS to continue to foster relationships with any individuals identified by ODHS as long-term placements in line with the [ORICWA placement preferences](#).
- If no long-term placements in line with the [ORICWA placement preferences](#) are available, the Court may consider ordering ODHS to engage in diligent efforts to locate a placement in line with the ORICWA placement preferences.

ORICWA Oregon Laws 2020. ch. 14 §§ 23

Permanent Guardianship Hearing (ORS 419B.365)

Having changed the child’s permanency plan to guardianship, the Court, under ORS 419B.365, may, upon petition by a party and after a hearing, order a permanent guardianship on behalf of a child in a dependency case when the child cannot safely return home within a reasonable time and the Court has determined that adoption is not an appropriate permanency plan. Once ordered, the parent(s) may not petition the Court to vacate a permanent guardianship order.

Permanent Guardianship Hearing (.365) Snapshot

- Preliminary Matters
 - Mediation
- Legal Issues and Written Findings
 - Inquiry and Notice
 - Standard and Burden of Proof
 - ORS 419B.365 Guardianship Standard
 - Active Efforts
 - Placement Preferences
 - Placement Outside the Placement Preferences
 - Cultural Connection Agreements

Preliminary Matters

Mediation

To order a permanent guardianship, the Court must first offer the parties an opportunity to participate in mediation under ORS 419B.517 and an opportunity, if requested by the tribe, to put in place a cultural agreement between the child’s tribe and the proposed guardian. ORICWA Oregon Laws 2020. ch. 14 § 43(4)(a)(A) & (B) (ORS 419B.365(4)(a)(A) & (B)) & 45(2) (ORS 419B.367(2)).

Legal Issues and Written Findings

Inquiry and Notice

The Court may not hold a hearing on the petition for permanent guardianship unless it has determined that ODHS:

- has made a good faith effort to [inquire](#) as to whether there is [reason to know the child is an Indian child](#), by, at the least, consulting with:
 - The child;
 - The child’s parent or parents;
 - Any person having custody of the child or with whom the child resides;
 - Extended family members of the child;
 - Any other person who may reasonably be expected to have information regarding the child’s membership or eligibility for membership in an Indian tribe; and

- Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORICWA Oregon Laws 2020. ch. 14 § 15(2); ICWA 25 USC § 1903(1)(i). & 1912(a). For more information, see the Chapter 3 section on [Inquiry](#).

If there is reason to know the child is an Indian child under ORICWA/ICWA, the court may not hold a hearing on the petition unless ODHS:

- promptly sent [notice](#) of the child custody proceeding by registered or certified mail, with return receipt requested, to:
 - Each tribe of which the child may be a member or eligible for membership; and
 - The child's parents and/or the child's [Indian custodian](#); or
 - Appropriate BIA Regional Director, if the identity or location of the child's parents, Indian custodian or tribe cannot be ascertained.
- filed an original or a copy of each notice sent with the Court, together with any return receipts or other proof of service.
- sent copies of the notices to the appropriate Regional Director, by registered or certified mail with return receipt requested or by personal delivery.

ORICWA Oregon Laws 2020. ch. 14 § 16(2); ICWA 25 USC §§ 1903(1)(i) & 1912(a). For more information, see the Chapter 3 section on [Notice](#).

Standard and Burden of Proof

The standard of proof is beyond a reasonable doubt, and the burden of proof is on the party petitioning the Court to establish the guardianship. ORICWA Section 43(4)(a)(C)(i) (ORS 419B.365(4)(a)(C)(i)).

Guardianship Standard

To order a permanent guardianship, the Court must determine that:

- A statutory basis for termination of parental rights has been proven (ORS 419B.502 to 419B.510);
- Based on testimony by a Qualified Expert Witness that the Indian child's continued custody by their parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and
- There is a causal relationship between the particular conditions in the Indian child's home and the likelihood that the Indian child's continued custody by the child's parent or custody by the child's Indian custodian will result in serious emotional or physical damage to the Indian child. Evidence that shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not, by itself, establish a causal relationship; **and**
- It is in the [best interest of the Indian child](#) that the parent never have physical custody of the child but that other parental rights and duties should not be terminated.

ORICWA Oregon Laws 2020. ch. 14 § 43(4)(a)(C)(i) & (3)(b) (ORS 419B.365(4)(a)(C)(i) & (3)(b)). For more information, see the Chapter 3 section on [Best Interest of the Indian Child](#).

Active Efforts

To order a permanent guardianship, the Court also must determine that:

- ODHS provided [active efforts](#) to reunify the child with their parent(s); and
- those efforts did not eliminate the necessity for guardianship because continued custody is likely to result in serious emotional or physical damage to the Indian child.

ORICWA Oregon Laws 2020. ch. 14 § 23(2) & 43(4)(a)(C)(ii) (ORS 419B.365(4)(a)(C)(ii)). For more information, see the Chapter 3 section on [Active Efforts](#).

Placement Preferences

The Court must find that the guardianship placement is in accordance with the [ORICWA placement preferences](#). This means that the child must be placed in the order of preference established by the Indian child's tribe.

If the Indian child's tribe has not established applicable placement preferences, the Indian child must be placed in the following order of preference:

- With a member of the Indian child's extended family;
- With other members of the Indian child's tribe; or
- With other Indian families.

ORICWA Oregon Laws 2020. ch. 14 § 44(3)(C)(iii) (ORS 419B.366(3)(C)(iii)); ORICWA Oregon Laws 2020. ch. 14 § 23(2). For more information, see the Chapter 3 section on [Placement Preferences](#).

Placement Outside the Placement Preferences

A party may move the Court for authority to make a guardianship placement contrary to the placement preferences. The Court may make such an order only if it determines, and issues a written order memorializing, that good cause exists to depart from the placement preferences.

- If there are objections to the motion, the Court must hold a hearing.
- The standard of proof is **clear and convincing evidence, and the burden of proof is on the party requesting the exception to the placement preferences.**
- ORICWA specifies what may not be considered good cause. These are described in detail in the chapter 3 section on [Placement Preferences](#).

ORICWA Oregon Laws 2020. ch. 14 § 23(4) & 43(4)(C)(iii) (ORS 419B.365(4)(C)(iii)). For more information, see the Chapter 3 section on [Placement Preferences](#).

Cultural Connection Agreements

If an agreement to maintain the child's connection with the tribe has been negotiated between the Indian child's tribe and the proposed guardian, the Court's guardianship judgment must include the terms of that agreement. ORICWA Oregon Laws 2020. ch. 14 §§ 43(a)(A) & (B) (ORS 419B.365(a)(A) & (B)) & 45(2) (ORS 419B.367(2)).

Guardianship Hearing (ORS 419B.366)

Having changed the child's permanency plan to guardianship, the Court may, under ORS 419B.366, upon motion and a hearing, order a guardianship. At any time, the parent(s) may request that the Court vacate a guardianship order issued under ORS 419B.366.

Guardianship Hearing (.366) Snapshot

- Preliminary Matters
 - Mediation
- Legal Issues and Written Findings
 - Inquiry and Notice
 - Standard and Burden of Proof
 - ORS 419B.366 Guardianship Standard
 - Active Efforts
 - Placement Preferences
 - Placement Outside the Placement Preferences
 - Cultural Connection Agreements

Preliminary Matters

Mediation

To order a guardianship, the Court must first offer the parties an opportunity for mediation under ORS 419B.517 and, if requested by the tribe, an opportunity to put in place a cultural agreement between the child's tribe and the proposed guardian. ORICWA Oregon Laws 2020. ch. 14 §§ 44(3)(a)(A) & (B) (ORS 419B.366 (a)(A) & (B)) & 45(2) (ORS 419B.367(2)).

Legal Issues and Written Findings

Inquiry and Notice

The Court may not hold a hearing on the motion to establish a guardianship under 419B.366 unless it has determined that ODHS:

- has made a good faith effort to [inquire](#) as to whether there is [reason to know the child is an Indian child](#), by, at the least, consulting with:
 - The child;
 - The child's parent or parents;
 - Any person having custody of the child or with whom the child resides;
 - Extended family members of the child;
 - Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
 - Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORICWA Oregon Laws 2020. ch. 14 § 15(2); ICWA 25 USC §§ 1903(1)(i) & 1912(a). For more information, see the Chapter 3 section on [Inquiry](#).

If there is reason to know the child is an Indian child under ORICWA/ICWA, before holding a hearing on the motion, the court must verify that ODHS:

- promptly sent [notice](#) of the child custody proceeding by registered or certified mail, with return receipt requested, to:
 - Each tribe of which the child may be a member or eligible for membership; and
 - The child's parents and/or the child's [Indian custodian](#); or

- Appropriate BIA Regional Director, if the identity or location of the child's parents, Indian custodian or tribe cannot be ascertained.
- filed an original or a copy of each notice sent with the Court, together with any return receipts or other proof of service.
- sent copies of the notices to the appropriate Regional Director, by registered or certified mail with return receipt requested or by personal delivery.

ORICWA Oregon Laws 2020. ch. 14 § 16(2); ICWA 25 USC §§ 1903(1)(i) & 1912(a). For more information, see the Chapter 3 section on [Notice](#).

Standard and Burden of Proof

The standard of proof is clear and convincing evidence, and the burden of proof is on the party moving to establish the guardianship. ORICWA Section 44(3)(a)(C)(i) (ORS 419B.366(3)(a)(C)(i)).

ORS 419B.366 Guardianship Standard

To order a guardianship, the Court must find by clear and convincing evidence that:

- the Indian child's [continued custody](#) by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child (as supported by the testimony of a [Qualified Expert Witness](#));
- a causal relationship between the particular conditions in the Indian child's home and the likelihood that the Indian child's [continued custody](#) by the child's parent or custody by the child's Indian custodian will result in serious emotional or physical damage to the Indian child. Evidence that shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse or nonconforming social behavior does not, by itself, establish a causal relationship; and
- the other requirements for a guardianship under ORS 419B.366:
 - the ward cannot safely return to a parent within a reasonable time;
 - adoption is not an appropriate plan for the child;
 - the proposed guardian is suitable and willing to accept the duties and authority of a guardian; AND
 - guardianship is in the [best interest of the Indian Child](#).

ORICWA Oregon Laws 2020. ch. 14 § 44(3)(a)(C)(i) (ORS 419B.366(3)(a)(C)(i)).

Active Efforts

To order a guardianship, the Court must find that by clear and convincing evidence that:

- ODHS provided [active efforts](#) to reunify the child with their parent(s); and
- those efforts did not eliminate the necessity for guardianship as continued custody is likely to result in serious emotional or physical damage to the Indian child.

ORICWA Oregon Laws 2020. ch. 14 §§ 18 & 44(3)(a)(C)(ii)(ORS 419B.366(3)(a)(C)(ii)). For more information see the Chapter 3 section on [Active Efforts](#).

Placement Preferences

- The Court must find that the guardianship placement is in accordance with the [ORICWA placement preferences](#). This means that the child must be placed in the order of preference established by the Indian child's tribe.

- If the Indian child’s tribe has not established placement preferences, the Indian child must be placed in the following order of preference:
 - With a member of the Indian child’s extended family;
 - With other members of the Indian child’s tribe; or
 - With other Indian families.

ORICWA Oregon Laws 2020. ch. 14 §§ 23 & 44(3)(c)(iii) (ORS 419B.366(3)(c)(iii)). For more information see the Chapter 3 section on [Placement Preferences](#).

Placement Outside the Placement Preferences

A party may move the Court for authority to make a placement contrary to the placement preferences. The Court may make such an order only if it determines, and issues a writing order memorializing, that good cause exists to depart from the placement preferences.

- If there are objections to the motion, the Court must hold a hearing.
- The standard of proof is **clear and convincing evidence, and the burden of proof is on the party requesting the exception to the placement preferences.**
- ORICWA specifies what may not be considered good cause. These are described in detail in the chapter 3 section on Placement Preference.

ORICWA Oregon Laws 2020. ch. 14 § 23(4) & 44(3)(c)(iii) (ORS 419B.366(3)(c)(iii)). For more information see the Chapter 3 section on [Placement Preferences](#).

Cultural Connection Agreements

If an agreement to maintain the child’s connection with the tribe has been negotiated between the Indian child’s tribe and the proposed guardian, the Court’s guardianship judgment must include the terms of that agreement. ORICWA Oregon Laws 2020. ch. 14 § 45(2) (ORS 419B.367(2)).

Termination of Parental Rights

To make a child available for adoption, the Court must first terminate the rights the parent has to the child.

Termination of Parental Rights Snapshot

- Preliminary Matters
 - Application of ORICWA
 - Mediation
- Legal Issues and Written Findings
 - Inquiry and Notice
 - Standard and Burden of Proof
 - Standard for Termination of Parental Rights
 - Active Efforts
 - Cultural Connection Agreements

Preliminary Matters

Application of ORICWA

- The Court must ask, on the record, each individual present whether they know or have [reason to know the child is an Indian child](#).
- The Court should also attempt to determine whether the child is an Indian child and ICWA/ORICWA applies.

- If there is sufficient evidence to show that the child is an Indian child:
 - the Court must enter a finding that ORICWA/ICWA applies to the case.
- If there is [reason to know that the child is an Indian child](#):
 - the Court must enter a finding that ORICWA/ICWA be applied unless and until the child is determined to not be an Indian child; and
 - the Court must order ODHS to use due diligence to identify and work with all of the tribes identified to verify whether the child is an Indian child and prepare a report, declaration, or testimony for presentation to the Court at the adjudicatory hearing.
- If at a previous hearing it was established that there was [reason to know that the child was an Indian child](#), but ODHS presents evidence that they have 1) exercised due diligence to contact all possible affiliated tribes; and 2) the child is not an Indian child:
 - the Court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a reason to know the child is an Indian child; and
 - the Court should instruct each party to inform the Court immediately if the party later receives information that provides [reason to know the child is an Indian child](#).
- If there has never been and continues to be no [reason to know that a child is an Indian child](#):
 - the Court must enter a finding that ORICWA/ICWA does not apply to the case unless and until there is a [reason to know the child is an Indian child](#); and
 - the Court must instruct each party to inform the Court immediately if the party later receives information that provides [reason to know the child is an Indian child](#).

ORICWA Oregon Laws 2020. ch. 14 §§ 15(3), 48 (ORS 419B.500) & 49(4) (ORS 419B.521(4)). For more information see the Chapter 2 sections on Indian child and Reason to Know.

Mediation

Before it may terminate parental rights, the Court must offer the parties an opportunity for mediation under ORS 419B.517 and the opportunity, if requested by the tribe, to put in place a cultural agreement between the child's tribe and prospective adoptive placement (if known). ORICWA Oregon Laws 2020. ch. 14 §§ 49(4)(b)(A) & (B) (ORS 419B.521(4)(b)(A) & (B)) & 50 (1)(c) (ORS 419B.529(1)(c)).

Legal Issues and Written Findings

Inquiry and Notice

The Court may not hold a hearing on the petition to terminate parental rights unless it has determined that ODHS:

- has made a good faith effort to [inquire](#) into whether there is [reason to know the child is an Indian child](#), by, at the least, consulting with:
 - The child;
 - The child's parent or parents;
 - Any person having custody of the child or with whom the child resides;
 - Extended family members of the child;

- Any other person who may reasonably be expected to have information regarding the child's membership or eligibility for membership in an Indian tribe; and
- Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

ORICWA Oregon Laws 2020. ch. 14 § 15(2), 49(4)(b)(C) (ORS 419B.521(4)(b)(C)). For more information see the Chapter 3 sections on [Inquiry](#).

If there is reason to know the child is an Indian child under ORICWA/ICWA, before holding a hearing on the petition, the court must verify that ODHS

- promptly sent [notice](#) of the child custody proceeding by registered or certified mail, with return receipt requested, to:
 - Each tribe of which the child may be a member or eligible for membership; and
 - The child's parents and/or the child's [Indian Custodian](#); or
 - Appropriate BIA Regional Director, if the identity or location of the child's parents, Indian custodian or tribe cannot be ascertained.
- filed an original or a copy of each notice sent with the Court, together with any return receipts or other proof of service;
- sent copies of the notices to the appropriate Regional Director, by registered or certified mail with return receipt requested or by personal delivery.

ORICWA Oregon Laws 2020. ch. 14 § 16(2), 49(4)(b)(C) (ORS 419B.521(4)(b)(C)). For more information see the Chapter 3 sections on [Notice](#).

Standard and Burden of Proof

The standard of proof is beyond a reasonable doubt, and the burden of proof is on the petitioner.

ORICWA Oregon Laws 2020. ch. 14 § 49(4)(a) & (b)(C)(i) (ORS 419B.521(4)(a) & (b)(C)(i)).

Standard for Termination of Parental Rights

To terminate parental rights, the Court must find beyond a reasonable doubt:

- Statutory grounds for termination of parental rights as set forth in ORS 419B.502-510;
- The Indian child's [continued custody](#) by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child (as supported by testimony from a [Qualified Expert Witness](#));
- a causal relationship between the particular conditions in the Indian child's home and the likelihood that the Indian child's [continued custody](#) by the child's parent or custody by the child's Indian custodian will result in serious emotional or physical damage to the Indian child. Evidence that shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse or nonconforming social behavior does not, by itself, establish a causal relationship.

ORICWA Oregon Laws 2020. ch. 14 § 48 (ORS 419B.500) & 49(4)(a) – (c) (ORS 419B.521(4)(a) – (c)).

Active Efforts

To terminate parental rights, the Court must determine that:

- ODHS provided [active efforts](#) to reunify the child with their parent; and

- Those efforts did not eliminate the necessity for termination of parental rights because continued custody by the parent is likely to result in the serious emotional or physical damage to the Indian child.

ORICWA Oregon Laws 2020. ch. 14 § 18 & 49(4)(b)(C)(ii) (ORS 419B.521(4)(b)(C)(ii)). For more information, see the section of chapter 3 on [Active Efforts](#).

Cultural Connection Agreements

To terminate parental rights, the Court must find that the parties and the prospective adoptive placement (if known) were offered mediation under ORS 419B.517; as well as an opportunity to put in place a cultural agreement between the child's tribe and the prospective adoptive placement.

ORICWA Oregon Laws 2020. ch. 14 § 49(4)(b)(A) & (B) (ORS 419B.521(4)(b)(A) & (B)).

Adoptions under 419B.529

After parental rights are terminated or relinquished, the juvenile code allows the Court to complete an adoption for a child who has been a ward of the Court without the filing of an adoption petition, if it is done in accordance with the requirements of ORS 419B.529.

Adoptions Snapshot

- Preliminary Matters
 - Mediation
- Legal Issues and Written Findings
 - Inquiry
 - Placement Preferences
 - Placement Outside the Placement Preferences
 - Cultural Connection Agreements

Preliminary Matters

Mediation

To complete an adoption under ORS 419B.529, the Court must offer the parties an opportunity for mediation under ORS 419B.517 and an opportunity to put in place a cultural agreement between the child's tribe and prospective adoptive parent. ORICWA Oregon Laws 2020. ch. 14 § 50(1)(c)(A) & (B) (ORS 419B.529(1)(c)(A) & (B)).

Legal Issues and Written Findings

Inquiry

If a finding has not yet been made that the child is an Indian child, and a Court hearing occurs, the Court must ask, on the record, each individual present whether they know or have [reason to know the child is an Indian child](#).

The Court may not finalize an adoption under ORS 419B.529 unless ODHS has fulfilled ORICWA's [Inquiry](#) requirement. This requires the Court to assess whether ODHS has made a good faith effort to determine whether there is [reason to know the child is an Indian child](#), by, at the least, consulting with:

- The child;
- The child's parent or parents;
- Any person having custody of the child or with whom the child resides;
- Extended family members of the child;

- Any other person who may reasonably be expected to have information regarding the child’s membership or eligibility for membership in an Indian tribe; and
- Any Indian tribe of which the child may be a member or of which the child may be eligible for membership.

If there is reason to know the child is an Indian child, the requirements of ORICWA described below must be applied.

ORICWA Oregon Laws 2020. ch. 14 § 15(2); ICWA 25 USC §§ 1912 & 1913. For more information, see the Chapter 3 section on [inquiry](#).

Practice Tip: Inquiry not Notice

Note: Although formal notice is not required under ORICWA, ODHS must still verify whether a child is an “Indian child”; if the child is an “Indian child,” ICWA applies, and the tribe is a party to the adoption proceeding under ORS 419B.529.

Placement Preferences

- The Court must find that the adoptive placement is in accordance with the [ORICWA placement preferences](#). This means that the child must be placed in the order of preference established by the Indian child’s tribe.
- If the Indian child’s tribe has not established applicable [ORICWA placement preferences](#), the Indian child must be placed in the following order of preference:
 - With a member of the Indian child’s extended family;
 - With other members of the Indian child’s tribe; or
 - With other Indian families.

ICWA 25 USC § 1915. For more information, see the Chapter 3 section on [Placement Preferences](#).

Placement Outside the Placement Preferences

A party may move the Court for authority to make a placement contrary to the placement preferences. The Court may make such an order only if it determines, and issues a writing order memorializing, that good cause exists to depart from the placement preferences.

- If there are objections to the motion, the Court must hold a hearing.
- The standard of proof is clear and convincing evidence, and the burden of proof is on the party requesting the exception to the placement preferences.
- ORICWA specifies what may not be considered good cause. These are described in detail in the chapter 3 section on [Placement Preferences](#).

ORICWA Oregon Laws 2020. ch. 14 § 23(4). For more information, see the Chapter 3 section on [Placement Preferences](#).

Cultural Connection Agreements

To perform an adoption under ORS 419B.529 or without a petition for adoption, if an agreement to maintain the child’s connection with the tribe has been negotiated between the Indian child’s tribe and the prospective adoptive placement, the Court’s adoption judgment must include the terms of that agreement. ORICWA Oregon Laws 2020. ch. 14 § 50(1)(c) & (4)(b) (ORS 419B.529(1)(c) & (4)(b)).

Invalidating a Proceeding

To promote compliance with ORICWA, parties to a case may request that any Court of competent jurisdiction vacate a hearing that fails to provide certain identified ORICWA protections.

Invalidation a Proceeding

The child, parent, Indian custodian, or tribe may request that any judgment or order be vacated if any of the relevant hearing requirements of ORICWA were violated, including: [inquiry](#), [notice](#), [jurisdiction](#), [transfer of jurisdiction](#), [the right to counsel](#), [the right to examine documents](#), and the provision of [active efforts](#). If the Court vacates the order, it must order the child immediately returned to the parent or Indian custodian, and any issues that previously were determined must be relitigated. ORICWA Oregon Laws 2020. ch. 14 § 22(1) & (2).

Improper Removal or Improper Retention of the Child

If any party to a proceeding under ORS chapter 419B asserts, or the Court has reason to believe, that an Indian child may have been improperly retained following a visit or temporary relinquishment of custody or improperly removed, the Court shall expeditiously determine whether the Indian child was improperly retained or improperly removed. ORICWA Oregon Laws 2020. ch. 14 § 22(3)(a).

If the Court finds that the Indian child was improperly retained or improperly removed, the Court shall terminate the proceeding and order ODHS to immediately return the Indian child unless the Court determines by clear and convincing evidence that doing so would subject the Indian child to substantial and immediate danger or a threat of substantial and immediate danger. ORICWA Oregon Laws 2020. ch. 14 § 22(3)(b).