

**Dry Creek Rancheria
Band of Pomo Indians**

Judicial Code

TITLE 1. TRIBAL ELDER CODE

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CHAPTER 1. PURPOSE AND CONSTRUCTION

SECTION 1. Title

This Code shall be known and cited as the “**Dry Creek Rancheria Band of Pomo Indians Tribal Elder Code.**”

SECTION 2. Purpose and Construction

It is the policy of the Dry Creek Rancheria Band of Pomo Indians to hold our elders in high esteem. The elders of our community are the custodians of tribal history, culture, and traditions which are vital to native culture. The purpose of this Code is to protect the elders within the jurisdiction of the Dry Creek Rancheria from abuse or neglect as defined by this Code and provide visitation rights for grandparents. This Code shall be liberally construed to affect its policies and purposes.

This Code is civil and does not effect any applicable provisions of Dry Creek Rancheria’s Criminal Code unless specifically modified by this Code.

SECTION 3. Definitions

For the purposes of this Code the following words and phrases shall have the following meanings:

- (A) “Abuse” means an intentional or negligent infliction of physical injury or pain, sexual abuse, mental anguish, unreasonable confinement, neglect, intimidation, financial exploitation, the deprivation by a caretaker of the basic necessities of life; such as, but not limited to, food, shelter, clothing, and personal care which are necessary to prevent physical harm, mental anguish, or mental illness, or any other type of maltreatment; no person shall be deemed to be abused for the sole reason that they are being furnished traditional remedial treatment by spiritual means through prayer alone in accordance with their religious beliefs.
- (B) “Elder” means any member of the Dry Creek Rancheria who has attained the age of fifty-five (55) years or older.
- (C) “Emergency” means a situation in which an elder is immediately at risk of death or injury and is unable to consent to services to remove the risk.
- (D) “Family” means a group of individuals as determined by tribal law, custom, or traditions.
- (E) “Caretaker” means an individual who has the responsibility for the care of an elder, either voluntarily, by contract, receipt of payment for care as a result of a family relationship, or by an order of a court of competent jurisdiction.

(F) “Department” means the Dry Creek Rancheria Social Services Department and its respective divisions, employees, agents, or representatives.

(G) “Dry Creek Rancheria” means the Dry Creek Rancheria Band of Pomo Indians.

(H) “Exploitation” means the act or process of using an elder or their resources for another person’s profit, advantage, gain, or for monetary or personal benefit without legal entitlement.

(I) “Good Faith” means an honest and reasonable belief or purpose and the lack of intent to defraud.

(J) “Least Restrictive Alternative” is an environment that should be used any time it is necessary to protect an elder which is the most like the elder’s home setting and is the most capable of supporting the protected person’s physical health, mental health, and emotional wellbeing.

(K) “Mental Anguish” means to subject an elder to fear, agitation, confusion, severe depression, or other forms of serious emotional distress through threats, harassment, or other forms of intimidating behavior.

(L) “Neglect” includes interfering with the delivery of necessary resources and services; failing to report abuse of an elder or vulnerable person; or failing to provide an elder with services or resources to aid in the elder’s practice of religion, tradition, or custom.

(M) “Open Adoption” means a form of adoption in which the birth family and the adopted child enjoy an ongoing, in-person relationship as agreed to by the adoptive parents.

(N) “Physical Injury” means bodily pain, harm, and/or impairment caused by malnutrition.

(O) “Protective Placement” means the placement of an elder in a hospital, nursing home, residential care facility, other suitable placement, or transfer from one facility to another with consent of that person or with appropriate legal authority.

(P) “Protective Services” means services provided to an elder with consent or by order of an appropriate legal authority which includes but is not limited to: social services, mental and physical health examinations, home and day care, legal assistance, guardianship, case management, and any other services consistent with this Code.

(Q) “Retaliation” means intimidating, threatening to cause bodily harm, or causing bodily harm to an elder, a reporter, or family member reporting elder abuse; causing the reporter or reporter’s family to be terminated, suspended, or reprimanded by an employer; causing property damage to real or personal property belonging to the reporter’s family.

(R) “Substantiated Report” is when there is probable cause of abuse after an investigation is conducted by a protective or social services worker.

(S) “Unsubstantiated Report” means when no probable cause exists after an investigation is conducted by a protective or social services worker.

CHAPTER 2. REPORTING ABUSE OR NEGLECT OF AN ELDER

SECTION 1. Duty to Report Abuse or Neglect of an Elder

(A) Suspected abuse or neglect shall be reported to the Department by:

- (1) The elder’s family or caretaker; or
- (2) Elected official of the Tribe; or
- (3) All tribal social workers, medical and dental staff, religious practitioners, or any other tribal employees who provide services to tribal elders; or
- (4) Any person or agency, including employees, with fiduciary duties to elders such as attorneys, accountants, property managers, or financial institutions; or
- (5) The abused elder; or
- (6) Any other person(s) who have reason to suspect that an elder is abused or neglected.

(B) Reports of suspected elder abuse are presumed to be made in good faith.

SECTION 2. Immunity for Reporting and Participating

A person who in good faith reports, provides information or records required, or participates in a judicial or administrative proceeding or investigation resulting from the reports or information of suspected abuse or neglect as defined by this Code is immune from any civil or criminal statute by reason of such action, unless the person acted with malice or unless such person has been charged with or is suspected in incapacitating, abusing, exploiting, or neglecting the elder in question.

Individuals under the physician-patient privilege, husband-wife privilege, or any privilege except the attorney-client privilege, provided for by professions such as the practice of social work or nursing covered by the law or a code of ethics regarding practitioner-client confidences are excluded from this provision.

SECTION 3. Failure to report; civil penalty; damages; criminal liability

Any person required to report who fails to report suspected or actual abuse or neglect as required by this Code may be subject to a civil money penalty of up to \$5,000. All persons required to report who fail to report are entitled to petition, notice and an opportunity for hearing in Tribal Court. Fines shall be assessed only after determination of a duty to report is found at the hearing. A person failing to report suspected abuse or neglect may be subject to suit by or on behalf of abused persons for damages resulting from unreported abuse.

SECTION 4. Bad faith report; civil liability; damages, criminal liability

Any person who makes a report of suspected abuse or neglect as defined by this Code knowing it to be false shall be subject to a civil money penalty of up to \$5,000. Those accused of making bad faith reports are entitled to petition, notice and an opportunity for a hearing in a civil suit for damages filed by persons unjustly charged. Criminal penalties may also be brought against a bad faith reporter as provided for in the Dry Creek Rancheria Criminal Code.

SECTION 5. Investigation

(A) The Department shall initiate an investigation, as required in part (B) of this section, upon receiving a report of elder abuse or neglect.

(B) The Department shall investigate the report of abuse or neglect within forty-eight (48) hours and prepare a written report within ten (10) calendar days based upon:

- (1) Personal interviews of the abused, the immediate family and caretaker, suspected abuser, employees of agencies (if involved), and any other person who may have pertinent information; and
- (2) Medical records and other evidence of abuse; and
- (3) Assessments of the elder's living conditions using Tribal standards for housing; and
- (4) Any other observations, assessments, or documents that may aid in completing an accurate report.

(C) The written report shall contain:

- (1) Elder's name, address or location, telephone number; and
- (2) Name, address or location, telephone number(s) of the person(s), or agency who is suspected of abuse or neglect under this Code; and
- (3) The condition of the abused; and
- (4) Names of witnesses and sufficient information to effect the subpoena power of the Court over them; and
- (5) Name, address or location, telephone number of caretaker(s); and
- (6) A description of the act(s) which are suspected of being abusive or neglectful; and
- (7) Any other information helpful in establishing abuse or neglect.

(D) The Department shall keep substantiated reports on file for five (5) years and unsubstantiated reports for two (2) years following the investigation of the report.

SECTION 6. Privileged Communication

No evidentiary privilege may be raised as a defense, except attorney-client privilege, for failing to report suspected abuse or neglect or testifying as a witness under this Code.

SECTION 7. Criminal Investigation

The investigation and other procedures allowed in this Code may run concurrently with criminal investigations.

SECTION 8. Emergency

(A) The Tribal Court may issue an ex parte emergency protection order authorizing emergency services or protective placement upon clear and convincing evidence that an elder:

- (1) Is at risk of immediate physical harm; and
- (2) No one is authorized by law or court order to give consent; and
- (3) The elder or authorized caretaker is incapacitated and cannot consent to services.

(B) The emergency protection order shall:

- (1) Set out the specific emergency services to be provided to remove the emergency; and
- (2) Allow protective placement only if the evidence indicates that it is absolutely necessary; and
- (3) Designate the person or agency required to implement the order; and
- (4) Be issued for seventy-two (72) hours excluding weekends and holidays, and may only be renewed for a maximum of an additional seventy-two (72) hours if evidence of a continuing emergency.

(C) The Tribal Court may issue a warrant for forcible entry by the Department if attempts to gain voluntary access have failed.

(D) The petition for an emergency protection order shall include the name and interest of the petitioner, the name, address, or location of the elder in question, proposed protective services, attempts to secure consent, and any other facts that will assist the Court in granting the order.

(E) Emergency protection orders may be set aside by the Tribal Court upon written petition of any party showing good cause.

(G) The Tribal Court shall hold a preliminary hearing on a petition to provide protective services within seventy-two (72) hours, excluding weekends and holidays, after an emergency protection order is issued unless good cause exists to grant a delay. The Court shall state on the record any cause for such delay.

- (1) All parties, including attorneys, are permitted to attend the preliminary hearing for a protection order. The hearing may be done ex parte if the need arises. The sufficiency of the petition will be determined on a totality of circumstances test and goes into effect immediately upon the granting of the order by the Tribal Court.

(H) If there is good cause to believe that an emergency exists and an elder is at risk of immediate or irreparable harm upon personal observation, the investigator or law enforcement officer may immediately protect the abused, including transporting him or her to adequate facilities. Immediately after the abused is protected, standard procedures for an emergency protection order must be followed.

(I) Anyone who acts in reasonable good faith pursuant to this section shall be immune from criminal or civil suit if the suspected abuse or neglect results in an unsubstantiated report.

SECTION 9. Rights of Elders, Their Families, and Caretakers

(A) An elder, family, or caretaker shall be informed of an abuse investigation before it begins, unless an emergency exists. If an emergency exists, notice must be given using a means reasonably calculated to give actual notice as soon as possible but no later than seventy-two (72) hours after the beginning of the abuse investigation.

(B) Elders may refuse to accept protective services provided there is good cause to believe that the abused can take care of themselves and the elder knows of the services offered.

(C) Families or caretakers may refuse services for themselves but cannot refuse services for the elder.

(D) Elders, family, or caretakers may refuse to allow investigators into their home and must be told of the right of the investigator to seek a warrant for entry.

(E) If criminal charges may be brought against any party under the Dry Creek Rancheria Criminal Code, the accused party must be informed of their rights under the Indian Civil Rights Act, 25 U.S.C. sec. 1301 (1994).

- (1) Criminal charges may include, but are not limited to: battery, assault, domestic violence, or any other criminal offense that may warrant a charge.

(F) Personal service of notice to the elder, family, or caretaker is required when a petition is filed pursuant to this Code.

(G) The elder, family, or caretaker has the right to attend all proceedings pertaining to the capacity of the abused unless the Tribal Court determines the elder's health is at risk in attending such proceedings.

(H) The elder, family, or caretaker has the right to independent medical, psychological, or psychiatric evaluations at their own expense.

SECTION 10. Procedures for Determining Capacity, Abuse, or Neglect

The Tribal Court shall determine an elder's capacity, degree of incapacity, or whether abuse or neglect has occurred based on clear and convincing evidence at a hearing requested in a voluntary proceeding or required at an involuntary

proceeding. All parties are entitled to petition, notice, and an opportunity to be heard.

SECTION 11. Elder Protection Order; Term

(A) If the Tribal Court determines that there is incapacity or evidence of abuse or neglect of an elder, a protection order will be issued which may contain, but is not limited to the following:

- (1) Removal from the place where abuse or neglect occurs, including the elder's home; and
- (2) Enjoining the abuser from committing further abusive acts; and
- (3) Requiring any party having a fiduciary duty to the elder to account for the elder's funds and or property; and
- (4) Requiring compensatory damages to be paid by an abuser or neglectful person to the elder for injuries resulting from abuser's or neglectful person's wrongful act(s); and
- (5) Appointing a representative, guardian ad litem, or recommending a representative payee for the elder; and
- (6) Ordering the Department to prepare a plan to deliver protective services which provides the least restrictive alternative to satisfy the elder's needs.

(B) An elder protective order may not exceed twelve (12) months. Extensions for the twelve (12) months following may be obtained in Tribal Court by petition, notice, and an opportunity for hearing. Extensions may be obtained as many times as necessary if cause is shown by clear and convincing evidence. Review of the need for continued protective orders shall occur every 6 months or upon motion of an interested party as accepted by the Court.

SECTION 12. Confidentiality of Reporter, Records, Hearings, Penalties for Noncompliance

(A) The identity of the reporter of abuse or neglect under this Code is confidential and shall not be released unless the reporter consents or the Tribal Court determines that the need of the elder exceeds the reporter's right to privacy and mandates disclosure. The reporter has the opportunity to petition and be heard at a closed evidentiary hearing with regard to any such disclosure. Any disclosure may be released only to the extent necessary to protect the elder.

(B) Records of investigations concerning abuse or neglect under this Code are confidential. The Department, law enforcement, court officials, attorneys, coroner, medical staff, and any other person whom the Court determines has reasonable cause to have access may view the record(s).

(C) Any one who violates this section of the Code shall be subject to a monetary penalty of up to \$5,000 per occurrence. Petition, notice, and an opportunity for hearing in Tribal Court will determine if a violation has occurred.

SECTION 13. Criminal Prosecutions

(A) Any person(s) who commits abuse or neglect against an elder may be criminally prosecuted under applicable provisions of the Dry Creek Rancheria Criminal Code.

(B) Criminal prosecutions may run concurrently with civil proceedings under this Code. Dismissal or deferral of a criminal proceeding in no way affects the applicability of this Code. Factors for the Court to consider when dismissing or deferring criminal proceedings are:

- (1) The elder, family or caretaker, and suspected abuser agree to resolve conflicts through any dispute process recognized by the Dry Creek Rancheria; and
- (2) All parties concerned agree to accept services as determined by the Department; and
- (3) The crime is not of a serious nature involving intentional bodily harm or intentional property damage, and the accused does not have a prior record of elder, adult, child, or sexual abuse.

SECTION 14. Court Proceeding on Petition

(A) Petition. The Department shall initiate proceedings on behalf of the Tribe, by filing a petition which contains the following information:

- (1) The name, birth date, age, residence, and gender of the elder.
- (2) The basis for the Court's jurisdiction under this Code.
- (3) A plain and concise statement of facts upon which the claim is made that the elder is in need of protection, including date(s), time(s), and location(s) at which the alleged facts occurred.

(4) The names, residences, and tribal affiliation, if any, of the person(s) alleged to have neglected and/or abused the elder.

(5) An indication as to whether the elder intends to freeze the defendant's assets if a judge finds evidence of a strong financial abuse case under Cal. Welfare and Institutions Code § 15657.01. If the elder wishes to freeze the defendant's assets, the plaintiff or victim must post bond to cover the property value of the frozen assets.

(B) Notice of Petition Filing; Hearing. Any person who has an interest in welfare of the elder shall be provided notice of the filing of the petition and the date of the hearing in any manner authorized by the Dry Creek Rancheria Judicial Code.

(C) Hearings. The Court shall conduct a hearing on the petition to determine whether the facts support a finding that the elder is in need of protection. All material and relevant evidence which is reliable and trustworthy may be admitted and relied upon by the Court to the extent of its probative value, including hearsay contained in a written investigative report, provided that the preparer of the report is present and available to provide testimony. The parties, including the elder, shall be afforded an opportunity to examine and controvert written reports, and cross-examine individuals whose testimony is presented. The Court may rely on conference telephone or other electronic devices that permit those appearing or participating to hear and speak to each other.

(D) Judgments. The Court shall make a written decision at the conclusion of the hearing. If the allegations of the petition are not sustained by a preponderance of the evidence, the Court shall dismiss the matter. If the allegations of the petition are sustained, the Court shall find that the elder is in need of protection, and may enter further orders for evaluation, assessment, or other orders to protect the elder. At the Court's discretion, a Dispositional Order ensuring the protection of the elder may be issued immediately or at an interval following the initial hearing.

(E) Standing/Jurisdiction. A petition for a protective order or an action for damages under this title may be brought by the Plaintiff, or where necessary, by his or her family members and/or guardian or legal fiduciary, or as otherwise provided under this title. The death of the plaintiff or victim shall not deprive the court of jurisdiction over a petition or claim brought under this Code. Upon petition, after the death of the plaintiff or victim, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for the benefit of the surviving spouse, child(ren), or other heirs as set forth under the relevant probate codes.

CHAPTER 3. VISITATION RIGHTS OF GRANDPARENTS

SECTION 1. Purpose

Elders are very important and highly respected within our tribal structure. They are the caretakers of our rich culture and traditions. The Indian Child Welfare Act (ICWA), in recognition, gives priority to grandparents when placing children who are in need. We also, as a people, wish to emphasize elder's rights and protection by making them a part of our laws.

The ICWA, defines "extended family" as the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, step-parent or any other person defined by law or custom of the tribe.

SECTION 2. Visitation Rights of Grandparents

The Court, in its discretion, may grant visitation rights with or without petition by the grandparents, if it is in the best interest of the grandchild.

SECTION 3. Petition for Visitation Rights by Grandparents

The grandparents of a child may petition the Court for grandchild(ren) visitation rights in the following circumstances:

(A) The parents of the child(ren) are divorced or legally separated; or

(B) An action for divorce or separate maintenance has been commenced by one of the parents of the child(ren); or

(C) The parent of the child(ren), who is the child of the grandparent, has died.

SECTION 4. Visitation Right Exceptions

The preceding provisions cited in Section 1, 2, and 3, inclusive, do not apply if the child(ren) has been placed for adoption with a person other than the child(ren)'s stepparent or grandparent. Any grandparent visitation rights granted pursuant Section 1, 2, or 3, inclusive, prior to placement for adoption of the child(ren), are terminated upon the adoption, except in the case of an open adoption.

CHAPTER 4. OTHER PROVISIONS

SECTION 1. Custom and Tradition

Any action under this Code shall be conducted in a manner which is consistent with the custom and/or traditional beliefs, if any, of the elder to which the action applies

and any such action which is contrary to such custom and/or traditional beliefs is prohibited. In determining the custom or traditional beliefs of a particular elder, any person taking action under this Code may rely on the advice of counselors familiar with such custom or traditional beliefs.

SECTION 2. Sovereign Immunity

Nothing in this Code shall be construed as a waiver of the sovereign immunity of the Dry Creek Rancheria unless otherwise provided by the Tribal Code.

SECTION 3. Severity and Effect

This Code shall be of immediate effect upon vote of the Tribal Council. If any clause, sentence, paragraph, section, or part of this Code shall, for any reason be adjudicated by any Court of competent jurisdiction, to be invalid or unconstitutional, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which the judgment shall have been rendered.