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NATIONAL TRIBAL JUDICIAL CENTER
AT THE NATIONAL JUDICIAL COLLEGE

Tribal Judicial Institute

WALKING ON COMMON GROUND
CONTINUING PATHWAYS TO EQUAL JUSTICE
TRIBAL • FEDERAL • STATE

Walking on Common Ground

COOPERATION. COLLABORATION. COMMUNICATION.

WALKING ON COMMON GROUND: TRIBAL-STATE-FEDERAL JUSTICE SYSTEM RELATIONSHIPS

Walking on Common Ground: Tribal-State-Federal Justice System Relationships

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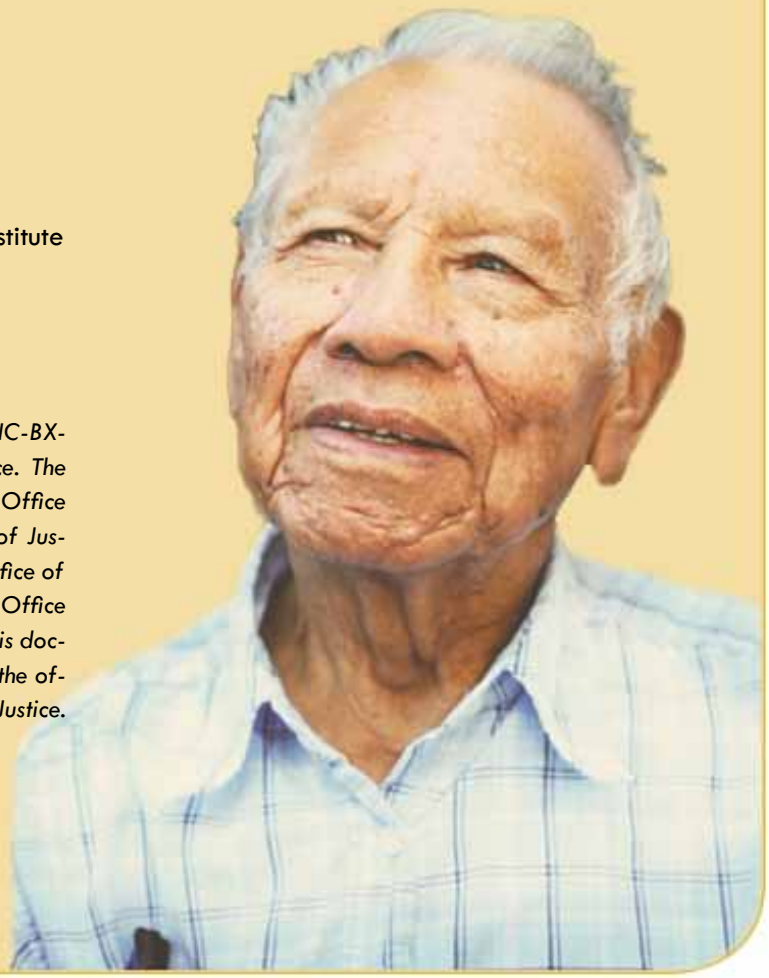

"**NATIONAL MEETINGS LIKE THIS** are an opportunity for folks to come together across the country and get some perspective on some very exciting and interesting things that are happening. They get invigorated and can take those ideas back. But it is also very important to follow through on state level forums because they open the door to dialogue between tribal leaders and state leaders … to come up with specific plans about how they are going to continue to collaborate."

A. Elizabeth Griffith, Deputy Director, BJA, OJP, DOJ

The Walking on Common Ground Gathering of December 2008 followed the tradition of previous Gatherings, bringing together tribal, state and federal justice communities to continue a dialogue that began 30 years ago. At the heart of the Gathering was the same commitment and drive to improve cooperation, collaboration and communication between the three justice communities. The Gathering was an opportunity for respectful dialogue and conversations about concepts and challenges that tribal, state and federal justice communities confront as they try to provide appropriate services to their communities.

The 562 tribes across the nation are diverse and distinct, by language, custom, traditions and geography. Those sovereigns that choose to form court systems are informed by their rich heritage and a deep respect for the ways of those who came before. The federal government continues to honor the trust relationship it has with the tribes and supports a continuing policy of self-government by the tribes. As a component of the Office of Justice Programs, U.S. Department of Justice, the Bureau of Justice Assistance (BJA) is a key element in the development and evolution of tribal justice systems. From fiscal year 2001 through 2008, the BJA has awarded almost $56 million to help tribes establish and sustain justice systems.

The Tribal Courts Assistance Program (TCAP) is the vehicle through which the BJA champions and assists tribal court systems, whether those grants are directly to tribes or to service providers. TCAP allows tribal communities to address their justice needs in culturally appropriate ways and helps tackle a range of needs from increased personnel to updated technology to increased access to education. TCAP ultimately enables much needed change and progress in tribal communities. BJA has recognized the value of bringing tribal, state and federal justice entities together to talk and listen. As a national service provider for tribal courts, The National Tribal Judicial Center (The NTJC) wholeheartedly endorses the necessity for increased collaboration, cooperation and communication engendered by gatherings such as this one. The NTJC looks forward to helping create positive change by hosting more Gatherings and facilitating further dialogue among these three justice communities.

Christine Folsom-Smith
Program Attorney
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New Voices

On December 9-10, 2008, 118 participants from tribal, state and federal justice communities attended Walking on Common Ground II: Continuing Pathways to Equal Justice ("the Gathering") in Palm Springs, California. The Gathering provided an opportunity for tribal, federal, and state justice communities to join together in the spirit of mutual respect and cooperation to promote and sustain collaboration, education, and the sharing of resources for the benefit of all people. The purpose of the Gathering was to assess what had happened and to reinitiate dialogue between tribal, state and federal justice communities since the 2005 Gatherings.* The Gathering was also an opportunity for new voices to be heard from Indian Country as well as from the federal and state justice communities. The Gathering allowed people to talk about the challenges they face in their communities and to find ways to overcome adversity for a more positive future.

Background

Indian Country holds a unique place in the nation. Tribes have governed their people since time immemorial in ways completely foreign to those who came and settled the land. The same could be said for those who brought their ideas of common law and western justice here. Oftentimes, these different and competing ways of "doing justice" create inherent barriers for understanding and acceptance. Many tribal justice systems have courts that very nearly mirror those of states while others hold true to custom and tradition in a world that is moving quickly away from traditional values and mores. Big business has come to Indian Country in the form of casinos and other corporate contracts, creating a need for tribal governments to interact in a marketplace that is often not cognizant that tribes are sovereign governments. More than ever, tribal communities are fighting to preserve their traditional ways and their inimitable contributions to the world at large while at the same time looking to federal and state justice systems to provide assistance in areas where their hands are tied.

* There were three gatherings in 2005. The first, "Alaska Gathering of Tribal Justice Leaders," was held in Anchorage, Alaska from April 11-13, 2005. The second, "National Gathering of Tribal Justice Leaders," was held in Washington, D.C. from May 22-24, 2005. The third, "Walking on Common Ground: A National Gathering from Tribal-Federal-State Courts," was held in Green Bay, Wisconsin from July 26-29, 2005.

The 2008 Gathering

The purpose of the 2008 Gathering was to gather data about relationships between tribal, state and federal justice systems since the Gatherings of 2005. The agenda was structured to allow for plenary sessions on the status of the pathway to common ground, highlighting successful collaborations, discussing the challenges of setting up collaborative projects, funding issues, and finally, building action plans and bridges with peers from the different justice systems. Interspersed among these sessions were regional break-outs designed to encourage dialogue and to begin the journey to heightened communication, collaboration and cooperation. This Gathering was specifically designed to highlight the need to work together as a long term vision, to focus on what is working with collaborative tribal-state programs, to identify remaining challenges, and to concentrate on how to get to the creation of even more constructive and beneficial cooperative programs.

The mission statement for the Gathering was "for tribal, federal, and state justice communities to join together in the spirit of mutual respect and cooperation to promote and sustain collaboration, education, and the sharing of resources for the benefit of all people." The advisory committee felt that this enduring mission continued to capture the intention of the original organizers of this enduring movement.

"Stand up and look at one another and start talking...."

Hon. Stanley Webster, Oneida

"Sovereignty is being able to control what goes on inside your reservation regardless of who does it."

Hon. William Zuger, Standing Rock Sioux Tribal Court

LOWER 48
The Regional Groups

Participants were divided into geographic regions for smaller group discussions following the plenary sessions. Each regional group discussed localized, specific challenges and then identified possible solutions to the issues presented. After each breakout session, the participants reconvened to report back to the larger assemblage. Following is a compilation of the challenges and solutions presented by each regional group from the lower 48 states.

PERCEPTION OF TRIBAL COURTS

Challenge Identified:

From the perspective of the state court, tribal courts are often viewed as substandard because the judges may be non-law trained and are thus perceived to be less knowledgeable. State courts do not understand that tribes are sovereign governments. There persists a lack of respect for tribal courts by attorneys, by state judges, and by the public, tribal and non-tribal.

Solutions Presented:

Tribal and state governments should…
Increase dialogue between the two systems and all agencies involved including sharing information with states and other tribes. Visit each other's courts and collaborate on specialty courts, like teen courts or DUI courts.

Form tribal-state forums as a platform for roundtable discussions on specific questions or issues ensuring they are working and collaborating together which helps tribal and state judges develop peer relationships. Use state-tribal forums for notification of conferences and events.

Tribal courts should…
Educate state judges on tribal law and federal Indian law. Invite tribal court judges to provide an educational component at annual state judicial conferences. Rely on personal relationships with state personnel to promote education. Sponsor conferences, seminars, and listening conferences to educate state courts, attorneys, and related personnel.

Require all lawyers to take a tribal bar exam before appearing in tribal court and invite state court judges to be *ex officio* members of the tribal bar.

Promote justice in all tribal court decisions and make decisions available to the community.

Improve communication and work together better with all courts.

Increase knowledge about tribal courts by local police departments, fire departments, clergy, schools, victims, and other agency officers.

Highlight unique and favorable aspects of tribal courts such as court advocates, lower filing fees, smaller dockets, friendlier atmosphere, peacemaking options, indigent services, and a self-represented litigant friendly atmosphere to increase awareness in the tribal community. Promote knowledge and understanding among tribal members. Organize mock trials for youth to raise awareness of what tribal courts do and don't do.

MAJOR CRIMES AND PROSECUTIONS

Challenges Identified:

Lack of cooperation with federal authorities regarding prosecution and investigations of major crimes has made it difficult for tribes to prosecute and convict offenders who come on the reservation to commit crimes. Tribes are not getting the information they need to properly proceed with criminal cases. The U.S. attorneys delay investigation of crimes on the reservation. Oftentimes, major crimes are not prosecuted, further victimizing tribal members.

Solutions Presented:

The federal government should …
Urge all government agencies involved with tribal courts to fund tribal justice systems rather than solely relying on the Bureau of Indian Affairs.

Fund and develop tribal police departments rather than relying on the Bureau of Indian Affairs to provide law enforcement.

Pass Tribal Law and Order Act requiring state and federal governments to honor tribal court orders and subpoenas.

Tribal courts should…
Hire criminal investigators who work for the tribe. Provide attorneys for all defendants in tribal courts. Strengthen ties and develop better relationships with the United States Attorney's Office.

SUSTAINING THE HEALING TO WELLNESS DRUG COURTS

Challenges Identified:

Many tribes receive funding to begin healing to wellness courts but due to turnover, community apathy or lack of continuing funding, it is difficult if not impossible to sustain these types of essential courts in tribal communities.

Solutions Presented:

Tribal courts should…
Lobby Congress to ensure some of the allocated Substance Abuse and Mental Health Services Administration (SAMHSA) dollars are given to the tribes.

Add assessment fees to tribal/state fines that could then be used to support these programs.

Lobby states for funding or seek donations from large corporations and/or nonprofit groups as well as seek community engagement and community sponsorships.

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JUDICIAL TOOLBOX

Extending Project Passport

Genesis and Goals of the Project

The goal of Extending Project Passport is to build upon the success of the original Project Passport. Project Passport was designed to improve recognition and enforcement of orders of protection within and between states and tribes by encouraging states and tribes to adopt a recognizable first page for orders of protection (i.e., by including common elements and format). The model template for this first page was originally developed through a regional effort Kentucky led with its seven surrounding states, beginning in 2000. The Southeast, led by Alabama with seven of its neighboring states and tribes, subsequently launched a similar initiative. Two Extending Project Passport western regional meetings held in 2004 and 2005 introduced the model template to 16 states, three U.S. territories and tribes in that region. A final regional Passport initiative in March of 2007 introduced the recognizable first page template to an additional 17 states and numerous tribes in the Northeast and Great Lakes areas, Puerto Rico and the Virgin Islands. More than half of the U.S. states (approximately 31 states to date) have adopted the model template into their orders of protection; others are actively in the process.

The National Tribal Justice Resource Center (NTJRC) is a partner in the initiative. A growing number of tribes have either adopted, or are in the process of considering adopting, the model template first page for their tribal protection orders. Tribes in Alabama, California, Idaho, Oklahoma, Montana, North Carolina, Michigan, Nebraska and Wyoming have adopted the model template. Among others considering its adoption are tribes in Wisconsin, Washington, Utah, Arizona, New Mexico, North Dakota, Mississippi, Connecticut and Alaska. The National American Indian Court Judges Association (NAICJA) fully supports this initiative through a formal resolution supporting Project Passport and encourages its members to participate in all efforts related to Project Passport.

The critical aspects of the model template for the first page are common data elements jointly identified by multi-disciplinary teams. If this essential data is not readily available and easily recognizable on an order of protection, verifying a protection order's authenticity, properly identifying presenting parties at the point of enforcement, and securing the safety of a domestic violence survivor (and possibly others at the scene) are in jeopardy. This is especially true for "foreign protection orders" (i.e., a protection order issued in another jurisdiction outside of the enforcing jurisdiction).

A secondary component of Extending Project Passport is the promotion of the use of XML (Extensible Markup Language) technology to improve the comparability of data entered in protection order registries across jurisdictions. For those interested in the potential to enhance electronic sharing of protection order data, a new XML-based first page for protection orders based on the model template has been developed. The use of XML has the potential to create an environment in which data can be easily exchanged between various court case management systems, justice system agencies, protection order registries, and the National Crime Information Center Protection Order File (NCIC POF).

Using a recognizable first page for protection orders helps strengthen the safety net for battered women and their children by offering greater consistency in the issuance and enforcement of orders of protection. The template is a practical mechanism for strengthening full faith and credit across jurisdictions and enlarging the safety net for domestic violence survivors - regardless of where they live or where the protection order was issued.

Legacy Building: The Passport TA Project

As states and tribes continue to develop and implement a recognizable first page for their protection orders, the National Center for State Courts (NCSC) and its partners will provide technical assistance and training on issues related to full faith and credit and enforcement of protection orders to multidisciplinary state and tribal representatives to support their implementation and enforcement efforts. In this continuation phase, the Project Team will develop an implementation manual to serve as both a legacy document and "how-to" training manual for Passport with accompanying training videos. The partners also will convene two regional meetings focused on state and tribal court collaboration on full faith and credit, protection order enforcement and related issues. In addition, the project will respond to specific requests for technical assistance from states, tribes and territories that currently are or will be working toward implementing Passport.

Project Team Dynamics

This collaborative effort builds upon the Regional Meetings on Full Faith and Credit convened by the National Center for State Courts in partnership with the National Center on Full Faith and Credit (NCFFC), the National Criminal Justice Association (NCJA), the Conference of State Court Administrators (COSCA), and the Conference of Chief Justices (CCJ). NCSC's partners for Extending Project Passport include the NCFFC, NCJA, COSCA, and CCJ, the Alabama Coalition Against Domestic Violence (ACADV), the National Sheriffs' Association (NSA), and the National Tribal Justice Resource Center (NTJRC) on behalf of the National American Indian Court Judges Association (NAICJA). For the Legacy Building Project, two new organizations have also joined the Project Team: the Southwest Center for Law and Policy and the Mashantucket-Pequot Tribal Nation and Tribal Court.

Contact Information

For more information about this project, please contact Denise O. Dancy, project director at the National Center for State Courts: 757-259-1593 or ddancy@ncsc.org .

VALIDATION OF AND ENFORCEMENT OF TRIBAL COURT ORDERS

Challenges Identified:

Tribal protection orders are not validated by or enforced by state courts or state law enforcement.

No outside agencies honor tribal court subpoenas.

Solutions Presented:

Tribal courts should…
Connect tribal law enforcement with the National Crime Information Center.

Give the victim a copy of the protection order that validates it was served with official court stamped seal and including both tribal and local state police departments contact information on the order. Provide the tribal and local state police departments with a copy of the served paper.

COMMUNICATION AND EDUCATION

Challenges Identified:

When we talk about coming together to collaborate with each other, we may have to cross some natural barriers before we can get where we want to go. Non-Indians may have never been on a reservation. We may not speak the same language, but we all deal with issues that are common to state and tribal communities. Our citizens may not understand how the court works, whether it is on the reservation or in town. In the current economic condition, all jurisdictions may now have budget issues, declining resources and declining employee morale.

Solutions Presented:

Tribal courts should…
Put a face on the people they are impacting – communication is a key component. Identify the issues most crucial to their communities and involve the communities in the solutions. Establish a balance between sovereignty and collaboration.

Set up a peer mentoring program for judges, court administrators, court clerks and law enforcement in the different sovereigns to encourage relationships between states and tribes. Develop educational opportunities for state judges in Public Law 280 states who do not know or understand tribal law, the function of tribal courts or jurisdictional issues.

Provide educational opportunities for their communities; learn about state court systems and tribal court systems. Invite federal government agencies into their communities for site visits. Help tribal councils understand the critical role tribal courts play as a separate branch of government.

Change the status quo; start early with Indian law education at all educational institutions. Encourage awareness of Indian law in all systems. Show through continuing legal education how each system can help the other and embrace their mutual values.

Develop a tribal court web site resource forum or clearinghouse that all can draw from. Let it be administered by the combined resources of the Conference of Chief Justices and the National American Indian Court Judges Association. Provide media and other information summaries to show what others are doing (like follow-ups from conferences) on the website. Provide Internet training or televised training on the website.

Encourage federal leaders to take an active role in supporting and developing peer-to-peer relationships with tribal leaders. Promote peer-to-peer invitations across the sovereigns to national conferences and events. Utilize lobbyists, Bureau of Justice Assistance personnel, the National American Indian Court Judges Association, the National Congress of American Indians, the American Bar Association, the Northwest Tribal Judges Association and other tribal organizations and associations to encourage and promote peer-to-peer relationships or mentoring relationships.

CHILDREN AND THE COURTS

Challenges Identified:

The Court Appointed Special Advocate (CASA) program needs a process or procedure whereby the CASA administrators can access and perform criminal background checks on the CASA volunteers. The problem is that the states say the federal authorities should do it, and the federal authorities say the states should do it, so the job does not get done potentially putting children at risk and raising liability issues.

Solutions Presented:

Tribal courts should…

Enlist the support of the following agencies to help create change: tribal court associations, state administrative office of the courts, chief judges' associations, and any judicial councils.

Present concrete solutions to the state attorney general and governor.

Encourage and support continued judicial education.

Advance government-to-government relations at all levels especially encouraging local tribal judges to make contact with local state counterparts with the end goal of promoting public trust and confidence in all justice systems.

TRIBAL COURT DEVELOPMENT CHALLENGES

Challenges Identified:

Different tribes are at different stages of development as far as their infrastructure and government structures are concerned. Some have no reservations, and some have very large land areas to cover. Some tribes have no law enforcement. Many tribes lack technical support within the tribe itself.

Solutions Presented:

Tribal courts should…

Aggressively seek grant opportunities for tribal courts that face pervasive funding challenges. Become strong advocates for tribal court funding with tribal councils. Utilize the services of a grant writer or designate persons responsible for tracking grant opportunities. Apply for TCAP grants for development of, and enhancements to, tribal courts.

Encourage tribes with established court systems to mentor tribal courts that are beginning to evolve.

Promote the use of state law enforcement for tribes that cannot rely on tribal law enforcement. Forge relationships with their state counterparts.

Locate attorneys and local bar associations familiar with Indian law issues for support on cases. Start their own bar associations.

Encourage better communication, respect for tribal courts, education, collaboration and hope for the future. Promote peacemaking without attorneys which is not limited to the parties only and which results in a healing process. Learn the mechanics of record keeping.

Submit technical assistance (TA) requests to BJA for help in all areas of assessment and training.

DATA SHARING

Challenges Presented:

The lack of data sharing between state, tribal and federal entities hampers the administration of justice in all communities.

Federal and state correctional facilities do not notify tribes of inmate release to parole or probation.

Tribal Child Support Enforcement Programs cannot get information from the Internal Revenue Service (IRS) nor can the states share necessary information without IRS approval.

Solutions Presented:

Tribal, state and federal courts should…
Share data and information between federal, state, tribal systems through a database all entities can access.

Encourage communication and information sharing with the IRS and Tribal Child Support Enforcement Programs.

PROTECTING TRIBAL SOVEREIGNTY

Challenges Presented:

Protecting tribal sovereignty is of paramount importance and cannot be overstated. Tribes and states can communicate on a government to government level to establish meaningful dialogue that supports the aims of both sovereigns.

Solutions Presented:

Tribal courts should…
Encourage governmental transparency from all sovereigns.

Make tribal laws and codes accessible to the public, tribal and non-tribal.

JUDICIAL TOOLBOX

Rocky Boy's Judicial Commission

The Rocky Boy's Judicial Commission was discussed in detail as a project that other tribes may find of value. This commission was developed as the tribe's codes were outdated, the tribal court had a high rate of judicial position turnover, and there was a need to separate the court from the tribal council. The tribe passed a referendum to its constitution to include the commission.

SOME DETAILS OF THE COMMISSION:

- The judicial commission members apply for their positions and the tribal council appoints them for four year terms.
- The tribal council controls its budget.
- Responsibilities include:
  - Recommending judges to the tribal council (judges are still appointed by the tribal council)
  - Oversee court administration
  - Establish policies
  - Hear complaints about the courts
- The commission also has its own policies/ procedures in place and the tribal council can remove members of the commission if needed.
- Commission members are not paid.

JUDICIAL TOOLBOX

The New Face of Justice : Joint Tribal-State Jurisdiction

Creating a climate for rehabilitation, recovery and reducing crime

Minnesota's 9th Judicial District encompasses 17 counties and four tribal nations. The Leech Lake Band of Ojibwe reservation is 1,050 square miles in size. There are very few towns with 15 communities spread approximately 20 to 80 miles apart. The reservation encompasses parts of four counties, Beltrami, Cass, Hubbard and Itasca, with the major portion of the reservation located in Cass County. Cass County is ranked fourth in the state for persons living below 200 percent of the poverty level. At Leech Lake, the Native American population is 10,205 persons; 8,875 of those people are eligible for Bureau of Indian Affairs services. There is a 46 percent unemployment rate. Sixty percent of residents have serious drug or alcohol problems, and 95 percent of reservation residents are directly affected by family members' drug and/or alcohol abuse.

The State of Minnesota is a Public Law 280 State. Native Americans are overrepresented in the juvenile justice system, yet they make up only 1.1 percent of the population statewide. In 2004, seven percent of Native American children were living in an out-of-home placement. In Minnesota, 21.7 percent of incarcerated youth are Native American. In the 9th Judicial District, which includes Beltrami, Cass, Hubbard and Itasca counties, there has been an 857 percent increase in case filings for methamphetamines. For illustration, in 2000, there were 54 case filings for methamphetamines. By 2005, there were 517 methamphetamine case filings. Cass County, Minnesota has an 11.5 percent Native American population. The county has 2,018 square miles with 13.5 persons living per square mile (61.6 statewide). This county is ranked sixth out of the 13 deadliest counties for drinking and driving. There was a 21percent increase in felony DWI's between 2000 and 2005 as well as a 12 percent increase in gross misdemeanor DWIs. The population experienced 30 fatalities and 56 incapacitating injuries from 2000 to 2002.

There were many failed approaches as the court system tried to find a way to deal with these escalating problems: modified forms of probation up to six years; financial sanctions; extended jail time; electronic home monitoring; community service; treatment (in-patient, out-patient, AA/NA, etc.); a staggered jail time program. If defendants were referred for treatment: 50 percent to 67 percent did not show up for intake; 40 to 80 percent drop out in three months; and 90 percent drop out in 12 months. The overall outcome of the treatment option was that 40 to 60 percent of clients remained abstinent at the one year mark. (Treatment Research Institute, 2003). If defendants were simply sent to jail, where any treatment is voluntary, 29.9 percent of offenders were rearrested within six months and 68 percent were rearrested within three years. (Bureau of Justice Statistics, 2002). Ninety-five percent of offenders relapse within three years. (Treatment Research Institute, 2002).

Inter-governmental and inter-agency collaboration is needed to break the cycle of drug and alcohol dependence. So began the Cass County – Leech Lake Band of Ojibwe Wellness Court. The court was created in 2006 to address the epidemic of alcohol-related crashes and deaths in Cass County. It is the first joint jurisdiction court in the nation and its clients include tribal members and non-Indians. The court sessions are conducted by ITV webcast in Walker and in Cass Lake. This is a program that is multi-jurisdictional and embraces multi-agency participation. The team is made up of a state district court judge and a tribal court judge, a county attorney, a public defender from the Regional Native Public Defense Corporation, the Minnesota Department of Corrections and Cass County Probation, the county sheriff and Leech Lake police, Leech Lake outpatient program and Pine Manor Inc., a company offering chemical dependency services. This project is coordinated with the 9th Judicial District MIS department. A similar model has also been effectively implemented in Itasca County, Minnesota.

Statistically, program participation is represented by 70 percent tribal members, 30 percent non-Indian participants of whom 20 percent are women and 80 percent are men. The triumph of this collaborative court is borne out by its success stories. There are 6,500+ days of documented sobriety; 20 percent of participants are enrolled in higher education programs; there is a measurable positive influence of family and friends; and most importantly, families are being reunited.

In February 2008, the tribal and state court agreed to work jointly on the common goals of improving access to justice, administering justice for effective results, as well as fostering public trust, accountability, and impartiality. Other agreements have resulted since that time. There is now a contract with the state for Leech Lake police services on the wellness court in addition to a contract with the 9th Judicial District for guardian ad litem services. Incarcerated parents can appear by ITV in tribal court for child protection hearings

This remarkable alliance of the justice systems has established some tremendous milestones. The Leech Lake tribal flag was installed in Cass County and Itasca County district courtrooms, another first in the nation. Leech Lake became a semi-finalist for the 2008 Harvard Honoring Nations Award and is held up as a national model for collaboration. There are many common goals that both tribal and state court systems strive for, including reducing disproportionate minority contact, keeping fewer children in out-of-home placement situations, addressing the epidemic of drug and alcohol abuse, and reducing the number of DWIs and traffic fatalities.

The benefits of collaboration are so vast and too significant for other justice systems to ignore. Allied state and tribal courts have the advantage of leveraging scarce resources, promoting lifelong healing while protecting public safety, and eliminating the destructive “us versus them” attitude common in many locales. This is a way to strengthen services to families and delve into funding sources that may not previously have been available. Strong coalition courts work together to improve lives of the people in their communities. They only can work when the people who have the ability to create change reach out to each other for the good of all.

Adapted from the materials presented by Hon. Korey Wahwassuck

"A New York Perspective"

The New York Federal-State-Tribal Courts Forum
Justice Marcy L. Kahn
New York State Supreme Court
Co-Chair, New York Tribal Courts Committee
Adapted from the presentation given by Justice Kahn

The Haudenosaunee (Six Nations of the Iroquois), including the Cayuga, the Oneida, the St. Regis Mohawk, the Seneca, the Tonawanda Seneca, the Onondaga, the Tuscarora, and the Algonquian, including the Unkechaug and the Shinnecock are the Indian nations recognized by New York.

New York has jurisdiction in Indian Territory for criminal offenses under 25 U.S.C. §232, which provides for in pertinent part, "jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York . . . ." Civil jurisdiction is conferred on the state by 25 U.S.C. §233, which provides for "jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person[s]. . . ." This statute also asserts that "courts may give effect to any tribal law or custom. . . ."

The New York Federal-State-Tribal Courts Forum was formally established in 2004. The first New York Listening Conference occurred in 2006. The Forum is structured with 18 designated members that include nine tribal representatives, five state representatives and four federal representatives. There are two appointed co-facilitators, who act on a rotating basis, one who is Native and one who is non-Native. The meetings are open to all interested parties and business is conducted by consensus.

The Forum's mission statement is "to foster understanding and improve cooperation among jurisdictions." The goal of the forum is to educate state and tribal justice officials, increase the exchange of information between the entities, to integrate ICWA training of all stakeholders, to promote resolution of jurisdictional conflicts and inter-jurisdictional recognition of judgments, to foster better understanding among our justice systems, and to enhance proper ICWA enforcement.

To learn more about the New York Federal-State-Tribal Courts Forum, please go to www.NYFedStateTribalCourtsForum.org.

Guest Article
ROLE OF THE INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM

Written by BJ Jones, Executive Director
Tribal Judicial Institute

Although Native people had methods of resolving disputes prior to the introduction of Anglo law to the North American continent, formal court institutions are a rather recent development in Indian Country. The development of tribal courts can be traced to a case occurring in the 1880s on what is now the Rosebud Indian reservation in South Dakota when a Lakota named Crow Dog allegedly killed another Lakota, Spotted Tail.[1] At the time of the killing, there was no formal Lakota court system, but instead the Lakota, utilizing traditional methods of resolving disputes, required Crow Dog to provide restitution to Spotted Tail's family by providing necessary provisions to the family. The federal territorial courts, concerned that the Lakota way had resulted in Crow Dog going unpunished, stepped in and prosecuted Crow Dog for murder. The United States Supreme Court held that the federal territorial court could not prosecute Crow Dog for murder because the Lakota had been reserved the right to hand out its own justice in the treaty between the Lakota Sioux and the United States.[2]

The United States government felt that this case showed a lack of law enforcement and justice in Indian Country and quickly acted to bring Indian people who committed serious crimes under federal authority.[3] The United States Department of Interior, the federal agency directing Indian affairs, also acted to set up court systems on Indian reservations called "Courts of Indian Offenses," [4] which could handle less serious criminal actions as well as resolving disputes among tribal members. Non-Indians could not be brought into these courts without their express consent. Many of the judges in these court systems were the local BIA superintendents whose objectives were to absorb Native people into the non-Indian world and to suppress any activities that interfered with this integration goal.[5] A majority of these courts and the Codes under which they operated did not reflect Native values and customs, but instead were efforts to change those values into the values the dominant society found important.

EARLY TRIBAL COURTS

It was not until 1934 that Indian tribes were allowed to set up their own justice codes and operate court systems enforcing tribal laws enacted by Indian tribes.[6] The creation of those court systems is the result of the inherent authority of tribal nations to enact their own laws and to be governed by them. It is important to remember that unlike federal and state courts, which are created by the United States and state constitutions as a separate, but co-equal, branch of government along with the executive and legislative branches of government, most tribal courts were created under the authority granted them by the tribal governing body. Some argue that this means that tribal courts do not operate separate and apart from tribal government, i.e., they do not have separation of powers, although most tribal codes of justice and constitutions provide for tribal court independence. Most tribal codes of justice lay out the procedures used in tribal court as well as define the different types of cases that can be brought in the court. Other important parts of tribal codes include sections defining the court's authority, or jurisdiction, to hear disputes and where a dispute has to take place for a tribal court to exercise jurisdiction.

Some Indian tribes did not choose to enact their own codes and still operate by the Code of Indian Offenses found in the Code of Federal Regulations.[7] Many smaller tribes could not afford to operate their own court systems and chose to retain the CFR courts operated by the Bureau of Indian Affairs. These courts are similar to tribal courts, except the Bureau of Indian Affairs is financially responsible for administering such courts. Most CFR courts provide for public defenders while many tribal courts do not. The types of cases CFR courts can hear, compared to tribal courts, also differ slightly with CFR courts being restricted from hearing internal tribal disputes, such as election disputes or political disputes, and from hearing disputes involving non-Indian parties unless they consent to be subjected to the CFR court's authority.

PUBLIC LAW 280 STATES

In some states, tribes do not operate court systems or will operate court systems which hear very limited types of cases, such as violations of a tribe's hunting and fishing code or cases that arise under the Indian Child Welfare Act.[8] In those states, called Public Law 280 states,[9] the state courts prosecute all persons, Indian and non-Indian, who commit crimes on Indian reservations and the state courts hear the private disputes, such as divorces, contract disputes, personal injury cases, and other matters that arise between parties, Indian and non-Indian. Even in those states, however, some tribal courts exist which still hear certain types of disputes. A person should always inquire into the existence of tribal law or the existence of a tribal court for a certain tribe even if the tribe's reservation is located in a Public Law 280 state.

PEACEMAKER OR TRADITIONAL COURTS

A recent trend among several Indian tribes has been to restore the traditional ways Native people settle disputes and to make these methods a part of the tribal court system. On many reservations, Indian tribal courts use methods such as "Peacemaking,"[10] "Sentencing Circles,"[11] or other methods of dispute resolution that more closely resemble the ways disputes were settled among Native people before the non-Indian society stepped in. This trend is very similar to the movement among some state courts for adopting alternative dispute resolution as an alternative to the adversary system the Anglo legal system values so highly.

TRIBAL COURTS TODAY

The tribal courts and CFR courts that exist today are a varied collection. Many tribal court judges are trained attorneys but that is not always the case. Tribal courts have been fortunate to have respected tribal members, who are not attorneys, serve as tribal judges. These individuals may be knowledgeable of the customs and traditions of a particular tribe and may be able to apply that knowledge and experience in resolving disputes. Oftentimes, the larger tribal courts have both law-trained and non-attorney judges. Many tribal members who have become attorneys have returned to work for their tribes as judges, and this has increased the level of respect for these courts in the eyes of tribal members. Tribal judges are generally appointed by the tribe's governing body to serve a certain term. Other tribes require elections for the position of tribal judges while yet others appoint, but the judge must run to retain his or her seat periodically. Most tribal courts allow both attorneys and "lay advocates" – tribal members who have become knowledgeable of tribal law – to represent persons in tribal court. Each tribal court has its own method of admitting persons to practice there, with some requiring bar exams, while most merely require the attorney to pay an admission fee and study the tribal code and constitution.

HOW TRIBAL COURTS FUNCTION: AUTHORITY OF TRIBAL COURTS

Jurisdiction of Tribal Courts : Criminal Jurisdiction

Persons with little knowledge of tribal courts may be surprised at how similar tribal court procedures are to those in state and federal courts. Tribal courts use sworn testimony, keep a record of court proceedings, and use both a judge and jury system to decide cases.

One big difference between tribal and state courts are the limits on tribal court authority over certain kinds of cases and persons. Whereas a state court is a court of general jurisdiction, meaning that the court can exercise authority over all persons who have committed a crime within the state's territory or has some contact with the state, tribal courts have seen their authority over certain acts and persons limited by certain United States Supreme Court decisions and acts of Congress. For example, tribal courts cannot prosecute non-Indians who commit crimes on the reservation, even if they are committed against members of the tribe. Those crimes have to be prosecuted in federal court, if the victim is Indian, or state court if the crime is against a non-Indian or is a victimless crime. This is because the U.S. Supreme Court has found that Indian tribes lack the inherent authority to regulate the criminal conduct of non-Indians. Tribal courts can, however, prosecute any Indian person who commits a crime within the reservation.[12]

Indian tribal courts are similarly limited in the types of sentences that can be imposed upon Indians who violate the law. At present, federal law[13] prohibits a tribal court from imposing a tribal jail sentence in excess of one year for any one crime committed. As a result, most tribes do not prosecute serious felonies such as murder, rape and aggravated assaults, preferring that the federal courts prosecute such crimes. Despite this, some tribal codes still outlaw these serious crimes in case the tribe elects to prosecute even with the limitation on sentencing.[14] Most tribal jails also are not equipped to house long-term inmates, but instead are similar to holding cells where inmates spend short jail sentences. Other tribes must contract with city or county governments to detain their prisoners.

There is a territorial element to a tribal court's exercise of authority over criminal activity also. In general, tribal courts can only exercise jurisdiction over crimes that have been committed on the reservation.

Jurisdiction of Tribal Courts : Civil Jurisdiction

A civil case in court is one involving a dispute between two private parties, such as a divorce or lawsuit to collect a debt owed a merchant. Indian tribes and their entities are also frequently involved in tribal court civil disputes.

Tribal courts have very broad authority to hear civil disputes, particularly when the dispute involves some area of domestic relations matter such as marriage, adoption, or child custody. Tribal courts have heard cases ranging from personal injury lawsuits where the injured party is requesting millions of dollars in injuries to small claims cases involving much more modest requests for relief of damages.

The daily staple of cases for a tribal court is very similar to that in the state courts with many domestic relations cases, consumer collection matters, juvenile delinquency proceedings, and housing cases. If a civil dispute involves an Indian on the reservation, such as a lawsuit by a merchant to collect a debt from a reservation Indian, the U.S. Supreme Court has recognized that such a case can only be brought in a tribal court, and not a state court.[15] Similarly, in the area of domestic relations, it is generally recognized that only tribal courts can hear cases such as those brought for the adoption of Indian children[16] who reside on the reservation, or divorce cases where one party to the dispute is an Indian residing on the reservation.

Tribal courts can even exercise jurisdiction over certain civil disputes involving non-Indians, unlike the criminal jurisdiction arena. If a non-Indian enters into a consensual relationship with the tribe (e.g., marries a tribal member or enters into a contract with the tribe to perform work on the reservation) or its members, and a dispute arises regarding the relationship, the tribal court can decide the dispute.

The tribe, or an individual Indian, can also bring the dispute into state court if either wishes to do so, although the non-Indian would probably be restricted to bringing the suit in tribal court.[17] Another instance where a tribal court may be able to exercise authority over the actions of a non-Indian on a reservation occurs when the non-Indian's activities have a serious impact upon the tribe and its members' well-being. Examples may be when a non-Indian is polluting reservation waters or is committing acts of domestic violence against a tribal member. In those instances, a tribal court would be able to issue orders preventing further polluting or domestic violence by the non-Indian, although it would be restricted from bringing a criminal prosecution against the non-Indian.

There are some limitations on tribal court jurisdiction which are the result of the use of federal law. For example, tribal courts cannot probate interests individual Indians have in trust or allotted lands or personal property held in trust, which are lands that are held in trust by the United States government for individual Indians. These types of probate hearings are conducted by administrative law judges in the Department of Interior. Tribal courts can hear probate hearings regarding the personal property (cars, bank accounts, etc.) of deceased Indians, however, and do frequently hear these cases. Nor can tribal courts hear bankruptcy cases or suits against the United States government. These types of cases are governed by federal law which prohibits tribal court authority.

Procedure Used in Tribal Courts: Criminal Cases

It should be remembered that because Indian tribes are not created by the United States Constitution, that document does not apply to restrict the actions of tribal governments or their court systems.[18] However, just as the Bill of Rights contained in the United States Constitution ensures certain rights to persons charged with crimes in the federal and state courts, Indian tribal courts have their own version of the "Bill of Rights." It is called the Indian Civil Rights Act, and it was enacted by Congress in 1968 to ensure persons certain basic rights when working or dealing with tribal governments and court systems. Because it guarantees many of the same rights that the Bill of Rights does, not surprisingly criminal proceedings in tribal courts are very similar to those in state and federal courts. Those persons charged with crimes in tribal court have the right to be read the charges, the right to confront witnesses against them and to call witnesses to testify for them, the right to remain silent which includes the right not to be compelled to testify in their own defense, the right not to be confined unless the tribe proves the charges against them beyond a reasonable doubt, the right to reasonable bail, and the right not to be prosecuted twice for the same criminal activity.

In other respects, the Indian Civil Rights Act provides more, and sometimes less, protection for the criminally accused than a state or federal court would provide. A defendant in a tribal court is entitled to ask for a jury trial of at least six persons whenever the crime he or she is charged with carries the possibility of a jail sentence. This is somewhat broader than the right in federal and some state courts where a person can only get a jury trial when facing the possibility of imprisonment of more than six months. The Indian Civil Rights Act only guarantees a jury trial of six persons, whereas the federal and most state courts guarantee a panel of twelve jurors to decide a case. Undoubtedly, Congress was concerned about imposing the huge costs associated with twelve-member juries on Indian tribes which are strapped for resources to operate their court systems.[19]

A similar concern may have prompted Congress not to require Indian tribal courts to provide free attorneys for indigent persons charged with crimes in tribal court. Although the tribal court must allow a person to be represented by counsel, the court does not have to appoint and pay for an attorney for a person who cannot afford legal counsel. Many tribal courts have public defender systems, sometimes staffed by attorneys but often staffed by non-attorneys familiar with tribal court procedures. Being represented by an attorney or the tribal public defender is purely voluntary as a tribal defendant may choose to represent himself or herself in the court, and most tribal courts have recognized a right to do this. Almost every tribal court has a prosecutor or presenting officer, usually an attorney but not always, who prosecutes criminal cases in the name of the tribe. Some tribal courts have received special grants to retain prosecutors who prosecute only a certain category of cases such as domestic violence cases.

A frequent criticism of tribal court jury trials is that only tribal members can sit on juries. The U.S. Supreme Court cited to this common reality when it held that tribal courts have no criminal jurisdiction over Indians from other reservations who commit crimes. This is true for most Indian tribal courts where jurors are usually drawn from tribal election rolls. Some tribes allow any Indian who resides on the reservation to serve on a tribal jury, while some other tribal codes actually do not appear to restrict any person from serving on a tribal jury provided the person lives on the reservation. One obvious problem tribes confront when deciding who should be allowed to sit on tribal juries is that non-Indians cannot be prosecuted by a tribe for violating their sworn duties as jurors, and this may convince tribes not to allow them to sit. Nothing in the law, however, prevents an Indian tribe from allowing any person to sit on a tribal jury, including those persons who are normally disqualified under state and federal law.

Indian tribes have also been given some freedom by Congress to decide what laws will be applied to persons who commit crimes within their reservations which are prosecuted in federal courts. The federal death penalty, for example, can only be applied to those persons who commit murders on reservations when the Indian tribe has chosen, by tribal resolution, to allow it to apply.[20] The same provision applies to allowing prosecutions of juveniles under 13 as adults[21] and the "three-strikes and you're out law," making certain repeat offenders subject to more serious punishment in federal court for their actions.[22]

Persons who are convicted by tribal courts and put into jail have the right to go to federal court to challenge their convictions after they have appealed through the tribal court system. This privilege, called the privilege of habeas corpus, is guaranteed any person in custody of a tribe by the Indian Civil Rights Act.[23] It is similar to the rights of a person to challenge a state conviction in federal court. The person must demonstrate a violation of the Indian Civil Rights Act, however, to obtain release from the federal courts.[24]

Procedure Used in Tribal Courts: Civil Cases

Indian tribal courts have broad leeway to adopt their own procedures to deal with civil cases heard in tribal courts, provided these procedures provide basic fairness to all parties.[25] The most common method of resolving disputes in tribal courts is the "adversary" system popular in state and federal courts. This system allows each party to present evidence and testimony and then requires the judge, or, in limited cases, the jury to decide which side should prevail. A tribal court need not provide a jury trial to a person in a civil case, as such is not mandated by the Indian Civil Rights Act. Nevertheless, some tribal courts do permit civil jury trials with similar juries as those selected in criminal cases. Oftentimes, this is only when a certain amount of money is in dispute. Tribal courts use many of the same laws that apply in state courts to resolve cases such as divorce, child custody, housing eviction cases, and consumer collection matters. Some tribal codes, however, go by tribal custom law, which is oftentimes not defined in the tribal code and requires some knowledge of the practices and customs of the tribe to understand. A good example of this is that many tribal courts place Indian children with grandmothers in custody disputes whereas a state court would almost never place a child with a non-parent. This is because grandparents have traditionally raised many Indian children, and Indian custom respects this practice.

Another practice commonly used in tribal courts which may appear inconsistent with what happens in state and federal courts is the right of persons to be heard, especially the elderly. Indian tribes traditionally resolved disputes by consensus rather than by court adjudication. One still sees the impact of a consensus-building tradition in many tribal courts where all parties are allowed substantial time to state their positions and may often refer to matters that do not appear related to the dispute before the court. Tribal courts are much more tolerant of this because most tribes have an oral tradition which placed much more of a premium on the spoken, rather than the written, word. This is why many tribes do not require a party in a civil case to file a written response to a civil complaint, but instead allow the person to appear in court and state his or her position in opposition.

ROLE OF TRIBAL COURTS IN PROTECTING ADULT AND CHILD VICTIMS

One area where tribal courts provide a vital service to victims of crime and violence is in issuing protection orders and orders protecting children who have been victims of abuse and neglect. On most reservations, when a person has been the victim of domestic violence or a child has been abused, the tribal court is the only court with the authority to issue an order protecting that person. Tribal court protection order proceedings are very similar to the procedures used by state courts. Most tribal courts have fill-in-the-blank forms to be filled in for a temporary protection order. After the issuance of a temporary protection order and notice of hearing the order is distributed to either tribal or BIA police to serve upon the offender. A hearing follows, at which time the victim can appear with an attorney, an advocate, or by himself or herself. After that hearing, if a permanent protection order is entered, a copy is sent to tribal or BIA law enforcement and sometimes sent to other local law enforcement if the victim frequently travels off reservation. Many tribal codes have mandatory arrest requirements and mandatory hold provisions in domestic violence cases which allow the victim to get protection from the offender after a violation.

Child abuse and neglect cases are another important part of tribal court cases. On many reservations the tribe operates its own child protection program, while on others the tribe coordinates those services with BIA or county child protection programs. When an Indian child is neglected or abused, the court or the tribal code can permit a law enforcement officer or social worker to take emergency custody of the child in order to protect the child. Such a removal is generally followed by a petition to the tribal court for an emergency placement which can only last for a specified period of time before the parents or guardian of the child have a right to appear in court for a hearing to determine if the placement should continue. If the emergency situation persists and the child protection program feels more services are needed, it can file a dependency and neglect petition which has to be proven by the tribe by clear and convincing evidence in most tribal courts.

In many tribal courts, the tribal prosecutor also serves as the presenting officer in abuse and neglect cases, while other tribal courts have persons who just serve as presenting officers. If the tribal court has a public defender, oftentimes this person represents the parents or guardian of the child. Many tribal codes allow for the appointment of a guardian ad litem for the child, which is a person who speaks for the child in tribal court. On many reservations, this person is a child advocate volunteer, while on others it is a person with knowledge of Indian child-rearing practices who can help the tribal judge determine what is best for the child. If a parent or guardian's neglect of his or her parental duties continue, the tribal court has a proceeding whereby the parental rights can be terminated and the child freed for adoption. These types of proceedings are less common on reservations because generally relatives of the child come forward to care for the child rather than the child being placed with another family.

TRIBAL COURTS AND THEIR RELATIONSHIP TO OTHER COURT SYSTEMS

It is very important that a tribal court order be honored by other courts, including state and federal. Not only is this important to the tribe, but to a person with an order from a tribal court it is essential that the order be honored off the reservation. This is especially true when the person's safety is dependent upon the order being honored by other courts. When one court honors an order of another court, it is called full faith and credit, or comity. Full faith and credit is required when law requires it, while comity means that one court will honor another court's orders out of respect for the other court's authority. In some situations, state and tribal courts must honor each other's orders under full faith and credit. This includes domestic violence protection orders[26] and child support orders.[27] Some states have also held that tribal court orders should be honored as orders from foreign territories.[28] In the majority of states, however, tribes and states either honor each other's orders under some type of comity or they do not honor each other's orders. Many state courts do not understand tribal court procedures and are cautious when confronted with tribal court orders because they believe that tribal court systems do not comply with the same standards as state courts and that some tribal judges are not law-trained. To overcome some of these issues, in many states, tribal-state court forums have been created to allow state and tribal judges to interact about their respective court systems, and this dialogue has led to agreements about such issues as full faith and credit.

CONCLUSION

Indian tribal courts are the unknown commodity in the American legal system primarily because people are uneducated about their authority and procedures. They perform vital functions in assuring harmony and safety for the reservation communities that they serve. They do so on drastically fewer dollars than the federal and state courts which they are often compared to. Tribal justice systems deserve the respect of all who work with them.

1 For a good discussion of this case see Sydney J. Harring, Crow Dog's Case: American Indian Sovereignty, Tribal Law and United States Law in the Nineteenth Century, (1994).

2 See Ex parte Crow Dog, 109 U.S. 556 (1883).

3 Congress did this by enacting the Major Crimes Act, 18 U.S.C. § 1153 (1948), giving the federal courts the authority to prosecute Indians who commit certain major crimes on reservations, including murder.

4 See Robert N. Clinton, Nell Jessup Newton & Monroe E. Price, American Indian Law: Cases and Materials 207 (3d. ed.1991).

5 The only qualification to be a judge in one of these courts was that the person not be a polygamist. Many of the types of crimes punishable under these early courts were efforts to force Indians into farming and ranching and to prevent them from practicing their traditional spiritual practices such as the Sun Dance. See William Hagen, Indian Police and Judges 145 (1966).

6 This came about as the result of the enactment of the Indian Reorganization Act of 1934 and subsequent federal regulations allowing Indian tribes to enact their own tribal codes and set up their own judicial systems. See 3 Fed. Reg. 952-959 (1938) codified at 25 C.F.R. 11.

7 Those tribes are listed at 25 C.F.R. § 11.100 (2008). A majority are located in Oklahoma.

8 The Indian Child Welfare Act, 25 U.S.C. § 1901 (1978), was enacted to give Indian tribal courts more authority to decide cases involving the removal of Indian children from their homes and into foster homes or adoptive homes.

9 They are called such because of a federal law which was enacted in 1953 called Public Law 83-280. See 25 U.S.C. §§ 1321-1326 (1968); 28 U.S.C. 1360 (1953); 18 U.S.C. 1162 (1953). This law was enacted as the result of a perceived lack of law enforcement and court systems on certain reservations. The law gave courts in certain states (Minnesota, Wisconsin, California, Nebraska, Oregon, and later Alaska) the authority to decide disputes that arise on Indian reservations and the other states the option to assume such authority by enacting appropriate laws.

10 The Navajo Tribal Court, for example, has a separate branch called the Peacemaker Court which allows people to utilize that method rather than the U.S.ual method of dispute resolution to resolve conflict. See Gloria Valencia-Webber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225 (1994).

11 The Mille Lacs Band of Chippewa Indians in Minnesota utilizes this method for sentencing juvenile delinquents.

12 Often the term "Indian Country" is utilized when reference is made to a tribe's territorial jurisdiction. Indian Country is a term of art defined under federal law, 18 U.S.C. § 1151 (1967), to include all lands within an Indian reservation, rights of way running through Indian allotments, and dependent Indian communities.

13 See 25 U.S.C. § 1302 (1986).

14 In some instances, both the federal courts and tribal courts have prosecuted the same criminal activity, and the U.S. Supreme Court has held that this is permissible. See United States v. Wheeler, 435 U.S. 313 (1978).

15 See Williams v. Lee, 358 U.S. 217 (1959).

16 See Fisher v. District Court, 424 U.S. 382 (1976).

17 See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138 (1984).

18 See Talton v. Mayes, 163 U.S. 376 (1896).

19 Such persons may include those who do not speak the English language, have been convicted of felonies, or who have sat on other juries within a certain period of time.

20 See 18 U.S.C. § 3598 (1994).

21 18 U.S.C. § 5032 (1996).

22 18 U.S.C. § 3559(c)(6) (2006).

23 See 25 U.S.C. § 1303 (1968).

24 See Duro v. Reina, 495 U.S. 676 (1990).

25 Such fairness is required by the due process provision of the Indian Civil Rights Act which requires a tribal court to provide due process to all persons in its court.

26 See 18 U.S.C. § 2265 (2006).

27 28 U.S.C. § 1738B (1997).

28 See 28 U.S.C. § 1738 (1948).

ALASKA
The Regional Groups

The vast state of Alaska is home to 231 Alaska Native tribes. The tribes are diverse not only geographically but linguistically as well. Further, they also have many different relationships with the state of Alaska (e.g., corporations, villages, tribes, etc.) Many of the challenges presented by the Alaska regional group are unique to the specific community relating the issue. This regional group consisted of tribal members from six different areas within Alaska and members of two tribal service organizations that deal directly with the tribes in Alaska.

"This Walking on Common Ground Gathering was a fantastic opportunity for representatives from the Alaska tribes to have that much time to sit down and share information, ideas, and concerns about their justice systems. Alaska is such a huge state with such high travel costs, so in-person opportunities to get together like this are priceless!

Lisa Jaeger, Tribal Court Specialist,
Tanana Chiefs Conference, Fairbanks, Alaska

FUNDING FOR HELP WITH COMMUNITY ISSUES

Challenges:

Many tribes receive grants that allow for full court staffing, but when the grant ends the staff is gone and the program is no longer running.

Solutions:

Tribal justice systems should…
Research and find different corporations that have grants for children's issues or community issues. Seek funding from private funders.

Encourage the use of memoranda of agreement or understanding (MOAs/MOUs) with state agencies to support programs and courts in tribal communities.

TRIBAL CONTACT WITH STATE LAW ENFORCEMENT

Challenges:

Time and travel to village by law enforcement or social services is so hard, so far; the village is not really getting services unless an extremely serious situation occurs.

State law enforcement exhibits a general lack of education on tribal issues and cultural insensitivity.

When public safety officers don't file the proper reports through the proper channels, no one takes action against perpetrators of crimes, and victims receive no justice.

Some communities have safe houses but the location is not always known by locals or by those in need.

Victims often don't have access to services to get the help they need.

Solutions:

Tribal justice systems should…

Host roundtable discussions when troopers come into the community about specific topics which will help them to learn how to be more responsive to the needs of the community.

Encourage the state to give more support to rural troopers.

Develop an identification system to assist victims in locating safe houses.

PEACEMAKING, CIRCLE HEALING, ELDER PANELS, YOUTH PANELS

Challenges:

Not everyone in the village agrees with the use of circle healing. We tend to throw out a whole system if we do not like one aspect of the process. For circle healing or peacemaking to work, we need to realize we have two primary goals: to help the offender and to make the community safer.

Not everyone is used to western style courts and their ways of dealing with problems. As a result, some teachers are reluctant to report truancy or class disruptions to elders or to the tribal courts because they don't know what will happen.

Solutions:

Tribal justice systems should…

Teach their communities about peacemaking: how it can be a benefit to all and how it does not have to cost money.

Utilize Youth Panels for youth issues where youths are in charge of the circle and the resolution of the issue.
Treat Youth Panels as courts, just a different style which is more suited to the issue presented.

Use Elders' Panels consisting of five tribal elders who may have been elected or appointed. Educate others that the Elders' Panel is not about scolding the offender; it's about talking to the offender about what he or she has done. Educate others that traditionally the elders would talk to the person at time of the indiscretion and if there was a child in danger, someone in the village was authorized to remove the child from danger and put him or her in a safe place.

NONRECOGNITION OF TRIBAL COURT ORDERS

Challenges:

Adoptions and name changes that are issued by the tribal courts are not recognized by the state; no full faith and credit is given to tribal court orders. There was an Alaska Attorney General's opinion of October 1, 2004 that resulted in tribal adoption decrees not being recognized by the state.

Solutions:

Tribal justice systems should…
Create a tribal/state judicial forum in which the tribe and state educate one another about their justice systems. Educate each other about what the courts are all about.

Build relationships with their peers in the state court system.

TECHNICAL ASSISTANCE SCARCE IN ALASKA

Challenges:

Code drafting and technical assistance are scarce in Alaska for Alaska tribes.

Solutions:

Tribal justice systems should…
Encourage the federal government to provide more funding specifically aimed at helping the Alaska tribes realize their goals of having a court system that meets their needs.

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JUDICIAL TOOLBOX

Barrow Tribal Court

One of the things we do in our community is outreach. We went to the law library and talked to the magistrate and the tribal court judge there. We were able to reach an agreement about the handling of minor consuming alcohol (MCA) cases. We discovered the district attorney had trouble with the Barrow Tribal Court because the minors involved had been in the system for two years which was too long. To accommodate the problem, the Barrow Tribal Court rewrote programs to dovetail with the state programs, while incorporating traditional values. We worked with the state, judge and administration in developing protocols. Today, we refer cases back to the state if they are not successful in tribal court. MCA fines in the state system are so high, so people will choose the tribal court in Barrow. We have worked out a system to extend sentences on case-by-case basis.

JUDICIAL TOOLBOX

Kodiak Area Native Association

The Kodiak Area Native Association (KANA) is a non-profit corporation that provides health services and social services to the Kodiak Area, and promotes the unique heritage of the tribes in the region.

The Mission of this tribal organization is to promote pride and self determination on the part of the sovereign and indigenous people of the Kodiak Island area in their cultural heritage and traditions:

- to preserve and promote their language, customs, folklore and arts;
- to promote the educational, health, physical, and economic community;
- to prevent and overcome racial prejudice and its inequities;
- and to restore effective self-government, reminding those who govern and those who are governed by their mutual and joint responsibilities.

www.kanaweb.org

LANGUAGE BARRIERS

Challenges:

For many people, their Native language is their first language, not English. The Native language may be spoken in the tribal courts, but Native people appearing in state court do not always receive interpreters.

When attorneys come to court everything becomes more difficult. Not many tribal judges are law-trained. State codes are difficult to understand.

Solutions:

Tribal justice systems should…

Educate attorneys about the different processes that are used in the tribal justice system, so they can help in facilitating a resolution to the dispute. In some tribal courts, attorneys are not allowed to directly address the court so that they do not take over the court and talk down to the judge.

Encourage state courts to provide appropriate interpreters when native people appear in state court just as they would for non-native English speakers of other languages.

COLLABORATING WITH STATE AND LOCAL AGENCIES

Challenges:

There is a lot of difficulty in developing and enforcing Memoranda of Understanding (MOUs) with state and local agencies. Some state-tribal MOUs exist but they only receive "lip service."

It was reported that at an Alaska state trooper training, the trooper trainer told troopers not to recognize protective orders unless the state had recognized them. State troopers are coming into schools to speak to the kids without there being a tribal representative present.

When Native people commit crimes, the offenders are sent to corrections facilities out of the community or out of the state.

Solutions:

Tribal justice systems should…
File justice system papers through the appropriate state department or agency as a foreign order. Next, file the order or present it to the tribal council which will enable it to certify the order.

Provide tribal representatives for training sessions offered by state agencies that relate to, or have the capacity to relate to, tribal issues.

Work with the state judiciary in developing alternative punishments or rehabilitative punishments that keep the offenders closer to, or connected with, the community if that is appropriate.

Work with local state magistrates to build relationships and open lines of communication.

MEMORANDA OF AGREEMENT/UNDERSTANDING (MOAs/MOUs)

Challenges:

In some areas, there is no state presence so it is difficult to draft and negotiate an MOA with a partner that does not exist.

Tribes need to be careful not to give away their authority or damage their sovereignty in an MOA, especially when funding decreases and the state no longer wants to fund the program.

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JUDICIAL TOOLBOX

Denali Kid Care &
Alaska Legal Services Corporation

Denali Kid Care is a program offered by the state of Alaska to provide children and teens with health care insurance. This vital program provides many health care services, including substance abuse treatment and mental health therapy.

http://hss.state.ak.us/dhcs/DenaliKidCare/default.htm

Alaska Legal Services Corporation (ALSC), established in 1967, has offices across the state of Alaska. ALSC's main mission is to provide superior legal assistance to low-income Alaska residents. ALSC's practice areas include family law, housing and consumer issues, government benefits, wills and probate matters as well as Native law cases. Importantly, those Native Alaskans who are allotment clients receive free legal services no matter what their level of income and no matter where they reside.

www.alsc-law.org

JUDICIAL TOOLBOX

The Village of Kake

The Healing Hearts Circle

Located among numerous islands in central southeast Alaska, Kake is located on Kupreanof Island, which is roughly the size of Rhode Island, and hosts an annual population of approximately 800 people. Traditionally a Tlingit village, Kake's population today reflects a number of other cultures: Tsimshian, Haida, Yupik as well as some of the "Lower 48" native cultures. The Native population accounts for about 75 percent of the community.

The village has no tribal court, just the Healing Hearts Circle. This remarkable effort began with the 7 Circles Coalition (based on musk oxes circling around their young for protection). Not everyone chooses to use the Healing Heart Circle. An adult leader chooses who is in the circle, selecting only helpful individuals. The offender can request others to be present. If the offender is a child, he or she may identify an elder to be in the circle and/or the parents are supposed to attend. The circle may be used for cases of bullying or minor consuming alcohol. Notebooks are prepared for all the stakeholders in the circle.

To ensure the success of the Healing Hearts Circle, it has to be a community-wide effort with members from all factions in community. Those involved cannot talk in the community about what goes on in the Healing Heart Circle because it is confidential. This is a place to come together to solve the individual's problem, powered by love and the best interest of others. No blame is allowed in the circle. The primary purpose is to find solutions so the person gets better and becomes a productive member of society. If it does not work, the case is referred back to state court. There is a recognized need for additional information sharing between the state and tribe. The Healing Hearts Circle is one way to address communication issues within communities and learn how to build relationships.

For more information: www.innovations.harvard.edu/awards.html?id=6164

Solutions:

Tribal justice systems should…
Analyze how an MOA or MOU will affect them in the long term.

Draft and execute contracts when there is money involved, not an MOA or MOU.

Provide tribal entities with education on MOAs/MOUs and the ramifications of entering into these agreements.

IDEAS AND TOOLS THE NATIVE TRIBES AND VILLAGES CAN DEVELOP

Each village must map out all the resources in the community so that everyone can know who to go to for what. This can help the community to come together and support sustainability. This is also a way to keep things out of the state judicial system.

Package liquor stores (tribally owned liquor stores) sometimes fund villages and village governmental services.

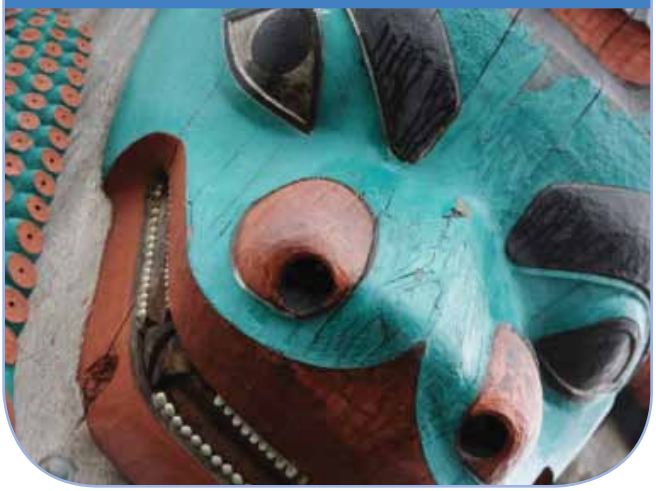
Our young people are able to change more easily; we should focus on them.
All villages are different, so each needs to work on relationships with agencies that they come in contact with on this basis.

Each community and then each region in Alaska can set up a communication tree that defines who does what and where. These need to remain "living" documents that are updated regularly and are easily accessible by communities.

For better communication, tribes and villages can develop online networking sites, blogs and forums and establish tribal/state judicial forums.

JUDICIAL TOOLBOX

Tanana Chiefs Conference



Tanana Chiefs Conference (TCC), located in Fairbanks, Alaska, is an association of 42 interior Alaska villages that provides a wide range of services for the people it serves The foremost mission is to promote tribal unity and self-determination among the member tribes. One of the programs offered by TCC is the Tribal Government Services Program. The key mission is to help the interior tribes form the government structures their people choose, while providing members with critical knowledge on how to protect their sovereignty. Some of this program's main goals revolve around training regarding government and court development as well as business growth and enhancement. Interwoven in all the trainings is a strong advocacy for strengthening and defending tribal sovereignty to ensure the future of robust tribal existence in Alaska.

www.tananachiefs.org/index.asp

The Alaska Native Justice Center

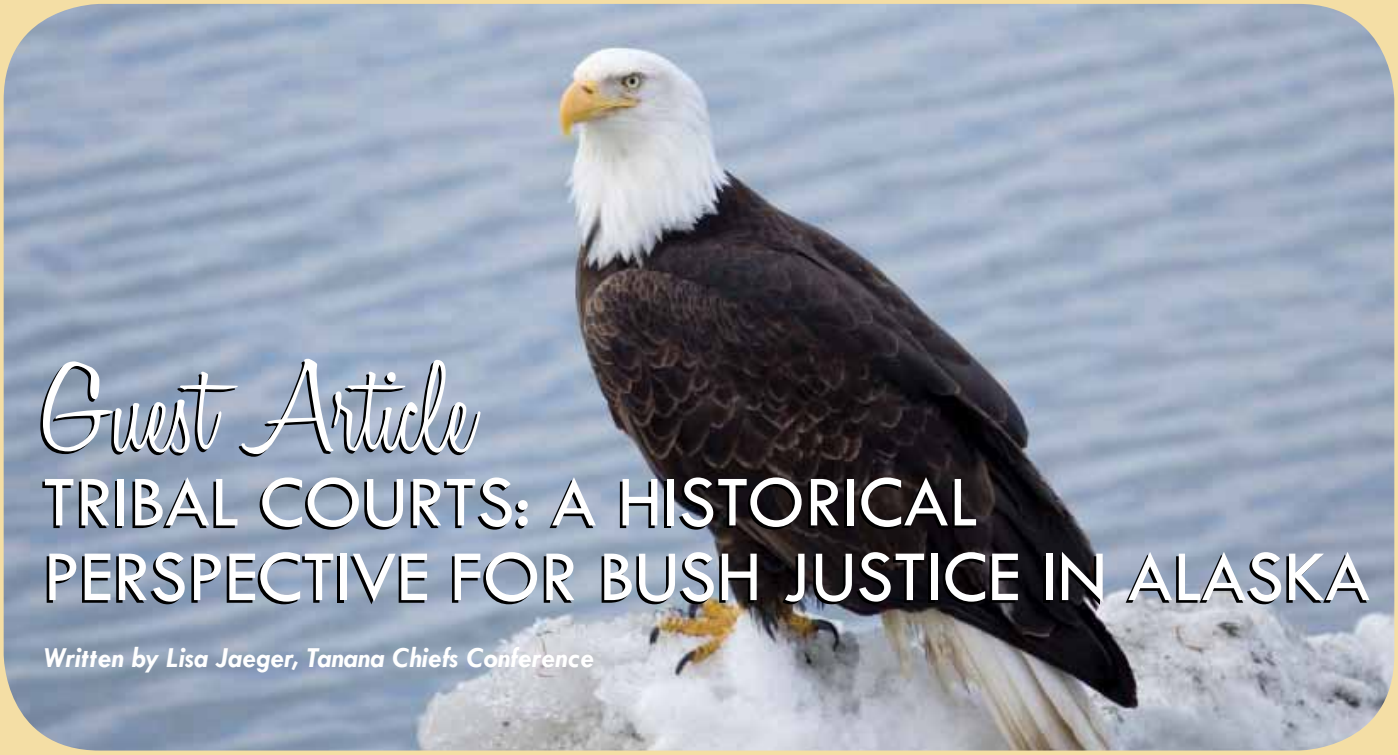
The Alaska Native Justice Center (ANJC) is at the forefront of advocacy for a healthy Native youth population in Alaska. One area of concentration to which it brings considerable knowledge and strength is in managing cases involving minors consuming alcohol and preventing such consumption. Under state law in Alaska, the consequences to a minor for consuming alcohol can be staggering: The first-time offender is subject to one year of probation; for a second offense, the minor faces a Conviction of Record, fine (up to $1000), community work service (up to 48 hours), and a suspended driver's license (for up to 90 days). For a third offense, which is a Class A misdemeanor, the minor may additionally face jail time, a higher fine ($2,000), additional hours of community work service (up to 96 hours), a longer driver's license suspension period (up to 180 days), and the term, "Habitual Offender," will be placed on his or her record.

In response to these provisions, , the ANJC developed a program specifically for dealing with minor consuming alcohol (MCA) cases. Pursuant to the program, the ANJC creates a family support wrap-around system with a cultural component and support when the cases come before the court.

ANJC also offers programs that include family law and advocacy; domestic violence and sex assault victim support; adult and youth re-entry programs; and tribal court development and technical assistance. Some of the other programs developed by ANJC are the Youth Empowerment Program (YEP), Aggression Replacement Training Program (ART), Managing Emotions Effectively Program (MEE), Prime for Life Program (PFL), Rural Juvenile Alcohol Safety Action Program (JASAP), Community Diversion Program (CDP), and the Tribal Youth Re-entry Program (TYRE).

Another program of which the ANJC is particularly proud is the Prime for Life Program. With this program , the ANJC focuses on reducing an individual's risk of alcohol dependency and teaching participants to protect what they value in their lives. The program teaches participants what alcohol does to the human body to encourage them to make healthier choices. This training is presented in a safe and culturally relevant environment that is non-judgmental, allows for interaction within the group and provides specialists in the area of alcohol dependency.

For more information about any programs presented by the ANJC, please contact Denise Morris at dmorris@anjc.net.



Guest Article

TRIBAL COURTS: A HISTORICAL PERSPECTIVE FOR BUSH JUSTICE IN ALASKA

Written by Lisa Jaeger, Tanana Chiefs Conference

"…..Same thing with tribal court. That came in long before white people. The court brought everything out in the open, before the people. They talked to the person making trouble right in front of him. They just talk. As peaceful as they can. The Indian way is to have respect for one another."

Chief Peter John
1900 - 2003
Traditional Chief, Minto Alaska

Modern tribal courts in Alaska may be best understood by viewing the long history of events, changing federal and state policies, and legal battles that have taken place over the years leading us to the present day. Long before contact with non-Native people, traditional systems were well established for maintaining order in tribal communities. Conflicts and disease brought first by the Russians, then by gold seekers, decimated Native populations in much of Alaska, affecting Native communities and traditional systems beyond the imagination. Although changes to tribal justice occurred with the introduction of a federal justice system during Alaska territorial days, organized tribal councils played an important role in early bush justice. The Alaska Statehood Act (1959) instituted a system of state magistrates in rural Alaska, replacing the role of the tribal councils and village tribunals to some extent. Finally, the settlement of Alaska Native Claims in 1971 left questions about tribal status and jurisdiction, which continue to be litigated in state and federal courts today.

Through all the surrounding conflicts and confusion, Alaska tribes have managed to survive, and even flourish. Tribes have established, and continue to develop tribal courts to help meet bush justice needs. This is partly due to a lack of adequate state resources to address justice problems in rural Alaska, but also due to the tribes themselves believing that solutions have to come from within their own communities. Today the majority of Alaska tribes handle some level of tribal

court cases, primarily attempting to address tremendous problems related to child mistreatment and neglect, alcohol and substance abuse, and domestic violence. They do this with little or no funding, and with varying amounts of cooperation with state agencies. After a lengthy study ending in 2006, the Alaska Rural Justice and Law Enforcement Commission reported, "There is no doubt that the reduction in state-tribal conflict over jurisdictional issues, and increased cooperation, coordination, and collaboration between State and tribal courts and agencies, would greatly improve life in rural Alaska and better serve all Alaskans."

TRADITIONAL JUSTICE SYSTEMS AND PRACTICES

Before contact first with the Russians, then with outsiders seeking gold and natural resources from other parts of the world, Alaska Native people were living under a wide range of self-governing systems for thousands of years. Family lines were strong, and basically organized through clans, banding together in various cultural groups, traveling within distinct areas of land and sea within which they harvested subsistence resources. The extreme arctic environment demanded respect and working together was the only way the people could survive.

Social order was maintained for hundreds of generations through traditional customs, self and family discipline, and strong spiritual beliefs and values such as the Yupik Yuuyaraq (the way of the human being), and Athabascan Animal Songs, (laws by which Athabascans lived by). The people had close daily interaction with the natural universe which had a profound influence on cultural ways of being and keeping order. Spirituality entered into nearly every aspect of daily life.

The way disputes were resolved varied between bands and cultural groups. In some areas authority for dispute resolution and mediation rested with the first male head of a nuclear or extended family, and beyond that the leader or headman of a collection of related families. Justice was applied by decisions of chiefs, clan leaders, spiritual leaders, whaling captains, and Elders. Some groups had elaborate systems of restitution and retribution; others were less structured. Minor offenses were dealt with by the family or clans, or not dealt with at all. In some areas, leaders formed council decision-making bodies or advisory assemblies to traditional chiefs.

Justice involved restitution, reprimanding, revenge, shaming, and in extreme cases, banishment of a person or war with another band. Banishment was an extreme punishment, as not having other humans to protect and help you basically made it a death sentence. Justice was often dispensed quickly, but in some systems elaborate potlatches and other rituals took place over a lengthy time period to resolve disputes and mend relationships.

RUSSIAN OCCUPATION AND U.S. PURCHASE

Traditional Alaska Native justice systems began to be disrupted with the coming of Russian explorers. Russia laid claim to Alaska beginning in the 1770s through the purchase of Alaska in 1867, mainly occupying the coastal areas with a primary interest in exploitation of furs. The Aleut people were the first Alaska Natives to be affected by being forced into slavery to hunt fur-bearing marine animals for the Russians. This practice also forced them to leave their traditional ways of life. An estimated 80% of the Aleut population died from introduced diseases against which they had no immunity, a crisis to the Aleut people and culture that is unimaginable.

Russians moved onward to Kodiak, affecting the Koniags, then to Southeast Alaska affecting the Tlingits who continued to wage war on the Russians into the 1850s. The diseases carried by the Russians traveled to Alaska Native people well beyond the areas occupied by the Russians. Between loss of population due to disease, loss of traditional hunting patterns, and moving into more permanent settlements, traditional Alaska Native justice systems were eroding along with Native cultures.

In 1867, U.S. Secretary of State William Seward made the deal to purchase Russia's claim to Alaska for $7.2 million, proclaimed by the Treaty of Cession. The Treaty contains the first written legal reference to Alaska Native people. The Treaty classified Alaska Natives into "civilized groups" which were to be regular citizens of the United States with no special relationship, and the rest were recognized as "uncivilized groups" which were to be subject to federal Indian law. This confusing classification of Alaska Natives in the Treaty of Cessions fueled much debate later in courts and other forums over the status of Alaska Native people in the years to come. Without a special political relationship to the federal government, Alaska Natives would have no aboriginal claim to land and resources under the Doctrine of Discovery, receive no special federal services under the trust responsibility of the federal government, nor have tribal status with the government-to-government relationship needed to operate tribal governments and justice systems.

EARLY RELATIONSHIP BETWEEN ALASKA TRIBES AND THE FEDERAL GOVERNMENT

When the United States purchased Alaska in 1867, the country was still busy recovering from the ravages of the Civil War. The tone at the time towards American Indians was to assimilate them primarily through boarding schools and allotting Indian lands to individuals. Hundreds of treaties with the Indians had been produced, reservations created, major decisions about Indian tribes made by the U.S. Supreme Court, and several acts of Congress passed. Indian tribes had endured persecution through wars, disease, and removal from their homelands. The tribes were in the process of losing their land base through the General Allotment Act (also known as the Dawes Act) which divided up Indian lands by allotting it to individual Indians, and then "surplussing" the remainder by selling it to non-Indians. The General Allotment Act resulted in a net loss of 90 million acres of Indian land, an area the size of California. When the U.S. purchased Alaska, all the land went into the "public domain." Transfer of land to private individuals, associations, tribes and designation of land for specific public purposes required future congressional action.

At first there was a relatively small federal presence in the Alaska territory and little attention paid to potential aboriginal claims, political status of Alaska Natives, and their special relationship to the federal government. Congress terminated treaty making with the Indians in 1871, therefore no treaties were made with Alaska Native people. The passage of the first Organic Act in 1884 created the District of Alaska and established a district court. The Act provided for a judge, clerk, several commissioners, and a marshal with four deputies. This court system was to enforce the applicable laws of the state of Oregon. The act also set up a land district which provided that "the Indians and other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms of which such persons may acquire title to such lands is reserved for future legislation by Congress." The act charged the secretary of interior with the responsibility of educating the school age children of Alaska, regardless

of race. During these early years no distinction between Native and non-Native residents of the territory was made in terms of service delivery.

Missionary-educator Sheldon Jackson was appointed as the first general agent for education in Alaska in 1885. Under Jackson's leadership, the Interior Department made contracts with various missionary associations, giving them jurisdiction over education in Alaska. A network of Native village schools was developed by these associations, later to be run by the Bureau of Indian Affairs until well after Statehood. These village schools were notorious for prohibiting the speaking of the Native languages and geared toward assimilating and westernizing the Alaska Native people. The affect of these schools in the loss of Alaska Native languages and damage to the Native cultures was enormous.

In addition to the village schools, the Interior Department established the Native reindeer industry, extended medical care specifically for Alaska Native people, and established village cooperative stores, sawmills, and salmon canneries. Additionally, some 150 Indian reserves were created for education, economic development, community development, and health. This was the political relationship that was needed for the future settlement of aboriginal claims and the existence of federally recognized tribes in Alaska.

In the 1890s, the Klondike Gold Rush brought people to Alaska by droves, as well as epidemics that followed, wiping out entire Native villages in some cases. The trauma of such a loss of people and its effects on the Alaska Native culture is almost incomprehensible. The Gold Rush also brought an increased demand for land so Congress began the process of moving land into private ownership. In 1891 Congress enacted the Alaska Townsite Act which provided a mechanism for non-Natives to get land in the larger settlements in Alaska. At that time Congress also opened land for trade and manufacturing sites, authorized setting aside land for timber reserves, and established the 86,000 acre Metlakatla Indian Reservation.

Like the Indian tribes in the lower 48, Alaska Native people, their culture and traditions were in jeopardy at the turn of the 20th century. By the late 1800s, whaling ships had almost killed off both the whale and walrus populations causing widespread starvation in Alaska's coastal communities; animal populations in other parts of Alaska on which people depended for subsistence were facing devastation as well. Villages were decimated by introduced diseases, including epidemics of influenza, diphtheria, chicken pox, measles, and tuberculosis. Schools prohibited speaking the Native language, the traditional spiritual beliefs were repressed, and dances and other cultural practices were denounced as pagan and sinful by the new Christian religion. Names were changed to English names and alcohol was introduced. The impacts on Alaska Native culture were tremendous, and traditional ways of self-governance and traditional justice systems were damaged.

TURN OF THE 20TH CENTURY

In 1900, Congress passed the Civil Code of Alaska, creating more judicial districts within the territory. James Wickersham was appointed as judge for the gigantic Third Judicial District based in Eagle, the first judge to sit in the interior of Alaska. Judge Wickersham traveled extensively by boat and dog sled throughout Alaska stopping at Native camps, listening to stories and learning about Native history. Judge Wickersham made key decisions in regards to Alaska Native land claims, and also went on to serve as Alaska's delegate to Congress. Wickersham was instrumental in the passage of the Organic Act of 1912 turning the District of Alaska into a U.S. Territory. The new Territory of Alaska had an elected legislature, although the governor remained appointed by the President. Wickersham also pushed for the establishment of the Alaska Agriculture College and School of Mines (now the University of Alaska), McKinley Park (now Denali National Park), the Alaska Railroad, and the Alaska Native Townsite Act.

With the stream of outsiders coming into Alaska, demand and competition for land continued to increase. Churches sought land and acquired it through the Missions Act of 1900, which allowed a religious denomination to acquire up to one square mile of land in Alaska. Disputes over land, particularly between miners, resource developers, and Alaska Native people arose. A string of court cases concerning Alaska Native land rights began, and continued up to the settlement of the Alaska Native Claims Act in 1971. There were contradictory decisions in these court cases, but two early cases in particular held that non-Natives could not acquire land without the consent of the federal government. In other words, Alaska Native people had an aboriginal claim to land that only the U.S. government could settle. The first such case, *United States v. Berrigan* (1905) was heard by Judge James Wickersham, and involved a dispute over land near Delta Junction. The second was *United States v. Cadzow* (1914), involving a land dispute near Fort Yukon.

Congress passed several acts in the early part of the 20th century specifically affecting Alaska Native people. The Nelson Act in 1905 legislatively established a separate system of education for Alaska Natives, giving the BIA nearly exclusive control over Alaska Native education until well after Alaska statehood. In 1906, Congress adopted the first land grant to Alaska Native people through Alaska Native Allotment Act which entitled Alaska Natives to restricted land entitlements of up to 160 acres of unappropriated, non-mineral land.

From the early twentieth century through the 1950s, village councils played a major role in resolving disputes in bush Alaska. The village council form of tribal government was primarily set up by missionaries and teachers. According to studies by Hippler and Conn, the councils were composed of Native men and women, and commonly acted by consensus. Councils heard complaints, lectured wrongdoers, and occasionally reinforced their decisions by invoking the authority of the church and the United States. Rather than taking punitive measures, council actions were often directed towards an admission of wrong and a promise to correct conduct in order to live more compatibly with other villagers. The village councils were successful in their administration of justice because they avoided the confrontational posture of trials, allowed for group decisions in which no single individual had to take the responsibility, and found solutions for misbehavior which were models of correction and deterrence. Although they operated on an unclear legal basis, village councils came to be supported by the federal Marshalls, the U.S. legal entity that was charged with enforcing law in the Alaska territory. Federal lay judges and commissioners were appointed to serve in the larger Alaska settlements. But likely due to lack of financial and infrastructure support, village councils played a major role in resolving judicial disputes.

Although some lower 48 Indians became citizens of the United States prior to 1924, the majority were not citizens. The Alaska Territorial Legislature offered Alaskan citizenship to Alaska Native people with a 1915 enabling act. Congress passed the Indian Citizenship act of 1924 granting all American Indians and Alaska Native people citizenship in the United States. In the Act Congress provided that, "The granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." With that, Alaska Native people were clearly citizens of the United States, and any rights to aboriginal claims to land were preserved.

Congress passed the second land grant to Alaska Natives through the 1926 Alaska Native Townsite Act designed to give Alaska Natives small land parcels under their homes in villages in a restricted status. Neither the 1906 Alaska Native Allotment Act, nor the 1926 Alaska Native Townsite Act, were a settlement of the much larger aboriginal claim to land in Alaska, but today, both Native allotments and restricted Alaska Native townsite lands are likely Indian country for the purpose of tribal jurisdiction because of their trust and restricted status. Both the Alaska Native Allotment Act and the Alaska Native Townsite Act were terminated in the 1970s by the Federal Land Policy and Management Act (FLPMA) ending the creation of new Alaska Native Townsites and Native allotments without a specific exception by Congress.

In 1934 Congress passed the Indian Reorganization Act (IRA) (also known as the Wheeler-Howard Act or the Indian New Deal), in the spirit of attempting to improve conditions on the reservations and to stop the loss of Indian lands in the Lower 48 states. The act was not fully applicable to Alaska tribes because it was geared more toward Indian reservations and few Alaska Native villages were thought to be located on reservations at that time. In 1936, Congress corrected this oversight with an amendment to the IRA that allowed all Alaska Native villages to organize their tribal governments under it. By 1941, 38 Alaska Native groups had organized under the IRA, and today about one third of the 231 federally recognized tribes in Alaska are organized under the IRA.

All the IRA tribes in Alaska have constitutions that went through a special federal election process through the secretary of interior. Most all of the remaining federally recognized tribes in Alaska also have constitutions, which went through their own internal processes to adopt. All the Alaska tribal constitutions generally or specifically allow the tribal councils to establish tribal courts, but very few have tribal court structures and procedures outlined in the constitutions. For all practical purposes, both the IRA and non-IRA tribes in Alaska have the same powers and are equally recognized by the federal government.

In the lower 48, it is said that the "modern" tribal court systems began with the passage of the IRA which encouraged the establishment of constitutional forms of tribal governments with tribally controlled judicial systems. In Alaska, village councils had already been formed and often used as dispute resolution bodies. After the application of the IRA to Alaska, the BIA encouraged tribal court activity through tribal ordinance by the village councils. This was largely the form of local justice in Alaska villages until changes brought by statehood. In Alaska, it is probably more appropriate to say that the era of "modern" tribal courts began much later, stimulated by the enactment of the Indian Child Welfare Act in 1978.

In the 1940s, the federal government's primary concern was World War II. A tremendous number of both Native and non-Native Alaskans were enlisted into the military, and Alaska's mineral and fishing resources were heavily exploited. Aside from the effects the entire United States felt from this war, Alaska tribes were particularly affected by the removal of the Aleut people from the Pribilof Islands, and the increased access to Alaska by the construction of the Alaska Highway. The Native languages and culture were still being suppressed by the BIA schools which were fully functioning at this time.

In 1948, Congress passed a statute defining Indian country, the territorial area over which a tribe has jurisdiction. The language reads: "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian Country,' as used in this chapter {18 USC Sec. 1151 et. seq.}, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." At this time there were reservations and reserves in Alaska, many Indian allotments, and most Native villages were probably considered "dependent Indian communities." But there was a long path ahead leading to the settlement of aboriginal claims, the questions over the existence of tribes after the settlement, and then the deliberations over what jurisdiction the tribes would have. Whether or not there is Indian country in Alaska was to be subject to much debate into the future.

1950S : TERMINATION ERA

In terms of federal Indian policy, the 1950s are called the "termination era" as Congress adopted polices aimed at terminating federal obligations to tribes. The three main tools the federal government used to accomplish this were the relocation program, introducing state jurisdiction into Indian country through Public Law 280 (P.L. 280), and actual termination of some tribes. Alaska experienced the relocation of many Alaska Native people to cities in the lower 48, and also the application of Public Law 280.

In response to lack of Alaska territorial jurisdiction over a criminal case within the jurisdiction of the Tyonek tribal government in 1958, Congress applied Public Law 280 to Alaska upon Alaska statehood in 1959. Basically, P.L. 280 extends state criminal and some civil jurisdiction into Indian country. At that time, Alaska Native aboriginal claims to land had not been settled, so Indian country would likely have been Native allotments, restricted Alaska Native townsites, reservations and reserves which numbered over 150, and dependent Indian communities.

A long lived effect of Public Law 280 on Alaska tribal courts was the way the state of Alaska interpreted this law for years after it was applied to Alaska. There were a series of Alaska court rulings which basically held that even if there were tribes in Alaska, P.L. 280 terminated tribal jurisdiction that they had. Tribal advocates took the position that P.L. 280 extended state criminal and some state civil jurisdiction into Indian country creating concurrent state-tribal jurisdiction, and tribal jurisdiction was not terminated. Over time, the Alaska state system is agreeing. While Public Law 280 extends state criminal jurisdiction and some civil jurisdiction into Indian country, there are questions about the existence of Indian country in Alaska, and therefore what the practical meaning Public Law 280 actually has.

A second effect of Public Law 280 is a policy by the Bureau of Indian Affairs not to fund tribal courts in states where Public Law 280 applies. This leaves Alaska tribal courts few revenue streams to operate under. There are limited grant opportunities available through the Department of Justice which cannot be counted on for on-going funding. Self-governance dollars are also limited, but tribes may use some to fund their courts. Or, tribes may use self-generated dollars. Most tribal courts in Alaska operate their courts on a volunteer basis, and/or use existing resources from other programs and services. For example, most tribes add the duty of tribal court clerk to an existing tribal staff position. Many tribes give judges a small stipend for hearing cases.

Alaska statehood brought very significant changes to bush justice, governance, and land ownership patterns in Alaska. The act itself preserved the status quo on aboriginal title, mentioning that the federal government had the right to settle any aboriginal claims to lands and resources that may be held by Alaska Natives. But the state of Alaska's rights to land and the actual selection of it were a main stimulus for filing suit to prevent it and finally settling the aboriginal claim in 1971.

With statehood, city councils were formed in many places, shifting power from the village councils. Federal commissioners and marshals were replaced with state lay judges or magistrates who were appointed by the Alaska court system. In the villages where magistrates were stationed, the role of the village councils in dispute resolution was greatly reduced. The single judge system was much more formal, and lacked the consensus approach taken by the village councils. Sadie Brower Neakok from Point Barrow was one of the more successful magistrates, who worked hard to make the magistrate system work for her people. She held court in her home kitchen when she first started as a magistrate in 1960, and continued her work for the next 20 years.

1960S : CIVIL RIGHTS ERA

The 1960s was an era of civil rights throughout the nation, and Indian country was no exception. Civil rights protests were occurring across the country and the age of identity politics blossomed. The United States Constitution – Bill of Rights, does not apply to the activity of Indian tribes, so in the early 1960s, Congress began seven years of hearings concerning claims that tribal courts in the lower 48 did not provide basic due process rights to Indian criminal defendants. In response, Congress passed the Indian Civil Rights Act (ICRA) in 1968 which applies to all tribal courts throughout the country. The ICRA established a basic Bill of Rights for persons subject to the jurisdiction of Indian tribes. On one hand it reaffirmed judicial powers of tribal self-government, but on the other, it placed certain standards on tribal courts while providing no funding to enable tribes to restructure or improve their court systems.

At the heart of the Indian Civil Rights Act (ICRA) is the obligation of tribes to provide a basic fundamental fairness through due process and equal protection in tribal operations. It is important to know that legislative history describes Congress' intent that the meanings of these terms be tribal meanings rather than state or federal interpretations of these terms. The ICRA basically requires notification of hearings, the opportunity to be heard, and fair hearings with consistent application of tribal law. The ICRA affects tribal court procedures particularly in the area of criminal jurisdiction. It requires basic due process rights for defendants, mandates a jury trial if the defendant wants it for offenses with potential jail penalties, authorizes defendants in criminal proceedings to use lawyers at their own expense, and requires that laws be applied equally to all persons. It also limited tribal court sentencing to six months in jail and/or a $500 fine upon conviction for any one offense. This limit was later raised to one year in jail and/or $5,000, and will likely continue to be raised by Congress as the severity of court cases that tribal courts handle increases.

By the late 1960s, Congress embraced a policy of promoting tribal self-government and increased funding for tribal court operations through the Bureau of Indian Affairs. However, many lower 48 tribal courts remained under-funded and under-staffed, and a policy of not funding tribal courts in P.L. 280 states evolved. Most tribes lacked resources to make procedural changes required by the Indian Civil Rights Act and expanded tribal jurisdiction. In Alaska, bush justice was either being addressed by state courts, village councils or Native panels, or, not at all.

In 1969 the National American Indian Court Judges Association (NAICJA) was formed for the purpose of improving tribal court operations. The members of this organization are primarily tribal judges, justices and peacemakers serving in tribal justice systems. Alaska tribes were given their own regional representation in the organization in 2000.

The civil rights movement of the 1960s was also the climate for Alaska Native people who were actively pushing for the settlement of aboriginal claims for land and resources. The key factors pushing the movement were the state's selection of valuable lands, the proposed construction of the Rampart Dam which would have flooded much of the Yukon river drainage, a proposal to use nuclear bombs to create a harbor in Point Hope (Project Chariot), and finally confirmation that there were vast oil reserves on the North Slope. Secretary of Interior Morris Udall froze land transactions in Alaska in 1966 after Alaska Natives filed a law suit over their claims.

1970S : SELF-DETERMINATION

During the 1970s, Congress passed several pieces of significant Indian legislation and the Supreme Court heard an abundance of Indian cases. The most significant legislation for Alaska Native people was the settlement of the aboriginal land claims through the Alaska Native Claims Settlement Act (ANSCA) in 1971, a claim to ancient homelands which had been unresolved for over 100 years. Although there were differences of opinion over how the claims should be settled, the unique settlement through ANCSA was the end of the disputes over whether or not Alaska tribes had aboriginal claims to land and resources. It was also the beginning of a new era for Alaska Native people, as 44 million acres of land and nearly one billion dollars was placed under Alaska Native regional and village for–profit corporations, thrusting Alaska Native people into management positions in the complex world of profit-making businesses. The 44 million acres of land were placed into an elaborate ownership of surface and subsurface rights and checkerboard patterns surrounding the villages.

After ANSCA was enacted, there were challenges in court over whether or not tribes in Alaska still existed. Eventually, the Department of Interior basically settled the matter by publishing the names of all the tribes in Alaska on its list of federally recognized tribes in 1993, and Congress confirmed the list in 1994. However, ANSCA left questions about tribal jurisdiction since the tribes, for the most part, were the same people as the corporation shareholders, but did not receive the land under ANSCA. Tribal jurisdiction is in part linked to "Indian country," the territorial area over which tribes have jurisdiction, and basically tribes have more jurisdiction in "Indian country" than outside of it.

Although the act "settled" aboriginal land claims with the tribes in Alaska, it did not adequately address aboriginal claims for hunting and fishing, since the land received by the Alaska Native people through ANCSA was not large enough to accommodate the hunting and fishing needs. An attempt to address this was made nine years later when the Alaska National Interest Lands Conservation Act (ANILCA) was enacted. Title VIII of ANILCA gives some preference for rural citizens of Alaska for subsistence hunting and fishing. Much controversy has surrounded this provision as the state contends it conflicts with the state constitution, and Alaska Native people argue that the provision does not adequately protect their hunting and fishing needs. Without Indian country, the tribes lack the jurisdiction to regulate hunting and fishing seasons and bag limits.

In 1975, the federal government took a major step towards the policy of Indian self-determination with the passage of Public Law 83-638, the Indian Self-Determination and Education Assistance Act. Through this act, tribal governments are able to receive funds through the Departments of Interior, and Health and Human Services, to deliver their own governmental and health care services. In Alaska many Native non-profit organizations were formed or strengthened to receive these dollars. Numerous tribes in Alaska receive these dollars on their own through 638 contracts, or through compacting. Most of the regional non-profit organizations assist tribes with the development and operation of their tribal courts.

Three significant U.S. Supreme cases in the 1970s affecting tribal court jurisdiction generally throughout the United States were: *Oliphant v. Suquamish* (1978), *U.S. v. Wheeler* (1978), and *Santa Clara Pueblo v. Martinez* (1978). A significant setback for tribal jurisdiction was established by the decision of the Supreme Court in the Oliphant case. The Court ruled that Indian tribes have no inherent power to prosecute and punish non-Indians who commit crimes on Indian reservations, unless the tribe has been granted such power in a treaty, agreement, or act of Congress. There is no law that specifically removed the tribal power to assert criminal jurisdiction over non-Indians, however, the Supreme Court ruled that the exercise of this power is "inconsistent with the status of Indian tribes." For the first time, the Supreme Court declared that

a fundamental tribal power could be extinguished by implication. After the *Oliphant* case, many tribes across the country began a process to decriminalize their codes, meaning that they handle cases as civil cases instead of criminal cases, since tribal governments were left without criminal jurisdiction over non-Natives.

Shortly after the startling *Oliphant* decision, the Supreme Court issued a ruling in *U.S. v. Wheeler* that helped to reaffirm the sovereign nature of Indian tribes. This case held that because Indian tribal courts and federal courts derive their authority from separate sovereigns, the double jeopardy clause of the U.S. Constitution does not prohibit prosecution in federal court of an Indian defendant already tried and sentenced for the same offense in tribal court. The case arose on the Navajo reservation and involved a crime committed by a Navajo tribal member.

A positive note for tribal sovereignty was struck in the last major Indian law decision by the Supreme Court in the 1970s, in *Santa Clara Pueblo v. Martinez*. The case involved a Santa Clara Pueblo woman who brought suit against tribal officials because the tribe denied tribal enrollment to children of female members who marry nonmembers, but not to children of male members who marry nonmembers. Ms. Martinez argued that the difference in treatment between male and female members of the tribe violated the equal protection requirement of the Indian Civil Rights Act. In this case, however, the United States Supreme Court decided that federal courts should not interpret what the meaning of equal protection is for tribes.

The Court held in the *Martinez* case that the Indian Civil Rights Act does not grant federal courts the power to decide tribal civil rights cases, except those involving criminal matters where a release from custody is sought. In those cases, a writ of habeas corpus challenging an allegedly unlawful imprisonment is the procedural tool. The Court reasoned that to impose standards of U.S. constitutional law would cause "unnecessary intrusions on tribal governments" and would threaten a tribe's ability to "maintain itself as a culturally and politically distinct entity." Tribal courts were identified as the only appropriate forum for applying such ICRA principles as equal protection and due process in a manner consistent with traditional Indian values and customs.

The passage of the Indian Child Welfare Act (ICWA) in 1978 marked a new era in tribal court development in Alaska. Prior to the passage of ICWA, one in four Indian children were taken out of their Indian homes and placed with foster homes or institutions, most of which were non-Native. The purpose of the act is to preserve and strengthen Indian families and Indian culture by affirming existing tribal authority to handle child protection cases, and by setting Native placement preference standards when child custody proceedings are in state courts. Shortly after the passage of the ICWA, tribes in Alaska re-organized their traditional tribal courts which had largely fallen into disuse, and began hearing child custody and protection cases. Tribes did this in spite of the lack of tribal recognition by the state of Alaska. Today, children's cases are the most common tribal court cases in Alaska, particularly in the interior where about half of all children who are in custody are in tribal custody.

1980S : CHALLENGES AND ACCOMPLISHMENTS

The Alaska National Interest Lands Conservation Act was passed by Congress in 1980 setting aside major tracks of Alaska land for national parks, preserves, and wildlife refuges. Title 8 of that act was an attempt to address the hunting and fishing rights portion of Alaska Native aboriginal claims that ANCSA failed to adequately address. The "subsistence" scenario the act set up became subject to much controversy, lawsuits, and eventually a bifurcated system of wildlife management between the state of Alaska and the federal government. The matter is currently undergoing complete federal review and new efforts in the Alaska Native community are underway to re-address Native subsistence, which is the Alaska Native way of life.

The 1980s was a decade when the existence of tribes in Alaska was challenged by the state of Alaska, and even on the federal front, Alaska tribes were listed as "Alaska Native Entities" on the list of federally recognized tribes. Alaska tribes were very active in the 1980s in asserting their existence and jurisdiction through their tribal governments and courts. Tribal court activity picked up tremendously as a result of the Indian Child Welfare Act, new IRA constitutions were being sought, tribal alcohol ordinances were published in the Federal Register, battles were being waged in federal and state court, and active efforts were undertaken to include Alaska tribes in any federal legislation affecting tribes in the country.

The tribes and Native organizations were also very active in the 1980s in advocating for the so-called "1991 amendments," which made changes to the Alaska Native Claims Settlement Act in preventing the stocks from going onto the open market in 1991. Although a mechanism to make it easier to transfer land from Native corporations to tribes did not make it into the 1991 amendments, transfers of land to tribes from corporations took place. Tribes also acquired land through transfers from cities, purchases, gifts, and from the Alaska Native Townsite program in villages where cities did not form.

In the 1980s, several cases regarding the existence and rights of Alaska tribes were heard in the Alaska court system with both favorable and unfavorable rulings for Alaska Natives. In 1988, the Alaska Supreme Court ruled that there were no tribes in Alaska except for Metlakatla and perhaps a few others in *Stevens v. Alaska Management & Planning*. However, in the following year, 1989, the court made a favorable ruling for Alaska tribes in the Nome Eskimo Community case. In that case, the court ruled that land cannot be taken away without tribal consent if the village is organized under the Indian Re-organization Act. The Alaska Supreme Court recognized the Indian Reorganization Act and the protection it gives for land, but still did not recognize tribal status for Alaska tribes in this case.

On the national front, U.S. Supreme Court cases were decided during the 1980s affecting tribal courts throughout the country. In 1981, the Supreme Court acknowledged that tribal courts have inherent civil authority, even over actions of non-Indians, that affect tribal interests such as the political integrity, economic security, and health or welfare of the tribes in *Montana v. United States*. Through this case, the Supreme Court offered guidelines for gaining federal approval of the exercise of tribal court civil jurisdiction, but also put tribes in a defensive position in potentially having to prove effects of non-Native actions on the tribes. This case supports the notion that Alaska tribal courts have civil jurisdiction over activities when the political integrity, economic security, and health or welfare of the tribes is affected.

In 1985, the Supreme Court addressed the question of whether or not non-Natives may challenge tribal jurisdiction in federal courts in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*. In this case, the Court held that non-Indians who challenge a tribe's jurisdiction must first raise the issue in tribal court and exhaust tribal appellate procedures before raising the issue in a federal court. In other words, once a case is filed in tribal court it must be heard by that court, and then by a tribal appellate court before it can be taken to a federal or state court to challenge tribal authority or procedures.

The activities and conflicts between the tribes and the State of Alaska in the 1980s paved the way for certified recognition of Alaska tribes in the 1990s.

1990S : TRIBAL RECOGNITION

Although recognition of Indian tribes is a federal decision, state governors are in control of all the state agencies that interface with tribes such as the State Troopers, Office of Children's Services, and Bureau of Vital Statistics. Tribes find more support for their governmental and judicial activities when state governors recognize and support them. In Alaska, tribal recognition by governors varied widely during the 1990s. In 1990, Governor Steve Cowper issued Administrative Order 123, recognizing that there are tribes in Alaska, likely to be the same as those communities recognized in the Alaska Native Claims Settlement Act. The Order recognized the powers of tribes to be to regulate membership, to manage internal affairs of the tribe, and any powers delegated to tribes by the federal government such as through the Indian Child Welfare Act.

The next governor, Walter J. Hickel, rescinded the Administrative Order 123. He described Alaskans as "all one people," leaving no room for administrative recognition of a special political status for Alaska Native people. The last Governor in the 1990s, Tony Knowles, recognized the tribes and started a major project called the "Millennium Agreement" which was meant to be "a framework for the establishment of lasting government-to-government relationships and an implementation procedure to assure that such relationships are constructive and meaningful and further enhance cooperation between the parties." Knowles however, was not supportive of some tribal powers for which Indian country would be necessary. At the 1997 Tanana Chiefs Convention in Fairbanks, Knowles spoke against the recognition of Indian country, especially the powers of taxation and regulation of fish and game.

On the federal front, the U.S. Supreme Court decided the case of *Blatchford v. Native Village of Noatak* in 1991, holding that Noatak could not sue the state in federal court for not giving revenue sharing to tribal councils. An important thing to note about this case is that the Ninth Circuit Court ruled that Noatak was a tribe because it was organized under the Indian Reorganization Act, and that the village of Circle (also involved in the case) was a tribe because it was named under ANCSA. The U.S. Supreme Court looked at that issue and decided not to make a new decision about that. This case helped pave the way to clarify federal recognition of tribes a few years later.

In the last days of President H. W. Bush's term (January 11, 1993), the Department of Interior issued an opinion that tribes do exist in Alaska, but ANCSA lands do not qualify as Indian country in a legal opinion titled "Governmental Jurisdiction of Alaska Native Villages Over Land and Non-members." This opinion is also known as the "Sansonetti Opinion." President Bill Clinton replaced President Bush just days after the Sansonetti Opinion was issued.

Clinton's administration did not outright pull the Sansonetti Opinion but it did take a significant step toward resolving the vagueness of federal recognition of tribes the following fall. On October 21, 1993, during the term of Assistant Secretary of Indian Affairs Ada Deer, the Department of the Interior (DOI) issued a list of tribes in the United States eligible for services from the department. Previous DOI lists included Alaska tribes as tribal entities, which left the status of tribes unclear. The 1993 list named the Alaska villages recognized under ANCSA as tribes, and specifically stated that they have "all the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes."

The lengthy preamble to the list explicitly stated that:

The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. Sec. 83.6(b) and to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the continuous 48 states...This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, and privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes." (Bureau of Indian Affairs, List of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, Oct. 1993).

The preamble to the list went on to state that "Inclusion on the list does not resolve the scope of powers of any particular tribe over land or non-members," and so the issue of tribal jurisdiction over ANCSA lands as Indian country was not clarified. Congress specifically confirmed the validity of the Department of Interior list through passage of the Federally Recognized Indian Tribe List Act of 1994. The act defines the term "Indian tribe" as meaning any Indian or Alaska Native tribe that the secretary of the interior acknowledges to exist as an Indian tribe. The list is to be published by the Department of Interior annually and the department cannot take a tribe off the list without an act of Congress. The only ways for a tribe not on the list to become federally recognized are through an act of Congress, a decision by a federal court, or by successfully going through the lengthy and expensive acknowledgement process established by Department of Interior regulation (25 CFR Part 83).

After this point, the debates between the Alaska tribes and the state and federal governments primarily focused on tribal jurisdiction: How much jurisdiction do Alaska tribes have? How does Public Law 280 affect Alaska tribes? How do the federal Indian law statutes such as the Indian Child Welfare Act and Violence Against Women Act apply? Is there Indian country in Alaska? Although tribes may organize their governments, possess sovereign immunity, have special tax status, and some civil jurisdiction without a territorial base, Indian country is vital for authority to enforce activities such as exercising criminal jurisdiction, taxation, and regulation of fish and game.

The federal and state court cases about Alaska tribes in the 1990s showed the unfolding of tribal recognition and the beginning of clarification over tribal jurisdiction. After the U.S. Supreme Court decided the Noatak case in 1991, which did not clarify what powers the tribe might have, there were three more significant federal cases concerning Alaska tribal status and jurisdiction in the 1990s: 1) *Native Village of Venetie IRA Council v. State of Alaska* (adoption case), 2) *Native Village of Tyonek v. Puckett* (power to exclude case), and 3) *State of Alaska v. Native Village of Venetie* (tax case).

The first *Venetie* case, the adoption case, involved both the Venetie and the Fort Yukon Tribes and individual tribal members. The Native parties filed suit to require the state of Alaska to recognize tribal court adoption decrees. The state of Alaska argued that even if the villages involved had tribal status, Public Law 280 terminated tribal jurisdiction. The federal court ruled that Public Law 280 does not terminate tribal jurisdiction, but that it gives concurrent jurisdiction between the tribes and the state. The court went on to say that the tribal status question was settled by the Interior Department's publication of the list of federally recognized tribes on October 21, 1993 for all tribes on the list. The Court, however, ruled that the question of status for Alaska tribes prior to October 21, 1993 was unanswered.

In Native Village of Tyonek, the federal court held that Tyonek is a tribe and went on to say that the Interior Department's list of recognized tribes was retroactive. In other words, tribes on the list had tribal status prior to October 21, 1993. The case put to rest the question of whether Tyonek and other Alaska tribes would be required to factually prove their tribal status for events occurring before 1993.

The *Venetie* tax case is the most notorious federal case of the 1990s affecting Alaska tribes. The basic question in the case ended up being whether or not the land underlying the village of Venetie was Indian country or not. Venetie was once a reservation created under the Indian Reorganization Act, but it was terminated by the Alaska Native Claims Settlement Act (ANCSA). Native corporations were formed under ANCSA and received land, but the corporations transferred the land (1.2 million acres) to the tribe which now owns it in fee simple title. The Venetie Tribal Government tried to tax construction occurring in the village, which requires a finding of Indian country status to do so.

After many years of various court hearings, the Venetie tax case was heard by the United States Supreme Court in 1998. The Court held that the land in question had gone through ANCSA and does not have Indian country status; therefore, the tribe could not impose a tax over entities doing business on its lands. The case left the decision that land which has gone through the Alaska Native Claims Settlement Act is no longer Indian country. However, the *Venetie* tax case does not rule out the possibility of Indian country for Alaska Native townsites and Native allotments, neither of which were issues in the case.

At the end of the 1990s, the Alaska Supreme Court recognized the existence of federally recognized tribes in Alaska and their inherent powers of self-government over members in a case called *John v. Baker* (1999). The case was an extreme departure from earlier Alaska Supreme Court decisions and strongly supported tribal jurisdiction in domestic relations over tribal members regardless of whether they occupy Indian country. The case involved a custody dispute between members of two different tribes who sought and received a tribal court determination of joint custody over their children. The father however, was unhappy with the tribal court decision and sought sole custody over the children by filing the same case in state court. After hearings at lower levels, the case was eventually heard by the Alaska Supreme Court. The court basically overturned its earlier decisions about the non-existence of tribes in Alaska and their jurisdiction, and decided that there are tribes in Alaska, tribal courts, and tribal jurisdiction over child custody disputes even in the absence of Indian country. In other words, tribal jurisdiction in Alaska is largely based on tribal membership, making decisions regarding tribal members, and protecting the health and safety of the tribe and tribal members.

The decision of the *John v. Baker* case was greatly needed to further state recognition of and cooperation with tribes in Alaska. The case removed a critical roadblock in progressing towards this goal, and placed Alaska tribes in a much better position to benefit from both federal and state recognition as they progressed into the 21st century.

2000S : REFINING TRIBAL JURISDICTION

In 2000, Alaska Governor Tony Knowles established the first statewide tribal-state negotiations team to develop a tribal-state cooperative framework called the Millennium Agreement. It was to be a step along the way of government-to-government relations between tribes and the Alaska State government. However, the second and third Alaska governors in the 2000s, Frank Murkowski and Sarah Palin, did not continue the work on, or seem to acknowledge the agreement.

The Alaska State Supreme Court further supported tribal recognition and jurisdiction in August of 2001 in a case called C.R.H. The C.R.H. case involved a child in need of aid who was eligible for tribal membership in both of the villages of Nikolai and Chickaloon. Chickaloon intervened in the state ICWA case before Nikolai, but later turned over its status as the ICWA tribe to Nikolai. Nikolai then made a motion to have the case transferred to the Nikolai Edzeno Tribal Court. In earlier cases concerning transferring jurisdiction under ICWA to tribes, the Alaska Supreme Court had basically held that even if there were tribes in Alaska, P.L. 280 terminated jurisdiction they might have. The supreme court reversed previous faulty reasoning in the C.R.H. case and held that ICWA cases in state court could be transferred to tribal courts, reversing earlier supreme court decisions on this issue.

The following year, 2002, the Alaska Attorney General's office issued an opinion interpreting the C.R.H. case which came to the conclusion that "state law now recognizes that tribes in Alaska have authority over child custody matters involving tribal children and need not petition the Secretary of the Interior to reassume jurisdiction before exercising their authority." However, in 2003, the Alaska Supreme Court made a decision to deny "comity" (recognition) of a tribal court case in Selawik because the tribal court did not provide the parties due process which means being notified of tribal court hearings, and an opportunity to be heard in front of fair and impartial judges. At this point in time, the state of Alaska basically recognized tribes, tribal courts, and their jurisdiction over child custody matters involving tribal children as long as the tribal court provided due process.

One of the inherent powers of a tribe is the power to banish a member to protect the safety and welfare of the tribe. In 2003, an Alaska court supported this right in a case called *Native Village of Perryville v. Tague*. In this case, the court affirmed the village's right to banish one of its members for violent behavior and to have the state court and state troopers assist in enforcing its order. The court cited the *John v. Baker* case, and found that a tribe's power to banish its members derives from its inherent authority over "internal affairs." However, issues surrounding tribal protective orders continue to be litigated, and cooperation in enforcement from state agencies is variable.

Following the election of Governor Frank Murkowski, Attorney General Greg Renkes issued a new opinion about tribes in 2004, which was an about-face from the 2002 Opinion. The major points of the 2004 opinion were that Alaska state courts have exclusive jurisdiction over Alaska Native child custody proceedings unless the Department of Interior has approved an ICWA Section 1918 petition, or state court has transferred a case under 1911(b), and that tribes that have not petitioned for reassumption have no authority to initiate child custody proceedings in tribal court. The opinion implies that the cultural adoption regulation is the sole alternative to reassumption: "However, the state has long ratified Indian adoptions that occur under tribal custom as a matter of equity under state law. Nothing in C.R.H. or this opinion should be construed as changing this longstanding policy in any respect." Although Alaska tribes continued to initiate child custody and protection cases in tribal court after the 2004 opinion was issued, they faced more resistance from the state in terms of cooperation from state agencies.

The matter of tribal initiation of child protection cases continued to be litigated, and in 2007, Superior Court Judge Tan issued a decision that Alaska tribes possess inherent power to hear cases involving member children in a case called *Tanana v. State of Alaska*. The decision was appealed and continues to be litigated. Similarly, in 2008, U.S. District Judge Timothy Burgess ruled that the Kaltag tribal court adoption orders are entitled to full faith and credit under the Indian Child Welfare Act in *Kaltag v. Jackson*, and the state filed an appeal of that case. New cases involving the existence of tribal jurisdiction in child welfare cases continued to be filed in 2009, and the litigation goes on.

By the end of the 2000s, the existence of federally recognized tribes in Alaska is clear, but a wide path of litigation over tribal jurisdiction is on-going. As much as the executive branch of the Alaska state government protests the existence of tribal jurisdiction, the judicial branch tends to confirm it, and is backed up by the federal courts. In the meantime, many Alaska tribes continue to take care of their members and children through tribal court activity as best they can, under the guidance of modern tribal law and traditional values that have served them for hundreds of generations.

CURRENT ALASKA TRIBAL COURTS

Today, there are some 229 Alaska tribes on the Department of Interior's list of federally recognized tribes. Over half of these tribes are developing or have active tribal courts. The types of cases that Alaska tribal courts address include child custody, adoptions and guardianships, child protection, child support enforcement, domestic violence, probate, alcohol violations, animal control, environmental regulation, juvenile delinquency, juvenile status offences, cultural protection, internal governmental disputes, property damage, property disputes, trespass, misdemeanor offences, and fish and game/ marine mammal protection.

Alaska tribal courts are organized under a range of structures, but most use a panel of judges rather than a single judge to hear cases. The tribal council may serve as the court, or a pool of judges created that may include some tribal council members. There may be a body entirely separated from the council established as the tribal court. The judges tend to be elders, council members, and tribal members who are respected and well-suited to the job, but not attorneys. Some tribes use the circle style sentencing format, which is an increasing trend particularly for juvenile delinquency and status offence cases.

Although tribal courts have a wide range of independence in terms of structures and procedures, they are all required to follow the due process guidance of the Indian Civil Rights Act of 1968, which is similar to the United States Bill of Rights. The fundamental elements of due process are notification of hearings, and an opportunity to be heard in front of a fair and impartial tribunal. The tribes are not required to provide due process in the same image as do the state or federal courts. Many of the provisions of the Indian Civil Rights Act apply to courts practicing criminal jurisdiction in cases where incarceration is a possibility. While all tribes in Alaska are interested in exercising their judicial capacity to protect the health and well-being of their tribal members, very few are interested in incarcerating them. Alaska tribes are most interested in protecting people and healing through treatment programs and cultural activities, and mending relationships.

While court battles over tribal jurisdiction between the state of Alaska and tribes are currently on-going, and will continue into the foreseeable future, rural Alaska is one of the most dangerous places to live in the United States. The danger is largely due to an alarming lack of adequate state law enforcement and justice services, and cross cultural issues. More collaboration and cooperation between the state of Alaska and Alaska's tribal courts would go a long way as part of the solution to rural Alaska's judicial problems.

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2008 Conference Agenda

TUESDAY, DECEMBER 9, 2008

8:00 am – 4:30 pm	Registration and Information Desk Open
7:30 am – 8:30 am	Continental Breakfast
8:30 am – 10:15 am	Opening and Welcome
	Traditional Opening by Hon. Stanley Webster, Oneida
	A. Elizabeth Griffith, Deputy Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Dept. of Justice
	Joy Lyngar, Chief Academic Officer, The National Judicial College
	The Hon. Eugene White-Fish, NAICJA President and Chief Judge, Forest County Potawatomi Tribal Courts
	The Hon. Christine M. Durham, Chief Justice of the Utah Supreme Court and President-Elect of the Conference of Chief Justices
10:15 am – 10:30 am	Break
10:30 am – 11:30 am	State of Pathway
	The Hon. BJ Jones, Director, Tribal Judicial Institute, University of North Dakota
11:30 am – 12:30 pm	Success in Collaboration
	Moderator: The Hon. David Raasch, Tribal Justice Specialist, Fox Valley Technical College, Criminal Justice Center for Innovation
	The Hon. Marcy Kahn, Justice, Supreme Court of New York State
	The Hon. Anthony Brandenburg, Intertribal Court of Southern California
12:30 pm – 1:30 pm	Working Lunch with Regional Breakouts
1:30 pm – 1:45 pm	Break
1:45 pm – 2:45 pm	Report Back – Regional Breakouts
	The Hon. David Raasch, Tribal Justice Specialist, Fox Valley Technical College, Criminal Justice Center for Innovation
	Gerry Cavis, National Security Specialist, Fox Valley Technical College, Criminal Justice Center for Innovation

2:45 pm – 3:30 pm	Challenges
	The Hon. David Raasch, Tribal Justice Specialist, Fox Valley Technical College, Criminal Justice Center for Innovation
	Paul Stenzel, The Stenzel Law office, Shorewood, WI
3:30 pm – 3:45 pm	Break
3:45 pm – 4:30 pm	Regional Breakouts – Overcoming Challenges
4:30 pm – 5:00 pm	Day One Closing
	Gerry Cavis, National Security Specialist, Fox Valley Technical College, Criminal Justice Center for Innovation

WEDNESDAY, DECEMBER 10, 2008

8:00 am – 4:30 pm	Registration and Information Desk Open
7:00 am – 8:00 am	Continental Breakfast
8:00 am – 8:15 am	Introduction for the Day and Recap Day One
	Ramona Tsosie, Consultant, National Tribal Judicial Center at The National Judicial College
8:15 am – 9:30 am	Speaking to the Challenges: An Out of the Box Approach
	Moderator: The Hon. David Raasch, Tribal Justice Specialist, Fox Valley Technical College, Criminal Justice Center for Innovation
	The Hon. Korey Wahwassuck, Chief Judge, Leech Lake Band of Ojibwe Tribal Court
	The Hon. John Hawkinson, Itasca County District Court
	The Hon. John P. Smith, Judge, Cass County District Court
9:30 am – 9:45 am	Break
9:45 am – 11:00 am	Regional Breakouts - Possibilities for the Future
11:00 am – 11:15 am	Break – transition back to plenary room
11:15 am – 12:00 pm	Panel on Funding Resources
	Vincent Knight, Executive Director, National Tribal Justice Resource Center
	Eunice Pierre, Policy Advisor, Bureau of Justice Assistance, Office of Justice Programs, U.S. Dept. of Justice
12:00 pm – 1:00 pm	Lunch (Provided)
	Barbara Smith, Chief Justice, Chickasaw Nation Tribal Court
1:00 pm – 1:15 pm	Break
1:15 pm – 2:00 pm	Communication, Information, and Collaboration:
	Building Bridges and Action Plans
	Vincent Knight, Executive Director, National Tribal Justice Resource Center
2:00 pm – 2:15 pm	Break – transition to breakout rooms
2:15 pm – 3:30 pm	Regional Breakouts – Action Plans
3:30 pm – 3:45 pm	Break – transition to plenary room
3:45 pm – 4:30 pm	Regional Report Back – Action Plans
	Gerry Cavis, National Security Specialist, Fox Valley Technical College, Criminal Justice Center for Innovation
4:30 pm – 4:45 pm	Final Thoughts
	Christine Folsom-Smith, J.D., L.L.M., Program Attorney, The National Tribal Judicial Center
4:45 pm – 5:00 pm	Evaluation and Closing Ceremony
5:00 pm	Adjourn

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