



Tribal Courts and State Courts:

Working Together to Prevent Jurisdictional Conflicts

H. Ted Rubin

"The single most effective means of resolving civil jurisdiction conflicts is by supreme court rule. We commend this approach to all our sister states where such conflicts exist."

The conclusion of the Oklahoma Forum on Resolution of Civil Jurisdictional Conflicts Between State and Tribal Courts finds common ground with a similar forum in the state of Washington. The Washington forum submitted a proposed rule that would require superior courts to grant full faith and credit to the order, judgment, or decree of a tribal court of a federally recognized Indian tribe to the same extent that they would recognize the actions of courts of other states. A third forum in Arizona recommended that the state and the Indian tribes and nations establish procedures to enable courts in one jurisdiction to certify questions to the highest court of the other jurisdiction.

Under a project funded by the State Justice Institute, state and tribal court officials in Oklahoma, Washington, and Arizona met four times in 1990 to design and implement a plan to solve jurisdictional conflicts within their states. The members of these demonstration forums worked arduously to fashion multifaceted approaches that could curb litigation, reduce inappropriate challenges to one court's jurisdiction, and help to enforce judgments between these two court systems. Officially designated lawyers

or law professors served as consultants, providing legal and other research information and drafting memoranda and reports.

The reports of the three forums are being widely disseminated in their states and will be offered to a national conference during the summer of 1991. The conference is being convened to encourage cooperation in all states that have Indian country. The forums represent a unique approach to these concerns—a uniqueness that is an outgrowth of the origins of this project.

The Conference of Chief Justices (CCJ) believed that cooperation between tribal and state courts could resolve jurisdictional conflicts and that a state chief justice should take the lead in forming a representative group to take the needed steps to build consensus (see sidebar, p. 40). CCJ endorsed a project, designed by the National Center for State Courts (NCSC) and later funded by the State Justice Institute, to demonstrate this approach in Arizona, Oklahoma, and Washington.

The Arizona and Washington forums held several meetings adjacent to Indian country to encourage testimony by Indian court and government officials. These two forums produced an agenda for each state that details numerous concrete approaches to serve as a foundation for cooperation. These and other forum results will be discussed below.

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The Oklahoma forum concluded that, due to the special nature of tribal history and tribal courts in that state, reliance should be placed on the supreme court's rule-making authority. Oklahoma has pioneered the concept of an annual sovereignty symposium, cosponsored by the supreme court, which convenes approximately 300 persons in a broad-based review of Indian law developments. Wisconsin adapted this approach in sponsoring its first colloquium in 1990. The Oklahoma model also served as a basis for the Arizona forum's recommendation of an annual conference for tribal and state judges, which alternates between the state's two law schools, with tribal and state judges actively participating in developing the conferences. This recommendation was implemented by the Arizona State University College of Law when it sponsored the initial conference on April 12-13, 1991.

Arizona forum report

This forum's agenda begins with education and the annual law school-sponsored conference. It urges that other educational programs for state court judges include Indian law and that educational programs for tribal judges include materials on Arizona law. It calls on the new Indian law section of the state bar association to sponsor an annual seminar on jurisdiction and recommends that nonlawyer advocates, who are permitted to practice before tribal courts, be invited to join this section. (This recommendation has already been implemented.) It requests that national computer-assisted legal research services such as LEXIS and WESTLAW add tribal statutes as well as reported decisions of tribal appellate courts to their databases.

The forum's recommendations regarding jurisdiction urge that agreements with Indian tribes or nations provide for the choice of forum in which disputes will be heard and that alternative dispute resolution provisions be incorporated into agreements. (Designation of

the forum, of course, must be consistent with established law.) The forum calls on appellate courts that decide jurisdictional questions to provide clear guidance to lower courts and litigants to reduce future litigation controversies.

The forum offered strong support for intergovernmental agreements that efficiently provide facilities and services. Approximately 170 intergovernmental agreements are filed annually in Arizona for approval by the attorney general. Twenty different Indian tribes enter into these agreements, which cover such areas as child welfare, health, commerce, education, environmental quality, and game and fish regulations. The forum recommended other agreements between the state and Indian tribes or nations regarding child custody and support, mental health evaluation and commitment, the enforcement of protective orders in spouse-abuse situations, and the supervision of parolees and probationers. The forum recommended that Indian tribes or nations and their constituent branches, such as the judicial system, enter into agreements with other Indian tribes or nations where appropriate.

The forum decided that substantive provisions from various interstate compacts to which Arizona is a party should be incorporated into intergovernmental agreements. Examples included the interstate compacts on juveniles, on the placement of children, and for the supervision of parolees and probationers.

The forum drafted its own Uniform Enforcement of State and Tribal Court Judgment Act and urged its adoption by the state and Indian tribes and nations. While the Arizona Supreme Court has recognized the application of comity in the enforcement of a tribal court judgment in a state court, such actions are seen as expensive and time-consuming. A uniform act would reduce the cost and time incurred in enforcing judgments.

The forum requested that the state amend the uniform acts it has adopted include Arizona's Indian tribes and nations as potential participants and to

include such a reference in any new uniform acts. Indian tribes and nations were encouraged to adopt such uniform acts—if they are consistent with tribal culture—to reduce differences in law between tribal and state jurisdictions.

The forum recommended that the governor, the chief executive of each Indian tribe and nation, the state legislature, and the legislative bodies of the Indian tribes and nations issue a proclamation that embraces a government to government approach in the dealings among these entities. (The governor of Washington recently signed a Centennial Accord, which authorizes government-to-government dealings between the state and the state's Indian tribes. A recent Oklahoma statute recognizes the sovereignty of all federally recognized tribes in that state.)

Washington forum report

This forum compiled a tribal court handbook for the 26 federally recognized tribes in the state, a compendium of agreements between tribes and state and local governments, and an action plan.

The tribal court handbook was written to improve public understanding of tribal courts and to reduce jurisdictional conflicts. The handbook presents important information relevant to practice in tribal courts and delineates which cases are appropriate to take before these courts. One section provides a short history of the development of tribal courts in the state. There is a brief treatise on the sources of tribal law that discusses tribal constitutions and codes and the relevance of such federal laws as the Indian Civil Rights Act of 1968 and the Indian Child Welfare Act of 1978.

The handbook discusses the impact of Public Law 83-280, which empowered states to impose substantial jurisdiction over Indian reservations and created concurrent tribal and state court jurisdiction that, in conjunction with a dispute, may cause a race to a courthouse.

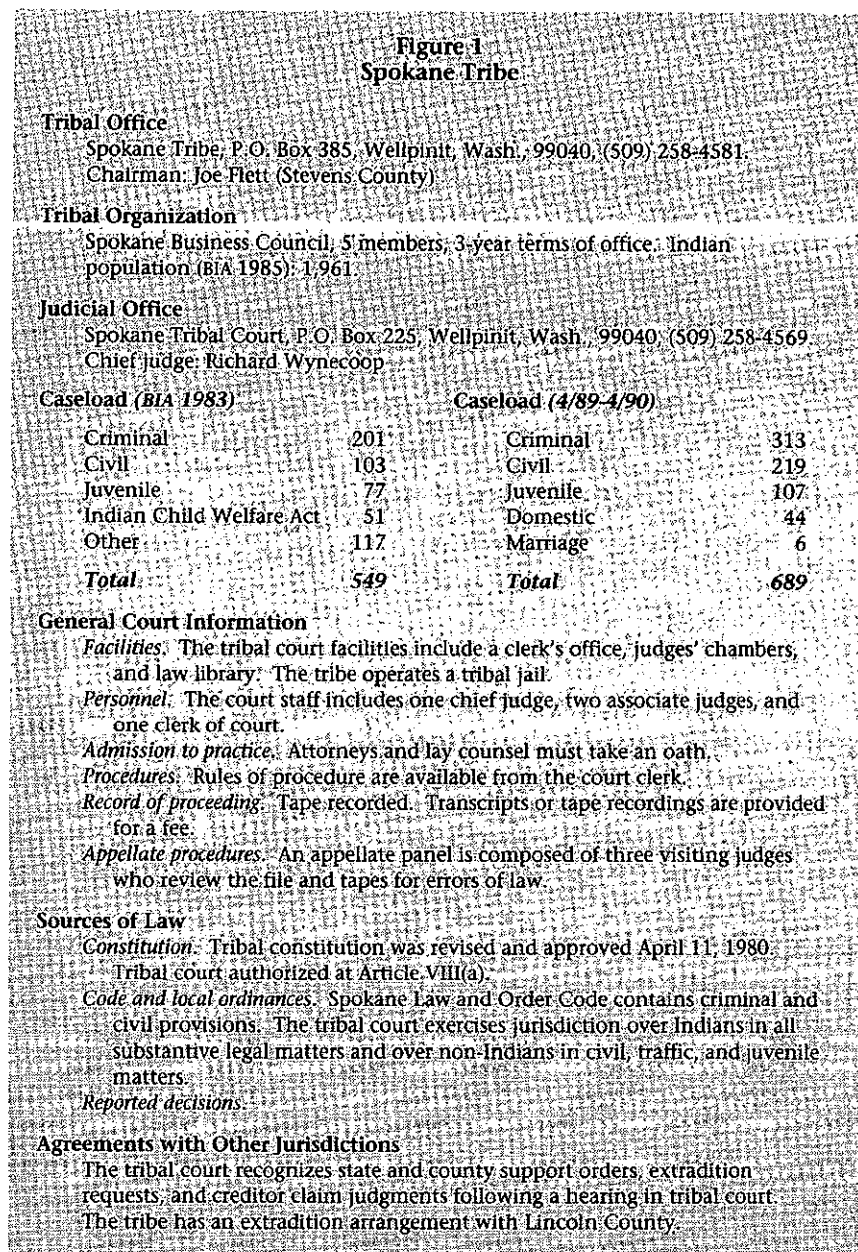
The handbook describes Washington State's subsequent retrocession of particular jurisdiction to certain tribes and analyzes critical federal cases on jurisdiction and procedure. The handbook also profiles each tribal court with information similar to that shown for the Spokane Tribal Court (see Figure 1). The forum updated and expanded tribal court profiles published in 1985 by the Branch of Judicial Services, Bureau of Indian Affairs. The handbook concludes with a bibliography.

The handbook was distributed to all tribal and state court judges, the board of governors and the Indian law section of the bar association, tribal attorneys, other attorneys who carry cases that involve Indian law questions, and other interested associations and individuals.

A South Dakota tribal court handbook served as the model for the Washington handbook. The Washington publication adds additional information that should further reduce jurisdictional conflicts and improve practice in these courts. The coordinating council that guides the national project urges each state that has tribal courts to produce and widely disseminate a similar handbook. The Washington forum has requested that the Indian law section of the state bar association take on the responsibility for updating the handbook, its tribal court profiles, and the compendium of agreements produced by the forum.

The compendium summarizes the provisions of twelve agreements and reproduces the verbatim text for most of them. The agreements cover child support enforcement, implementation of the Indian Child Welfare Act, deputization of tribal police officers as county deputy sheriffs, tribal purchase of space in a county juvenile detention facility, water quality management, joint hunting and fishing regulations, a tribal/county regional planning program, and a timber, fish, and wildlife agreement, among others.

Here, too, the forum's hypothesis is that agreements will forestall litigation and that bringing such agreements to



wider attention will stimulate even more agreements between tribes and state and local governments.

The Washington agenda consists of nine points.

1. The governor's office should prepare and disseminate implementation guidelines for the Centennial Ac-

cord—the landmark agreement of principle between the state executive and the Indian tribes.

2. The supreme court should adopt the forum's proposed civil rule that addresses the transfer of matters between the two court systems when jurisdiction is unclear and directs

recognition of tribal court judgments by state courts. Tribal councils and courts should adopt reciprocal full-faith and credit enforcement provisions.

3. The supreme court should solicit comments from tribal courts and attorneys when adopting court rules that have a potential impact on tribal courts.
4. Procedural deficiencies in the Indian Child Welfare Act should be independently investigated because Washington executive agency administrators reportedly have failed to fulfill their legal obligations under the act.
5. The forum voiced support for additional agreements that could resolve and reduce jurisdictional conflicts.
6. The forum called for broad dissemination of the tribal court handbook and compendium of agreements.
7. Tribal councils and courts should ensure that complete, updated versions of their codes are readily accessible.
8. State judicial training conferences should continue to invite tribal judges. Training sessions should teach state and tribal judges about each others' court systems and other matters of mutual interest.
9. State court management associations should invite tribal court administrators, clerks, and staff to participate in workshops and training sessions. These educational programs should include topics relevant to tribal courts.

Oklahoma forum report

The name Oklahoma means "land of the red man" and is a combination of two Muskogee, or Creek, words. The Oklahoma forum took as its starting point the history of the state, including the resettlement of five tribes from the southeastern United States to eastern Oklahoma, other Indian tribe settlements in what is now western and central Oklahoma, and the white settle-

ment of other western and central land in what became the forty-sixth state. Because of this history, there is tremendous diversity among the states' tribes, and each tribe may see the need for a different structure and procedure for its court.

Just as the resettlement of tribes into present-day Oklahoma characterized the historical perspective of state/tribal relations, tribal sovereignty characterizes relations today. Legislation enacted in 1989 recognized the sovereignty of all federally recognized tribes. State/tribal transactions are mandated on a sovereign-to-sovereign basis between the executive branches of the tribes and the states. A compact between Oklahoma and the Comanche Tribe for the tribe to administer a pari-mutuel horse-racing track, approved by the respective parties in 1990, exemplifies such recognition.

Oklahoma is different from other states in that Indian country is characterized by checkerboard land patterns that were set apart for use by Indians under the superintendence of the federal, not the state, government. "Dependent Indian communities" and allotments exist outside the boundaries of a reservation. Thirty-six tribes are recognized as "domestic dependent nations." Twenty-two of these tribes have courts; all but a few maintain a court of appeals or supreme court. The vast majority of tribal court judges are law trained. Many of the courts are organized under the Code of Federal Regulations (CFR). Others are created pursuant to a tribe's own laws.

The Oklahoma forum decided that the rule-making authority of the state supreme court was the most effective route for resolving jurisdictional conflicts. Any member of the state bar association (an integrated bar directly under the supervision of the supreme court with more than 1,000 Indian members) may ask the supreme court to consider adopting a rule dealing with civil jurisdictional concerns. Tribal and state court judges may request such a rule as well. The supreme court can

respond more quickly to a request than the legislature.

Conclusions

These forums have demonstrated that tribal and state court officials can join together to design a range of strategies that clarify civil jurisdiction authority, facilitate the correct selection of a forum, obtain formal and informal agreements to reduce unnecessary litigation, and provide direction for other measures aimed at cooperation between these two court systems. The forum's recommended agendas will be initiated, but they are ongoing and will, quite probably, always need to be reexamined.

State and tribal court systems are both like and unlike each other. Tribal courts increasingly rely on written codes and written decisions, but this is far from universal. Their rulings are blended with what Chief Justice Tom Tso, of the Navajo Nation, describes as "common law"—the custom and tradition of the tribe that is accepted by its members. State court systems with their greater funds, resources, training, and staff assistance are more regulated. But state courts increasingly choose alternative dispute resolution mechanisms that have long been a hallmark of the tribal approach.

Many, if not most, tribal judges are not law school graduates, although an increasing number are. But Indian judges regularly participate in law seminars conducted by Indian law educational and other organizations. The forums urge not only that tribal court officials learn more about state law and procedure but that state judges and non-Indian attorneys become much better acquainted with tribal law and procedures and, indeed, with the tribal judges and other court officials as well.

The forum model, with its active leadership by the chief justice, represents one approach to systematically developing a plan that improves these working relationships. There are others.

The coordinating council that guides this project has worked productively with the three state forums on these issues and relationships. They urge that each state with Indian country develop a consensus on which court system has the power or authority to hear a particular type of case and how, through education and cooperative ventures, constituents can be guided to the proper venue.

The independent evaluator who assessed the work of the three forums gave high marks to the forum model but entered an important caveat for other states that might initiate such an approach:

"The success of this model, however, is dependent upon the forum participants having had positive experiences with parallel systems and being committed to finding a practical solution to an

otherwise vexing problem. Just as necessary is the need for information about the parallel system, how it operates, and who runs it. Once judges from both systems discover that they have more in common professionally than there are differences among them, the stage will be set for forums like those sponsored by this project. That day, it is hoped, will not be far off." scj

The State Forum Model

The chief justice appoints the following.

1. Four state court officials, one to serve as chair.
2. Three tribal court officials, one to serve as vice-chair.
3. A law professor or lawyer consultant (may be assisted by law students).
4. A state court official to provide staff support and logistics help.

The forum holds four meetings to review problem areas, take testimony, and prepare and document an agenda for action.

Selection of the forums in Arizona, Oklahoma, and Washington

Arizona

Arizona's chief justice appointed two tribal court judges, a supreme court staff attorney, a court of appeals judge, and three Indian court officials (on the recommendation of the national coordinating council that has guided this national project since its inception in January 1989). The court of appeals judge served as chair. The staff attorney provided support services to the forum. The Indian officials were the chief judge of the Tohono O'odham Judiciary, the chief judge of the Fort Mojave Tribal Court (who is also president of the Southwest Indian Court Judges Association), and the court solicitor for the judicial branch of the Navajo Nation.

The national project funded a consultant to this and other forums. For Arizona, the consultant was a non-Indian attorney who had worked in the office of the general counsel of the Navajo Nation for eight years and

had been an attorney in private practice in Window Rock, Ariz., since 1980. The national project also provided funds for transportation and other costs incident to the four meetings each forum held, for law student assistants, and for report publication and miscellaneous costs.

Oklahoma

The Oklahoma chief justice consulted with state and tribal court officials in selecting the Oklahoma forum. The chief justice served as chair. The vice-chair was a practicing Indian attorney who served part time as a justice of two Indian supreme courts in Oklahoma. The chief justice selected an assistant attorney general, the state court administrator, and the chairman of the Indian Affairs Commission as other members and named his long-term legal assistant as the project consultant.

Washington

The Washington chief justice named a former chief justice, Vernon R. Pearson, as chair of the forum. Justice Pearson also serves as chair of the national project's coordinating council. A University of Washington law professor and a leading authority on Indian law, who served as a legal scholar and consultant to the national coordinating council, was designated as consultant to the Washington forum. The chief justice designated other members on the recommendation of the coordinating council: a state trial court judge and a juvenile court administrator in jurisdictions adjacent to Indian country, a staff member of the administrative office of the courts, the chief judges of the Colville and Quinault tribal courts, and a tribal attorney for the Suquamish tribe. Staff services were provided by a supreme court staff assistant. scj