Tribal Court – State Court Forum

In-person Meeting: 10/26/2023

Materials Binder

Judicial Council *of* California

Tribal Court–State Court Forum

CONTENTS

Agenda……..…….1

Minutes of Open Meeting: 8/10/2023 ……3

Forum Project Update……...……..5

Padilla, Murkowski, Merkley, Huffman Call for GAO to Study Inequitable Justice System Facing Tribal Nations in Different States……...……..6

Government Accountability Office Study Request on PL 83-280..……..12

Government Accountability Office Response Letter on PL 83-280...……..…….15

VAWEP Updates……17

Assembly Bill No. 44…….....19

Assembly Bill No. 3099…….27

Rule 5.386. Procedures for Filing a Tribal Court Protective Order…….…...30

2022 Division of Law Enforcement Info Bulletin: Enforcement of Tribal Court Protection Orders…….31

Child Sex Trafficking On-Ramps and Off-Ramps Fact Sheet……..…..….34

Resources Related to the Indian Child Welfare Act Updates……...……..39

Senate Rules Committee: Bill No.: AB 81……..42

Cross-Jurisdictional Collaboration on the Opioid Crisis in Indian Country……..….52

NCAI Opioid Initiative……53

Tribal Response to the Opioid Epidemic in California……57

Native Populations and the Opioid Crisis: Forging a Path to Recovery……...66

Tribal Healing to Wellness Courts: Addressing the Opioid Crisis……78

Adult Drug Courts and Medication-Assisted Treatment for Opioid Dependence…….82

Reasons for California Courts to Track Data on Tribal Affiliation……...……90

Paper Genocide: The Erasure of Native People in Census Counts……93

Paper Genocide: The Barriers to an Accurate Count of Native People in 2020……..104

Best Practices for American Indian and Alaska Native Data Collection…….114

Since you asked: What data exists about Native American people in the……...…122
criminal justice system?

NCAI Policy Research Center: Supporting Indian Country in Shaping its
Own Future……..126

Judicial Council of California Memorandum: Recognition and Enforcement of
Tribal Court Orders in California……131

Full Faith and Credit, Comity, or Federal Mandate? A Path that Leads to
Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders,
and Tribal Child Custody Orders…….139

Oregon State Bar Bulletin: Strengthening Tribal Justice: State and Tribal
Cooperation Lead to Changes in Oregon Law…….169

Michigan Court Rules Practice Rule 2.615. Enforcement of Tribal Judgements……174

Florida Jurisprudence, Second Edition, Indians or Native Americans……176

Minnesota Law Review: The Last Judicial Frontier: The Fight for Recognition
and Legitimacy of Tribal Courts……..182

Tribal Healing to Wellness Courts & Joint Jurisdiction Courts in California
How to Support and Expand……223

California's Yurok Tribe Reclaiming Lost Lives with Old Tribal Values,
Spiritual Healing……..224

Tribal Healing to Wellness Courts: Intergovernmental Collaboration……226

Tribal Court–State Court Forum:

Cross-Jurisdictional Collaboration to Improve Safety, Outcomes and Access to Justice

JUDICIAL COUNCIL OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

October 26, 2023

Judicial Council Conference Center Board Room, 455 Golden Gate Avenue, 3rd Floor
San Francisco, California

Agenda

THURSDAY, OCTOBER 26, 2023

9:00–9:30 a.m. Registration and Sign-In

9:30–10:30 a.m. Welcome and Introductions

- Co-chair Welcome
- Introductions
- Approval of Minutes of August 10, 2023
- Public Comment
- Co-chair Update

Hon. Abby Abinanti, Co-Chair, Chief Judge of the Yurok Tribal Court
Hon. Joyce Hinrichs, Co-Chair, Judge of the Superior Court of California, County of Humboldt

10:30–11:30 a.m. VAWEP Updates

- Legislative Update
- Update from the Department of Justice Office of Native American Affairs
- Update on procedures for recognition and enforcement of tribal court restraining orders
- Update and demo of the final version of the CSEC harm reduction bench cards

Vida Castaneda, Senior Court Services Analyst, Judicial Council of California
Hon. Lawrence C. King, Chief Judge of the Morongo Band of Mission Indians Tribal Court
Merri Lopez-Keifer, (Luiseno) Director, Office of Native American Affairs, Office of Attorney General Rob Bonta
Hon. Christine Williams (Yurok), Chief Judge of the Wilton Rancheria Tribal Court

11:30 a.m.–12:30 p.m. Indian Child Welfare Act Updates

- Post *Brackeen v. Haaland*
- Pending California Supreme Court Cases on inquiry
- Pending legislation: Assembly Bill 81
- Tribal Dependency Representation Program
- Office of Tribal Affairs Updates and initiatives

Hon. Ana L. España, Judge of the Superior Court of California, County of San Diego
Ms. Stephanie Weldon, (Yurok) Director, Office of Tribal Affairs, California Department of Social Services, Sacramento California

12:30–1:30 p.m.	**Working Lunch** *(Redwood Room)*: Strategies to Improve Cross-Jurisdictional Understanding and Collaboration addressing the Opioid Crisis.
1:30–2:30 p.m.	Data: Data Analytics Advisory Committee Updates • Data on tribal affiliation *Hon. Joyce Hinrichs*
2:30–3:30 p.m.	Recognition and Enforcement of Tribal Court Orders • Juvenile Dependency and Delinquency • Child Custody Orders • Traffic • Domestic Violence • Trespass *Hon. Richard C. Blake, (Hoopa) Chief Judge of Redding Rancheria and Hoopa Valley Tribal Courts* *Hon. Alison M. Tucher, Presiding Justice of the Court of Appeal, First Appellate District, Division Three*
3:30–4:30 p.m.	Tribal Healing to Wellness Courts and Joint Jurisdiction Courts • Where are they? • What do they look like? • What have been the barriers and challenges to getting them up and running? • How do we support their expansion and development? *Hon. Abby Abinanti* *Hon. Lawrence C. King* *Hon. Devon Lomayesva, (Iipay Nation of Santa Ysabel) Chief Judge of the Intertribal Court of Southern California*
4:30 p.m.	Adjourn

This meeting is supported with funds from the U.S. Department of Health and Human Services, Court Improvement Program, the California Department of Social Services and by Subgrant No. CW 23 22 1535 awarded by the state administering office for the STOP Formula Grant Program. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or U.S. Department of Justice, Office on Violence Against Women.

Judicial Council of California
Tribal Court–State Court Forum

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

TRIBAL COURT–STATE COURT FORUM

MINUTES OF OPEN MEETING

August 10, 2023
12:15-1:15 p.m.
Via Zoom

Advisory Body Members Present:	Hon. Abby Abinanti (Cochair), Hon. Joyce Hinrichs (Cochair), Hon. April Attebury, Hon. Richard Blake, Hon. Ana España, Hon. Winston Keh, Hon. Patricia Lenzi, Hon. Kristina Lindquist, Ms. Merri Lopez-Keifer, Hon. Nicholas Mazanec, Hon. Dorothy McLaughlin, Hon. April Olson, Ms. Andera Pella, Hon. Mark Ralphs, Ms. Christina Snider, Hon. Alison Tucher, Ms. Stephanie Weldon, Hon. Christine Williams, and Hon. Joseph Wiseman.
Advisory Body Members Absent:	Hon. Leonard Edwards (Ret.), Hon. Tara Flanagan, Mr. Christopher Haug, Hon. Joni Hiramoto, Hon. Lawrence King, Hon. Devon Lomayesva, Hon. Stephen Place, Hon. Victorio Shaw, Hon. Dean Stout, and Hon. Allen Sumner
Others Present:	Ms. Vida Castaneda, Ms. Audrey Fancy, Ms. Amanda Morris, Ms. Christy Simons.

OPEN MEETING

Call to Order and Roll Call

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

Approval of Minutes

The advisory body reviewed and approved the minutes of the June 8, 2023, Tribal Court–State Court Forum meeting. Motion to approved by Judge Winston Keh and seconded by Judge Richard Blake. Minutes are approved by consensus.

INFORMATION ONLY ITEMS (NO ACTION REQUIRED)

Info 1

Cochairs Report

The chairs did not have anything to report at this time.

Info 2

Riverside County Tribal Alliance

Judge McLaughlin updated the members on the activities and work of the Riverside County Tribal Alliance.

Presenter: Hon. Dorothy R. McLaughlin, Judge of the Superior Court of California, County of Riverside.

Judge Dorothy McLaughlin presented to the committee a brief overview of the Riverside County Tribal Alliance. Its mission is to minimize court and county intervention and increase tribal participation and control by developing culturally appropriate services for Native American children and families, and to create and sustain partnerships founded upon understanding, communication and cultural awareness among the sovereign tribal nations and community and governmental agencies. The Alliance has three work groups: the substance abuse work group, domestic violence work group, and foster care work group. The entire alliance meets in-person twice a year.

Info 3

California State-Federal Judicial Council

Forum members who serve on this body will update the Forum on recent and upcoming meetings related to tribal issues.
Presenters: Hon. Devon Lomayesva, Chief Judge of the Intertribal Court of Southern California and Judge Joseph Wiseman, Chief Judge of the San Manuel Band of Mission Indians Tribal Court.

This item was deferred to the next Tribal Court – State Court Forum meeting on October 26, 2023.

Info 4

October 26th Forum in person meeting topic planning.

Discussion of topics and potential speakers and presenters for the Forum in person meeting.
Presenters: All

Forum members had an open discussion of potential meeting topics to be addressed during the in-person meeting on October 26, 2023. Topics raised include training for social workers assigned to tribal cases, fentanyl in tribal communities, possible panels for the Beyond the Bench conference tentatively planned for winter 2024, and the effects of recent legislation on foster care among others.

ADJOURNMENT

There being no further business, the meeting was adjourned at 12:57.

Approved by the advisory body on enter date.

Forum Projects Update

Rules and Forms | Indian Child Welfare Act (ICWA): Discretionary Tribal Participation
(Approved at Judicial Council meeting 09.19.2023. Effective January 1, 2024)

Although California law protects the relationship between tribes and their children beyond the scope of the Indian Child Welfare Act (ICWA) and permits tribal participation in juvenile cases in various situations where ICWA does not apply, tribal leaders and other advocates report that courts often decline to permit tribes to participate in juvenile cases if ICWA does not apply. The Tribal Court-State Court Forum and the Family and Juvenile Law Advisory Committee recommend amending two rules of court and approving a form to clarify the process and set standards consistent with California statutes for the court's exercise of discretion to permit the participation of a tribe in juvenile cases involving a child affiliated with the tribe, even when there is no express statutory right to participate or intervene under ICWA and Welfare and Institutions Code section 224.4.

Judiciary Committee omnibus bill AB 1756
Legislation to protect the privacy of personal information of tribal court judges and protect their safety and security was included as part of the Judiciary Committee omnibus bill AB 1756 Section 26 amended section 7920.500 of the Government Code to add "(q) A judge of a federally recognized Indian tribe." To the definition of "elected or appointed official".

ALEX PADILLA
U.S. SENATOR for CALIFORNIA
(https://www.padilla.senate.gov)

Newsroom (/newsroom/) • **Press Releases (/newsroom/press-releases/)**

JUNE 26, 2023

Padilla, Murkowski, Merkley, Huffman Call for GAO to Study Inequitable Justice System Facing Tribal Nations in Different States

WASHINGTON, D.C. — Today, U.S. Senator Alex Padilla (D-Calif.), Senator Lisa Murkowski (R-AK), Vice Chair of the Committee on Indian Affairs, Jeff Merkley (D-OR), Chair of the Appropriations Subcommittee on the Interior, Environment, and Related Agencies, and Representative Jared Huffman (CA-02) sent a letter to the Governmental Accountability Office (GAO) requesting they examine tribal criminal justice outcomes in states that have civil and criminal jurisdiction over Tribal lands – Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin – as compared to the rest of the country. They also requested GAO investigate how these complex criminal justice jurisdictional challenges impact investigations and protections for missing or murdered Indigenous women and people.

In 1953, Congress enacted *Public Law 83-280*, or "PL-280," over the unanimous objection of Tribal governments and without any meaningful tribal consultation. The law ceded criminal jurisdiction over tribal lands from the federal government to certain states, mandating this transfer of jurisdiction from the federal government to state governments in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin and allowing certain other states to opt in. Absent PL-280, states would not have any criminal jurisdiction over Tribal lands. Notably, when PL-280 passed, it did not provide any additional resources to states to offset the assumption of the new jurisdiction. In effect, the Bureau of Indian Affairs does not

provide federal law enforcement funding to tribes in PL-280 states like they do with other tribes in non-PL-280 states. The lack of resources and structural consequences of PL-280 have created a dire situation for public safety on affected tribal lands.

Padilla is also leading an effort (https://www.padilla.senate.gov/wp-content/uploads/PL-280-Tribes-FY24-Funding-FINAL-PDF-004.pdf) to secure $165 million in the FY 24 appropriations bill for Tribal governments in PL-280 states. An investment of $165 million in public safety funding for tribes in PL-280 states would help these tribes to build their own law enforcement capacity, improve crime response times, and support coordination with local and state law enforcement agencies. Providing this funding is critical to addressing chronic under-policing on tribal lands and allowing Tribal governments to protect their people through culturally appropriate community policing.

“We are concerned about the extent to which complex jurisdictional rules governing criminal justice inside and outside of Indian Country impact American Indian and Alaska Native Tribes and communities, and we ask that GAO examine criminal justice outcomes in states that have jurisdiction over tribal lands as a result of Public Law 83-280 (P.L. 280) compared to other states,” **wrote the lawmakers.**

“As recently as 2021, GAO noted that Tribes and Tribal stakeholders expressed concerns about challenges with cross-jurisdictional cooperation and a lack of comprehensive national data on missing and murdered Indigenous cases, among other concerns. We believe that P.L. 280 has created jurisdictional and funding challenges that result in crimes, particularly those committed by non-Native individuals, going uninvestigated and unpunished,” **continued the lawmakers**.

“We applaud the efforts and leadership of Senator Alex Padilla and all the legislators who have joined this letter requesting that the Government Accountability Office study the impact of Public Law 280, a law that was imposed on tribes without tribal consent, or even consultation. Since its enactment 70 years ago, Tribes in PL 280 states like ours have struggled to create public safety on our reservations. We have fewer federal resources for our courts, law enforcement, and public safety systems, yet are challenged by the same issues that Tribes in non-PL 280 states face. We

believe this study is a critical first step in the federal government taking accountability for PL-280's devastating impact on tribes and states, which receive no support for increased jurisdictional responsibilities," **said Yurok Chief Justice Abby Abinanti**.

"PL-280 has left us with the impossible choice: accept minimal law and often adversarial protection from our local government or take tribal funds away from health care, elder care, and language preservation to fund our own police force," **said Meryl Picard, Chairwoman of the Bishop Paiute Tribe**. "I want to thank Senator Padilla, Chair Merkley, and Vice Chair Murkowski for acknowledging our struggle and working towards a solution that upholds the federal government's responsibility to keep our people safe from harm."

"After nearly 20 years in Morongo Tribal leadership, I know that PL-280 has hampered our ability to address crime on our reservation," **said Chairman Charles Martin of the Morongo Band of Mission Indians**. "This study will get to the heart of the issue and give us the data we need to pave a path to healing. I am deeply grateful to Senator Padilla, Chairman Merkley and Vice Chairwoman Murkowski for their leadership and willingness to give us the tools to address the flawed PL-280 system. "

Full text of the letter is available here (https://www.padilla.senate.gov/wp-content/uploads/GAO-study-request-on-PL-280-6.26.23.pdf)and below:

Dear Mr. Dodaro:

We are concerned about the extent to which complex jurisdictional rules governing criminal justice inside and outside of Indian Country impact American Indian and Alaska Native Tribes and communities, and we ask that GAO examine criminal justice outcomes in states that have jurisdiction over tribal lands as a result of Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360) (commonly referred to as "P.L. 280") compared to other states.

GAO has previously reported that American Indian and Alaska Native communities are considered to be among the most vulnerable to violence, human trafficking, and involvement with the justice system, yet data on the prevalence of crises such as missing and murdered women, justice-

involved youth, and human trafficking in Indian country are difficult to quantify and often unknown. The public safety crisis in rural Alaska is so great the Department of Justice declared it a federal emergency in 2019.

While federal agencies provide support to federally recognized tribes in Indian country and help tribes administer justice, states typically do not have jurisdiction to prosecute offenders in Indian country unless a federal law grants such jurisdiction. With some exceptions, P.L. 280 ceded criminal jurisdiction over tribal lands from the federal government to state governments in six states – Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin – granting these states jurisdiction to prosecute crimes by or against American Indians and Alaska Natives in Indian country. The law also allowed other states to elect to assume full or partial state jurisdiction (collectively, "P.L. 280 states"). Notably, when P.L. 280 was enacted into law, the federal government did not provide additional resources to states to offset the assumption of new criminal jurisdiction and law enforcement responsibilities. In addition, P.L. 280 was imposed on tribes without tribal consent, or even consultation.

As recently as 2021, GAO noted that tribes and tribal stakeholders expressed concerns about challenges with cross-jurisdictional cooperation and a lack of comprehensive national data on missing and murdered Indigenous cases, among other concerns. We believe that P.L. 280 has created jurisdictional and funding challenges that result in crimes, particularly those committed by non-Native individuals, going uninvestigated and unpunished.

An additional consequence has been that without federal money appropriated to the Bureau of Indian Affairs in P.L. 280 states for "Public Safety and Justice" (PSJ) programs, federally recognized tribes in P.L. 280 states are denied the opportunity to exercise tribal sovereignty and fully operate PSJ programs, as authorized under the Indian Self-Determination and Education Assistance Act, reducing access to justice and judicial services even though tribes continue to have concurrent jurisdiction with the P.L. 280 states.

In light of these growing concerns, we ask that GAO provide information on and examine the following questions:

1. *What state and federal criminal justice system data are available on criminal justice outcomes related to P.L. 280 states versus non-P.L. 280 states, and what does that data show?*

2. *What additional data is needed, if any, to better understand criminal justice outcomes in these states?*

3. *How does P.L. 280 impact law enforcement staffing, investigations, and outcomes for tribal communities in P.L. 280 states versus non-P.L. 280 states?*

4. *What concerns do stakeholders have on impacts of investigations of and protections for missing or murdered Indigenous women and people in P.L. 280 states versus non-P.L. 280 states?*

5. *What, if any, federal efforts are underway to address reported justice system inequities in P.L. 280 states?*

6. *Has the federal government provided comparable or equivalent resources to tribal and/or state governments in P.L. 280 states, including not just law enforcement, but also prosecutorial resources and recidivism measures? And how has P.L. 280 impacted public safety funding, infrastructure for tribal courts, police, and other tribal justice agencies?*

7. *What were the initial impacts of P.L. 280 on public safety for tribes and what are the reported present-day impacts? How have the impacts of P.L. 280 changed over time?*

8. *How does the public safety of tribes in P.L. 280 states, response times from local police, jurisdictional clarity, relationships with state and county public safety partners compare with those tribes in non-P.L. 280 states?*

9. *How has P.L. 280 impacted the development of tribal government law enforcement and court systems?*

10. *By state (P.L. 280 and non-P.L. 280), what federal money has been distributed to tribes and tribal organizations for public safety and justice?*

Thank you for your consideration of our request, and we look forward to your response.

Sincerely,

###

Congress of the United States

Washington, DC 20515

June 26, 2023

The Honorable Gene Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Dodaro:

We are concerned about the extent to which complex jurisdictional rules governing criminal justice inside and outside of Indian Country impact American Indian and Alaska Native Tribes and communities, and we ask that GAO examine criminal justice outcomes in states that have jurisdiction over tribal lands as a result of Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360) (commonly referred to as "P.L. 280") compared to other states.

GAO has previously reported that American Indian and Alaska Native communities are considered to be among the most vulnerable to violence, human trafficking, and involvement with the justice system, yet data on the prevalence of crises such as missing and murdered women, justice-involved youth, and human trafficking in Indian country are difficult to quantify and often unknown. The public safety crisis in rural Alaska is so great the Department of Justice declared it a federal emergency in 2019.

While federal agencies provide support to federally recognized tribes in Indian country and help tribes administer justice, states typically do not have jurisdiction to prosecute offenders in Indian country unless a federal law grants such jurisdiction. With some exceptions, P.L. 280 ceded criminal jurisdiction over tribal lands from the federal government to state governments in six states – Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin – granting these states jurisdiction to prosecute crimes by or against American Indians and Alaska Natives in Indian country. The law also allowed other states to elect to assume full or partial state jurisdiction (collectively, "P.L. 280 states"). Notably, when P.L. 280 was enacted into law, the federal government did not provide additional resources to states to offset the assumption of new criminal jurisdiction and law enforcement responsibilities. In addition, P.L. 280 was imposed on tribes without tribal consent, or even consultation.

As recently as 2021, GAO noted that tribes and tribal stakeholders expressed concerns about challenges with cross-jurisdictional cooperation and a lack of comprehensive national data on missing and murdered Indigenous cases, among other concerns.[1] We believe that P.L. 280 has created jurisdictional and funding challenges that result in crimes, particularly those committed by non-Native individuals, going uninvestigated and unpunished.

An additional consequence has been that without federal money appropriated to the Bureau of Indian Affairs in P.L. 280 states for "Public Safety and Justice" (PSJ) programs, federally recognized tribes in P.L. 280 states are denied the opportunity to exercise tribal sovereignty and fully operate PSJ programs, as authorized under the Indian Self-Determination and Education Assistance Act, reducing access to justice and judicial services even though tribes continue to have concurrent jurisdiction with the P.L. 280 states.

[1] GAO, *Missing or Murdered Indigenous Women: New Efforts are Underway but Opportunities Exist to Improve the Federal Response* GAO-22-104045 (Washington, D.C.: Oct. 28, 2021).

In light of these growing concerns, we ask that GAO provide information on and examine the following questions:

1) What state and federal criminal justice system data are available on criminal justice outcomes related to P.L. 280 states versus non-P.L. 280 states, and what does that data show?

2) What additional data is needed, if any, to better understand criminal justice outcomes in these states?

3) How does P.L. 280 impact law enforcement staffing, investigations, and outcomes for tribal communities in P.L. 280 states versus non-P.L. 280 states?

4) What concerns do stakeholders have on impacts of investigations of and protections for missing or murdered Indigenous women and people in P.L. 280 states versus non-P.L. 280 states?

5) What, if any, federal efforts are underway to address reported justice system inequities in P.L. 280 states?

6) Has the federal government provided comparable or equivalent resources to tribal and/or state governments in P.L. 280 states, including not just law enforcement, but also prosecutorial resources and recidivism measures? And how has P.L. 280 impacted public safety funding, infrastructure for tribal courts, police, and other tribal justice agencies?

7) What were the initial impacts of P.L. 280 on public safety for tribes and what are the reported present-day impacts? How have the impacts of P.L. 280 changed over time?

8) How does the public safety of tribes in P.L. 280 states, response times from local police, jurisdictional clarity, relationships with state and county public safety partners compare with those tribes in non-P.L. 280 states?

9) How has P.L. 280 impacted the development of tribal government law enforcement and court systems?

10) By state (P.L. 280 and non-P.L. 280), what federal money has been distributed to tribes and tribal organizations for public safety and justice?

Thank you for your consideration of our request, and we look forward to your response.

Sincerely,

Alex Padilla
United States Senator

Lisa Murkowski
United States Senator

Jeffrey A. Merkley
United States Senator

Jared Huffman
Member of Congress

July 12, 2023

Congressional Requesters:

Thank you for your letter requesting that the Government Accountability Office review matters relating to the criminal justice outcomes in states that have jurisdiction over tribal lands as a result of Public Law 83-280 compared to other states.

GAO accepts your request as work that is within the scope of its authority. At the current time we anticipate that staff with the required skills will be available to initiate an engagement in about five months. Your request has been assigned to Mr. Charles Michael Johnson, Jr., Managing Director, Homeland Security and Justice. Closer to the time GAO can start this engagement, Mr. Johnson or a member of his team will contact with the staff points of contact to confirm that this request continues to be your priority for us. As applicable, we will also be in contact with the cognizant Inspector General's office to ensure that we are not duplicating efforts. If an issue arises during this coordination, we will consult with you regarding its resolution.

If you have any questions, please contact Mr. Johnson at 202-512-7331 or johnsoncm@gao.gov, or Mr. Carlos Diz, Assistant Director, Congressional Relations, on my staff at 202-512-8256 or dizc@gao.gov.

Sincerely yours,

A. Nicole Clowers
Managing Director
Congressional Relations

Attachment

Ref: CCAR 23-0934

Attachment: List of Requesters

The Honorable Jeffrey A. Merkley
Chair, Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations
United States Senate
(POC: Meredith Booker)

The Honorable Alex Padilla
United States Senate
(POC: Sarah Swig)

The Honorable Lisa Murkowski
United States Senate

The Honorable Jared Huffman
House of Representatives

VAWEP Updates

Violence Against Women Education Project (VAWEP)

The Violence Against Women Education Project (VAWEP) is an initiative designed to provide tribal and state courts with information, supplies, technical assistance, educational materials, and programs on the role of the courts in responding to cases involving these issues.

The goal of VAWEP is to provide current education and program support in the areas of domestic violence, sexual assault, stalking, dating violence, and human trafficking. The VAWEP tribal team focuses on issues affecting tribal communities and provides resources to state and tribal courts.

Tribal/State Programs Unit: Resources relating to cases of domestic violence, dating violence, sexual assault, trafficking, elder abuse, and stalking and Native American communities. https://www.courts.ca.gov/14851.htm

Legislation & DOJ Update

AB 44: Existing law establishes the California Law Enforcement Telecommunications System (CLETS) within the Department of Justice to facilitate the exchange and dissemination of information between law enforcement agencies in the state.

This bill would require the department to grant access to the system to the law enforcement agency or tribal court of a federally recognized Indian tribe meeting certain qualifications, as specified. https://legiscan.com/CA/text/AB44/id/2839620/California-2023-AB44-Amended.html

AB-3099 DOJ study: California Assembly Bill 3099 (AB 3099) calls for the California Department of Justice to provide training and guidance to law enforcement agencies and tribal governments to help reduce uncertainty regarding criminal jurisdiction and improve public safety on tribal lands. The new effort also includes funds to study challenges related to the reporting and identification of missing and murdered Native Americans in California, particularly women and girls. California is home to more people of Native American and Alaskan Native heritage than any other state in the country — with approximately 176 California Native American Tribes and a little over 100 separate tribal reservations. https://oag.ca.gov/nativeamerican/ab3099
Bill Text:
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3099

DOJ MMIP Regional Events: *Missing in California Indian Country* events are taking place throughout the four regions of our state. They, in part, serve as critical public safety events for tribal communities and aim to elevate the state's response to the Missing Murdered Indigenous Persons crisis (MMIP). These events will allow for loved ones to report an individual missing, receive an update on an active missing person's case, and/or provide a DNA sample for inclusion in the DOJ's Unidentified Persons Database.

Best Practices: Recognition and Enforcement of Tribal Restraining Orders

CRC Rule 5.386 – allowed for local procedures to electronically file and register tribal court orders.

Enforcement of Tribal Court Protection Orders: This bulletin is designed to ensure that state and local law enforcement officials across California have the necessary information to enforce and prosecute violations of tribal court protection orders. Enforcement of protection orders across jurisdictional lines is a critical component of protecting victims of violence. This is a supplement to Information Bulletin No. DLE-2016-03.

Both California and federal law under the Violence Against Women Act (VAWA) require all law enforcement officers of this state to give full faith and credit to tribal court protection orders, sometimes called "protective orders," issued by a federally-recognized tribe, and enforce those orders accordingly. (Cal. Fam. Code,§§ 6400-6409 [Uniform Interstate Enforcement of Domestic Violence Protective Orders Act]; 18 U.S.C. § 2265 [Violence Against Women Act].)
https://oag.ca.gov/system/files/media/2022-DLE-11.pdf

CSEC Bench Cards & Infographic

- *Harm Reduction and Commercial Sexual Exploitation of Children and Youth Bench Cards*
    - This bench card set was produced by staff at the Judicial Council of California as a collaborative project with the California Department of Social Services' Child Trafficking Response Unit (CTRU). These bench cards serve as a companion to CTRU Harm Reduction Series—Courts, which describes how to use this approach when serving youth abused through commercial sexual exploitation.
    - The bench cards are available to judicial officers in a tribal court or state court. If you need information on where to locate the bench cards on-line or if your court would like additional hard copies of the bench cards for judicial officers in your court, please contact: vida.castaneda@jud.ca.gov
- *Child Sex Trafficking On-Ramps and Off-Ramps Fact Sheet and Infographic*
    - This infographic and fact sheet were developed in conversation with youth survivors and 39 stakeholders who provide training and/or technical assistance on child sexual exploitation and youth interventions across the country. These resources are intended to help courts and community stakeholders understand the common on-ramps into the life of trafficking and the most significant off-ramps for children who are being trafficked.
    - National Council of Juvenile and Family Court Judges (NCJFCJ): https://www.ncjfcj.org/wp-content/uploads/2023/01/NCJFCJ-OnRamps-CST-2.pdf

Assembly Bill No. 44

Passed the Assembly September 14, 2023

_____

Chief Clerk of the Assembly

Passed the Senate September 13, 2023

_____

Secretary of the Senate

This bill was received by the Governor this _____ day of _____, 2023, at _____ o'clock ___M.

_____

Private Secretary of the Governor

CHAPTER _____

An act to add Section 15168 to the Government Code, relating to tribal police.

LEGISLATIVE COUNSEL'S DIGEST

AB 44, Ramos. California Law Enforcement Telecommunications System: tribal police.

Existing law establishes the California Law Enforcement Telecommunications System (CLETS) within the Department of Justice to facilitate the exchange and dissemination of information between law enforcement agencies in the state.

This bill would require the department to grant access to the system to the law enforcement agency or tribal court of a federally recognized Indian tribe meeting certain qualifications, as specified.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) California is home to more Native American and Alaska Native people than any other state in the country. There are 109 federally recognized tribes in California and 67 nonfederally recognized tribes listed on the contact list maintained by the Native American Heritage Commission. Federally recognized tribes have a unique government-to-government relationship with local, state, and federal entities, and are recognized as sovereign nations. Tribes can create their own laws, governmental structure, and enrollment or membership rules for the land and citizens of their nation.

(b) California has the fifth largest caseload of missing and murdered Indigenous women and people. Nationwide, more than four in five Native American and Alaska Native women have experienced violence in their lifetime, and more than one in three have in the last year. One in 130 Native American children are likely to go missing each year. Indigenous women go missing and are murdered at rates higher than any other ethnic group in the United States. Nearly one-half of all indigenous women have been raped, beaten, or stalked by an intimate partner. LGBTQ+ Native

Americans and people who identify as “two-spirit” people within tribal communities are also often the targets of violence.

(c) California Native American tribes retain the inherent authority to self-govern, including the authority to enact laws that govern their lands.

(d) Approximately 26 tribal governments in the state have exercised their inherent authority by establishing law enforcement agencies to maintain public safety on Indian lands. Additionally, tribes have exercised their inherent authority by establishing 22 tribal courts statewide, serving approximately 40 tribes.

(e) Federal law requires certain states, including the State of California, to enforce state criminal laws on Indian lands in those states, but does not provide adequate resources to the selected states or the tribes within those states for public safety.

(f) Thirteen states and the federal government provide tribal law enforcement authority to enforce state or federal law if tribal officers meet qualifications delineated in the state and federal authorizing legislation and regulations. Twenty-one of the 26 tribal governments in California that have law enforcement departments have deputation agreements with the Bureau of Indian Affairs, Office of Justice Services, which allows qualified tribal officers to become special commissioned federal officers authorized to enforce federal law on Indian lands in their jurisdiction.

(g) Where state and county law enforcement departments have developed close working and cooperative relationships with the tribal law enforcement agencies, these relationships have resulted in greater public safety for both the non-Indian and Indian communities.

(h) State law establishing the California Law Enforcement Telecommunications System (CLETS) states that “the maintenance of law and order is, and always has been, a primary function of government,” and that “the state has an unmistakable responsibility to give full support to all public agencies of law enforcement,” and that the state’s responsibility “includes the provision of an efficient law enforcement communications network available to all such agencies.” Indian tribes have not been considered public agencies for purposes of this statute, excluding them from CLETS access.

(i) Current entities with access to CLETS include sheriffs, city police departments, district attorneys, courts, probation

departments, the California Highway Patrol, the Department of Justice, the Department of Insurance, the Employment Development Department, university, college, and school district police departments, fire department arson investigation units, and the Federal Bureau of Investigation. Despite this broad application of public agencies with access to CLETS, tribal courts and tribal police that operate within California's borders do not have CLETS access.

(j) Without access to CLETS, tribal police cannot receive, share, or update critical criminal record information, missing and unidentified persons files, protective order files, and violent persons files; all of which are critical to effective and thorough investigations of, and related to, missing and murdered Indigenous women and people, violence, and domestic violence on tribal lands.

(k) Without tribal access to CLETS, tribal courts and tribal law enforcement cannot enter domestic violence protective orders, emergency protective orders, or other restraining orders, limiting the ability of county and state law enforcement to protect tribal people. Tribal protective orders can only be entered into the Tribal Access Program and are only viewable by other law enforcement through National Crime Information Center, limited systems that do not give county or state law enforcement access to the parameters of these protective orders. Because tribal law enforcement lack access to CLETS, they are unable to view the parameters of a CLETS protective order when they respond to calls for service in these matters. This lack of access to CLETS hampers state and county police officers from effectively protecting victims of violence and harassment, and creates a greater risk that these legal protective orders will not be enforced at the expense of the safety of women, children, and victims fleeing violence. This exacerbates the crisis of missing and murdered Indigenous women and people.

(*l*) In a pilot program involving the Sycuan Tribal Police Department, an agreement with the county allowed full access to CLETS by tribal officers. Because information is mutually shared between the tribe and local law enforcement, both tribal police and sheriff's deputies have access to each other's data, including witness contact information, civilian contact with law enforcement, report narratives, and lists of stolen items. This mutual relationship of support, resource sharing, and communication between the tribe

and local and state government has been beneficial to both agencies and critical to increasing public safety for the Sycuan Tribe, including an increase in crimes solved throughout the community.

SEC. 2. Section 15168 is added to the Government Code, to read:

15168. (a) Notwithstanding Section 15153, the system may connect and exchange traffic with the compatible systems of a tribal government, as provided in this section.

(b) A law enforcement agency or court of a tribe may apply to the Attorney General for access to the system. The Attorney General shall provide system access to any law enforcement agency or court of a tribe that has made application and that meets all of the qualifications prescribed in subdivision (c), as determined by the Attorney General. System access provided to a tribe shall be at the sole expense of that tribe.

(c) The Attorney General shall deem a tribe that has applied for system access pursuant to subdivision (b) to be qualified only if the governing body of that tribe has enacted or adopted a law, resolution, or ordinance, which shall be maintained in continuous force, that provides for all of the following:

(1) The tribe expressly waives its right to assert its sovereign immunity from suit, regulatory or administrative action, and enforcement of any ensuing judgment or arbitral award, for any and all claims arising from any actions or omissions of the tribe, including its officers, agents, and employees, when acting within the scope of their authority and duty, arising out of, connected with, or related to, the system.

(2) The tribe expressly agrees that the substantive and procedural laws of the State of California shall govern any claim, suit, or regulatory or administration action, that the obligations, rights, and remedies shall be determined in accordance with such laws, and that the courts of the State of California or of the federal government, as applicable, shall have exclusive jurisdiction.

(3) The tribe agrees to cooperate with any inspections, audits, and investigations by the Department of Justice for improper use or compliance with the operating policies, practices, and procedures, including any sanction or discipline imposed by the department, up to and including removal of system access.

(4) The tribe and its agencies, entities, or arms, including any officers, agents, and employees of the tribe when acting within the

scope of their authority and duty, shall comply with the laws of the State of California relating to the use of records and information from the system, including, without limitation, Section 6200 and this chapter, Sections 502, 11105, 11141, 11142, 11143, and 13300 to 13304, inclusive, of the Penal Code, and Section 1808.45 of the Vehicle Code.

(5) The tribe and its agencies, entities, or arms, including any officers, agents, and employees of the tribe when acting within the scope of their authority and duty, shall comply with the Department of Justice's regulations, agreements, and operating policies, practices, and procedures, relating to the security requirements, access to the records and information from the system, and use of records and information from the system.

(d) The intent of the Legislature in enacting this section is to grant tribes access to, and use of, criminal justice databases, and the information in those databases, in a manner similar to the access granted under federal law codified in Section 534 of Title 28 of, and Section 41107 of Title 34 of, the United States Code.

(e) The Director of General Services shall determine the charges to be paid by a tribe to the department for system access, including any initial setup charges and any ongoing charges for access. These charges shall be reasonably similar to those imposed on other system subscribers.

(f) As used in this section, the following terms are defined as follows:

(1) "Tribe" means a federally recognized Indian Tribe whose territorial boundaries lie wholly or partially within the State of California, and any agencies, entities, or arms of the tribe, as applicable, either together or separately.

(2) "Sovereign immunity" means immunity from suit or action of the tribe and its agencies, entities, or arms, including the officers, agents, and employees of the tribe when acting within the scope of their authority and duty.

Approved _____, 2023

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Governor

Assembly Bill No. 3099

CHAPTER 170

An act to add Article 2.4 (commencing with Section 11070) to Chapter 1 of Title 1 of Part 4 of the Penal Code, relating to the Department of Justice.

[Approved by Governor September 25, 2020. Filed with Secretary of State September 25, 2020.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3099, Ramos. Department of Justice: law enforcement assistance with tribal issues: study.

Existing law authorizes the Department of Justice to provide technical assistance to local law enforcement agencies, other state agencies, and federal agencies in the investigation of criminal matters, the detection of crimes, and the apprehension or prosecution of criminals.

Existing law establishes a Rural Indian Crime Prevention Program to provide grants to local law enforcement agencies to provide training to officers and to provide specified services to Native American persons and communities.

This bill would require the department, upon an appropriation of funds by the Legislature, to provide technical assistance to local law enforcement agencies, as specified, and tribal governments with Indian lands, relating to tribal issues, including providing guidance for law enforcement education and training on policing and criminal investigations on Indian lands, providing guidance on improving crime reporting, crime statistics, criminal procedures, and investigative tools, and facilitating and supporting improved communication between local law enforcement agencies and tribal governments.

The bill would require the department, upon appropriation of funds by the Legislature, to conduct a study to determine how to increase state criminal justice protective and investigative resources for reporting and identifying missing Native Americans in California, particularly women and girls. The bill would require the department to submit a report to the Legislature upon completion of the study, as provided.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) In Public Law 83-280, Congress expressly granted California concurrent criminal jurisdiction with California's tribal governments over specified areas of Indian country within the state for the enforcement of statewide criminal laws. A lack of consistency in the application of PL-280

on California Indian country currently exists statewide creating jurisdictional uncertainty for local law enforcement and California tribes with Indian land.

(b) Existing law establishes a California missing persons registry, in addition to other missing persons networks and databases that are designed to assist law enforcement in their investigations of missing and unidentified persons in California.

(c) According to most recent census data, California is home to more people of Native American and Alaska Native heritage than any other state in the country. There are currently 109 federally recognized Indian tribes and over 70 non-federally recognized tribes in California. Tribes in California currently have nearly 100 separate reservations or rancherias. There are also a number of individual Indian trust allotments. These lands constitute "Indian country."

SEC. 2. Article 2.4 (commencing with Section 11070) is added to Chapter 1 of Title 1 of Part 4 of the Penal Code, to read:

Article 2.4. Tribal Assistance Program

11070. (a) To improve upon the implementation of concurrent criminal jurisdiction on California Indian lands, the Department of Justice shall, subject to an appropriation by the Legislature, in a manner to be prescribed by the department, provide technical assistance to local law enforcement agencies that have Indian lands within or abutting their jurisdictions, and to tribal governments with Indian lands, including those with and without tribal law enforcement agencies, to include, but not be limited to, all of the following:

(1) Providing guidance for law enforcement education and training on policing and criminal investigations on Indian lands that supports consistent implementation of California's responsibilities for enforcing statewide criminal laws on Indian lands that protect the health, safety, and welfare of tribal citizens on Indian lands.

(2) Providing guidance on improving crime reporting, crime statistics, criminal procedures, and investigative tools for conducting police investigations of statewide criminal laws on Indian lands.

(3) Providing educational materials about the complexities of concurrent criminal jurisdiction with tribal governments and their tribal law enforcement agencies, specifically to tribal citizens on Indian lands, including information on how to report a crime, and information relating to victim's rights and victim services in California.

(4) Facilitating and supporting improved communication between local law enforcement agencies and tribal governments or tribal law enforcement agencies for purposes of consistent implementation of concurrent criminal jurisdiction on California Indian lands.

(b) (1) To address the issues involving missing and murdered Native Americans in California, particularly missing and murdered Native American women and girls, the department shall, subject to an appropriation by the

Legislature, in a manner to be prescribed by the department, conduct a study to determine how to increase state criminal justice protective and investigative resources for reporting and identifying missing Native Americans in California, particularly women and girls. The study shall include all of the following:

(A) A determination of the scope of the issue of missing and murdered Native Americans in California, particularly women and girls.

(B) Identification of barriers in reporting or investigating missing Native Americans in California, particularly women and girls.

(C) Ways to create partnerships to increase cross-reporting and investigation of missing Native Americans in California, particularly women and girls, between federal, state, local, and tribal governments, including tribal governments without tribal law enforcement agencies.

(2) As part of the study, the department shall conduct outreach to tribal governments in California, Native American communities, local, tribal, state, and federal law enforcement agencies, and state and tribal courts.

(3) The department shall submit a report to the Legislature upon completion of the study. The report shall include all of the following:

(A) Data and analysis of the number of missing Native Americans in California, particularly women and girls.

(B) Identification of the barriers to providing state resources to address the issue.

(C) Recommendations, including any proposed legislation, to improve the reporting and identification of missing Native Americans in California, particularly women and girls.

(c) (1) The requirement for submitting a report imposed pursuant to paragraph (3) of subdivision (b) is inoperative on January 1, 2025, pursuant to Section 10231.5 of the Government Code.

(2) A report to be submitted pursuant to paragraph (3) of subdivision (b) shall be submitted in compliance with Section 9795 of the Government Code.

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<< Previous Rule [**Back** to Title Index] **Next** Rule >> | **Printer-friendly** version of this page

2023 California Rules of Court

Rule 5.386. Procedures for filing a tribal court protective order

(a) Request for written procedures for filing a tribal court protective order

At the request of any tribal court located within the county, a court must adopt a written procedure or local rule to permit the fax or electronic filing of any tribal court protective order that is entitled to be registered under Family Code section 6404.

(b) Process for registration of order

The written procedure or local rule developed in consultation with the local tribal court or courts must provide a process for:

(1) The tribal court or courts to contact a representative of the superior court to inform him or her that a request for registration of a tribal court protective order will be made;

(2) Confirmation of receipt of the request for registration of the order; and

(3) Return of copies of the registered order to the tribal court or the protected person.

(c) No filing fee required

In accordance with Family Code section 6404(b), no fee may be charged for the fax or electronic filing registration of a tribal court protective order.

(d) Facsimile coversheet

The *Fax Transmission Cover Sheet for Registration of Tribal Court Protective Order* (form DV-610) or similar cover sheet established by written procedure or local rule must be used when fax filing a tribal court protective order. The cover sheet must be the first page transmitted, to be followed by any special handling instructions needed to ensure that the document will comply with local rules. Neither the cover sheet nor the special handling instructions are to be filed in the case. The court is not required to keep a copy of the cover sheet.

Rule 5.386 adopted effective July 1, 2012.

Title 5, Family and Juvenile Rules-Division 1, Family Rules-Chapter 12, Separate Trials (Bifurcation) and Interlocutory Appeals; adopted January 1, 2013.

Title 5, Family and Juvenile Rules-Division 1, Family Rules-Chapter 12, Separate Trials (Bifurcation) and Interlocutory Appeals-Article 1, Separate Trials; adopted January 1, 2013.

[Back to Top]

California Department of Justice DIVISION OF LAW ENFORCEMENT John D. Marsh, Chief	**INFORMATION BULLETIN**	
Subject: **Enforcement of Tribal Court Protection Orders**	*No.* 2022-DLE-11 *Date:* 9/30/2022	*Contact for information:* John D. Marsh, Chief Division of Law Enforcement (916) 210-6300

TO: All CALIFORNIA DISTRICT ATTORNEYS, CHIEFS OF POLICE, SHERIFFS, AND STATE LAW ENFORCEMENT AGENCIES

This bulletin is designed to ensure that state and local law enforcement officials across California have the necessary information to enforce and prosecute violations of tribal court protection orders. Enforcement of protection orders across jurisdictional lines is a critical component of protecting victims of violence. This is a supplement to Information Bulletin No. DLE-2016-03.

TRIBAL COURT PROTECTION ORDERS ARE TO BE GIVEN "FULL FAITH AND CREDIT"

Both California and federal law under the Violence Against Women Act (VAWA) require all law enforcement officers of this state to give full faith and credit to tribal court protection orders, sometimes called "protective orders," issued by a federally-recognized tribe, and enforce those orders accordingly. (Cal. Fam. Code,§§ 6400-6409 [Uniform Interstate Enforcement of Domestic Violence Protective Orders Act]; 18 U.S.C. § 2265 [Violence Against Women Act].)

Full faith and credit requires that valid civil and criminal protective orders must be enforced by local and state law enforcement to protect victims wherever a violation of an order occurs, regardless of where the order was issued. (18 U.S.C. § 2265.) VAWA defines "protection order" as "any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person[.]" (18 U.S.C. § 2266(5)(A).) VAWA also encompasses protections contained in support, child custody, and visitation orders and protective directives in other court orders. (18 U.S.C. § 2266(5)(B).) Emergency, ex parte, temporary, and final orders are also subject to full faith and credit under VAWA. (18 U.S.C. 2265(b)(2).)

FORMAT OF A TRIBAL COURT PROTECTIVE ORDER MAY VARY FROM TRIBE TO TRIBE

California is home to one of the largest populations of American Indian/Alaska Native people in the nation. There are 574 federally recognized tribes in the United States. Of those 574 tribes, California is home to 109 federally recognized tribes. There is no standard format for tribal court protection orders. Therefore, California law enforcement may come into contact with hundreds of different formats of tribal court protection orders: they may differ from an order issued by a California court in name, verbiage, content, layout, and duration.

TRIBAL PROTECTIVE ORDERS DO NOT NEED TO BE LOCATED IN NCIC OR CLETS DATABASES

Law enforcement officers must enforce valid tribal court protection orders, whether or not they are registered or filed. However, it is important to note that nationwide, many tribal courts enter their protective orders directly into the National Crime Information Center (NCIC), and not in the California Restraining and Protection Orders System (CARPOS) or the California Law Enforcement Telecommunications System (CLETS).

- Therefore, California law enforcement officers **SHALL NOT** require any of the following when being asked to enforce a tribal court protective order:
    - Presentation of a certified copy of the tribal court protection order. The order may be inscribed on any tangible medium or stored in an electronic or other medium if it is retrievable in perceivable form. (Cal. Fam. Code, § 6403, subd. (a).)
    - Registration or filing of the protection order with the state. (Cal. Fam. Code, § 6403, subd. (d).)
    - Verification in any statewide database (for example, the California Law Enforcement Telecommunications System (CLETS) or the California Restraining and Protective Order System (CARPOS)). (Cal. Fam. Code § 6403, subd. (d).)

DETERMINING PROBABLE CAUSE FOR ENFORCEMENT

- **When a tribal court protective order is presented to a law enforcement officer:** Presentation of a protection order that identifies both: (1) the protected individual and the individual against whom enforcement is sought and, (2) on its face, appears to be currently in effect, constitutes probable cause to believe that a valid tribal court protection order exists. (Cal. Fam. Code, § 6403, subd. (a).) Once there is probable cause to believe that a valid tribal court protection order exists, a law enforcement officer must enforce the order as if it were an order issued by a California court. (Cal. Fam. Code, § 6403, subd. (a); 18 U.S.C. § 2265(a).)

- **When a tribal court protective order is NOT presented to a law enforcement officer:** If a protection order is not presented, a law enforcement officer may consider other information to determine if there is probable cause to believe that a valid order exists. (Cal. Fam. Code, § 6403, subd. (b)).

IF AN ORDER HAS NOT BEEN SERVED, LAW ENFORCEMENT SHALL SERVE THE ORDER

If a law enforcement officer determines that an otherwise valid tribal court protection order cannot be enforced because the respondent (i.e., the individual against whom enforcement is sought) has not been notified or served with the order, the officer shall inform him or her of the order, make a reasonable effort to serve the order, and allow him or her a reasonable opportunity to comply with the order before enforcing it. Verbal notice of the order is sufficient. (Cal. Fam. Code, § 6403, subd. (c).) Service of the order should then be noted in the law enforcement officer's report.

THERE IS NO CIVIL LIABILITY IF LAW ENFORCEMENT ACTS IN GOOD FAITH

There shall be no civil liability on the part of, and no cause of action for false arrest or false imprisonment against, a peace officer who makes an arrest pursuant to a protective or restraining order that is regular upon its face, if the peace officer, in making the arrest, acts in good faith and

has reasonable cause to believe that the person against whom the order is issued has notice of the order and has committed an act in violation of the order. (Cal. Fam. Code, § 6383, subd. (h)(1).)

CONTACT INFORMATION

The California Department of Justice takes great pride in assisting local law enforcement agencies in enforcing criminal and civil laws and protections. Should your agency require technical assistance, please contact the Department's Division of Law Enforcement at (916) 210-6300 or the Department's Office of Native American Affairs at (916) 210-6474.

Child Sex Trafficking On-Ramps and Off-Ramps Fact Sheet

NCJFCJ est. 1937
NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES
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The following themes were developed through a roundtable discussion of 39 stakeholders who provided training and/or technical assistance on child sexual exploitation, youth interventions across the country, and youth survivors.

NoVo Foundation

Factors That Act as On-Ramps to Child-Sex Trafficking

ON RAMP

Poverty and Its Effects

- A need for money to afford food, rent, and other necessities is often the impetus for exploitation of children who are trafficked by their families or made more vulnerable to manipulation, especially if unaccompanied.
- Poverty also interacts with other social structures to create additional on-ramps, such as poverty acting as a barrier to health care or the cost of immigrating to the United States creating debt for people who are undocumented.

Immigration

- Immigration poses direct and indirect on-ramps as many undocumented immigrants are uniquely vulnerable to the coercive tactics used to recruit people and keep them ensnared in sex trafficking.
- Immigrants face myriad structural inequalities that interact and combine with the previously mentioned on-ramps. Many undocumented immigrants experienced poverty and/or community violence in the countries where they were born. Depending on the immigration route, they may have faced further violence or become deeply indebted to those who smuggled them across the border. Once they arrive in the United States they may face profound social isolation and vulnerability to exploitation due to their fears of deportation and limited English proficiency.

Adverse Childhood Experiences, Historical Trauma, Lack of Parental Involvement, and Discrimination

- Youths' experience of physical abuse, sexual abuse, family rejection, and caregiver substance use are all described as on-ramps to child sex trafficking.
- Experiences of discrimination, particularly historical and generational histories of trauma and racism, homophobia, and misogyny are not only direct on-ramps but also amplify other on-ramps to sex trafficking. The resulting trauma, mental health needs, and associated behaviors – such as highly-sexualized behavior – are risk factors, as traffickers seek out traumatized youth and intellectually disabled youth who are more vulnerable. Systemic discrimination is a barrier that prevents young people at risk of sex trafficking from accessing critical resources.

Current or Past Involvement in the Child Welfare or Juvenile Justice Systems Increases the Risk of Exploitation

- Involvement in social services and justice systems can indicate that a child has had adverse experiences that put them at higher risk for child sex trafficking. These systems may also create adverse experiences (e.g., parent incarceration) that put them at higher risk.
- More directly, there are high-profile examples of how these systems put young people into the hands of traffickers, including meeting traffickers among staff, other youth, or foster care families.

Community Violence and the Fragmenting of Trust and Social Support Create More Opportunities for Youth to Be Exploited

- The impact of entrenched community violence breaks down community networks of care, leads to poor health outcomes such as depression and PTSD, and limits youths' positive future orientation or their ability to hope and plan for positive futures. Young people can feel trapped by their environment and circumstances and may be unable to see any options.
- Gangs, which are pervasive within the United States and along immigration routes, can manipulate and force children into sex trafficking.

Lack of Access to Adequate Education

- Lack of access to education is a social determinant of many poor health outcomes, and it can also be an on-ramp to sex trafficking. Schools often do not meet the educational needs of young people who fall behind academically and the education system does not identify and properly provide services to these young people. Inadequate education becomes an on-ramp for young people who are not receiving quality individualized education.

Social Isolation and Manipulation Through Relationships and/or Social Media

- Social isolation deprives youth of friendship, love, care, and acceptance making youth more vulnerable to manipulations by family, friends, and other individuals, including those online.
- Isolation from family and friends makes young people desperate for a sense of belonging. This need can create an increased dependence on social media for connection and support. Traffickers and abusers who recognize vulnerabilities and prey on their basic human needs use social media as a tool to exploit them and ensure they cannot escape.

Factors To Identify, Build, and Maintain Off-Ramps

Facilitate Access to Services that Build Economic Empowerment and Offer Assistance with Employment, Housing, and Benefits

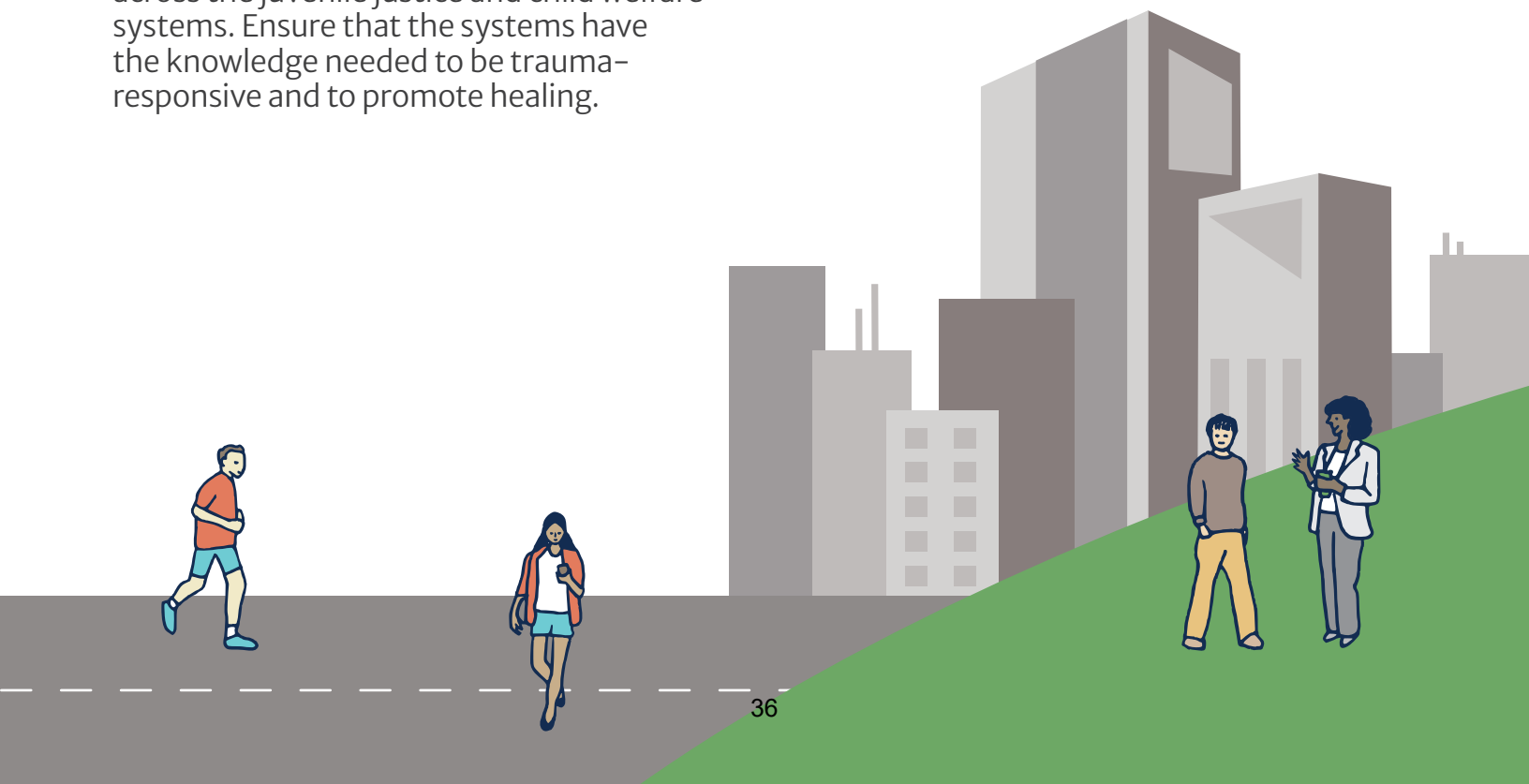
- Poverty can limit a family's or an individual's ability to fulfill their fundamental physiological and safety needs like food, water, and shelter. Therefore economic empowerment is a critical prevention and intervention tool. Examples include employment services and reconnection to educational resources.
- Sex trafficking intervention must include a housing-first model. Safe shelter is a fundamental physiological need and assistance with housing for youth and families can prevent opportunities for manipulation and coercion – providing a foundation for success in exiting sex trafficking.

Cultivate Trauma-Responsive Systems and Communities to Help Youth Heal from Their Experiences

- Provide training and education to social workers, attorneys, foster parents, service providers, judges, and probation officers across the juvenile justice and child welfare systems. Ensure that the systems have the knowledge needed to be trauma-responsive and to promote healing.

Offer Culturally Appropriate Diversion Programs

- Diversion programs help youth recover without introducing them to the juvenile justice system and limit their exposure to additional on-ramps.
- Diversion programs can keep young people who are survivors of sex trafficking out of detention centers and connected to community-based teams and service providers. Specialized teams should be composed of social workers trained to deal with the high levels of trauma. These teams should also have limited caseloads. Diversion program practitioners must also be trained in cultural humility, be welcoming to LGBTQIA+ youth, and be a constant source of empathy and support allowing youth to feel a level of consistency and safety.



Communities of Support

- Community-based resources for treatment are critical components of building the off-ramps to child sex trafficking. These resources include counseling, family support groups, and reproductive and general health services. Programs must be culturally and linguistically appropriate and trauma-informed. Communities of support facilitate youth building healthy relationships and healing from their trauma.

Positive Relationship Formation with Survivor Mentors and Peer Supports

- Survivor mentors and peer supports provide youth with opportunities to learn from other survivors who have succeeded after escaping sex trafficking.
- To be successful off-ramps, support and services must incorporate the voice and leadership of survivors. Survivor leaders are not only uniquely positioned to ensure services meet the needs of young people, they also serve as real-world examples that exiting sex trafficking is possible. Furthermore, youth need to be given the opportunity to build healthy, stable, and trustworthy relationships with peers and mentors who have had shared experiences.

Inspire Each Child's Future Orientation

- A young person's ability to imagine, hope, plan, and overcome obstacles allows them to plan for a successful future and exit sex trafficking.
- Empower survivors and provide space for them to develop skills, lead programs, build new self-concepts, and create their own plans for their futures.

Offer Legal Services

- The system must also adapt to provide the legal services that survivors need in order to access the off-ramps of child sex trafficking, including records sealing, expungement, vacatur, and support in obtaining visas and other immigration relief. These legal services ensure young people are not viewed as criminals but as survivors of crime. This helps build faith in the court system as a place that helps survivors. Immigration protections offer a critical off-ramp to child sex trafficking as immigration relief provides young immigrant children with the opportunity to work and live without fear of deportation.

Child Sex Trafficking On-Ramps and Off-Ramps Fact Sheet is a publication of the National Council of Juvenile and Family Court Judges (NCJFCJ). This material is made possible through funding from the NoVo Foundation under the Life Story Grant funding opportunity that focuses on strategies to address commercial sexual exploitation. Points of view or opinions do not necessarily represent the official position or policies of the NoVo Foundation or the NCJFCJ.

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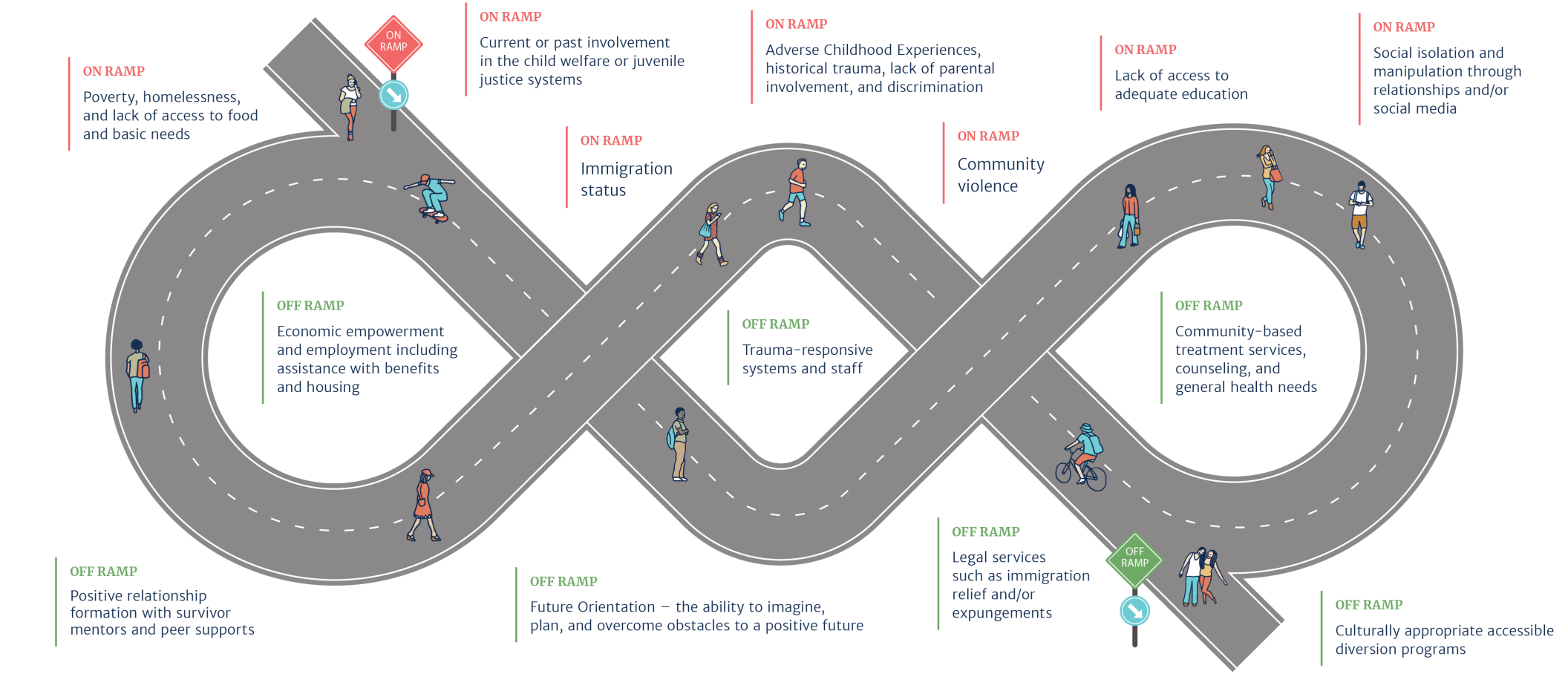

Child Sex Trafficking On-Ramps & Off-Ramps Fact Sheet

Children across the U.S. are being manipulated, coerced, and forced by family members, friends, partners, and individuals, including those on the internet, to exchange sex. Child sex trafficking occurs within various systems and community-level factors that create on-ramps where young people are exploited, but there are also solutions and off-ramps in those systems and communities.

Resources Related to the Indian Child Welfare Act Updates

Brackeen v. Haaland (2022) 99 U.S. 255, 143 S.Ct. 1609, 216 L.Ed.2d 254

ICWA Inquiry cases pending before the California Supreme Court:

In Re Dezi C., S275578. (B317935; 79 Cal.App.5th 769; Los Angeles County Superior Court; 19CCJP08030.) Petition for review after the Court of Appeal affirmed orders in a juvenile dependency proceeding. This case presents the following issue: What constitutes reversible error when a child welfare agency fails to make the statutorily required inquiry concerning a child's potential Indian ancestry?

In re Ja.O., S280572. (E079651; 91 Cal.App.5th 672; San Bernardino County Superior Court; J291035.) Petition for review after the Court of Appeal affirmed orders in a juvenile dependency proceeding. This case presents the following issue: Does the duty of a child welfare agency to inquire of extended family members and others about a child's potential Indian ancestry apply to children who are taken into custody under a protective custody warrant?

Pending California Legislation regarding ICWA

AB 81 – Legislation to strengthen California laws implementing ICWA

Legal Representation for Indian tribes in Juvenile cases

Tribal Dependency Representation (TDR) Program: $4.1 million for Tribes. Office of Tribal Affairs will administer the first ever publicly funded Legal Representation program for Tribes to ensure equity and inclusion.
Background
Pursuant to WIC section 317, parents, and children, as parties in a juvenile dependency proceeding, have access to publicly funded legal representation. However, despite Tribes being a party to Indian child custody proceedings, California has not historically extended access to publicly funded legal representation to federally recognized Tribes in California. As such, Tribes have encountered barriers when attempting to exercise their right to intervene, which has led to poorer outcomes for Indian children and families.
The California legislature responded by authorizing funding for legal counsel to represent Tribes in a California Indian child custody proceeding, as defined by subdivision (d) of section 224.1, that is initiated or ongoing in the juvenile court. The 2022 Human Services Omnibus Bill, Assembly Bill (AB) 207 (Chapter 573, Statutes of 2022), responded to this inequity by

establishing the Tribal Dependency Representation (TDR) Program to provide funding to assist any federally recognized Indian tribe located in California, or with lands that extend into California.

The TDR Program provides:

- Minimum base allocations provide each Indian tribe that enters into a specified agreement and submits a letter of interest with $15,000 for legal counsel,
- Allocation of funds of more than $15,000 per eligible tribe, based on a methodology determined in consultation with Tribes pursuant to the CDSS Tribal Consultation Policy.
- There shall be no tribal share of cost for any funds reimbursed.

Statute and Program Requirements:

- Requires Tribes to annually submit a letter of interest which includes certain requirements.
- Requires Tribes to enter into agreements (memorandum of understanding or MOU) to access program funds.

Section 10553.14 is added to the Welfare and Institutions Code, to read:
The Tribal Dependency Representation Program is hereby established to provide funding to assist any federally recognized Indian tribe located in California, or with lands that extend into California, in funding legal counsel to represent the Indian tribe in a California Indian child custody proceeding, as defined by subdivision (d) of Section 224.1, that is initiated or ongoing in the juvenile court.
An Indian tribe may designate another entity to administer the allocation of funds on a tribe's behalf upon designation by the tribe for this purpose. There shall be no tribal share of cost for any agreement executed under this section.
To be eligible for an allocation of funds under this allocation, an Indian tribe shall enter into an agreement with the department pursuant to subdivision (a) of Section 10553.1 or in accordance with Section 1919 of Title 25 of the United States Code.
An Indian tribe that seeks funding pursuant to this section shall submit an annual letter of interest to the State Department of Social Services.
For more information on this program email tribalaffairs@dss.ca.gov

US: Foster Care Legal Representation (Press release)

U.S. Department of Health and Human Services, Administration for Children and Families - September 28, 2023
ACF proposes to allow a title IV-E agency to claim Federal financial participation (FFP) for the administrative cost of an attorney providing: legal representation in foster care proceedings of a title IV-E agency or any other public agency or tribe that has an agreement in effect under which the other agency has placement and care responsibility of a title IV-E eligible child; independent legal representation of a child who is either a candidate for title IV-E foster care, or in title IV-E foster care (hereafter, referred to as a child "who is eligible for title IV-E foster care"), the child's

parent(s), and the child's relative caregiver(s) in foster care and other civil legal proceedings when such legal representation is found necessary by the Secretary to carry out the requirements in the title IV-E agency's title IV-E foster care plan; and legal representation of an Indian child's tribe, when the child's tribe intervenes in any state court proceeding for the foster care placement or termination of parental rights of an Indian child who is in title IV-E foster care or an Indian child who is a candidate for title IV-E foster care when such legal representation is found necessary by the Secretary to carry out the requirements in the title IV-E agency's title IV-E foster care plan.
https://www.federalregister.gov/documents/2023/09/28/2023-20932/foster-care-legal-representation

ICWA Compliance through a Kin-First Culture

Creating a Kin-First Culture – The American Bar Association

Why should child protection agencies adopt a kin-first approach? – Casey Foundation

Kinship Care for the Safety, Permanency, and Well-being of Children Removed from the Home for Maltreatment: A Systematic Review

*Placements of Indian Children in Juvenile Proceedings: What Judges & Attorneys Need to Know (Requires free registration with the Judicial Council's JCART website)
Our panel of experts will discuss the Indian Child Welfare Act (ICWA) placement preferences, what they are, when they apply, and the obligations imposed on the court and an agency to ensure that all placements under ICWA comply with the placement preferences or meet the requirements to deviate from the placement preferences. Panelists will also explore some of the common issues that arise and how to avoid them, as well as the rights of native children to a culturally appropriate placement under the Foster Care Bill of Rights even in cases where ICWA may not apply.
Live WEBINAR held 10/04/2022
Click here to view the video
Transcript:
PDF File
Material:
PDF File
Topics discussed include:
• Evidence required to support a finding that a placement is within the preferences, or that deviation from preferences is permitted;
• Tribally approved and specified homes; and
• Court's discretion on relative placements under SB 354.

Office of Senate Floor Analyses
(916) 651-1520 Fax: (916) 327-4478

THIRD READING

Bill No: AB 81
Author: Ramos (D), et al.
Amended: 9/1/23 in Senate
Vote: 27 - Urgency

SENATE JUDICIARY COMMITTEE: 11-0, 7/11/23
AYES: Umberg, Wilk, Allen, Ashby, Caballero, Durazo, Laird, Min, Niello, Stern, Wiener

ASSEMBLY FLOOR: 75-0, 4/20/23 - See last page for vote

SUBJECT: Indian children: child custody proceedings

SOURCE: California Tribal Families Coalition
Morongo Band of Mission Indians

DIGEST: This bill codifies within state law certain provisions relating to Indian children[1] currently codified in the federal Indian Child Welfare Act of 1978 (ICWA), and renames the provisions of the Family Code, the Probate Code, and the Welfare and Institutions Code as the Californian Indian Child Welfare Act (CalICWA).

Senate Floor Amendments of 9/1/23 expand cross-references to the California Indian Child Welfare Act (CalICWA) established by this bill into the remainder of the Codes; and make clarifications to existing law to ensure that state and private actors are taking the steps required under the federal Indian Child Welfare Act (ICWA) and CalICWA.

[1] Because the relevant federal and state laws uses the term "Indian" and does not capitalize "tribe," this analysis does the same.

ANALYSIS:

Existing federal law:

1) Provides that Indian tribes are domestic independent nations that exercise inherent sovereign authority which can be modified only through Congressional action. (*E.g.*, *Michigan v. Bay Mills Indian Community* (2014) 572 U.S. 782, 788-789.)

2) Establishes ICWA, which requires states to establish specific adoption preferences for a child who is a member of a federally recognized Indian tribe, or who is eligible to be a member and is the child of a member of a federally recognized Indian tribe, and to make specified efforts to notify the child's tribe when an Indian child is placed in foster care. (25 U.S.C. §§ 1901 et seq.)

3) Defines the following relevant terms within ICWA:

   a) An "extended family member" is as defined by the law or custom of the child's Indian tribe or, in the absence of such law or custom, is a person who has reached the age of 18 years of age and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

   b) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation, as defined.

   c) "Indian child" means any unmarried person who is under 18 years of age and is either (i) a member of an Indian tribe or (ii) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

   d) "Indian child's tribe" means (i) the Indian tribe in which an Indian child is a member or eligible for membership, or (ii) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.

   e) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

f) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village, as defined.

g) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoption under tribal law or custom; it does not include the unwed father where paternity has not been acknowledged or established.

h) "Reservation" means Indian country, as defined, and any other lands to which title is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

i) "Tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings. (25 U.S.C. § 1903.)

4) Establishes, in state proceedings involving the custody of an Indian child, or the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the child's Indian tribe, certain requirements relating to the proceedings, including:

a) Granting jurisdiction of certain custody, foster care placement, and parental rights termination cases involving an Indian child to the child's tribe.

b) Granting the right to intervene in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child to the child's tribe and Indian custodian.

c) Requiring the provision of notice to an Indian child's parent, Indian custodian, and the Indian tribe in an involuntary proceeding involving an Indian child, as specified; granting the child's tribe the right to examine the reports and documents filed with the court in connection with foster placement and parental termination proceedings; and requiring a showing that "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of an Indian family were made and were unsuccessful before a foster care placement is made or parental rights are terminated.

d) Establishing adoption placement preferences for Indian children, in the absence of good cause to the contrary, to a placement with (i) a member of the child's extended family, (ii) other members of the Indian child's tribe, or (iii) other Indian families, and similar foster care placement preferences.

e) Authorizing states and Indian tribes to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between states and Indian tribes. (25 U.S.C. §§ 1911-1922.)

5) Provides that, in any case where state or federal law applicable to a child custody proceeding under state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the state or federal court shall apply the state or federal standard. (25 U.S.C. § 1921.)

Existing state law:

1) Makes findings and declarations relating to the state's implementation of ICWA:

a) That there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members or citizens of, or are eligible for membership or citizenship in, an Indian tribe.

b) It is in the interest of an Indian child that the child's membership or citizenship in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of an Indian child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled. (Welf. & Inst. Code, § 224.)

2) Establishes the juvenile court, which is intended to provide for the protection and safety of the public and minors and nonminor dependents falling under its jurisdiction as dependents or wards. (Welf. & Inst. Code, §§ 202, 245.)

3) Defines, for purposes of matters relating to the juvenile court and other matters relating to children addressed in Division 10 of the Welfare and Institutions Code, unless the context requires otherwise, the terms "Indian," "Indian child,"

"Indian custodian," "Indian tribe," "reservation," and "tribal court" as provided in ICWA; and when used in connection with an Indian child custody proceeding, defines "extended family member" and "parent" as provided in ICWA. (Welf. & Inst. Code, § 224.1)

4) Defines, for purposes of the Family Code, unless the context otherwise requires, the terms "Indian," "Indian child," "Indian child's tribe," "Indian custodian," "Indian organization," "Indian tribe," "reservation," and "tribal court," re used as provided in ICWA; and when used in connection with an Indian child custody proceeding, defines "extended family member" and "parent" as provided in ICWA. (Fam. Code, § 170.)

5) States that ICWA, and specified provisions of the Welfare and Institutions Code, shall apply in the following guardianship or conservatorship proceedings arising under the Probate Code:

   a) In any case in which the petition is a petition for guardianship of the person and the proposed guardian is not the natural parent or Indian custodian of the proposed ward, unless the proposed guardian has been nominated by the natural parents and the parents retain the right to have custody of the child returned to them upon demand.

   b) To a proceeding to have an Indian child declared free from the custody and control of one or both parents brought in a guardianship proceeding.

   c) In any case in which the petition is a petition for conservatorship of the person of a minor whose marriage has been dissolved, the proposed conservator is seeking physical custody of the minor, the proposed conservator is not the natural parent or Indian custodian of the proposed conservatee and the natural parent or Indian custodian does not retain the right to have custody of the child returned to them upon demand. (Prob. Code, § 1459.5(b).)

This bill:

1) Provides that the sections of the Family Code, the Health and Safety Code, the Probate Code, and the Welfare and Institutions Code that apply to proceedings involving an Indian child, including the definitions set forth in Welfare and Institutions Code Section 224.1, shall be collectively known as the CalICWA.

2) States that the Legislature finds and declares that federally recognized tribes are sovereign nations with inherent rights to self-governance. Federally recognized tribes have the sole authority to determine their tribal citizenship, and this

includes the right to regulate domestic relations involving their citizens. The federal government recognizes its trust relationship with federally recognized tribes and the unique political status of federally recognized tribes and their citizens. It is the policy of the State of California to support, protect, and uplift this inherent tribal sovereignty. Tribes have been protecting and caring for their children from Time immemorial. The State of California is committed to protecting essential tribal relations and the political status of federally recognized tribes by recognizing a tribe's right to protect the health, safety, and welfare of its citizens.

3) Incorporates definitions from ICWA into CalICWA within Welfare and Institutions Code Section 224.1 and into related provisions of the Family Codes, Health and Safety Codes, and Probate Codes.

4) Adds, to existing Family Code, Health and Safety Code, Probate Code, and Welfare and Institutions Code sections that refer to ICWA, references to CalICWA.

5) Clarifies certain requirements under ICWA and CalICWA in cases involving an Indian child, including:

   a) Stating in the Probate Code that, as required by ICWA and CalICWA, in any case in which the court determines indigency, the parent or Indian custodian of an Indian child shall have the right to court-appointed counsel in any removal, placement, or termination proceeding.

   b) Requiring within the Probate Code, in any case in which the court or petitioner knows or has reason to know that a proposed ward or conservatee is an Indian Child, notice of every subsequent hearing in the proceeding to comply with specified provisions of ICWA and CalICWA and be sent to specified entities, including the tribe in which the child may be a member or eligible to be a member, as specified.

   c) Clarifying that the "active efforts" to maintain or reunite an Indian child with their family required under ICWA and CalICWA must begin at the initial agency contact with a child who is known to be, or for whom there is reason to know that child is, an Indian child; and that the contact made with extended family members should include consulting with them as possible placements for the child.

   d) Clarifying that a county welfare department or county probation department has an obligation to inquire whether a child is an Indian child,

as specified, when a child is placed on a temporary custody pursuant to a warrant.

e) Clarifying that the responsibility for conducting a diligent search to seek placements for an Indian child in the descending order of priority required by ICWA remains on the person or agency who removed the child from their parent, guardian, or Indian custodian's custody.

6) Makes nonsubstantive conforming changes.

7) Contains an urgency clause.

Comments

For over a hundred years spanning the nineteenth and twentieth centuries, U.S. policy condoned and encouraged state governments and private to forcibly remove Indian children from their homes, their parents, and their tribes, with the explicit goal of cutting them off from their heritage so that they could be "civilized." In 1978, when Congress could no longer overlook the destruction being wrought on Indian communities, it passed ICWA, which imposed minimum standards for proceedings involving the custody and placement of Indian children, as defined, with the overall goal of preserving the ties between an Indian child and their tribe whenever feasible.[2]

While ICWA has been in effect for decades, it has recently been the subject of increased litigation from individuals who disagree with ICWA's goal of maintaining tribal ties, and from persons who appear to disagree with the concept of tribal sovereignty generally. These efforts reached the Supreme Court after an *en banc* panel of the United States Court of Appeals for the Fifth Circuit held that ICWA was unconstitutional; fortunately, the Supreme Court reversed the Fifth Circuit and confirmed ICWA's viability.[3] Nevertheless, the Supreme Court's ruling did not reach all of the arguments against ICWA—certain arguments were not considered because the petitioners lacked standing—so it is likely that efforts to challenge ICWA will continue.

Here in California, ICWA is partially codified in the codes: some of ICWA's requirements are expressly repeated in state law, while others—such as certain definitions—merely incorporate ICWA provisions by reference. Because of the Supremacy Clause of the United States Constitution,[4] California is required to

[2] 25 U.S.C. §§ 1901 et seq.
[3] *Haaland v. Brackeen* (Jun. 15, 2023) 143 S.Ct. 1609.
[4] U.S. Const., art. VI, par. 2.

follow whether or not it is codified in state law; but there are advantages to having ICWA also codified in state law, such as the convenience of having the relevant law in a single location. California has also added protections for Indian children in some circumstances over and above what is required by ICWA.

This bill fully incorporates, on an urgency basis, ICWA into the Family, Probate, and Welfare and Institutions Codes; the collective provisions are known as the CalICWA. By expressly setting forth the definitions and other subject matter from ICWA in state law, this bill establishes a wholly independent state-law framework for ensuring that custody decisions involving Indian children properly account for the child's tribal relationships and the interest in maintaining those ties. This bill also updates cross-references in the Health and Safety Code to reflect the implementation of CalICWA. These provisions are intended to allow California to continue providing these protections to Indian children in the event that a court prohibits the enforcement of ICWA at the federal level.

Additionally, this bill clarifies certain obligations relating to cases involving Indian children. These clarifications include specifying that a county welfare department or county probation department has an obligation to inquire whether a child is an Indian child, as specified, when a child is placed on a temporary custody pursuant to a warrant under Welfare and Institutions Code section 340, and that the "active efforts" to maintain or reunite an Indian child with their family required under ICWA and CalICWA must begin at the initial agency contact with a child who is known to be, or for whom there is reason to know that child is, an Indian child. These clarifying provisions are intended to ensure that the federal and state goals of keeping Indian children with their families and tribes, whenever possible, are met.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 9/1/23)

California Tribal Families Coalition (co-source)
Morongo Band of Mission Indians (co-source)
ACLU California Action
Agua Caliente Band of Cahuilla Indians
Cachil Dehe Band of Wintun Indians of the Colusa Indian Community
California Open
Habematolel Pomo of Upper Lake
Hoopa Valley Tribe
Jamul Indian Village of California
Picayune Rancheria of Chukchansi Indians

Seneca Family of Agencies
Tejon Indian Tribe
Tolowa Dee-ni' Nation
Torres Martinez Desert Cahuilla Indian Tribe

OPPOSITION: (Verified 9/1/23)

None received

ARGUMENTS IN SUPPORT: According to the California Tribal Families Coalition:

> Although ICWA was enacted over 40 years ago, Indian children continue to be overrepresented in the child welfare system at a rate at least two times that of White children – in some counties in California, the rate is as high as four times. This is because meaningful implementation has not yet been achieved consistently across the state. However, the federal ICWA is so important and so effective at rolling back past practices of Indian family separation, that California passed similar legislation as early as 2006. As attacks on the federal ICWA continue throughout the nation, California's codification of its provisions may also be threatened.
>
> This bill was introduced to strengthen California child welfare provisions leading up to a United States Supreme Court case known as *Haaland v. Brackeen*. In a 7-2 opinion on June 15, 2023, the Supreme Court unreservedly held that all challenges made to the federal Indian Child Welfare Act (ICWA) were rejected, some on the merits and others for lack of standing. The decision affirms what tribal nations in California have always known and advocated for – that Indian children and families require remedial protections to reduce disproportionality in child welfare and ICWA provides the protections needed to improve outcomes.
>
> Although the Supreme Court decision was overwhelmingly positive, there are legal nuances throughout the opinion that California now has the opportunity to address in its own state law version of ICWA. AB 81 (Ramos) would strengthen California protections, in part, by including California state law citations in addition to references to the federal Indian Child Welfare Act. This provides clarity for practitioners in the courtroom to cite to state law and ensures that state law provisions remain regardless of what changes may happen to the federal Act moving forward.

ASSEMBLY FLOOR: 75-0, 4/20/23
AYES: Addis, Aguiar-Curry, Alanis, Alvarez, Arambula, Bains, Bauer-Kahan, Bennett, Berman, Boerner Horvath, Bonta, Bryan, Calderon, Juan Carrillo, Wendy Carrillo, Cervantes, Chen, Connolly, Davies, Dixon, Essayli, Flora, Mike Fong, Vince Fong, Friedman, Gipson, Grayson, Haney, Hart, Holden, Hoover, Irwin, Jackson, Jones-Sawyer, Kalra, Lackey, Lee, Low, Lowenthal, Maienschein, Mathis, McCarty, McKinnor, Muratsuchi, Stephanie Nguyen, Ortega, Pacheco, Papan, Jim Patterson, Joe Patterson, Pellerin, Petrie-Norris, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Sanchez, Santiago, Schiavo, Soria, Ting, Valencia, Villapudua, Waldron, Wallis, Ward, Weber, Wicks, Wilson, Wood, Zbur, Rendon
NO VOTE RECORDED: Megan Dahle, Gabriel, Gallagher, Garcia, Ta

Prepared by: Allison Whitt Meredith / JUD. / (916) 651-4113
9/5/23 12:38:58

****** END ******

Cross-Jurisdictional Collaboration on the Opioid Crisis in Indian Country

The opioid crisis is a nationwide problem of addiction to opioids, prescription pain relievers, heroin, and man-made opioids such as fentanyl. The addictiveness of these drugs continues to be misunderstood, leading to the misuse of these drugs and hundreds of thousands of overdose deaths. The opioid crisis has also negatively affected millions of individuals, their families, and their communities. In the United States, from 1999 to 2009, deaths involving opioids were more common among American Indian and Alaska Native (AIAN) communities than any other racial or ethnic minority group.[1] Can courts develop cross-jurisdictional strategies to address the issue and improve outcomes for individuals and families involved in the justice systems?

Readings & Resources:

- NCAI (National Congress of American Indians) Opioid Initiative
- Tribal Response to the Opioid Epidemic in California (September 2020)
- Native populations and the opioid crisis: forging a path to recovery
- Tribal Healing to Wellness Courts: Addressing the Opioid Crisis
- Adult Drug Courts and Medication-Assisted Treatment for Opioid Dependence

1. **How is the opioid crisis affecting court users in your courts?**

2. **How can we better identify the effects of opioid use across case types?**

3. **How can we leverage state and tribal resources to get individuals the best treatment available?**

4. **Other thoughts?**

[1] See https://ipr.usc.edu/wp-content/uploads/2020/11/TMAT-Community-Report-FINAL-2020.10.30.pdf

Partnerships & Initiatives (/initiatives/partnerships-initiatives/resources-for-indian-country-coronavirus)

- Resources for Indian Country Coronavirus (/initiatives/partnerships-initiatives/resources-for-indian-country-coronavirus)
- Tribal Interior Budget Council (/initiatives/bia-tribal-budget-advisory-council)
- EPA Environmental Information Exchange Network (/initiatives/partnerships-initiatives/epa-environmental-information-exchange-network/epa-network)
- Our Natural Resources (/initiatives/our-natural-resources)
- Native Financial Education (/initiatives/nativefinancial-ed)
- Partnership for Tribal Governance (/ptg)
- Project on the Judiciary (/initiatives/project-on-the-judiciary)
- Supreme Court Project (/initiatives/supreme-court-project)
- Tribal Health Care Implementation (/initiatives/tribalhealthcare-implementation)
- Tribal-State Collaboration Project (/initiatives/partnerships-initiatives/tribalstate-collaboration-project)
- NCAI Intertribal Tax Initiative (/initiatives/partnerships-initiatives/ncai-tax-initiative/ncai)
- NCAI Opioid Initiative (/initiatives/partnerships-initiatives/ncai-opioid-initiative)
- Allies for Indian Country (/initiatives/partnerships-initiatives/allies-for-indian-country)
- Tribal Food Sovereignty Advancement Initiative (/initiatives/partnerships-initiatives/food-sovereignty)
- Climate Action Task Force (/initiatives/partnerships-initiatives/climate-action-task-force)

Campaigns (/initiatives/campaigns)

NCAI Policy Research Center (/initiatives/ncai-policy-

NCAI Opioid Initiative

OVERVIEW

The National Congress of American Indians (NCAI) is working with tribes to help end the opioid epidemic in tribal communities. The problem of opioid supply and demand are significant in AI/AN communities, and solutions require collaboration across multiple sectors.

This work grew out of the work of the NCAI Substance Abuse Task Force and input from tribes at NCAI meetings and events. This webpage includes the latest resources for tribe to help address this growing problem in our communities.

SCOPE OF THE PROBLEM

The opioid epidemic in American Indians and Alaska Natives (AI/ANs) is basically a problem of supply and demand. Opioids include: 1) prescription products such as oxycodone, hydrocodone, morphine, methadone, and fentanyl; and 2) illegal drugs including heroin and illicitly manufactured fentanyl.

Opioids — a problem of supply and demand

The opioid epidemic is complex and has resulted from the following problems of supply and demand:

Supply — opioids are made available for overuse and abuse through the following sources:

- Provider prescription and over-prescription
- Overuse of opioids in pain management practices
- Pharmacy supply - improper access, diversion or security breaches
- Impaired provider access, diversion, self-prescription
- Community access through drug dealers, theft of prescribed opioids
- Pharmaceutical company distribution of large amounts of opioids in communities
- Illegal manufacturing

Demand — opioids are available and in demand due to the following issues:

- Lack of access to appropriate care for conditions requiring pain management
- Use for relief of mental health issues, trauma, chronic stress
- Cause of substance abuse/addiction, overdose, neonatal abstinence syndrome
- Usage by impaired providers
- Poverty, unemployment and economic opportunity in drug trafficking, sales, theft
- Lack of access to prevention/treatment/recovery services
- Lack of funding to address the opioid epidemic

Solutions — a wide variety of opportunities in multiple sectors

The solutions to the opioid epidemic require solutions in many areas, including the following:

Health provider/system education, training, monitoring, security

- Providers – pain management education, drug prescribing guidelines, drug monitoring programs
- Pharmacy – education/counseling patients on proper use, potential for abuse, security measures to prevent diversion, double signatures for dispensing
- Identification and treatment for impaired providers

research-center)

• Increased access to specialty care, referral funding for conditions requiring pain management

Opioid addiction prevention, treatment, recovery strategies

• Better diagnosis of addiction, access to treatment/recovery services, inpatient/outpatient treatment, medication assisted therapy, naloxone use
• Strategies to address root causes: trauma, chronic stress, mental health counseling/treatment
• Additional funding for grants to communities for interventions
• Education and treatment guidelines for neonatal abstinence syndrome

Law enforcement strategies

• Enhanced arrest/convention of drug trafficking, diversion, theft, illegal manufacturing
• Drug court options for addicts instead of jail/prison time
• Increased access to treatment/recovery services for the incarcerated

Community strategies

• Community opioid emergency declaration
• Community needs assessment, strategic planning, collaboration with other stakeholders
• Community awareness, education, wellness and prevention activities
• Naloxone distribution
• Community economic development strategies
• Implementation of the recommendations of the Tribal Behavioral Health Agenda

Litigation strategy

• Pharmaceutical company oversupply – seek economic and injunctive relief to prevent future abuses

Federal/State/Local government efforts

• Education and awareness of opioid crisis, available resources, collaboration with tribes
• More data/research on needs, solutions, sharing of best and promising practices
• Increased resources for provider, treatment/recovery, law enforcement and community strategies

RESOURCES

Policy briefs and reports

Tribal Leaders Toolkit: Strengthening our Nations 2018 - Addiction Task Force. (http://www.ncai.org/initiatives/Addiction_Tribal_Leader_Toolkit_FINAL.pdf) This toolkit includes the latest policy brief on the opioid epidemic from the NCAI Policy Research Center, a briefing paper on the 2018 Opioids Legislation, and presentations from tribes on their efforts to address the opioid epidemic in their communities.

Research Policy Update: The Opioid Epidemic: Definitions, Data, Solutions (http://www.ncai.org/policy-research-center/research-data/prc-publications/NCAI_PRC_Research_Policy_Update_Opioids_March_2018_FINAL.pdf) (March 2018). This update provides information on the complexity of the opioid epidemic, and provides information on definitions, current data for the U.S. and AI/AN overdose deaths, and discusses the origins of this epidemic along with possible solutions.

Responding to the Opioid Crisis: An Update for Tribal Leaders (http://www.ncai.org/policy-research-center/research-data/prc-publications/Opioid_Brief_NCAI_PRC_June_2017_FINAL.pdf) (Summer 2017). This brief summarizes impact trends of the opioid crisis in Native communities and provides tribal leaders with recommendations for prevention and intervention to protect the health of their citizens.

Webinars/Trainings

NCAI Policy Research Center Monthly Webinar Series: Neonatal Opioid Withdrawal Syndrome (NOWS) in American Indians and Alaska Natives.

(https://www.youtube.com/watch?v=RVqNUIICAMg&feature=youtu.be) This webinar in July 2018 featured an overview of Neonatal Opioid Withdrawal Syndrom by CAPT Ted L. Hall Pharm D, BCPP, RPh, Ho-Chunk Nation Director of Pharmacy/Chief Pharmacist, IHS Heroin, Opioids, and Pain Efforts (HOPE) Committee - Perinatal Substance Use Workgroup Co-Chair.

NCAI Opioid Initiative Monthly Webinar Series: Tribal Litigation Options to Combat the Opioid Epidemic. This webinar in April 2018 featured an update on litigation options for tribes to combat the opioid epidemic.

NCAI Policy Research Center Monthly Webinar Series: The Opioid Epidemic - IHS Response to a National Crisis. (https://youtu.be/qPsepeuwPJk) This webinar in March 2018 featured a review of what the Indian Health Service (IHS) is doing to address the opioid epidemic in AI/AN communities. The speaker was CAPT Cynthia Gunderson PharmD, Vice Chair of the IHS Heroin, Opioids, and Pain Efforts (HOPE) Committee.

Meetings/Hearings

NCAI 2019 Executive Council Winter Session, Washington DC - Addiction Task Force, February 11, 2019 - **View Agenda** *(coming soon!)*

NCAI 75th Annual Convention & Marketplace, Denver CO - Opioids Breakout Session, October 23, 2018 - **View Agenda (http://www.ncai.org/Opioids_Breakout_Agenda__-_NCAI_Annual_2018.pdf)**

Senate Committee on Indian Affairs – **Oversight Hearing on "Opioids in Indian Country: Beyond the Crisis to Healing the Community" (https://www.indian.senate.gov/hearing/oversight-hearing-opioids-indian-country-beyond-crisis-healing-community)**

NCAI 2018 Mid Year Conference, Kansas City, MO - SAMHSA Tribal Listening Session, June 3, 2018 - **View Tribal Leader Letter; (http://www.ncai.org/conferences-events/ncai-events/DTLL_2018_NCAI_Listening_Session_5-31-18.pdf)** (http://www.ncai.org/conferences-events/ncai-events/DTLL_2018_NCAI_Listening_Session_5-31-18.pdf)Breakout Session on "Utilizing Federal and Community Resources to Overcome the Opioid Epidemic," June 4, 2018 - (http://www.ncai.org/conferences-events/ncai-events/Overcoming_Opioid_Epidemic_TLSF_Session_Agenda.pdf) **View Agenda (http://www.ncai.org/conferences-events/ncai-events/DTLL_2018_NCAI_Listening_Session_5-31-18.pdf)**

Tribal consultations

NCAI 2018 Mid Year Conference, Kansas City, MO - SAMHSA Tribal Listening Session, June 3, 2018 - **View Tribal Leader Letter (http://www.ncai.org/conferences-events/ncai-events/DTLL_2018_NCAI_Listening_Session_5-31-18.pdf) (http://www.ncai.org/conferences-events/ncai-events/DTLL_2018_NCAI_Listening_Session_5-31-18.pdf)**

Opioid Consultation and Listening Session – NIH, SAMHSA, IHS
Monday, May 21, 2018
Prior Lake MN
For more information, visit: **www.nihb.org (http://www.nihb.org/)**

Funding opportunities

Search for funding opportunities on sites such as grants.gov, SAMHSA.gov, CDC.gov.

Partner Resources

SAMHSA – Tribal Behavioral Health Agenda (https://store.samhsa.gov/product/The-National-Tribal-Behavioral-Health-Agenda/PEP16-NTBH-AGENDA)

NCAI Links

Policy Issues (/policy-issues)
Resources (/resources)
Conferences & Events (/conferences-events)
Initiatives (/initiatives)
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Terms of Use (/terms-of-use)
About Tribes (/about-tribes)
Native Youth (/native-youth)
About NCAI (/about-ncai)
Membership (/membership)
Privacy Policy (/privacy-policy)

National Congress of American Indians (NCAI)
Embassy of Tribal Nations
1516 P Street NW, Washington, DC 20005
Phone: (202) 466-7767, Fax: (202) 466-7797

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TRIBAL RESPONSE TO THE OPIOID EPIDEMIC IN CALIFORNIA

[SEPTEMBER 2020]

The opioid crisis is a nationwide problem of addiction to opioids, prescription pain relievers, heroin, and man-made opioids such as fentanyl. The addictiveness of these drugs continues to be misunderstood, leading to the misuse of these drugs and hundreds of thousands of overdose deaths. The opioid crisis has also negatively affected millions of individuals, their families, and their communities. In the United States, from 1999 to 2009, deaths involving opioids were more common among American Indian and Alaska Native (AIAN) communities than any other racial or ethnic minority group.

To address the opioid crisis, the 21st Century CURES Act was passed in December 2016, creating a program called the State Targeted Response (STR) to the Opioid Crisis. Through this program, almost $1 billion became available to American states and territories through grants aimed at funding interventions addressing the opioid crisis. The states and territories that received these funds were able to use the money to make it easier for people to access treatment for opioid use disorder (OUD). The most commonly referenced treatment approach is called medication-assisted treatment (MAT). MAT is a combination of therapy and medications that both help individuals recover from OUD and prevent overdosing. Other important goals of the STR program include encouraging prevention efforts, providing treatment, and strengthening recovery support services.

California's health agency, the Department of Health Care Services (DHCS), received funds from the STR program and partnered with organizations across the state to focus on the opioid crisis in Tribal and Urban Indian communities. This partnership led to the creation of the Tribal MAT Project. The five main Tribal MAT partner programs and the efforts that they have made are detailed in this report. The data in this report is reflective of efforts through June 2020.

[Tribal MAT] A unified response to the opioid crisis in California's Indian Country

CCUIH	The California Consortium for Urban Indian Health (CCUIH) is a nonprofit statewide partnership of Urban Indian health organizations and substance abuse treatment facilities that support health promotion and access amongst urban American Indians in California. Under the Tribal MAT Project, CCUIH focused on five important activities: naloxone training, educational materials development and distribution, coalition building, outreach, and support of partner organizations.
California Rural Indian Health Board, Inc. Since 1969	The California Rural Indian Health Board (CRIHB) is a network of Tribal Health Programs, which are controlled and sanctioned by American Indian people, and their Tribal Governments. CRIHB is committed to elevating and promoting the health status and social conditions of the American Indian People in California. Under the Tribal MAT Project, CRIHB focused on five major activities: naloxone training, educational materials distribution, coalition building, outreach, and support of partner organizations.
TeleWell – Indian Health Program MAT Project	TeleWell Behavioral Medicine, a program under Sprenger Behavioral Medicine Inc., provides psychiatric and addiction medicine services using telehealth technology. TeleWell partnered with California Indian Health Programs and local American Indian and Alaska Native (AIAN) communities to integrate culturally sensitive healing and best practices into their services. Throughout the Tribal MAT Project, TeleWell focused on improving access to MAT by delivering teleMAT services, offering webinars and remote recovery platforms, and providing remote and onsite clinic support.
Project ECHO® University of California Los Angeles Integrated Substance Abuse Programs	A team from UCLA's Integrated Substance Abuse Programs (ISAP) implemented a Tribal MAT educational model called the Extension for Community Healthcare Outcomes (ECHO). The Project ECHO model uses an established remote education approach to support healthcare providers in Indian Country to deliver MAT. Additionally, the ECHO model is a distance-based learning method used across the country to link specialists at academic medical centers with local clinics via web-based training. The focus of the Tribal MAT Monthly ECHO Clinics was to provide MAT education and technical assistance to those providing healthcare in American Indian and Alaska Native (AIAN) communities experiencing opioid use disorder (OUD).
Two Feathers Native American Family Services	Two Feathers Native American Family Services (NAFS) provides culturally driven mental health and wellness programming to all Native American youth and families living in Humboldt County. Under the Tribal MAT Project, Two Feathers-NAFS created a three-Tribe consortium that implemented intensive mental health and wellness services to a small number of multi-stressed Native families. Services included outreach, prevention efforts, and a culturally adapted wraparound program called Making Relatives.

TRIBAL MAT COLLABORATIVE EFFORTS

Naloxone Training
In order to decrease overdose deaths, CCUIH and CRIHB purchased NARCAN® (naloxone) Nasal Spray and distributed it to Urban Indian and Tribal stakeholders. Naloxone is a spray that has been shown to save lives by reversing an opioid overdose. CCUIH and CRIHB gave training sessions on opioid overdose recognition, response, and naloxone administration using culturally adapted materials. CRIHB also provided additional educational events on domestic violence, suicide, and harm reduction.

Educational Materials
CCUIH and CRIHB developed and disseminated culturally adapted materials specific for AIAN patients, providers, and other stakeholders intended to educate communities about OUD and MAT. Materials included brochures, booklets, trifolds, and posters with information about prevention, treatment, and recovery.

Webcam Provision
CRIHB supported other Tribal MAT program outreach efforts by distributing webcams to community partners who lacked the equipment necessary to fully participate in the Tribal ECHO clinics and TeleWell webinars.

MAT Funding Support
CCUIH and CRIHB developed MAT funding opportunities to support their partner organizations. This additional funding allowed partners to accomplish their goals of increasing access to MAT, reducing unmet treatment needs, reducing the incidence of opioid use disorder, and reducing opioid overdose related deaths.

Tribal MAT Champions
CCUIH and CRIHB developed a new community outreach position called MAT Champions. These individuals communicated and developed partnerships with Tribal, Urban, and community MAT organizations. They shared educational materials, hosted training sessions, and assisted local coalitions in developing resources.

Coalition Building
Both CCUIH and CRIHB collaborated to develop and lead the California Indian Opioid Safety Coalition (CIOSC). CIOSC is a professional statewide partnership of American Indian-serving organizations working together to address the opioid epidemic in California's Indian communities. Throughout the Tribal MAT Project, CIOSC engaged its members by hosting collaborative meetings and webinars.

CALIFORNIA INDIAN OPIOID SAFETY COALITION (CIOSC) MEETINGS

● 1st CIOSC Meeting
"Kick off"
# of attendees **104**
# of speakers **14**

● 2nd CIOSC Meeting
"Planning for Coalition Success"
# of attendees **31**
# of speakers **6**

● 3rd CIOSC Meeting
"System of Care"
# of attendees **17**
# of speakers **5**

● 4th CIOSC Meeting
"Planning for Action"
# of attendees **114**
# of speakers **18**

266 = Total attendee count

43 = Total presenter count

CCUIH

NALOXONE TRAINING

29 Trainings provided

401 Training attendees

1,087 Naloxone kits distributed

EDUCATIONAL MATERIALS

9,700 Educational brochures distributed

781 Educational brochures downloaded

1,400 Educational posters distributed

718 Educational posters downloaded

CALIFORNIA RURAL INDIAN HEALTH BOARD, INC. SINCE 1969

NALOXONE TRAINING

103 Trainings provided

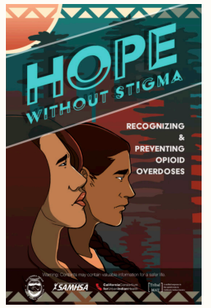
1,351 Training attendees

12,024 Naloxone kits distributed

EDUCATIONAL MATERIALS

15,210 Educational brochures distributed

19,765 Educational posters distributed



Educational Webinars
TeleWell developed and provided an educational webinar series to aid community partners and healthcare providers who work with individuals experiencing OUD. Monthly webinars were held and made available on their website. Topics included information about OUD, potential treatments, cultural and traditional components of recovery, and how to adapt services during COVID-19 restrictions.

MAT Technical Assistance
TeleWell worked directly with Indian health clinics across the state to provide onsite and remote assistance for the development of their OUD programs. Services were provided to both new and existing MAT programs.

TeleMAT Care Provision
TeleWell provided telehealth recovery support services to American Indian patients who would otherwise be out of reach. Patients could receive care through video meetings with doctors specializing in MAT and addiction treatment.

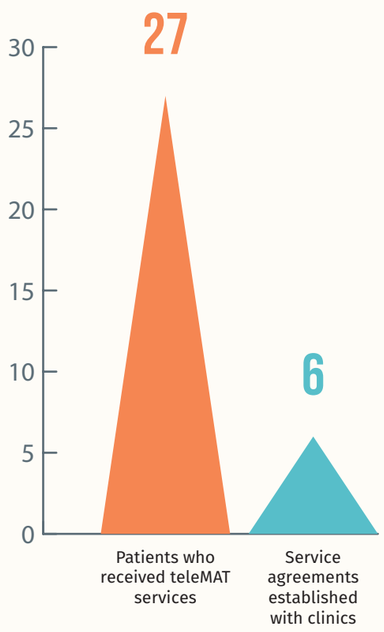
Spirit of Healing Recovery Meetings
The TeleWell team hosted web-based recovery support meetings called “Spirit of Healing” which used cultural approaches to wellness and recovery.

SPIRIT OF HEALING

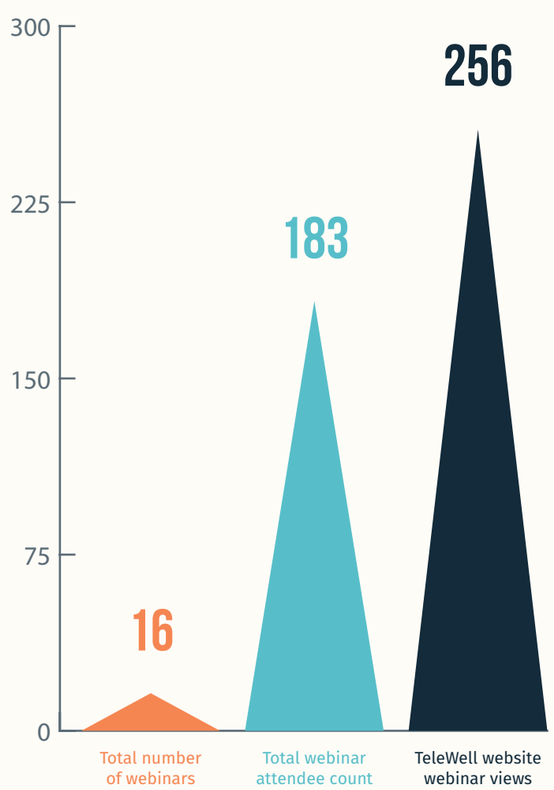
65

Spirit of Healing meetings since October 2019

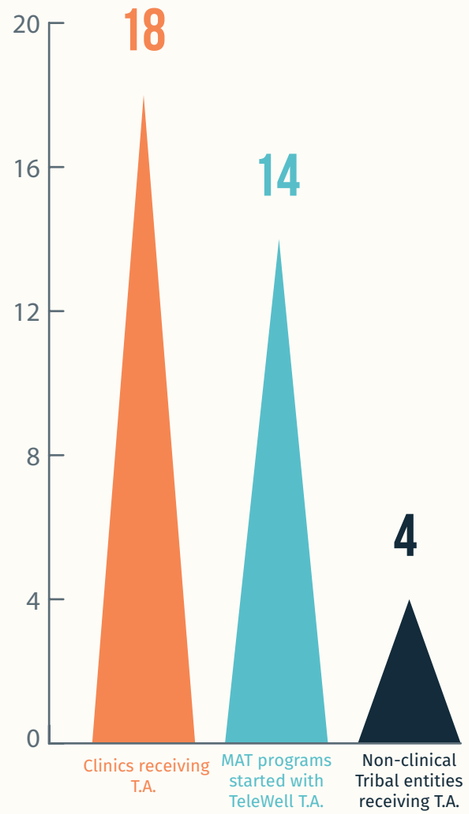
TELEMAT SERVICES



EDUCATIONAL WEBINARS



MAT TECHNICAL ASSISTANCE (T.A.)



Tribal MAT ECHO Clinic

The Tribal MAT ECHO team at UCLA ISAP developed and hosted online sessions (called 'clinics') that connected doctors and other healthcare workers throughout California. The monthly Tribal MAT ECHO Clinics were one-hour sessions that included a didactic (designed to teach) presentation about MAT and case-based learning to address clinical questions from healthcare providers working with community members experiencing OUD. The team conducted clinics on various topics relevant to OUD treatment in AIAN communities.

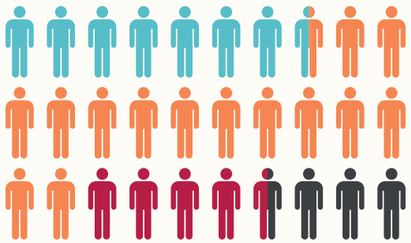
27

Webcams distributed

Provided to:

- Indian Health Programs
- Community providers

Clinic Attendee Breakdown



25% Medical

48% Administrative

15% Behavioral

12% Other

17

Tribal MAT ECHO Clinics

Topics included:

- Traditional healing
- Historical trauma
- Practitioner & patient interactions
- Pain management & risk reduction
- Stigma
- Overdose prevention
- Case studies

444

Clinic attendees

Representing:

- Urban Indian organizations
- Tribal organizations
- Treatment/recovery centers
- Consultant groups
- Federally Qualified Health Centers (FQHCs)

TWO FEATHERS
NATIVE AMERICAN FAMILY SERVICES

450

Youth participated in culturally-based prevention activities

50

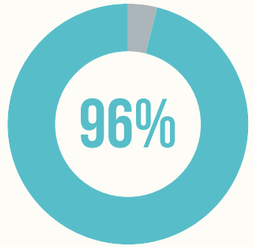
Youth registered through A.C.O.R.N. cultural prevention program services

225

Stakeholders attended the **2019 Critical Issues in Native American School Based Mental Health Conference**

86

Youth and families identified and referred for services



Percent of youth and families successfully engaged in services

110

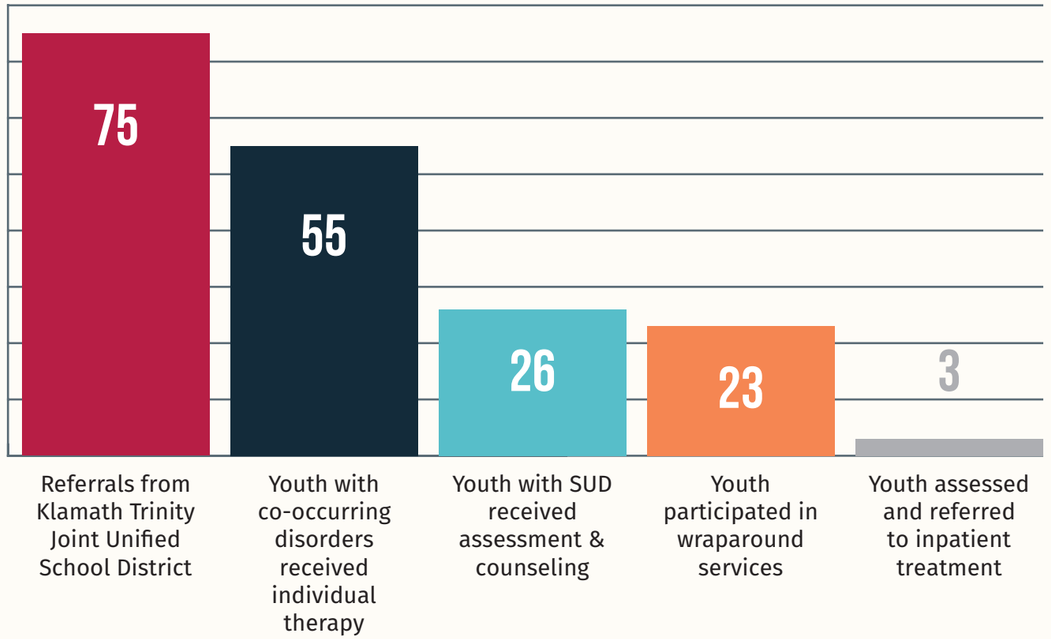
Youth participated in substance use disorder prevention/early intervention group

TWO FEATHERS
NATIVE AMERICAN FAMILY SERVICES

Tribal Youth and Family Services Consortium
Two Feathers developed a community based youth and family services consortium with Tribal partners. This consortium focused on creating a culturally informed system of care that provided OUD prevention and treatment services, suicide prevention, and intensive case management services for AIAN youth and their families. These wraparound services were built on individual and family strengths to help improve overall well-being.

Culturally Appropriate Outreach and Prevention Efforts
Two Feathers developed and implemented culturally-based programs alongside local Native leaders, non-profit organizations, and agencies. These programs were focused on youth and families and promoted youth resiliency, socio-emotional skills, mental well-being, and community building. To encourage community engagement, Two Feathers hosted the 2019 Critical Issues in Native American School Based Mental Health Conference in collaboration with the Indian Health Service, Humboldt County Department of Health and Human Services, and local school districts.

TWO FEATHERS MAT SUBSTANCE ABUSE SERVICES



RECOMMENDATIONS

This community report highlights the five Tribal MAT funded agencies and their focus to increase community strengths, increase partnerships between stakeholders, and build trust and respect between the community and providers. With limited data for Tribal and Urban Indian populations, this information is vital to understand what is working as each of the Tribal MAT Project partners had specific program activities and outreach to AIAN communities. The USC team evaluated these primary components of the Tribal MAT projects: 1: Development and distribution of culturally adapted OUD materials, 2: MAT Champion outreach, 3: Coalition building and partner engagement, 4: Naloxone training and distribution, 5: Provision of educational and ECHO clinic webinars, 6: Provision of technical assistance to clinics attempting to establish or enhance MAT programs, 7: Delivery of MAT services through telemedicine, 8: Wraparound services, 9: Intensive case management, and 10: Cultural programming. Access to culturally specific materials, coalitions, trainings, webinars, funding opportunities, and MAT technical assistance are now available, with the efforts of the five Tribal MAT Project partners, to help reduce OUD in Tribal and Urban Indian populations in California.

The following recommendations are based on the evaluation outcomes of the five Tribal MAT programs:

Funding

In April 2020, DHCS announced continued funding for the Tribal MAT Project. This additional support will continue funding for and engagement of partners within AIAN communities. These efforts are crucial if we are to effectively address the opioid crisis across California.

Policy

Continued advocacy for the AIAN communities of California must be included in future funding opportunities. Training programs on advocacy and the legislative process should be available for community members to empower them to develop future policies.

Outreach

Innovative outreach efforts are still necessary to address issues of stigma and trust among patients receiving treatment for OUD. Funding is needed for community based navigators to serve as a trusted resource for information on available MAT and OUD services.

Culturally Adapted Approaches

Funding is needed for community based navigators to serve as resources for information on MAT, OUD, and wraparound services. Continued funding will aid in the incorporation of traditional healing and recovery approaches using community accepted best practices for OUD and MAT program development.

Sustainability

Program efforts should include training that prepares stakeholders to apply for funding to support MAT and OUD programs while retaining healthcare workers in their communities.

Technology

Future funding should consider incorporating increased access to technology for stakeholders addressing OUD and providing MAT services. For example, as telehealth is becoming more prevalent, funding broadband access should be a top priority for the DHCS.

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For more information about the five Tribal MAT programs and their available resources, please visit their websites listed below, or reach out to the listed Tribal MAT primary contact.

Tribal MAT — A unified response to the opioid crisis in California's Indian Country

Tribal MAT Project

http://www.californiamat.org/matproject/tribal-mat-program/

California Consortium for Urban Indian Health (CCUIH)

https://ccuih.org/medicationassisted-treatment-project/

Tribal MAT Primary Contact:
Hannah Youngdeer, MAT Champion
hannah@ccuih.org

California Rural Indian Health Board (CRIHB)

https://crihb.org/

Tribal MAT Primary Contact:
Tamika Bennett, Tribal MAT Coordinator
tbennett@crihb.org

TeleWell

https://www.telewell.org

Tribal MAT Primary Contact:
David Sprenger, MD, Project Director
manager@telewell.org

UCLA ISAP Tribal MAT ECHO

http://www.uclaisap.org/ca-hubandspoke/index.html

Tribal MAT Primary Contact:
Gloria Miele, Program Director
gmiele@mednet.ucla.edu

Two Feathers Native American Family Services

https://twofeathers-nafs.org

Tribal MAT Primary Contact:
Virgil Moorehead, Executive Director
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Tribal MAT
A unified response to the opioid crisis in California's Indian Country

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PMID: 33898160

Native populations and the opioid crisis: forging a path to recovery

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Abstract

American Indian/Alaska Native (AI/AN) populations have proven particularly susceptible to the opioid crisis in the USA, but the White House's 2019 national opioid policy roadmap is not structured to address AI/AN vulnerabilities. The concept of resilience, usually considered a positive system attribute, can be applied to complex systems to understand the larger compensatory interactions that restore systems to previous structures despite disruptions or interventions. The opioid crisis is a case of detrimental resilience because even effective interventions have not succeeded in eradicating opioid abuses. Resilience-based systemic interventions are needed to disrupt various aspects of systems while enhancing the social and cognitive abilities of affected populations to withstand the threat. This paper examines community characteristics, healthcare, and law enforcement within the context of AI/AN populations to emphasize the mechanisms that promote undesirable resilience for the opioid crisis. A research agenda bringing together systems science and management is needed to coordinate sectoral interventions and establish strategies to disrupt the resilient cycle of opioid addiction.

Keywords: Opioids, American Indians, Systems management, Resilience

Introduction

Efforts to mitigate the opioid crisis in the USA must include immediate research and policy attention to its disproportional impact on Native populations. In 2015, American Indians/Alaska Natives (AI/AN) had the highest drug overdose death rates of any population in the USA (Mack et

al. 2017). The opioid mortality rates for AI/AN populations have risen almost continuously for nearly two decades and are comparable to the mortality rates of non-Hispanic whites (Tipps et al. 2018). Figure 1 illustrates overdose deaths, including opioids, over time by race.

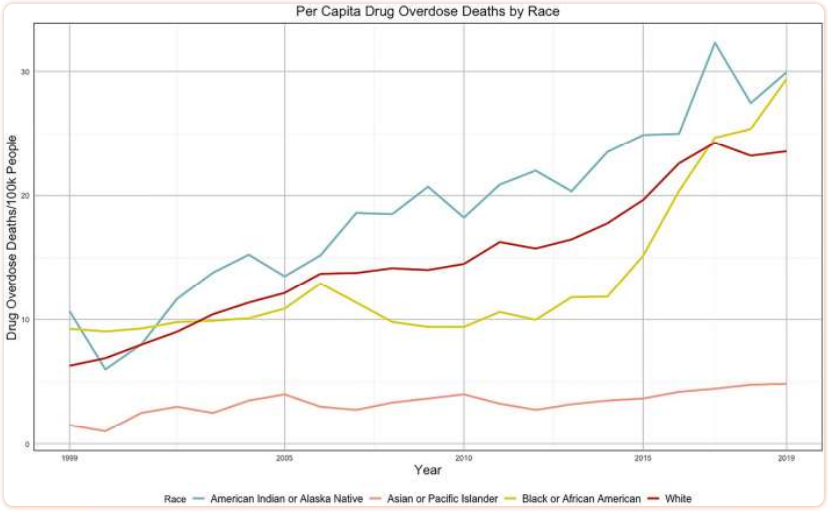

Fig. 1

Overdose deaths over time by race (CDC Wonder Online Database 2020)

Furthermore, AI/AN drug overdose rates may be underestimated by as much as 35% because of race/ethnicity misclassifications on death certificates (Mack et al. 2017). Such acute manifestations of the opioid crisis for AI/AN populations make its related research management an urgent concern. Even though the White House Office of Science and Technology Policy's October 2019 national roadmap to stem the opioid crisis (Fast Track Action Committee on Health Science and Technology Response to the Opioid Crisis, Committee on Science of the National Science & Technology Council 2019) recognizes that the special needs of specific groups should be studied, it does not sufficiently consider ways to prevent the problem's systemic roots from propagating through interconnected sectors.

The complexities contributing to the opioid crisis require systems science to address the root causes of opioid use. Resilience, defined as ability of a system to recover from disruptions, is usually considered a positive system attribute. However, the opioid crisis is an example of detrimental resilience, as shown by the multiple interventions that have not succeeded in ending opioid abuses. Below we describe some successful interventions, couched by the framing we provide in this paper, but the persistence of opioid abuse among AI/AN communities can be attributed to the undesired resilience of the opioid abuse system. Thus, resilience science can provide an analytical perspective to reveal strategies for reducing the resilience of opioid supply chains, consumer demand, and subsequent high mortality rates. Resilience-targeted interventions are needed to disrupt various aspects of systems while enhancing the social and cognitive abilities of affected populations to withstand the threat.

We argue that the opioid crisis and its resilience in AI/AN populations arises from the relationships between federal Indian law, policies, and societal practices. Herein we examine three sectors affected by these differences: community, healthcare, and law enforcement. We discuss the unique characteristics of these sectors for AI/AN populations, and how these differences influence opioid resilience. By applying a network lens, we can better understand the challenges related to opioid use and propose strategies specific to AI/AN communities for forging pathways towards both recovery and abstention from opioid abuse for vulnerable populations.

Sectors of the opioid crisis

Community

Park et al. (2020) outlines community as an underutilized area in which the crisis can be solved. The community sector encompasses the conditions in which people live, commute, and work. Factors exposing community members to risks of opioid addiction may include physical activities with risks, like driving, playing sports, or performing manual labor, where accidents can necessitate prescription pain medication. But beyond voluntary physical risks, the National Academy of Sciences and Medicine (2017) considers the root causes of opioid misuse to be poor working conditions, lack of economic opportunity, and eroded social capital. We examine these factors in this section. They vary between communities and often along lines of race/ethnicity, including AI/AN. There are 574 federally recognized tribes in the USA that are considered sovereign nations (Robbins 2020), and these factors vary between them as well, but have some commonalities, especially as related to federal policies of AI/AN populations. With regards to working conditions in AI/AN communities, the Occupational Safety and Health Administration (OSHA) generally applies to tribal enterprises (Occupational Safety and Health Administration (OSHA) 1998). Economically, however, depressed economic sectors are common in reservations, leaving residents with insufficient opportunities; Brown et al. (2017) argue that uncertainty in law enforcement, as will be described below, negatively impacts economic development in tribal communities. Casinos, entrepreneurial endeavors, arts, tourism, and external investment providing employment for reservations provide a few examples of exceptions, with regards to depressed economic sectors, on certain reservations (Emery et al. 2006). Illustrating, the extreme level of inter-ethnicity income inequality, the poverty rates in 2019 for white people and AI/AN people were 9.0% and 24.2%, respectively (KFF 2020). Furthermore, between 2006 and 2010, about 45% of working age Native Americans were employed, while the average was nearly 60% for Americans as a whole (Kocherlakota 2017).

The history of social capital erosion in tribal reservations likely represents the largest departure for AI/AN populations from other US communities in terms of the National Academy's three roots of opioid addiction. AI/AN social capital was specifically targeted in policies for Native people in the nineteenth and twentieth centuries. Until the passage of the Indian Child Welfare Act in 1978, federal programs systematically removed Tribal children from their families to attend federally run boarding schools. These schools aimed to assimilate AI/AN children into mainstream American culture at the expense of their culture, languages, proximity to family, and often their own safety. Such assimilations sought to disrupt the native cultures that persisted on reservations. This and other social traumas have had intergenerational effects (Lajimodiere 2014), visible in reservations' insufficient community support structures and violence or drug use within homes

(Stevens et al. 2015), where substance use by family members constitutes a risk factor for other members of the family (Substance Abuse and Mental Health Services Administration 2018). The community impacts continue to be seen: AI/AN children born to parents using opioids struggle more to develop and thrive, and a parent's negligence, arrest, or death may instigate their children's removal from their homes and in some cases from their communities for foster care (Momper et al. 2012). Compounding this, studies of Canadian indigenous mothers found that those who had a child removed were 55% more likely to have overdosed after adjusting for education and indigenous ancestry (Thumath et al. 2020). Any strategy seeking to holistically protect AI/AN populations from the opioid crisis will have to reckon with the intergeneration trauma and the legacy of pain that affect social capital and leave AI/AN populations more vulnerable to the factors leading to substance disorders. Opioid abuse for AI/AN populations is resilient because the demand is bolstered by these circumstances.

Scholars and practitioners recognize the need for community-based approaches to address the opioid crisis. These could include drug checking programs and appointing PWUD (persons who use drugs) to leadership positions for designing anti-opioid strategy and policy may help (Park et al. 2020). Leston et al. (2019) suggest implementing prevention and help services into school curriculum. Childs et al. (2021) indicate that local champions and leaders who advocate for drug harm reduction strategies that provide overdose education and safer alternative drugs may reduce stigma against PWUD. Conversely, resistance to harm reduction strategies, a particularly salient issue in rural communities, can be a major impediment to both eliminating stigma against PWUD and opioids overdoses generally (Childs et al. 2021).

Healthcare

Our motivation to include healthcare as an important avenue for countering opioids abuse stems from issues of normalization of drug use as a medical issue, medical training (Park et al. 2020), pharmaceutical company emotional support deficiencies (Leston et al. 2019), and sentiment surrounding minority treatment in healthcare (Goodman et al. 2017).

The over-prescription of opioids are a fundamental cause of the epidemic: from 2000 to 2010, opioid prescription for oral analgesics rose 104% (Sarpatwari et al. 2017). After pharmaceutical companies marketed time-released opioids like OxyContin as having low risk of addiction (Gounder 2013; Meldrum 2016), health professionals around the USA, including dentists (see Larson 2019) and doctors working for the Indian Health Service (IHS) prescribed them more readily. But opioids proved highly addictive, and the increased prescriptions lead to widespread opioid misuse (U.S. Health and Human Services 2019).

In rural communities, including native communities, opioid addiction problems can arise from healthcare deficiencies. Opioids are also more likely to be prescribed in counties with more uninsured people (Center for Disease Control (CDC) 2019), and even people that have insurance may find that prescription narcotics are more reliably covered than other medical tools (Gounder 2013), such as corrective surgery, which are often considered too costly for economically depressed and low density populations (Meldrum 2016). Compounding these factors, Indian Health Clinics are severely underfunded: in 2017, national health expenditures per capita were $9726

compared with $4078 for IHS patients (IHS.gov 2019). Clinics are often placed on Priority One status to provide coverage only when life and limb are at immediate risk. Sick or injured patients who are not covered for treatment of the cause of pain instead receive options to manage it, often opioids. Significant healthcare reform, described below, has reduced the quantity of opiates distributed to individual patients, but these regulations alone will not eliminate the need to address medical symptoms and causes for over 25 million Americans experiencing daily pain. Opioid availability is resilient because few alternatives exist for pain management. When opioids are not made available through the health sector, users can obtain access through illegal drug markets.

Interventions in the medical field include training medical professionals to use opioids appropriately and preventing pharmaceutical companies from paying doctors to advertise these drugs in the media and to patients (Park et al. 2020). Leston et al (2019) suggests expanding behavioral health services to address emotional issues, such as those discussed in the previous section, which have been reported as a major cause for PWUD.

Law enforcement

The opioid literature emphasizes the need for anti-policing progress in the fight to address the opioids abuse. Minhee and Calandrillo (2019) attribute the criminal-based stigma to the Reagan-era drug policy and the war on drugs, and contrast the USA with countries like Switzerland and Portugal, where crimes, addiction rates, and deaths decreased following the elimination of expensive and inefficient criminal charges as a solution to drug problems. Conversely, in the USA, the criminal justice system's attempts at interdiction of illicit opioids have fueled the emergence of potent and less bulky drug products (Dasgupta et al. 2018) more likely to escape detection. This has enabled resilience in illicit markets operations. Incarcerating offenders does not necessarily protect them because they emerge with a subsequent higher risk of overdosing, partially due to decreased tolerance (Joudrey et al. 2019). Additionally, having a public record from a drug conviction hinders employment opportunities that could help draw users away from opioid use (Dasgupta et al. 2018), again making the illicit market more resilient. Poor economic prospects can also encourage illegal dealing of opioids: for example, in a small-sample study of a Great Lakes Indian Reservation, Momper et al. (2012) found that elder and middle-aged community members with legitimate proscriptions sold pills to augment their incomes.

In a system where legal recourse is already mismatched to the problem, an additional layer of complexity exists in Indian Country through the strict dictates of the various authorities that can enforce laws on tribal members and non-members. For major crimes, the federal government is responsible for investigation and prosecution, but in recent years the U.S. Attorney's Office has declined to prosecute a relative steady rate of one third of the cases referred from Indian Country (U.S. Department of Justice 2017). Criminal justice officials within local communities lack the resources and support to surveil as necessary to prevent movements and impacts of drugs. Furthermore, complicated jurisdictional schemes make it difficult to penalize drug dealers, especially if they come from outside a reservation: tribes do not have criminal jurisdiction over non-Indians (1978). Thus, illegal behavior can persist in tribal areas due to jurisdictional constraints (Crane-Murdoch 2013) and well as financial and manpower constraints within the community police. The system of opioid demand can perpetuate itself while benefitting from legal impunity.

Park et al. (2020) identify the reversal of the criminalization of PWUD in their six-part framework for addressing the opioids epidemic. Often times, witnesses to overdoses state fear of criminal action as a reason for the delay or refusal to call emergency services after an overdose. In fact, geographic areas with higher rates of police activity have higher rates of overdose fatalities (Park et al. 2020). Good Samaritan laws could help eliminate reporting fear (Leston et al. 2019). Lastly, the prosecutorial mindset towards drug use impedes harm reduction strategies (Childs et al. 2021) that could help PWUD.

Interventions for ai/an populations

In describing these sectors, we demonstrate how federal Indian law, policies, and societal practices contribute to the opioid crisis and its resilience in AI/AN populations. This contrasts to attributing drug use to any physiological differences of AI/AN populations, a narrative that has proven harmful to efforts to curb alcohol use (Gonzalez et al. 2019). Understanding how the sectors and their interactions enable resilience in opioid availability and use provides inside for opportunities to disrupt that resilience.

Figure 2 below shows the interplay between the three sectors supporting resilience in opioid use. Opioids serve as a vector that converts social problems to costs for local communities, health care providers, and law enforcement. In the system of opioid resilience, each sector feeds off systemic problems in other sectors.

Fig. 2

Sectors of the opioid crisis

The healthcare and law enforcement sectors have each taken steps to combat the US opioid crisis. The national prescription rate of opioids has decreased from its peak in 2012 (81.3 per 100 persons in the USA), and law enforcement seizes drugs, arrests offenders, and administers naloxone to prevent overdose deaths. Yet the rate of deaths from opioids has continued to rise (Scholl et al. 2019). While the root causes of the crisis remain unaddressed, the system of opioid abuse re-

mains resilient. AI/AN communities are uniquely vulnerable and afflicted in the crisis and thus offer insightful perspectives of potential actions that might be taken to reduce the resilience of opioid usage and support community recovery.

Current interventions for AI/AN populations show an understanding of the multi-dimensionality of the opioid crisis and the interactions of the three sectors profiled in this paper. Tipps et al. (2018) document different practices of various AI/AN communities in their work to combat the opioid crisis, and tribes have been leading community-based responses that incorporate public health data infrastructure (Seven Directions: A Center for Indigenous Public Health 2019). In the health sector, IHS is the first federal agency to centralize information about drug prescriptions to curtail doctor shopping practices. Changes in local IHS administration can give more autonomy to tribes, though this may not always be feasible because of resource constraints. But doing so allows for treatment options that include grounding in cultural traditions and building social capital to address opioid resilience. Since the onset of the SARS-CoV-2, telemedicine expansions in Canada and the USA has increased access to opioid treatment for indigenous communities, decreased stigma, and promoted patient self-efficacy (Wendt et al. 2021). Yet another example of increased autonomy of tribes in health care is exemplified by the Native Behavioral Health Access Improvement Act, designed to allow tribes to incorporate cultural and behavioral practices into their recovery programs (Smith 2019).

For law enforcement, many tribes have enacted Wellness Courts, which transfer drug-offending tribal members from criminal proceedings to culturally appropriate clean and sober treatment programs. These efforts represent solutions that address two sectors within the opioid crisis, law enforcement and community. Tribes can also banish individuals from reservations, one of the few legal recourses available to tribes over non-tribe members, as a way to sever connections with drug traffickers (Tipps et al. 2018). Unfortunately, drug-related banishment has proved difficult to enforce because of inadequate policing resources, so the method does not necessarily benefit the community. Furthermore, Well Courts have demonstrated some limitations. Notably, the most successful participants in the courts are typically those that leave their reservations after the program is finished, which is counterproductive in preserving and maintaining native community, culture, and values (Cochran and Kettel 2020). Additionally, the success of these court programs varies widely between tribes, and state court programs have higher rates of success (Cochran and Kettel 2020).

Tribes have also sued drug companies, which could provide resources for treatment options, but the legality of such cases have been contentious in the courts and even a victory would be unlikely to halt the ongoing crisis (Tipps et al. 2018). The effectiveness of any of these actions can be marred by insufficient resources, but tribes throughout the country have begun implementing programs to support their members in avoiding or controlling opioid addiction. The Cherokee Nation implemented their own comprehensive health care system in Oklahoma, taking extreme precaution to limit the supply of opioids to tribal people. Despite this, they continued to see higher rates of opioid overdoses, which their data collection system was able to attribute to external sources of opioids supply. They have proceeded to file a lawsuit against pharmaceutical companies for contributing to their increase in addiction and death rates (Leeds 2018).

In the community sector, a key systemic strategy must include early intervention with pre-school to high school children impacted by intergenerational trauma or intergenerational post-traumatic stress disorder (PTSD). Children with PTSD can experience a variety of anxiety disorders and can enter adolescence with unhealthy coping responses. Experimentation with alcohol and drugs can relieve anxieties and lead to addiction. Key systems within tribal communities for training can include tribal Head Start programs, childcare and public or tribal schools. Anxiety disorders in Native American children are largely unknown and, therefore, require training and skill development for teachers and parents. Training would assist teachers and parents in identifying key behavior associated with anxiety and provide skills in managing the symptoms. These trainings would elevate the collective knowledge and skill level of a community to address key mental health problems and, thereby, reduce the resilience of opioid use.

MAT (medication-assisted treatment) has been a growing method to reduce addiction and overdose in both tribal populations and in general in the USA. Vashishtha et al. (2017) suggest that federal and state level funding must be increased to address 92% of the opioid-dependent population eligible for MAT treatment. They also address the need to remove barriers to MAT prescription and the prioritization of low -threshold and experimental MAT approaches for marginalized populations. The implementation of MAT programs does not come without challenges, though. MAT programs are often met with resistance because they are not seen as a form of sobriety. Framing of MAT as a treatment for addiction like a biological disease and recognizing it as a legitimate form of medical treatment is needed to help communities accept MAT services. Venner et al. (2018) also discussed shortcomings of MAT strategies that include inconsistency with medicine-free traditional AI/AN methods of healing, barriers to MAT access in the form of discrimination and high turnover within IHS, and a lack of research on MAT.

Tribes have implemented specific programming according to their needs, strengths, and resources. The Penobscot Nation Wellness Court engages participants in their culture and community. In “open court nights,” members of the greater community share awareness and broader perspectives surrounding addiction for topics like historic trauma or brain functionality that are relevant to participants’ experiences (Decontie 2018). The Lummi tribe police seek to provide positive role models and even mentorship for the community. Health providers and law enforcement are able to coordinate, which can help more individuals to enroll in the available treatment programs (Long 2018).

The Suquamish has implemented several programs and initiatives to encourage and support recovery, including intentional prevention like youth cultural programming, trips, and education opportunities that not only create an atmosphere of accountability but also trust and relationships between individuals and their community. There are also programs to provide life skills for adults and behavioral health, including for stress and unresolved grief. The goal is to invest in living a clean and healthy life based on the tribe’s culture, traditions and spirituality (Forsman 2018). The Warm Springs Tribal Council has a community counseling center and a family preservation program that seeks to tap into tribal traditions and spirituality. Funding was recently allocated to develop curriculum on historic trauma for school-aged children and families to learn to talk about uncomfortable but important topics, including as a means of drug use prevention. The efforts to reach people include visits to jails, and speaking with the youth as well as the elderly (Miller

2018). In a community-based needs assessment, successes included scenarios where treatment involved clients reconnecting to the community and culture, communication with clinicians, case managers, and patients was present, and cases where known barriers to successful treatment were faced head on, like stigma, privacy, distance, insurance, and readiness to change (Zeledon et al. 2020).

These interventions could be strengthened by a resilience analysis of the opioid system that maps the various pathways between demand and supply to anticipate how they will shift in response to a disruption. The problem cannot be solved in siloes; no single policy solution can disrupt the resilience of the opioid crisis, whether as a legal issuance of prescribed opioids or by targeting the black market. An effective policy or practice to reduce the resilience of the opioid supply chain requires first that causal factors causing resilience be better understood. Following this, a resiliency framework to analyze cross-system intervention strategies can target both the causes and ongoing prevalence of opioid addiction.

Conclusions

Opioid abuse affects the fabric of entire communities and its resilience arises from interacting factors between different sectors. While risk-informed management strategies focus on identifying the most vulnerable component of a system to disrupt, such one-dimensional efforts within opioid supply and demand networks have proven insufficient because these systems can restructure and compensate to retain functionality. Solutions must transcend individual users to examine the interactions and reinforcing nature of different societal sectors. Although government documents continue to view the justice system as distinct from other non-biological contributors of opioid addiction (Fast Track Action Committee on Health Science and Technology Response to the Opioid Crisis, Committee on Science of the National Science & Technology Council 2019), opioid use must be addressed through holistic systems management.

The opioid distribution and demand system will benefit from more intentional analysis. The crisis has a broad foundation, and requires making resources available, like inpatient treatment centers or other clean and sober housing, or further support financial for existing programs. Cohesive policy guidance to address the opioid crisis must recognize the multi-dimensionality of the crisis and deploy systematic anti-resilience strategies.

Disclaimer

The views, thoughts, and opinions presented in this article belong solely to the authors, and not necessarily to the author's employer, organization, committee or other group or individual.

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Addressing the Opioid Crisis

Over-presctiption of powerful opiod pain relievers beginning in the 1990s led to a rapid escalation of use and misuse of these substances by a broad demographic of men and women across the country.[1] This has led to a resurgence of heroin use, as some users transitioned to using this cheaper opioid. As a result, the number of people dying from opioid overdoses has soared increasing nearly four-fold between 1999 and 2014.[2] Opioid analgesic pain relievers are now the most prescribed class of medications in the United States, with more than 289 million prescriptions written each year.[3]

The increase in prescriptions of opioid pain relievers has been accompanied by dramatic increases in misuse and by a more than 200 percent increase in the number of emergency department visits from 2005 to 2011.[4] Heroin overdoses were more than five times higher in 2014 (10,574) then ten years before in 2004 (1,878). Drug overdose deaths also occur due to the illicit manufacturing and distribution of synthetic opioids, such as fentanyl, and the illegal diversion of prescription opioids. Illicit fentanyl, for example, is often combined with heroin or counterfeit prescription drugs or sold as heroin, and may be contributing to recent increases in drug overdose deaths.[5]

The opioid crisis has not sparred Indian country. But it has also not striked with equal impact. Some communities face devastating rates of opioid use, while others do not. This webpage features articles and resources to assist Wellness Courts in serving participants with opioid addictions.

TLPI's Opiod Crisis in Native America Fact Sheet Series

1. **Introduction to the Opioid Crisis**
2. **Benefits of Medication Assisted Treatment**
3. **Overdose Reversing Drugs**

- **Tribal Opioid Response Grantee Success Stories: Prevention, Treatment, and Recovery Innovations in Native American Communities**

  The Tribal Opioid Response Technical Assistance Center would like to share with you this new publication, *Prevention, Treatment, and Recovery Innovations in Native American Communities*, a compilation of stories from TOR grantees across the country sharing successes they have seen in their programs by incorporating their culture and traditions.

  This is the first volume in a planned series celebrating the work that TOR grantees are doing in their communities, please contact TOR staff if your TOR program has a successful project you would like to share: cph-nativecenter@uiowa.edu

- **MOUD Toolkit for Treatment Courts**

  The toolkit offers practical resources to help treatment courts implement medication for opioid use disorder (MOUD) in accordance with scientific knowledge, treatment court best practices, and emerging legal precedent.

  The new toolkit is intended for treatment courts implementing or preparing to implement MOUD in their program. The toolkit includes three model memoranda of understanding, two letter templates, and an informational brochure for treatment court participants and their loved ones.

- **NCAI Opioid Initiative**

  The National Congress of American Indians (NCAI) is working with tribes to help end the opioid epidemic in tribal communities. The problem of opioid supply and demand are significant in AI/AN communities, and solutions require collaboration across multiple sectors. This work grew out of the work of the NCAI Substance Abuse Task Force and input from tribes at NCAI meetings and events. This webpage includes the latest resources for tribe to help address this growing problem in our communities.

- **American Society of Addiction Medicine (ASAM) National Practice Guideline for the Use of Medications in the Treatment of Addiction Involving Opioid Use**

  Kayle Kampman and Margaret Jarvis, 9 J Addic. Med. 5 (Sept./Oct. 2015)

  This publication includes recommendations that encompass a broad range of topics, starting with the initial evaluation of the patient, the selection of medications, the use of all the approved medications for opioid use disorder, combining psychosocial treatment with medications, the treatment of special populations, and the use of naloxone for the treatment of opioid overdose.

- **Medication-Assisted Treatment for Opioid Use Disorders in Drug Court**
  Benjamin R. Nordstrom and Douglas B. Marlowe, Drug Court Practitioner Fact Sheet Vol. XI, No. 3 (National Drug Court Institute, Aug. 2016)
  A substantial proportion of adult drug court participants have a moderate to severe opioid use disorder. In a 2014 survey of all state and territorial drug court coordinators in the United States, opioids were ranked as the primary substance of abuse in approximately 20% of adult urban drug courts and in just over 30% of rural and suburban drug courts. This fact sheet provides a brief overview of opioid use disorders, medication-assisted treatment (MAT) available for opioid use disorders, and the best practices and legal standards for MAT in drug courts.

- **Naloxone: Overview and Considerations for Drug Court Programs**
  Caleb J. Banta-Green, Drug Court Practitioner Fact Sheet, Vol. XI, No. 3 (National Drug Court Institute, Dec. 2016)
  Approximately one in five people who use heroin will have an overdose each year, and about one in one hundred will die from an overdose. Pharmaceutical opioids such as morphine, codeine, oxycodone, and methadone also are involved in many overdoses. With brief training, people who use heroin and other opioids, and members of their families and social networks, can effectively recognize and respond to an opioid overdose and successfully administer naloxone, the opioid overdose antidote. Distributing naloxone to laypersons has resulted in thousands of overdose reversals and has saved many lives.

- **Alternatives to Opioids for Chronic Pain Relief**
  Sandra Lapham, Drug Court Practitioner Fact Sheet, Vol. XI, No. 2 (National Drug Court Institute, Jun. 2016)
  Chronic pain increases the risk for noncompliance with substance abuse treatment and complicates recovery efforts. An understanding of the alternatives to opiates for the treatment of chronic pain may help drug court professionals provide more effective assistance to their clients. This fact sheet provides basic information on alternatives to opioids for chronic pain management. It describes: who is most likely to suffer from non-cancer-related chronic pain; what sufferers themselves can do to manage chronic pain; and how drug court participants can relieve chronic pain without the use of opioids.

- **Understanding and Detecting Prescription Drug Misuse and Misuse Disorders**
  Sandra Lapham, Drug Court Practitioner Fact Sheet, Vol. XI, No. 1 (National Drug Court Institute, Feb. 2016)
  This fact sheet is designed for court professionals. It describes prescription drug misuse and provides information on: the attributes of the most commonly misused and addictive prescription drugs; the extent and consequences of misuse; side effects and toxicity; characteristics of those who are most likely to misuse prescription drugs; signs and symptoms of misuse; ways to identify and treat those who may have developed a drug use disorder, including a section on medication-assisted treatment of opioid use disorder; and educational and technical assistance resources on this topic from SAMHSA and other organizations.

- **2016 Minnesota Tribal-State Opioid Summit: Final Report**
  (March 9, 2017)
  The Dayton-Smith Administration and Minnesota?s Tribal Leaders agreed to partner on a summit focused on developing strategies and solutions to address the opioid crisis in Indian Country. The Tribal-State Opioid Summit took place on Tuesday, October 18, 2016 at the Lower Sioux Indian Community in Morton, Minnesota. This report summarizes the conversations, and policy and budget recommendations for Tribes and the State that came out of the small group discussions.

Webinars

Webinar: Medication Assised Treatment Indroduction
The National Drug Court Institute (NDCI) with funding from the Office of National Drug Control Policy Executive Office of the White House in colloboratio with American Academy of Addictio Psychiartry (AAAP) developed an online training curriculum designed to eudcate drug court porfessionals on medication assised treatments (MAT) for substance uce disorders with a major foucs on opiod use disorders. Nin modules were developed and are available at this webiste.

Modules

- Module 1: What are Substance Use Disorders
- Module 2: What is Medication-Assisted Treatment
- Module 3: Medication Assisted Therapies: Using Medication for Treatment of Opioid and Alcohol Disorders
- Module 4: Strategies to Reduce Diversion of Abusable Medications
- Module 5: Primary Components of Evidenced Based Treatments for Addictions
- Module 6: Pros and Cons of MAT
- Module 7: Drug Courts and MAT: The Legal Landscape
- Module 8: Long-term Opioid Therapy and Chronic Pain: Understanding and Mitigating Risk
- Module 9: Interpretation of Drug Testing Results in Medication-Assisted Treatment (MAT)

Webinar: Holistic Treatment of Substance Use Disorders: MAT and Beyond
This is the third session in a three-part on-demand webcast series entitled Medication Assisted Treatment in Context. Originally filmed on September 14, 2016 in Mt. Pleasant, Michigan.?This final installment of the series focuses on using MAT within an integrated health treatment model and how to use MAT in regards to monitoring, pain management, and with other medications. **Learning Objectives:** 1. Describe the different MAT monitoring practices and why they are needed (CHES Area of Responsibility 1.6.1, 1.6.4) 2. Identify that MAT can be part of a holistic solution to substance use disorders (1.6.1, 2.1.1) 3. Define the challenges of managing pain for patients on MAT (1.6.4) **Sponsors:** This webcast was provided by the Michigan Public Health Training Center at the University of Michigan School of Public Health. The Michigan PHTC is a part of the Region V Great Lakes Public Health Training Collaborative and the Public Health Learning Network. This training was provided in partnership with the Saginaw Chippewa Tribal Court, Nimkee Memorial Wellness Center, Saginaw Chippewa Indian Tribe Behavioral Health, McLaren Central Michigan, and the Tribal Law and Policy Institute.

Webinar: Substance Use Disorders As A Public Health Issue
This is the second session in a three-part webcast series entitled Medication Assisted Treatment in Context, originating on August 24, 2016 at the Nimkee Memorial Wellness Center in Mt. Pleasant, MI.? This session will include an overview of substance use disorders, specifically focusing on opioid misuse, and will provide a discussion of the need to approach prevention and treatment from multiple perspectives. **Learning Objectives:** 1. Describe how addiction affects the brain (CHES Area of Responsibility 1.4.1, 1.4.2) 2.?Recognize the current issue of substance use disorders within tribal communities, specifically in Michigan (1.4.1, 1.4.2) 3.?Identify opportunities and resources for action around substance use disorders in Michigan (2.1.3, 6.1.2) **Sponsors:**These activities are provided by the Michigan Public Health Training Center at the University of Michigan School of Public Health. The Michigan PHTC is a part of the Region V Great Lakes Public Health Training Collaborative and the Public Health Learning Network. This training is co-provided by the Saginaw Chippewa Tribal Court, Nimkee Memorial Wellness Center, Saginaw Chippewa Indian Tribe Behavioral Health, McLaren Central Michigan, and the Tribal Law and Policy Institute.

Webinar: Medication Assisted Treatment: An Evidence Based Treatment Option
This is the first session in a three-part webcast series entitled Medication Assisted Treatment in Context. This session originated on July 15, 2016 at the Nimkee Memorial Wellness Center in Mt. Pleasant, MI.? This session will provide an introduction to the different MAT options, including a look at the advantages and disadvantages of MAT and the evidence-base supporting this treatment approach. **Learning Objectives:** 1. Describe MAT as an evidence-based treatment option for substance use disorders (CHES Area of Responsibility 1.6.1, 1.6.2) 2.?List the advantages and disadvantages of MAT (CHES Area of Responsibility 1.6.1, 1.6.2) 3.?Identify the difference between methadone, buprenorphine, naloxone, and naltrexone (CHES Area of Responsibility 1.6.1, 1.6.2) **Sponsors:** These activities are provided by the Michigan Public Health Training Center at the University of Michigan School of Public Health. The Michigan PHTC is a part of the Region V Great Lakes Public Health Training Collaborative and the Public Health Learning Network. This training is co-provided by the Saginaw Chippewa Tribal Court, Nimkee Memorial Wellness Center, Saginaw Chippewa Indian Tribe Behavioral Health, McLaren Central Michigan, and the Tribal Law and Policy Institute.

Webinar: Presciption Medication Abuse: Knowledge and Skills for Drug Court Practitioners
James W. Finch
Presented as part of the www.TreatmentCourts.org series. (Note: Webinar is a free, but requires registration.)
In this webinar, attendees will explore what is different and what is similar when abusing prescription medications as compared to illicit drugs or alcohol; apply these concepts to the process of evaluation and intervention within the context of the judicial system; understand the current standard of care related to rational, low-risk prescribing of opioid analgesics for pain management; apply this understanding in the context of communicating and working collaboratively with medical providers regarding these medications; and recognize the magnitude of the current epidemic of prescription medication abuse and understand some of the social issues underlying the epidemic.

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IN BRIEF
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Adult Drug Courts and Medication-Assisted Treatment for Opioid Dependence

More than 2,700 drug courts are in operation today in the United States.[1] About half of these are adult drug treatment courts. Developed to decrease recidivism among substance-involved offenders, adult drug courts oversee substance use disorder treatment for criminal offenders accepted into these programs.

Many drug court participants need treatment for opioid dependence. Medications can be an important part of effective treatment for offenders dependent on opioids,[2] decreasing craving and withdrawal symptoms, blocking euphoria if relapse occurs, augmenting the effect of counseling, and reducing recidivism and reincarceration.[2,3]

Many national and international professional bodies consider medication-assisted treatment (MAT) with methadone, buprenorphine, or extended-release injectable naltrexone an evidence-based best practice for treating opioid dependence. However, many drug courts do not recommend (or even allow) the use of MAT for opioid dependence. For example, a 2010 survey of 103 drug courts found that, whereas 98 percent reported that at least some of their drug court participants were opioid dependent, only 56 percent of the courts offered any form of MAT to participants.[4]

This *In Brief* is for the drug court team: the judge, coordinator, public defender or defense attorney, prosecutor, evaluator, treatment provider, law enforcement officer, and probation officer. Its objective is to encourage drug court personnel to increase their knowledge about the effectiveness of MAT and increase its use in drug courts.

> *MAT is the use of medications, in combination with counseling and behavioral therapies, to provide a whole-patient approach to the treatment of substance use disorders.*[5]

Opioid Use and Dependence

Disease Concept of Dependence

The concept of substance dependence, or addiction, as a brain disease is widely accepted. It is considered a disease that has "cognitive, behavioral, and physiological characteristics that contribute to continued use of drugs despite the harmful consequences."[6] The American Society of Addiction Medicine (ASAM) defines addiction, in part, as a "primary, chronic disease of brain reward, motivation, memory and related circuitry."[7]

The National Association of Drug Court Professionals (NADCP) also accepts the concept of addiction as a disease, stating that addiction is "in part, a neurological or neuro-chemical disorder characterized by chronic physiological changes to brain regions governing motivation, learning, attention, judgment, insight, and affect regulation."[8]

Extent of Opioid Use

Data from the 2012 National Survey on Drug Use and Health (NSDUH) indicate that the number of people reporting past-year use of heroin has steadily increased since 2007. Past-year heroin use was reported by 669,000 people; 467,000 reported dependence on or abuse of heroin.[9]

Nonmedical use of pain relievers continues to be more widespread than heroin use. Nearly 1.9 million people initiated nonmedical use of opioid pain relievers in 2012, second only to the number of those initiating use of marijuana, and 2.1 million reported dependence on or abuse of pain relievers (second only to marijuana).[9]

The problem of opioid use is greater among those involved with the criminal justice system than among the general population. Precise information about drug court

participants and opioid abuse is scarce, but one study found that:[10]

- Seven percent of participants entering urban drug court programs named illicit opioids as their primary drug of abuse.
- Ten percent of participants entering suburban drug court programs named illicit opioids as their primary drug of abuse.
- Twelve percent of rural participants named illicit opioids as their primary drug of abuse.

Matusow et al.[4] found that, following the national trend, more drug court participants reported nonmedical use of prescription opioids (66 percent) than reported use of heroin (26 percent). This trend was more pronounced in rural and suburban areas than in urban areas.

The 2012 NSDUH reports that:[9]

- Of individuals on parole or other supervised release from prison, 7.0 percent reported current nonmedical use of psychotherapeutic drugs (including opioid pain relievers), compared with 2.6 percent of adults not on parole or supervised release.
- Of those on probation, 10.1 percent reported current nonmedical use of psychotherapeutic drugs, compared with 2.4 percent of adults not on probation who reported nonmedical use of psychotherapeutic drugs.

Although the NSDUH does not list specific psychotherapeutic drugs for the criminal justice population, the group of psychotherapeutic drugs most used by the general population are opioid pain relievers.[9]

MAT: An Evidence-Based Best Practice for Opioid Dependence

Methadone, buprenorphine, and extended-release injectable naltrexone are effective treatments for opioid use disorder and could decrease recidivism and avert drug-related crimes. Many national and international organizations strongly support the use of MAT as an evidence-based practice for treatment of opioid dependence.

Support for MAT

National Association of State Alcohol and Drug Abuse Directors (NASADAD). In January 2013, NASADAD released its *Consensus Statement on the Use of Medications in Treatment of Substance Use Disorders*. The statement included the following:

> For some people, medication will be unnecessary. For others, it may be a helpful tool for recovery. For still others, medication will be a crucial component of treatment without which the prognosis for recovery is very poor. In all cases, the use of addiction medications should be considered and supported as a viable treatment strategy in conjunction with other evidence-based practices and as a path to recovery for individuals struggling with substance use disorders.[11]

World Health Organization (WHO). WHO strongly supports the use of MAT, stating that provision of pharmacological treatment for opioid dependence should be a healthcare priority worldwide.[12] WHO also includes methadone and buprenorphine on its list of *essential medicines* for adults.[13] Essential medicines are those that are associated with addressing priority healthcare needs; inclusion on WHO's list is based on disease prevalence, safety, efficacy, and comparative cost-effectiveness.

National Institute on Drug Abuse. Principle 12 of *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide* states: "Medications are an important part of treatment for many drug abusing offenders. Medicines such as methadone, buprenorphine, and extended-release naltrexone have been shown to reduce heroin use and should be made available to individuals who could benefit from them."[14]

The National Association of Drug Court Professionals. NADCP[8] supports the use of MAT and states that the use of MAT has been proven through "rigorous scientific studies" to improve addicted offenders' retention in counseling and to reduce illicit substance use, rearrests, technical violations, and reincarcerations.

MAT and Drug Courts

Despite strong support for MAT in the treatment of opioid dependence, there is very low usage of MAT among drug courts. In a survey of drug courts, 50 percent reported that MAT was not available under any circumstances to participants with opioid dependence.[4] A study funded by the U.S. Department of Justice surveyed 380 adult

drug courts nationwide on drug court practices and found low use of methadone maintenance therapy among drug courts.[15] Approximately two-thirds (67.5 percent) of courts indicated that detoxification was available. However, only 20.9 percent offered methadone-to-abstinence treatment, and only 18.0 percent stated that methadone maintenance was available. Further, many drug court programs will not admit individuals who are already using methadone.[15]

> *Medications have developed remarkably over the past five years to the point that a 'good treatment program' should have the capacity to assess for and provide medications for* [its] *addicted patients.*[16]

Effective Medication Treatments for Opioid Dependence

Methadone and buprenorphine have been approved by the U.S. Food and Drug Administration (FDA) to treat opioid dependence. Extended-release injectable naltrexone is approved for the prevention of relapse to opioid use.

How These Medications Work

Opioid receptors are found on the surface of brain cells (neurons). Opioid effects are initiated when opioids bind to these receptors. The medications used to treat opioid dependence act at these same opioid receptors, particularly the mu receptors. The medications are *full agonists*, *antagonists*, or *partial agonists*.

Full agonists bind to the mu opioid receptors and create a potentially unlimited response. The effects of full agonists are directly proportional to the dose. Methadone is a full agonist. (Opioids such as heroin, morphine, hydrocodone, and oxycodone are also full agonists. However, methadone differs from these opioids in its full spectrum of effects. Some of these differences are described in the Methadone section, below.)

Antagonists also bind to these opioid receptors, but instead of activating the receptors, they block the receptors from being activated. The effects of opioids such as heroin and opioid pain medication cannot then be activated or felt. Naltrexone is an antagonist.

Partial agonists possess some of the properties of both antagonists and full agonists. Partial agonists bind to receptors and cause a limited reaction. Taking more of a partial agonist does not create a bigger effect. Partial agonists may displace or block full agonists (like heroin) from mu receptors and prevent the euphoric and analgesic effects of opioids. Buprenorphine is a partial agonist.

Methadone

Used to treat opioid dependence for decades, methadone is the most widely used medication for this purpose in the world,[17] and a large body of literature supports its effectiveness.[18] Methadone both reduces cravings for illicit opioids and prevents withdrawal symptoms, enabling people taking it to lead productive and fulfilling lives.

Although methadone is a full agonist, it does not produce the same euphoric effects as heroin, morphine, and other full agonists. Methadone is orally administered. It distributes widely throughout the body and is broken down slowly. Because of this, methadone is slower to start working and remains active in the body for a long time.

Methadone must be dispensed by opioid treatment programs (OTPs) that are regulated at federal and state levels. OTPs do not exist in every state, and they may be particularly hard to find in rural areas. Generally, oral methadone is dispensed daily in liquid form at OTPs; the medication may be taken safely for years.[19]

Patient education and careful and close monitoring of patients by treatment professionals when methadone therapy is started are critical to preventing adverse events, withdrawal symptoms that may lead to relapse, and accidental overdose and death. Methadone's common side effects include nausea, constipation, sweating, sleep difficulties, and decreased sexual desire. The medication can interact with many other medications and illicit drugs.[19]

A patient is allowed methadone doses to take home if, during ongoing assessments, the OTP physician considers the patient to have made sufficient progress in recovery based on length of time in treatment and additional objective criteria.[19]

OTPs routinely provide other services, such as counseling; referral to mutual-help groups; routine urine drug testing; physical examination; screening for other behavioral health issues; and assistance with housing, medical care, and vocational services.

Effectiveness of methadone

When doses are appropriate, methadone improves treatment retention and, as a result, decreases relapse and the health and criminal problems associated with illicit opioid use.[20] Long-term methadone maintenance therapy is more effective than either detoxification with methadone or medication-free treatment in decreasing heroin use and retaining patients in treatment.[17,21] A review of the literature showed that, in 11 clinical trials involving 1,969 people, methadone improved treatment retention and reduced heroin use compared with nonmedication treatment.[17] Bhati et al.[22] found that if outpatient methadone treatment were expanded to all eligible offenders, 3.3 million nondrug crimes could be averted. Every dollar spent on ongoing methadone treatment yields almost $38 in benefits through reduced crime, better health, and gainful employment.[23]

It is important to understand that methadone is a *maintenance* medication, not a cure. A maintenance medication is one taken to stabilize and control an illness or symptoms of illness over time. It is effective only for as long as the patient takes it. Some individuals may be able to discontinue methadone and continue in recovery without it. However, long-term maintenance with methadone is not unusual.

Buprenorphine

Buprenorphine, a partial agonist, received FDA approval in 2002 to treat opioid dependence. It comes as a mono-product and a combination product: buprenorphine alone, and a buprenorphine/naloxone combination. Naloxone is an antagonist. It is added to block any euphoric effects of buprenorphine that would occur if a person were to abuse the medication by injecting it, thus decreasing the desirability of the medication for abuse/misuse. For this reason, the combination product is (and should be) more frequently used than buprenorphine alone. The mono-product should be used only for pregnant women or those allergic to naloxone.

Buprenorphine:

- Reduces cravings for and withdrawal symptoms from opioids.
- Has limited side effects and contraindications.
- Has less abuse potential than methadone and is less likely to result in medically significant harm if misused.

Unlike methadone, buprenorphine may be dispensed or prescribed in a medical office by specially trained and approved physicians. The physicians must meet federal criteria to treat patients with buprenorphine. It is also provided by some OTPs that meet federal and state requirements.[24] Physicians who can provide treatment with buprenorphine may be available in locations (e.g., rural areas) where methadone is not available, improving access to MAT for opioid dependence. However, buprenorphine treatment is more expensive than methadone treatment (on the basis of dose-to-dose price comparison) and may, consequently, be perceived as cost prohibitive.

Effectiveness of buprenorphine

Studies have shown that buprenorphine is more effective than placebo.[25,26] Studies comparing the effectiveness of buprenorphine to that of methadone have been mixed. Buprenorphine does appear to be as effective as *moderate* doses of methadone. (Like methadone, buprenorphine is a maintenance medication.) However, buprenorphine is unlikely to be as effective as *higher* doses of methadone and therefore may not be the treatment of choice for patients with higher levels of physical dependence.[25] Magura et al.[27] found that among people who were incarcerated, most preferred buprenorphine to methadone when released back into the community.

> *The accumulated data demonstrate that treatment of opioid dependence with buprenorphine is a major public health tool in the management of opioid dependence and in HIV/AIDS prevention and care for opioid dependent injecting drug users.*[28]

Extended-Release Injectable Naltrexone

FDA approved extended-release injectable naltrexone in 2010 to prevent relapse to opioid use. Unlike methadone, buprenorphine, and oral naltrexone, which are administered daily, extended-release injectable naltrexone is given via injection once a month. In addition, healthcare practitioners can provide the medication without special training or credentialing (it is also available in some OTPs).

Naltrexone is an opioid antagonist; it fully blocks the effects of opioids such as heroin and oxycodone. Because of this, a person who is dependent on opioids must

be withdrawn from all opioids for 7 to 10 days before receiving extended-release injectable naltrexone, or he or she will undergo withdrawal symptoms immediately.

Extended-release injectable naltrexone is not a controlled substance and has no abuse or diversion potential, offering an alternative to agonist therapy with methadone or buprenorphine as well as expanding access to MAT.

Extended-release injectable naltrexone is relatively safe and well tolerated. Major adverse effects include severe, acute precipitated opioid withdrawal (if the patient is not fully detoxified), risk of injection site problems, and the potential for adverse liver effects if given in "excessive doses"; it is contraindicated for patients with acute hepatitis or liver failure.[29]

Effectiveness of extended-release injectable naltrexone

Extended-release injectable naltrexone has not been studied for as long as either methadone or buprenorphine, but research indicates that it is a promising treatment for opioid dependence. For example, studies have found that the injectable form of naltrexone can improve patient adherence to the medication and increase treatment retention.[18,30,31] Treatment retention is particularly important because it provides clinicians sufficient time to engage patients in psychotherapy or counseling so that they can learn to make psychological and social adjustments that support a life without opioids.[30]

Injectable naltrexone has been found to be effective in reducing relapse to opioid use in people who are involved in the criminal justice system. For example, a recent multisite study of people under legal supervision (e.g., probation, parole, drug court) found that those who completed a treatment program where they received six monthly injections of naltrexone had, 6 months after their last injection, significantly fewer positive urine tests for opioids than those who did not complete treatment (i.e., did not receive all six injections). They were also less likely to be reincarcerated than those who did not complete treatment.[32]

Increasing the Use of MAT in Drug Court Programs

A first step toward increasing the use of MAT in drug court programs is to examine barriers to its use. One potential barrier is that not all communities have access to OTPs for methadone. For example, OTPs are mainly located in urban areas.[33] However, the use of buprenorphine and extended-release injectable naltrexone for opioid treatment in physicians' offices is improving access to MAT.

Individual drug court personnel may also lack sufficient knowledge about MAT, or they may be biased against using medications to treat substance use disorders. As a result, they may be reluctant to refer participants to MAT.[4] Some people believe MAT to be "exchanging one addiction for another," but MAT is actually much like taking maintenance medication to control heart disease or diabetes. Further, naltrexone is not a controlled substance, and buprenorphine has limited potential for misuse. Both methadone and buprenorphine will continue a patient's physical dependence on opioids. However, when used properly, these medications help people manage their addiction so that the benefits of recovery can be achieved and maintained.

Drug court personnel may also believe that MAT is not appropriate for individuals with co-occurring mental disorders. It is estimated that up to 45 percent of people who are incarcerated have both substance use and mental disorders[34]—this percentage represents a significant number of people in need of effective treatment for substance use disorders. The fact is that MAT is appropriate for individuals with co-occurring disorders, along with integrated treatment for their disorders that includes monitoring for possible medication interactions.[34]

To increase referrals to MAT, drug court staff can:

- Examine reasons that MAT is not being used (e.g., lack of knowledge, long-standing community beliefs about MAT, bureaucratic issues, potential cost).
- Learn more about the actions and benefits of MAT from the Center for Substance Abuse Treatment, state ASAM chapters, state Opioid Treatment Authorities, and the American Association for the Treatment of Opioid Dependence (see Resources).
- Identify local providers of MAT, using the Substance Abuse and Mental Health Services Administration's OTP Directory and Buprenorphine Physician and Treatment Program Locator (see Resources).
- Contact local OTP directors and discuss the effectiveness of MAT.

- Develop relationships with behavioral health facilities that can provide integrated treatment for drug court participants who have co-occurring substance use and mental disorders (or with professionals who have experience working as part of integrated care teams).
- Consult regularly with treatment professionals; use their expertise to set the best course for each drug court participant.
- Identify local physicians who can prescribe buprenorphine and extended-release injectable naltrexone and who are willing to coordinate such care with drug court staff.
- Work with local substance abuse coalitions to educate the community and change attitudes about the treatment of opioid dependence, to increase understanding of MAT and change drug court policies.

Resources

Web Resources

American Association for the Treatment of Opioid Dependence
http://www.aatod.org

American Society of Addiction Medicine
http://www.asam.org

Behavioral Health Treatment Services Locator
http://findtreatment.samhsa.gov

Buprenorphine Physician and Treatment Program Locator
http://buprenorphine.samhsa.gov/bwns_locator

Medication-Assisted Treatment for Substance Use Disorders
http://www.dpt.samhsa.gov

National Alliance for Medication Assisted Recovery
http://www.methadone.org

National Alliance of Advocates for Buprenorphine Treatment
http://www.naabt.org

National Commission on Correctional Health Care
http://www.ncchc.org

National Drug Court Institute
http://www.ndci.org

Opioid Treatment Program Directory
http://dpt2.samhsa.gov/treatment

State Opioid Treatment Authorities
http://dpt2.samhsa.gov/regulations/smalist.aspx

Relevant Publications From SAMHSA

(see back page for electronic access and ordering information)

Advisory, An Introduction to Extended-Release Injectable Naltrexone for the Treatment of People With Opioid Dependence

The Facts About Buprenorphine for Treatment of Opioid Addiction (consumer publication)

Medication-Assisted Treatment for Opioid Addiction: Facts for Families and Friends (consumer publication)

Methadone Treatment for Pregnant Women (consumer publication)

Opioid Overdose Toolkit

Treatment Improvement Protocol (TIP) 40: *Clinical Guidelines for the Use of Buprenorphine in the Treatment of Opioid Addiction*

TIP 43: *Medication-Assisted Treatment for Opioid Addiction in Opioid Treatment Programs*

TIP 44: *Substance Abuse Treatment for Adults in the Criminal Justice System*

What Every Individual Needs To Know About Methadone Maintenance Treatment: Introduction to Methadone (consumer publication)

Other Publications

Advancing Access to Addiction Medications: Implications for Opioid Addiction Treatment
http://www.asam.org/docs/advocacy/Implications-for-Opioid-Addiction-Treatment

Guidelines for the Psychosocially Assisted Pharmacological Treatment of Opioid Dependence
http://www.who.int/substance_abuse/publications/opioid_dependence_guidelines.pdf

RSAT Training Tool: Medication Assisted Treatment (MAT) for Offender Populations (curriculum)
http://www.rsat-tta.com/Files/Trainings/FinalMAT

Notes

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In Brief

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Reasons for California Courts to Track Data on Tribal Affiliation

109 of the 574 federally recognized tribes in the United States – close to 20% – are located in California. California has more individuals who identify as American Indian/Alaska Native than any other state. This population includes individuals affiliated with California tribes as well as individuals affiliated with tribes located in other states.

Currently California courts do not keep data on the tribal status and affiliation of litigants in the courts.

In juvenile cases, courts are required by state and federal law to identify the tribal status and affiliation of children in the courts.

In other case types, tribal status and affiliation can be important to determining whether the state court has subject matter jurisdiction (e.g., certain kinds of rights in tribal trust assets cannot be adjudicated in state court), whether a tribal court may have concurrent jurisdiction over a matter, or whether the individual in question may be eligible for services and resources based on their tribal identification.

Benefits to the State Courts:

As part of efforts to improve compliance with the Indian Child Welfare Act (ICWA), several local courts in California have established tribal collaborations. These courts report that information on the number of cases involving Indian children as well as the tribal affiliation of those children is important to structuring these collaborative efforts and developing practices consistent with the ICWA Best Practices Guide for California Courts and Judicial Officers published by the Judicial Council in October of 2020, but there is currently no way to track that information in court case management systems.

Several counties (El Dorado, Humboldt, and Del Norte) have established joint-jurisdiction courts with local tribes to draw in tribal resources and improve outcomes for court involved individuals and families. The courts have been successful but require identification of tribal members within the state court system.

The Humboldt County District Attorney's Office, the Humboldt County Superior Court, and the Yurok Tribe recently entered into an MOU that will divert Yurok tribal members charged with certain types of crimes to the Yurok Tribal Court. This will reduce caseloads within the state court.

These efforts require tribally specific data so that individuals can be referred to their specific tribes.

Title IV-D Child Support Cases as an illustration

State and tribal courts may have concurrent jurisdiction over child support cases involving their tribal families. If an individual subject to a support order receives income from a tribe or from assets held in trust for members of the tribe (things like per capita distributions of gaming revenue, sales of timber or other resources from a reservation, etc.) these may not be available to satisfy a child support order made by a state court. Certain trust assets are beyond the jurisdiction of the state courts and tribal governments as sovereigns are immune from compliance with garnishment orders issued by a state court. To better serve and protect their tribal families and children, in 2013 the Yurok Tribal Court developed and implemented their own Title IV-D child support program.

Child support cases could be filed directly with the Yurok Tribal Court, but the tribe also sought to transfer existing child support cases throughout the state from the state court system to the tribal court. This had a clear benefit to the state courts by reducing caseloads. It improved outcomes in these cases because the tribal court had options for culturally appropriate in-kind payment options that were not available in the state system. The tribal court could also make effective orders against tribal trust assets or payments that were beyond the reach of the state courts. However, because tribal affiliation information is not part of the state court case information identifying these

Tribal courts in California are seeking to expand their capacity into other case types. The Yurok tribe for example has already or intends to develop programs to assist with re-entry when tribal members are released from prison and to supervise probation for their members. The issues experienced with the Title IV-D Child Support cases will be repeated in each case type area that tribal courts expand to. Grant applications to support development of these programs requires case load information. This information is difficult to obtain because the state courts do not maintain tribal specific case information.

Reduce disproportionality and disparities:

Because California courts do not track tribal identity and affiliation, we don't know whether there are disparate outcomes within the court system. Evidence suggests there would be because there are disparities and disproportionality in all other indicators that are studied:

> "AI/AN people rank at, or near the bottom of, nearly every social, health and economic indicator. Lower life expectancy and disproportionate disease burden are the result of inadequate education, disproportionate poverty, discrimination in the delivery of health services, and cultural differences." https://ncoa.org/article/american-indians-and-alaska-natives-key-demographics-and-characteristics

Available evidence suggests this would extend to the courts:

> Research shows that when a judge is presented with two families—one Native, one non-Native—with the same set of circumstances, the Native children are three times more likely than other children (and four times more likely than white children) to be removed at the first encounter.

Disparities persist in in native youth incarceration and in adult incarceration.

Data is Necessary to Support Tribal Justice Systems:

If cases can be heard in tribal court rather than the state court system, this reduces state court case loads and improves access to justice for tribal communities by providing a culturally appropriate, locally based court system. In the Judicial Council's Native American Communities Justice Project conducted in 2008, lack of data was identified in the Research Report as a serious problem:

> This lack of data specific to Native Americans has at least two serious implications: (1) it makes the magnitude of the problem difficult to assess because it is not documented; and (2) it creates obstacles for tribes to securing funding to address family violence issues because most grant proposals require that the potential grantee provide data to document the problem. (page 7)

This was echoed in the companion Policy Paper:

> State and local agencies do not collect data that is useful to tribal communities. There is no uniform method of collecting crime statistics, such as the location of a crime—whether it is on tribal lands and, if so, the tribe's name. Data collected does not usually identify the tribal affiliation of the victim. Crime reports and investigations typically do not indicate if the victim is Native American, and when they do, they rarely indicate the person's tribe. This is a significant problem for Native Americans for two reasons: (1) because sexual assault is an underreported crime, the lack of tribal-specific data means that the underreporting for this population is that much worse, and (2) without tribally specific data, tribal governments and organizations in California are at a disadvantage when applying for grants, because many grants require this level of data. (page 8)

Again, this requires the collection of tribally specific data so that tribes have data about the needs of their citizens and know where their tribal members are in contact with the court system.

ANALYSIS RACE

Paper Genocide: The Erasure of Native People in Census Counts

Dec 9, 2019, 8:58am Jen Deerinwater

Native people were excluded from the first 70 years under the U.S. Constitution, which explicitly regarded "Indians not taxed," or those living on reservations or unsettled territories, as not countable.

This is the first article in a two-part series. Read the second article in the series here.

The Trump administration's fear-mongering tactics against immigrant communities surrounding the 2020 census may have been shocking to some, but it's not the first time the government has used the census as a tool of oppression. Native people, in particular, are the most undercounted ethnic group in the census' history. Native people were excluded from the first 70 years under the U.S. Constitution, which explicitly regarded "Indians not taxed," or those living on reservations or unsettled territories, as not countable. In more recent years, the U.S. Census Bureau's own data has shown significant undercounting. In the 1990 census, 12.2 percent of Native people on reservations were undercounted, according to the Census Bureau's findings. A decade later, the census seemed to improve, with the bureau not reporting a statistically significant undercount. But then in 2010, it jumped back up to 4.9 percent.

This is particularly devastating for Indigenous people because of how census data has been used to help determine many aspects of tribal sovereignty, such as tribal recognition and enrollment.

Judy Shapiro, an attorney practicing Indian law for 34 years, told me that the federal government uses census data as part of the mechanism for "gatekeeping" for federal recognition. "Through the federal recognition process, they determine who is Native, who continues to exist, and who they are responsible for [maintaining trusts and treaties]."

Inaccurate counts of blood quantum have had an enormous effect on

Marcy Angeles for Rewire.News

The erasure of Native people from the U.S. census and tribal rolls amounts to paper genocide, a systematic destruction of Native identity by reclassifying people into non-Native racial groups on government records. By erasing our existence via the census, our treaty rights are further ignored and funding streams for our tribal nations are gutted. What's worse, the details surrounding the 2020 census suggest there is no real change in sight.

A Brief History of Native Erasure in the U.S. Census

The census is written into the U.S. Constitution and must occur every ten years. The first census was taken in 1790, after the inauguration of President Washington and before the second session of the first Congress ended.

Today, the Census Bureau typically collects data by sending self-reporting forms to households across the country. Any household that doesn't return a form is then visited or called by a census enumerator. This process has changed over the years, and many Native households fall through the cracks and don't get counted. "American Indian and Alaska Natives" are designated by the Census Bureau as a hard-to-count population due to issues including non-traditional addresses, high rates of renters and houselessness, and difficulties accessing more rural lands.

Nonetheless, census data is used in a variety of ways. It determines everything from how many congressional representatives communities have, to the apportioning of federal funds for community needs, to the enforcement of the Voting Rights Act of 1965, and much more. For Native people, the census is crucial to their state and federal recognition, the enforcement of treaties, and the economic health and well-being of tribal governments and its citizens. And yet, since the census began, Native people have not been counted accurately.

Native people didn't appear in the census until 1860. Before that, they were not identified in the 1790-1850 censuses as a result of discrimination in the U.S. Constitution. One exception was the 1850 census of the New Mexico Territory, which listed Pueblo people as "Copper." (They were designated as "Indian" in the 1860 and 1870 censuses of the territory.) Enumerators began counting Native people living in the general population, meaning those living among white and free people of color, for the first time in 1860, when, according to the National Archives, they received instructions to count the "families of Indians who have renounced tribal rule, and who under state or territory laws exercise the rights of citizens."

From 1790 to 1870, the U.S. Marshals were responsible for collecting census data. They were replaced in 1880 by specially appointed census supervisors, who were required by an act of Congress to hire enumerators to take the census count.

Up to the 1950 census, how a person's race was classified was often based entirely upon the perception of the enumerator. "If a different census taker comes to the door and they leave their paper bag at home, then maybe they're Indian that year," Shapiro said, referring to the idea that a person's race could be determined based on whether their skin color was darker than a paper bag.

According to Shapiro, Native people often went underground to evade persecution. They would sometimes hide when census takers would come, Shapiro explained, changing their appearance, making strategic marriages, and employing other strategies to hide their indigeneity in the hopes they wouldn't be exiled. This affected the accuracy and quality of the counts.

Rose Buchanan of the National Archives told me that the 1890 census marked the first time Native people living both among the general population and in tribal communities were counted. However, nearly all of the 1890 census schedules were destroyed in a fire at the Department of Commerce in 1921. As a result, the 1900 census is typically referred to as the first inclusive count of Natives in the United States.

Tribal rolls, also known as the Indian census rolls, were the primary means for counting Native people until 1940. However, the tribal rolls counted only groups of Native people, whereas the U.S. census collected data of all U.S. citizens. Between 1885 and 1940, officials took 692 rolls on Native nations. The Act of July 4, 1884 required every Bureau of Indian Affairs (BIA) agent to submit an annual "census on the Indians at his agency or upon the reservation under his personal charge." There were no instructions, though, on how to count Native people, so it stands to reason that some of this data is inaccurate.

Whether the data was accurate seems beside the point for the U.S. government. As the Leadership Conference's "Race and Ethnicity in the 2020 Census" report explains, the U.S. government began collecting such data at the end of the 19th century in order to "carry out policies designed to maintain the white majority's influence and power in the political, social, and economic arenas." Indeed, many Native people weren't citizens of the United States until the 1924 Indian Citizenship Act and therefore had no right to vote in U.S. elections. Some Native people, though, were granted citizenship under the Allotment Act of 1887, also known as the Dawes Act.

Measuring "Indian Blood"

Beyond the paper bag test, government officials have used blood quantum for racial identification since the turn of the 20th century. And just as the government used the one drop rule to discriminate against African people and keep them enslaved, it used blood quantum to harm Indigenous communities.

In theory, blood quantum measures the amount of "Indian blood" a Native person possesses, which is then captured on a Certificate of Degree of Indian Blood issued by the BIA. Officials use the following federal government records to measure blood quantum: census rolls between 1885 and 1940, the 1900 special Indian census, the Dawes Rolls, Durant Rolls, and land conveyances involving Native people. During this period, sexual violence became a common form of genocide against Native people, which some elders have attributed to an effort to lower the blood quantum of future generations.

There are only three types of living beings in the United States that have to register their blood quantum with the U.S. government: dogs, horses, and Native people.

The census of 1880 was the first to include "a complex rubric for racial identification" for Native people, according to a paper by University of Colorado librarian Margaret Jobe. "The enumerators needed to distinguish between full-blood tribal members and individuals of mixed racial or tribal origin."

According to Jobe's paper, the superintendent of the 1870 census, Francis A. Walker, considered three options for counting mixed Natives:

> to assign race based on the "condition" of the father or the mother; to assign race based on the "superior or inferior blood"; or to assign race by "the habits, tastes, and associations of the half-breed". Walker believed that the latter was the most logical and least cumbersome choice …. The first alternative—the "condition" of the father or the mother was particularly problematic. During the era of slavery, if the condition of the mother was "slave," then the child was considered a slave.

Jobe's paper further explains, "With the passage in 1887 of the General Allotment (Dawes) Act, the United States government institutionalized the distinction between full- and mixed-blood Indians. To receive an allotment, Indians had to become enrolled members of their respective tribes. To enroll in a tribe, an individual needed to prove a certain degree (purity) of Indian blood."

The instructions for the 1900 U.S. census directed enumerators to count blood quantum by writing "0" if the Indian has no white blood. If they had white blood, they were assigned a fraction that was nearest to their blood quantum, such as 1/2 or 1/4. The 1930 Indian census rolls only allowed three categories of blood quantum, including "full blood, 1/4 for one-fourth or more Indian blood, and -1/4 for less than one-fourth."

Shapiro noted that the enumerators for the 1930 U.S. census were instructed to count people of mixed white and Indian blood as Indian unless their blood quantum was "very small" or if they were "regarded as a white person in the community where he lives." Instructions were also given to count "a person of mixed Indian and Negro blood" as Negro unless the "Indian blood predominates and the status of an Indian is generally accepted in the community."

By institutionalizing blood quantum, the federal government put indigeneity, and that of future generations, in the hands of white agents of the state who were determined to exterminate Native people. As I've written previously, "It is not our blood quantum or even our tribal citizenry that makes us who we are; it is our connection to our ancestors, people, and the seven generations to come."

Inaccurate counts of blood quantum have had an enormous effect on Native individuals and nations. For example, one of my family members is listed as full blood in one roll and one-half in another. If children were members of more than one tribe, officials would count them on the roll of only one tribe as opposed to every roll taken for all of their tribal nations.

My blood quantum is registered with the BIA as one-eighth. While the Cherokee Nation doesn't use blood quantum to determine tribal citizenship, some tribal nations do. This incorrect data has a direct impact on the ability of future generations to gain tribal citizenship and be entitled to their treaty rights.

The passage of the Indian Citizenship Act in 1924 created new issues for counting Indigenous people. As Jobe's paper explains, "The Census Bureau was concerned that Mexican laborers might attempt to pass themselves as Indians in the states that share a border with Mexico. To get an accurate count of the Indian population, the bureau instructed enumerators to take special care to differentiate between the two groups in the states of California, Arizona, and New Mexico." To this day, Indigenous people from what is now known as Mexico and Central and South America aren't counted as Indigenous to

those lands. They can identify on the census as American Indian or Alaskan Native, but are often counted as Hispanic or Latino.

The census did not begin using self-reporting forms until 1960, allowing Native people to finally record their race themselves. However, it wasn't until the census of 2000 that multiracial individuals could self-identify with more than one race. Many individuals of mixed heritage, who might have identified as white, Black, or Asian in earlier years, were then able to identify themselves as Indian as well.

The Impact of Undercounting

Since the first iterations of the census and tribal rolls, the U.S. government has used this data to cheat Native peoples out of allotments of land, distribution of goods and money, and treaties it has failed to honor.

The eligibility for treaty-related services, such as Indian Health Services care, is equated with tribal enrollment status even when accurate historical tribal enrollment data doesn't exist. Whether or not a Native person was eligible for goods and services was tied to these allotment lists, tribal rolls, and prior censuses under U.S. Indian law. If the Census Bureau hadn't counted a person on any of these lists, then the government did not consider the person as Native. This was especially troublesome when, as in 1930, the Commissioner of Indian Affairs sent directives to Indian agents to lose the "names of Indians whose whereabouts have been unknown for a considerable number of years." Their whereabouts could have been unknown for any number of reasons: they were hiding from government officials, were away hunting or fishing when the counts occurred, or they were incarcerated or had been murdered.

The U.S. census and tribal rolls were also a means of assimilating Native people to European or Western traditions. As Jobe's paper notes, "The Census of 1880 introduced a special enumeration schedule for the Indian Division that could be used to measure the degree to which an Indian had adopted a European way of life. For example, it asks if a person was a chief or war chief, wore citizen's dress, was supported by civilized industries in whole or part, or was supported by hunting, fishing, or gathering." This effectively measured how "civilized" and assimilated Native people had become to the white man's ways as opposed to living their traditional ways of life.

Racist enumerators and agents also forced Indigenous people to assume Christian names, or inaccurately spelled Native names. A directive given in 1902 to agents taking Indian census rolls suggested how to translate "Indian names to English." Indian names were instructed to be recorded as such unless they were "too difficult to pronounce or remember." Animal-related names could be translated to English, though agents should avoid "foolish, cumbersome, or uncouth translations which would handicap a self-respecting person." My last name, Deerinwater, is spelled in multiple ways over several rolls of my people. I've been left to wonder what my ancestor's name originally was before U.S. government officials got their hands on it.

And these counting systems counted men as the heads of households. Under the 1902 directive, officials assigned women and children the surname of their husbands and fathers even though this was not the way many nations and clans traditionally assigned names.

Census Data Today

The inaccurate and often racist and colonizing U.S. census, as well as historical tribal rolls, are still used to this day to determine important matters, such as federal recognition. Federal recognition is essentially the U.S. government making a decision on who is a legitimate Native nation and as a result, who is entitled to treaty rights, trust land, and many other goods and services. Shapiro, who has worked with tribal governments on this, told me that this is a "terrible, difficult process."

For example, census data has played a key role in the recognition process for the Mashpee Wampanoag of Massachusetts. In the 1970s, the Mashpee filed a land claim that took them to trial. The standard imposed in the case required the Mashpee to show they were a "unitary Native people," Shapiro said, but the census data was inconsistent. They were then challenged as to whether they were culturally Native based on standards of distant tribes. The jury ultimately decided that the Mashpee weren't really Native.

In 2007 the Mashpee finally gained federal recognition. In such recognition cases, the courts had to consider how long the tribe has been in a "continual community and political existence," said Shapiro. This could become an issue for tribes that were displaced due to land loss.

This wasn't the end of the Mashpee's problems. In 2015, they gained land in trust from the U.S. government. Having trust land meant that the Mashpee could build a casino, generating a crucial source of revenue for the tribe. But as the Mashpee began developing their casino project, a group of plaintiffs partially funded by a white developer who wanted to build a competing casino challenged the trust land decision in federal district court. In 2018, the U.S. Department of Interior determined the Mashpee do not qualify for land in federal trust, putting the Mashpee's reservation, historic homeland, and casino project at risk. The tribal government is currently appealing this decision, and a bill to restore the Mashpee land's federal trust status passed the U.S. House of Representatives in May.

Gaining trust land can be incredibly powerful for tribal nations, and not only because it means that the land goes off the tax rolls. It establishes tribal jurisdiction and limits the power of state governments to control Native people's economic development. When a tribe has land in trust, they can do economic development projects, including gaming, which help tribal nations prosper and gain economic and political power. " A number of tribes have done this, but a small number of them have succeeded to the point that they wield powerful voices in the capital and state houses," Shapiro said.

"In a lot of places people only like tribes when they're poor, invisible, or quaint. Assembling a land base, particularly for a tribe that's been hiding for years, is significant," Shapiro added.

As such, the United States often works against the well-being of tribes.

Take U.S. Supreme Court Justice Clarence Thomas' opinion in the 2009 *Carcieri v. Salazar* decision holding that if tribes weren't "under federal jurisdiction" in 1934, when the Indian Reorganization Act was passed, then they can't hold land in trust. This affects tribes that were not federally recognized before 1934, often because the government used the existence of intermarriage and assimilation to deny their status as Indian nations. This history is now being used against them, particularly for tribes mixed with Black people.

Despite Native erasure through the U.S. census and tribal rolls, these forms of data collection can still provide a historical account of Native people. Shapiro has poured through old censuses and says "it's an amazing resource" in terms of uncovering history. "It shows who was stubborn enough to stay. You can see people going away, but coming back.

They could be off whaling one year, but they were back the next. You can see a sweep of stubborn remaining history."

A correct recording of our people is a form of historical preservation and is necessary for the well-being of future generations of Native people. Just as we shouldn't repeat the errors and atrocities of the past, the 2020 census must not repeat its genocidal mistakes. But as I explore in part two of this series, the federal government hasn't yet learned from its history.

Author's note: For the purposes of this article "Native" is used to mean American Indian and Alaskan Natives, and Indigenous denotes the Indigenous people of the land who do not fall under the categories of American Indian and Alaskan Native, such as Native Hawaiians.

TOPICS AND TAGS: 2020 Census, American Indian and Alaska Natives, Bureau of Indian Affairs, census, Census Data, Civil rights, Economic rights, Human Rights, indigenous women, Law and Policy, LGBT rights, Native Women, Social rights

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Paper Genocide: The Barriers to an Accurate Count of Native People in 2020

Dec 10, 10:19am Jen Deerinwater

ANALYSIS RACE

Paper Genocide: The Barriers to an Accurate Count of Native People in 2020

Dec 10, 2019, 10:19am Jen Deerinwater

The undercounting of American Indians and Alaska Natives in the census wreaks havoc on tribal communities today, and it will for generations to come.

This is the second article in a two-part series. Read the first article in the series here.

As the country prepares for the 2020 census, many tribal governments and communities are still awaiting an accurate count of the most undercounted group in the United States: American Indians (AI) and Alaska Natives (AN). Though the 2020 census is the first to offer an online response form, that will have little impact in increasing AI and AN participation given existing barriers. At the same time, the undercounting of AI and AN people wreaks havoc on tribal communities today, and it will for generations to come.

The AI and AN population is increasing at a faster pace than the total U.S. population, yet it remains among the hardest-to-count groups for the census. Dr. James Tucker testified before the Senate Committee on Indian Affairs on February 14, 2018 that barriers to an accurate count of AI and AN people include a distrust of the U.S. government, a youth-heavy population nontraditional addresses, low internet access, language and literacy barriers, weather and road access issues, and high rates of poverty and houselessness. Despite acknowledgement of these barriers, the U.S. government has changed little to address them.

As I discussed in Part One of this two-part series on the U.S. census and Native communities, the undercounting of AI and AN people has multiple negative consequences, including lowering the representation of our communities in Congress, causing funding deficits for health and human services, and hindering tribal recognition and enrollment for AI and AN people. It also endangers voting rights: Political jurisdictions use census data to ensure, for example, that AI and AN voters have language assistance while voting. (Of the 350 languages spoken in U.S. homes, 150 of them are Native languages.)

If we are to stand with our ancestors and fight for the well-being of the
push local, state, and federal governments to meaningfully and respe
community leaders to finally achieve an accurate count.

Marcy Angeles for Rewire.News

An inaccurate census count is a form of paper genocide. It is another way for the United States to deny the treaty rights of AI and AN people and nations.

A "Hard-to-Count" Population

Approximately 26 percent of Native people live in what the Census Bureau considers "hard-to-count" census tracts. Many AI and AN people living on tribal lands don't have traditional addresses. Their homes are often referenced by their proximity to a landmark, office, or intersection. These individuals typically use post office boxes to receive mail, and several families may use the same one. North Dakota legislators recently used this lack of traditional addresses to disenfranchise Native voters in the state.

Alaska, Arizona, and New Mexico have some of the highest percentages of hard-to-count populations partially due to weather and road access. Only one-fifth of the Navajo Reservation roads in Utah—part of the largest reservation in the country—have been paved, while one-quarter are gravel and more than half are dirt, according to the Rural Community Assistance Corporation (RCAC). "Hazardous under normal conditions, the roads frequently become impassable after heavy rain or snow, and Utah Navajos overwhelmingly agree that their roads are unbearable," wrote RCAC's Mariamne Beuscher.

Dee Alexander, intergovernmental tribal affairs specialist at the Census Bureau, told me that census enumerators will use bush planes, dogsleds, snowmobiles, ATVS, and horseback to access these areas.

Because some Alaska Native communities are only accessible via ice roads, and community members will often leave their homes for traditional hunting and fishing or warm-weather jobs, enumeration will begin in Toksook Bay, Alaska, in January 2020. The census will begin on April 1 for the rest of the country.

Group quarters—including military housing, jails, prisons, and other institutions—are also considered hard-to-count communities. After controlling for population size, AI and AN people are incarcerated at rates higher than any other ethnic group in the United States. (There's scant data on AI and AN people in the criminal justice system given they are often not separated out in Bureau of Justice Statistics, but our communities are too familiar with the overrepresentation of AI and AN people in prisons and jails.) Alexander told me that group quarter enumeration will be separate from self-response forms and that people are counted based on where they live and sleep most of the time. For individuals who are incarcerated, institutionalized in civilian or military facilities or military personnel deployed, stationed, or on a military vessel ported out the United States on census day, the agency responsible for the facility provides the information using their recorded demographic data. Given the propensity to erase indigeneity in data collection, this will likely result in a large undercount of these populations.

Even when individuals have the opportunity to complete the census forms themselves, there remain limitations in how Indigenous people can report their ethnic and racial identities. AI and AN are used as racial categories by the Census Bureau for Indigenous people whose ancestral lands fall across the "Americas" regardless of their citizenship status. However, many of these Indigenous people may identify on the census as Hispanic. Native Hawaiians, despite being an Indigenous group, are included with other Pacific Islanders, which limits the reliability of data on Native Hawaiian populations. This has led some in the Indigenous community to question the outdated racial and ethnic categories of the census, which were last updated in 1997, and its potential of lowering the Indigenous response. This becomes even more detrimental for AI and AN people who are mixed race or of more than one tribal nation.

The National Congress of American Indians (NCAI), the longest-running AI and AN organization in the United States, is advising AI and AN people to only identify as AI and AN, and not as mixed race on the census. Checking AI and AN and another racial group will often result in population reports that lump the two groups into a single category as "two or more races," along with all non-Native people who also report multiple races.

"While we never want to discount the multiple identities people have, we are aware that identifying these multiple identities defaults to the 'majority' race and then absents our community," said Kerry Hawk Lessard, executive director of Native American Lifelines, an urban Indian health program funded by the Indian Health Services. "It is critical that we are counted, especially when … there is inconsistent data collection practices around AI/AN, particularly in health and morbidity reports."

The same can be said of the gender question, which only allows respondents to choose male or female, erasing those that are Two Spirit, non-binary, and transgender.

Culturally Relevant Engagement

Distrust of the U.S. government and a lack of cultural competency by decision makers are also key barriers to an accurate count of AI and AN communities. In the most comprehensive survey to date of Native voters, the Native American Voting Rights Coalition (NAVRC) found a low level of trust in the federal, state, and local non-tribal governments.

Chief Randy Crummie of the Santee Indian Organization, a state-recognized tribe in South Carolina, said in a tribal consultation with the Census Bureau that an accurate count of the Santee people will never occur through the census because of the distrust in the U.S. government. More than 500 years of ongoing genocide, removals, environmental exploitation leading to human rights violations, and Trump's anti-Indigenous violence and rhetoric have left many Indigenous people across the country afraid to respond to census questions.

When U.S. officials engage with tribal governments to ensure a fair and accurate count, their outreach often "lacks the cultural sensitivity necessary to be effective," said Tucker in his Senate testimony. Tucker went on to explain that a member of the Yakama Tribe in Washington state attended a census meeting where a non-Native trainer attempted to explain to Native enumerators what actions they needed to take to be culturally appropriate for their communities. The Yakama member left the meeting and later told a fellow attendee that it was inappropriate for a non-Native to try and teach him about his own culture, according to Tucker's testimony.

Some elected officials with historically undercounted constituents are working to address these cultural differences and the fears among AI and AN communities, but the issue is deeply rooted and the current administration isn't helping. "Every single person in this country counts, but this administration continues its work to disenfranchise communities across this country and our state to instill fear in the census process," Democratic Rep. Deb Haaland of the Laguna Pueblo in New Mexico told me. "I'm raising awareness so people aren't afraid to fill out their census document and know how important it is to get an accurate count for our state."

Haaland, one of the first two Native women to be elected to Congress, is working in partnership with the New Mexico state government as well as cities, counties, and local organizations and is planning outreach events and promoting census jobs and volunteer positions.

Democratic Sen. Ben Cardin of Maryland told me that he's "highly aware of the importance of an accurate census and has taken several actions to ensure that every single Marylander is counted." His efforts have included advocating for appropriations that provide full funding for census operations, organizing town halls and other public events to highlight the importance of the census, hosting a discussion between the Maryland congressional delegation and Census Bureau leadership to discuss concerns over the prospect of

including a citizenship question on census forms, and pushing for state leaders to address their preparations for the census with more urgency. The senator's efforts are particularly notable considering that in 2017, funds were diverted from the Census Bureau call center in Hagerstown, Maryland, to the Federal Emergency Management Agency. Maryland is home to three state-recognized tribes, which have expressed concern regarding the lower funding and resources they received for the census.

To further assist officials and Indigenous communities in explaining the importance of responding, NCAI has released a toolkit clarifying how the 2020 census will operate.

Internet Access on Tribal Lands

Internet access will also be a major issue for the 2020 census, as it is the first year people in the United States can participate online. According to the American Indian Policy Institute's Tribal Technology Assessment, 18 percent of reservation residents lack internet access at home. Some tribal lands, such as the Wind River Reservation in Wyoming, have unreliable and very limited internet access. Nearly one-fourth of AI and AN people are living in poverty, so even if the internet is available nearby, they often can't afford the technology to participate in the census online.

Federal officials have also raised concerns of internet trolls who might get in the way of an accurate count by spreading inaccurate information online. Given the general distrust of the U.S. government among Native populations, such activity might further dissuade AI and AN people from participating in the census.

Other Barriers to an Accurate Count

The Census Bureau will hire up to 500,000 temporary workers for 2020, according to Alexander. NCAI has raised concerns that the lower pay and temporary nature of the work will lead to higher employee turnover — a concern on tribal lands, where there will be few enumerators to conduct counts to begin with. The lower pay and temporary nature of the work lends itself to a high employee turnover, according to NCAI. At the same time, tribal liaisons, who coordinate among the Census Bureau, tribal governments, and tribal members to increase AI and AN participation in 2020, are unpaid positions. These liaisons are trusted members in tribal communities and are vital to the success of a proper 2020 count and are often appointed by tribal government. If NCAI is concerned with turnover

for those that are paid, then it stands to reason that the tribal liaisons could be ineffective at ensuring an accurate count.

Funding issues around the 2020 Census don't end at the pay of enumerators and tribal leaders. Congress and the federal government chronically underfunds the Census Bureau. According to Alexander, "budget uncertainty" led the Census Bureau to cancel tests on the Standing Rock Sioux and Coleville reservations, which would have helped the government better understand the best questions and formats to use to ensure high AI and AN response in 2020. At least one test was held in Providence County, Rhode Island, but there is a low recorded AI and AN population in the region, at 1.4 percent in the county and 1.1 percent in the state. So the test may not be reflective of the broader challenges facing Native people across the country.

Due to federal funding concerns, some state and city governments are now picking up the federal government's slack by funding their own census count projects. California and New York City have allocated funding to ensure an accurate 2020 count for all of their residents.

The California Complete Count – Census 2020 office notes that it is coordinating the "state's outreach and communication strategy, which focuses on the hardest-to-count Californians." Of all regions in the 2010 census with residents who identified as American Indian and Alaska Native alone or in combination with another race, California had the largest percentage, with 110 federally recognized tribes in the state and nearly 80 more petitioning for recognition. For its 2020 effort, the state has allocated $3.12 million to fund multiple prongs of AI and AN outreach, including a media campaign to provide services specifically to tribal governments and AI and AN urban communities.

In New York City, the 2010 census found the AI and AN population was 111,749, the largest urban Native population in the country. That same census reported a response rate of less than 62 percent in the region, 14 percent lower than the national average. To combat this, Mayor Bill de Blasio's office and the City Council has funded a multi-pronged operation, called NYC Census 2020, totaling $40 million. The efforts will include multilingual, tailored messaging and an engagement plan that "seeks to leverage the power of the City's 350,000-strong workforce and the city's major institutions, including libraries, hospitals, faith-based, cultural, and higher educational institutions, among others, to communicate with New Yorkers about the critical importance of census participation," according to the initiative's website.

"NYC Census 2020 is deeply committed to a full and accurate count of all New Yorkers in the upcoming census, especially those in historically undercounted and marginalized communities," Julie Menin, director of NYC Census 2020, told me. "This is why … we are collaborating with hundreds of advocates and organizations across all groups in New York City, including local Native American community leaders, to increase our city's overall self-response rate. Our efforts aim to combat the historic erasure of indigenous cultures and peoples and to ensure that every New Yorker gets their fair share of political representation."

Kathleen Daniel, field director for the NYC Census 2020, added that the census "is your RSVP to what could be the greatest party on the planet: living in America … by filling in the census you're RSVPing so your host, the amazing country that we live in, can be prepared for you."

No one I contacted at the NYC 2020 Count program, however, could list a single AI and AN community leader or organization they're partnering with to ensure an accurate count. Given the contentious relationship that many AI and AN people and tribal nations have with the United States and lack of trust in the census, it seems unlikely New York City's effort will appeal to many AI and AN people in the region.

In NCAI President Jefferson Keel's testimony before the Senate Committee on Indian Affairs in February 2018, he cited the 2010 Census Barriers, Attitudes, and Motivators Survey (CBAMS) to give evidence of the AI and AN population's distrust of the census. CBAMS stated that AI and AN people didn't consider the census a "civic responsibility," and that they had a "unique belief profile." AI and AN people expressed skepticism of the purpose, use, and security of census data more than any other racial or ethnic group. They were "particularly characterized by suspicion about the use and purpose of the Census," according to Keel.

Despite the many valid reasons of suspicion and distrust in the U.S. government and census, it's vital that an accurate count of Indigenous communities occurs. Without this, we experience not only the loss of resources that our ancestors gave through their blood and land in treaty negotiations, but we suffer a continued genocide through data erasure. If we are to stand with our ancestors and fight for the well-being of the seven generations to come, then we must push local, state, and federal governments to meaningfully and respectfully work with tribal government and community leaders to finally achieve an accurate count.

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Best Practices for American Indian and Alaska Native Data Collection

Current standard data collection practices by many federal, state, and local entities effectively omit or misclassify American Indian and Alaska Native (AI/AN) populations, both urban and rural. This is particularly concerning in the midst of the COVID-19 pandemic as these current standards of practice are resulting in a gross undercount of the impact COVID-19 has on Native people. Two major problems that are seen in data collection for Native populations include multiple descriptions of Native people found in data sources between federal, state, and local public entities and methodologies for collection, analysis, and presentation of data are inconsistent in available datasets.

To address these incomplete, inaccurate, and unreliable standard data collection and analysis practices, Urban Indian Health Institute (UIHI), a Tribal Epidemiology Center, has created best practices for methods to collect, analyze, and present data on AI/AN populations. The following data collection best practices recommendations are grounded in and stem from Indigenous values and practices.

Recommendations

General Data Collection

Best Practices for Advocacy and Decision Making for Tribal Leadership, Policy Makers, Urban Indian Organizations, and Community Members

Mandate collection of race and ethnicity in health data that utilizes local, state, federal, and territorial funds. Include enforcement mechanisms for non-collection of this data. Provide best practices, training, and technical assistance for mandated agencies.

In data collection, AI/AN should always be defined as AI/AN alone; and, if the AI/AN individual identifies as another race, include the individuals who are AI/AN in any combination with any other race and include those who identify as Latinx/Hispanic. In the event the definition cannot be as inclusive as stated above, the next less inclusive definition should be used, i.e. AI/AN alone.

Data tools used for collection of race and ethnicity should allow for selection of multiple races with the ability to disaggregate the data once collected. Data collection tools that do not allow for disaggregation are not recommended as they will effectively eliminate AI/AN in the data. AI/AN are one of the largest growing multi-racial groups in the United States, and data collection should reflect this diversity.[1]

Collect tribal affiliation. If using electronic data collections tools, this should be an inclusive list of all federal- and state-recognized tribes with a write-in option for First Nations or other tribal affiliation not listed. If using paper, ensure there is a space allocated to write in tribal affiliation.

- If your local, county, or state jurisdiction includes tribes and federally defined tribal lands, the addition of tribal affiliation should not be done until proper tribal consultation has been completed. In that government to government consultation, the tribes will determine if tribal affiliation should be collected and how that data should be reported back to them. Additionally, an urban Confer should take place with urban Indian organizations prior to adding the tribal affiliation.

- UIHI recommends using “tribal affiliation” in contrast to “tribal citizenship,” as only tribes determine and define tribal citizenship. Use of tribal affiliation allows for the collection of what tribe(s) and an individual identifies with, without impeding on tribal sovereignty.

- Caution should be taken when releasing data on tribal affiliation publicly. To ensure privacy, UIHI recommends suppression of individual tribal affiliation if the reportable data contains less than 10 of a specific tribal affiliation. UIHI recommends working with local tribes and Native organizations in the region to obtain recommendations on when and how the data should be shared.

Do not release tribally specific data without a Data Use Agreement from the tribe that grants such a release.

- For example, if a tribe reports the number of COVID-19 infections to the state, the state cannot release that tribe's data in a way that identifies the tribe without their permission. The release of this data without permission is a direct violation of the tribe's sovereignty, which grants them authority to govern any release of this data. When a Data Use Agreement is executed between government agencies and tribes regarding use of this data, it protects both the tribe and the government agency and should be standard practice for all data shared between tribes and government agencies.

National Electronic Disease Surveillance System access should be granted to Tribal Epidemiology Centers who were established as Tribal Public Health Authorities under the 2010 Affordable Health Care Act. Tribal Epidemiology Centers have the unique ability to work with tribes and urban Indian populations and are governed by urban and rural Native leadership.

Aggregate data on AI/AN populations. Aggregate data across time that includes a longer time frame for the analysis builds larger samples, which assists in overcoming the challenge of small populations analysis.

- For example, analyze data over three or five years rather than a single year. Another consideration for aggregating data is to combine several adjacent counties into one group, or present data at the state level to reflect demographics and outcomes of AI/AN.

Use weighted sampling for AI/AN populations.

- Weighted sampling is the practice that allows for the population that is being analyzed to accurately reflect how it's proportion in the total population is being represented from which it is being abstracted from. This gives increased strength to small populations.

Limit stratification in analysis to restrict reduction of sample size. Increased breakdowns often reduce sample sizes to very small numbers.

Avoid reporting data collected and findings from analysis as 'multi-racial' and 'other' when possible.

Link data sets to correct for racial misclassification. Racial misclassification is when an individual is classified as a different race than they identify with. This often occurs when the data collector makes assumptions based on stereotypical physical appearance instead of asking the individual what their race is. In some instances, racial misclassification occurs when an individual's race is not collected and the data system defaults to "white."

- Data linkages aim to identify two records in two data sets that represent the same person.[2] For example, a data linkage between a cancer registry and an IHS patient registration looks for records in the two files that are for the same person. Because the IHS patient registration file includes tribal members only, any individual in the cancer registry who is also in the IHS file is assumed to self-identify as AI/AN. Thus, the record in the cancer registry is corrected to reflect the correct race of the individual who is misclassified as another race.

Oversample the AI/AN population.

- Oversampling is an intentional sampling process, designed to incorporate more (typically low prevalence) members of a certain community (AI/AN population) into your sample and to adjust population distribution of the dataset.

Conduct mixed-methods research (quantitative and qualitative).

- Mixed-methods research includes storytelling, focus groups, and key informant interviews. Often, epidemiologists have findings that are not statistically significant, but that does not mean the data is not important or indicative of change or disparity, especially when working with a small population. In such cases, supplementing qualitative data can support initial results despite quantitative results showing insignificance.

Report limitations of data collection and analysis.

- It is important to list, explain, and discuss limitations so those considerations can be accounted for in evaluating the results and outcomes but also so that future endeavors may seek to address and improve upon these limitations.

Report strength-based and positive outcomes that focus on effective results illustrating the strength and resiliency of Indigenous people.

Surveillance Data Collection

Best Practices for Public Health Jurisdictions

Surveillance data flows from the local level through reports of diseases, conditions, and outbreaks to the state, local (New York City and District of Columbia), or territory and then to the Centers for Disease Control and Prevention (CDC) through the Nationally Notifiable Disease Surveillance System (NNDSS). COVID-19 is a Nationally Notifiable Condition to the Centers for Disease Control and Prevention. NNDSS follows the 1997 Office of Management and Budget (OMB) standards of reporting race in one of five categories, permitting the reporting of more than one race, and race being based on self-identification.

Data Collection

Often, current data collection standards do not provide inclusive categories in data collection tools that properly capture AI/AN. This results in the erasure of the AI/AN populations and limits the ability to understand the health and well-being of the community.

Collection of race and ethnicity. Reporting forms at the local, state, and territorial level must include reporting on race and ethnicity, must include AI/AN as one of the racial categories, and must allow the reporting of multiple races. AI/AN should always be defined as, AI/AN alone, and, if the AI/AN individual identifies as another race, include the individuals who are AI/AN in any combination with any other race, and include those who identify as Latinx/Hispanic. In the event the definition cannot be as inclusive as stated above, the next less inclusive definition should be used, i.e. AI/AN alone.

Collect tribal affiliation. If using electronic data collection tools, this should be an inclusive list of all federal- and state-recognized tribes with a write-in option for First Nations or other tribal affiliations not listed. If using paper, ensure there is a space allocated to write in tribal affiliation.

Public health personnel at the local level (or state or territorial level if case investigation is done at that level) need to receive training on asking people under investigation (PUI) for COVID-19 about their race and ethnicity—to enable PUI to report more than one race if that is how the person self-identifies—and to record these responses correctly on case reporting forms. They should be able to explain in a culturally attuned way to the PUI why this information is being collected and how it will be used. They should be trained to obtain this information on first contact with the PUI and, if not obtained on first contact, to ask when further contact is made. If the PUI is not able to respond because of illness or disability, public health personnel should receive training on how to illicit this information from family, friends, or those who could provide race information in a manner that would be most acceptable to the PUI.

Regular feedback should be provided to public health personnel at the local, state, and territorial level about missing race data along with a plan for quality improvement as problems are noted.

States and territories need to report race/ethnicity information to the CDC. NNDSS provides National Electronic Disease Surveillance System (NEDSS) standards to support the transmission of 1997 OMB standards of race/ethnicity data to the CDC by states, territories, and tribal health departments.

NNDSS access should be granted to Tribal Epidemiology Centers who were established as Tribal Public Health Authorities under the 2010 Affordable Health Care Act. Tribal Epidemiology Centers have the unique ability to work with tribes and urban Indian populations and are governed by urban and rural Native leadership.

Data Analysis

AI/AN are frequently not analyzed or are placed in a category with other smaller racial groups and analyzed as “other”. The declaration of a small population or not statistically significant stems from the practices of incorrectly identifying and defining AI/AN and misclassifying them as “other” races or ethnicities. Without further breakdown, disaggregation, and enumeration of the different racial combinations that Native people self-identify with, AI/AN are erased, omitted, and/or suppressed from reports.

Numerator: Include people who are AI/AN alone and, if multi-race, include people who are AI/AN in any combination with other races. Include all ethnicities.

Denominator: Counts of AI/AN alone or in any combination can be obtained from data.census.gov using the American Community Survey. Data are available down to the county level in the United States. Data are available by gender and age down to the state/territory level. Additional data on AI/AN alone or in any combination with other races may be obtained from state, territorial, and tribal population forecasting organizations.

Counts: If the numbers of AI/AN with COVID-19 are too small to protect privacy, consider aggregating the data of several adjacent counties or presenting data at the state level. Take into consideration how surveillance data for other conditions with small numbers is presented and discussed, and aggregate data across time that includes a longer time frame for the analysis. For example, analyze data over three or five years rather than a single year.

Defined settings: If a significant proportion of cases are due to outbreaks in people who live in defined settings (long-term care facilities, jails and prisons, homeless shelters, etc.), consideration should be given to analyzing these cases separately from cases assumed to have been exposed elsewhere in the community. This serves two purposes: 1) it can highlight which defined settings pose a specific morbidity risk to AI/AN and 2) if a defined setting makes up a substantial proportion of deaths in a county or state, including those deaths in the analysis of the community can hide the true mortality burden. As an example of the second case, if there were many deaths in long-term care facilities serving primarily older, non-Hispanic White people, including these in the population under analysis may mask that mortality outside of those facilities is disproportionately among AI/AN.

COVID-19 Mortality Data in Native Populations

Best Practices for Medical Examiners, Coroners, and Funeral Homes

Unlike surveillance data where the best practice is to ask, if possible, the PUI for COVID-19 which racial and ethnic groups they self-identify as, this is not possible with the loved one who has passed away. In most instances where someone dies, the funeral home is responsible for working with the decedent's next of kin or informant to fill out the demographic portion of the death certificate, including how the decedent would have described their race and/or ethnicity. In some instances, the medical examiner or coroner may be responsible for obtaining this information from the decedent's next of kin or informant. Numerous studies have demonstrated that a high proportion of AI/AN people who die are misclassified as white on their death certificates.[3,4]

Data Collection

Due to subjective observation by the funeral home, medical examiner, or coroner, Native people are born AI/AN and die classified as white. In addition, if the next of kin is asked, funeral homes, medical examiners, and coroners may not properly offer multi-race options.

Funeral homes, medical examiners, and coroners must ask the next of kin or informant how the decedent would have described their race/ethnicity and tribal affiliation and should abstain from placing information on the death certificate based on subjective observation.

AI/AN should always be defined as AI/AN alone, and, if the AI/AN individual identifies as another race, include the individuals who are AI/AN in combination with other race, and include those who identify as Latinx/Hispanic. In the event the definition cannot be as inclusive as stated above, the next less inclusive definition should be used, i.e. AI/AN alone.

Regular feedback should be provided to funeral homes, medical examiners, and coroners about unknown or refused race responses on the death certificates along with a plan for quality improvement when a problem is identified.

Provisions in state and territorial law should be made for the next of kin or informant to amend the death certificate after it is filed if the race/ethnicity information is incorrect or is unknown at the time the death certificate is filed.

Data Analysis

Since 2018, all state and territorial death certificates comply with 1997 Office of Management and Budget (OMB) standards of reporting race in one of five categories, permitting the reporting of more than one race, and race being based on self-identification.

Numerator: Include decedents who are AI/AN alone and, if multi-race, include decedents who are AI/AN in any combination of another race. Include all ethnicities. For guidance on how to use provisional death data to count deaths from COVID-19 see: www.cdc.gov/nchs/data/nvss/coronavirus/Alert-3-Final-COVID-19-Guidance-and-Provisional-Death-Counts.pdf

Denominator: Counts of AI/AN alone or in any combination can be obtained from data.census.gov using the American Community Survey. Data are available down to the county level in the United States. Data are available by gender and age down to the state/territory level. Additional data on AI/AN alone or in any combination may be obtained from state, territorial, and tribal population forecasting organizations.

Small counts: Understand state, territorial, and tribal laws about the confidentiality of mortality data. In some areas, mortality data from death certificates is public data with no assumption of privacy. In other areas, there are laws regarding the release of data. If privacy is a concern and numbers of AI/AN with COVID-19 are too small to protect privacy, consider aggregating the data of several adjacent counties or presenting data at the state level. Take into consideration how mortality data for other conditions with small numbers is presented and discussed.

Defined settings: If a significant proportion of deaths are in people who live in defined settings (long-term care facilities, jails and prisons, homeless shelters, etc.), consideration should be given to analyzing these deaths separately from cases assumed to have died elsewhere in the community. This serves two purposes: 1) it can highlight which defined settings pose a specific mortality risk to AI/AN and 2) if a defined setting makes up a substantial proportion of deaths in a county or state, including those deaths in the analysis of the community can hide the true mortality burden. As an example of the second case, if there were many deaths in long-term care facilities serving primarily older, non-Hispanic White people, including these in the population under analysis may mask that mortality outside of those facilities is disproportionately among AI/AN.

It may be possible to check for racial misclassification using other data sources. Link data sets to correct for racial misclassification. Data linkages aim to identify two records in two data sets that represent the same person.[2] For example, a data linkage between a cancer registry and an IHS patient registration looks for records in the two files that are for the same person. Because the IHS patient registration file includes tribal members only, any individual in the cancer registry who is also in the IHS file is assumed to self-identify as AI/AN. Thus, the record in the cancer registry is corrected to reflect the correct race of the individual who is misclassified as another race.

The Urban Indian Health Institute recommendations are grounded in the principles of Indigenous data sovereignty

In order to conduct Indigenous epidemiology, we must honor and uphold tribes' inherent right to govern their peoples, lands, resources, and data. We use these practices and elements to assess and evaluate AI/AN populations to provide accurate and meaningful data that is relevant and reflects the unique cultures, traditions, and health needs of urban and rural Native communities. To address the impact of COVID-19 in Native communities, we must use a model of Indigenous health equity,[5] which demands collaboration with Native communities and tribal leadership for meaningful data collection and analysis. [6,7]

When undertaking any efforts toward improving data collection among AI/AN people, come to Indigenous people because we have the answers, not because you think we have the most problems. The answers to preventing the spread of COVID-19 in AI/AN communities are carried in our stories, our practices of honoring elders, and generational practice of ensuring a great future for the next generations.

Data for Indigenous people, by Indigenous people.

Urban Indian Health Institute is available for technical assistance requests regarding these recommendations.

Phone: (206) 812–3030
Email: info@uihi.org
Visit: uihi.org/request-technical-assistance

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Since you asked: What data exists about Native American people in the criminal justice system?

Problems with data collection - and an unfortunate tendency to group Native Americans together with other ethnic and racial groups in data publications - have made it hard to understand the effect of mass incarceration on Native people.

by Roxanne Daniel, April 22, 2020

The scarcity of data on Native Americans in the U.S. criminal justice system comes up a lot in our conversations with activists and reporters, who rightly wonder why Native populations are often excluded from comparisons with other racial and ethnic groups. While Census data reveals that Native populations are overrepresented in the criminal justice system, other information that could shed more light on the issue is sparse. So, we compiled the information that *does* exist — which is fractured and hard to locate — in one place below.

Preface: What the Census data says

We've previously used data from the 2010 Census to analyze incarcerated populations by race/ethnicity and sex for each state. In our analysis, data on prisons and jails were combined. We found that, in 2010, there were a total of 37,854 American Indian/Alaskan Natives in adult correctional facilities, including 32,524 men and 5,132 women (and 198 who were 17 or younger). That is equivalent to a total incarceration rate of 1,291 per 100,000 people, more than double that of white Americans (510 per 100,000). In states with large Native populations, such as North Dakota, American Indian/Alaskan Native incarceration rates can be up to 7 times that of whites. Once the 2020 Census data is released, we will update our analysis, since it is 10 years old now.

Other data on Native Americans in the criminal justice system

Prisons: In 2016, 19,790 Native men and 2,954 Native women (22,744 total) were incarcerated in U.S. state and federal prisons, according to the Bureau of Justice Statistics' (BJS) National Prisoner Statistics (NPS) series. The NPS series reports the population of state and federal prisons – but not local jails – by race/ethnicity and sex, but the most recent data available with that level of detail is from 2016. However, other sources supplement these findings:

- BJS reports an increase to 23,701, in Prisoners in 2017. Oklahoma tops the list as the state with the highest number of American Indian/Alaskan Natives incarcerated, followed by Arizona, Alaska, and California. However, this data is not broken down further by sex *and* race.
- Limited state-level data is also available from some state Departments of Corrections, like Alaska's, which identifies Alaskan Native populations in its annual Offender Profile. However, many other states, even those with large Native populations like

California and Texas, group these populations into an "other" category when reporting demographics. (More on that in our discussion of data limitations below.)

Jails: The BJS annual report on jail inmates estimates 9,700 American Indian/Alaskan Native people – or 401 per 100,000 population – were held in local jails across the country as of late June, 2018. That's almost twice the jail incarceration rates of both white and Hispanic people (187 and 185 per 100,000, respectively). Frustratingly, this data is also not reported by sex.

The 2016 BJS *Jails in Indian Country* report identifies 80 facilities operating on tribal lands, holding 2,540 people – 1,750 men and 620 women – in mid-2016. The number of inmates *admitted* to Indian country jails was 9,640 during the month of June 2016, giving us an idea of "jail churn" in facilities on tribal lands. Additionally, this report is one of the very few sources for this population's offense data, although even here, about 35% of offenses are unhelpfully categorized as "other."

Youth: People under the age of 21 make up 42% of American Indian/Alaskan Native populations in the United States, so Native youth confinement is a special concern. With a detention rate of 255 per 100,000 in 2015, Native youth are approximately three times more likely to be confined than white youth (83 per 100,000). In Indian country jails, approximately 6% of the confined population was 17 or younger in 2016; unfortunately, the number of youth held in other adult prisons and jails is not broken down by race/ethnicity. The Census of Juveniles in Residential Placement reports data on Native youth in juvenile justice facilities across the U.S., most recently for 2017, including details about offense type, facility type, sex, age, and more.

Contributing to these confinement rates is disproportionate police contact: Native youth are arrested at a much higher rate than white youth. The 2018 arrest rate for Native youth was 2,251 per 100,000 while white youth were arrested at a rate of 1,793 per 100,000.

Data collection from Native populations suffers from a number of limitations

Data collection efforts in tribal communities face a number of problems that limit the data's accuracy and comprehensiveness.

According to the National Institute of Justice, issues such as difficulty in outreach, overlapping jurisdictions, and differences between tribal justice systems make the collection of data from these communities especially challenging. U.S. government policies and priorities also limit the data it collects and reports about Native populations:

A lack of reciprocity between the U.S. and tribal justice systems has worsened the issues with data collection and sharing.

- **The DOJ has moved slowly:** A Department of Justice (DOJ) oversight report in compliance with the 2010 Tribal Law and Order Act (TLOA) states that the "TLOA requires the Department's BJS to collect data related to crimes in Indian country. However, 7 years after TLOA became law, its data collection and reporting efforts are still in development."

- **Reporting is voluntary:** According to the same report,"…because participation in the FBI's Uniform Crime Reporting (UCR) Program is voluntary, not all tribes report crime statistics into the UCR database. As a result, *Indian country crime statistics are so outdated and incomplete as to be virtually useless.*" The BJS derives most of its crime data from the UCR program, which is especially incomplete when it comes to tribal jurisdictions' data. The DOJ report found that while "207 tribes reported to the UCR in 2014, only 115 tribes submitted complete information that was included in the final UCR report." It's worth mentioning that there are, as of 2017, 226 tribal law enforcement agencies recognized by the federal government. Assuming the same number existed in 2014, that means 19 (8%) did not report crime data at all.
- **Data collection does not distinguish between tribes:** According to the DOJ report, the National Crime Victimization Survey "does not allow the calculation of separate crime statistics for each American Indian tribe." A report from the United States Sentencing Commission's Tribal Issues Advisory Group also cites a lack of accurate databases in tribal courts, consistent and comparable disaggregation, and data sharing between federal and tribal entities.
- **Data aren't used to help Native communities:** The U.S. Sentencing Commission's Report notes that the limited data that is collected has not been used to "evaluate and improve" law enforcement activities in Indian country. This adds to the strain caused by the general lack of cooperation between U.S. and tribal justice systems: According to a report by the National Tribal Judicial Center, federal and state correctional facilities "do not notify tribes of inmate release to parole or probation." The report notes that tribal "protection orders are not validated by or enforced by state courts or state law enforcement. No outside agencies honor tribal court subpoenas." This lack of reciprocity worsens the already countless issues with data collection and sharing.
- **Cultural and socioeconomic barriers lead to undercounting:** More broadly, a "distrust of the U.S. government, a youth-heavy population, nontraditional addresses, low internet access, language and literacy barriers, weather and road access issues, and high rates of poverty and houselessness" create a deeply problematic undercounting of American Indian/Alaskan Native people. (A report by Rewire.News examines the consequences of this undercounting, including lower representation in Congress, funding deficits in health and human services, and a decline in tribal recognition and enrollment.)

"Other" data obscurities

Data publications often put Asian Americans, Pacific Islanders, Native Hawaiians, and Native Americans in a single category, obscuring differences between these groups.

Criminal justice data often uses racial and ethnic categories to break down the disproportionately high representation of Black and Hispanic populations in prisons and jails. Beyond these categories, however, lies the illusive "other" designation, which lumps together Asian Americans, Pacific Islanders, Native Hawaiians, and of course, American Indians and Alaskan Natives. However, as the Census data reveals, disproportionate incarceration rates for these groups are not negligible. This practice obscures differences between these groups and makes it

difficult to determine how the justice system plays a role in Native communities. Specifically:

- The Bureau of Justice Statistics categorizes American Indian/Alaskan Natives as "other" in their Felony Sentences in State Courts data series. According to research by the Native American Voting Rights Coalition, several Native women surveyed mentioned that their husbands/partners were ineligible to vote due to felony convictions, contributing to a variety of barriers that hinder Native American political participation. The lack of disaggregated data makes it difficult to determine the exact proportion of Natives who are disenfranchised.
- According to the *American Indian and Alaskan Natives in Local Jails* report, there were 31,700 individuals in jail – in addition to those categorized as American Indian/Alaskan Native – who identified as American Indian/Alaskan Native *and* another race(s), suggesting higher rates of incarceration nationwide if multi-racial individuals were included in Native population counts or rates.
- Rewire.News's report also highlights how gender categorization of Native populations can often obscure those who identify as Two Spirit, non-binary, or transgender.

As it stands, there are many more questions than answers about Native Americans in the criminal justice system. Until criminal justice agencies overcome the limitations on data collection — and until the offices that publish the data are willing to list Native Americans as a distinct demographic group, rather than a member of an "Other" category — informational gaps will continue to make it difficult to understand how overcriminalization has impacted Native populations.

Roxanne Daniel is a Smith College student providing research support at the Prison Policy Initiative.. (Other articles | Full bio | Contact)

NCAI Policy Research Center

Supporting Indian Country in Shaping its Own Future

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Research Recommendations (/policy-research-center/research-data/research-recommendations)

Data Resources (/policy-research-center/research-data/data-resources)

PRC Publications (/policy-research-center/research-data/prc-publications)

Data Disaggregation (/policy-research-center/research-data/data)

Data Disaggregation

The Asterisk Nation

While American Indians and Alaska Natives are an integral and unique part of US society, *we continue to be invisible* to most other Americans due to an absence of data, accurate media images, and historical and contemporary awareness about Native peoples in schools, healthcare facilities, professions, military service, and daily life.

This invisibility is perpetuated by federal and state agencies and policies that leave American Indians and Alaska Natives out of data collection efforts, data reporting and analysis, and/or public media campaigns. ***American Indians and Alaska Natives may be described as the "Asterisk Nation" because an asterisk, instead of data point, is often used in data displays when reporting racial and ethnic data*** due to various data collection and reporting issues, such as small sample size, large margins of errors, or other issues related to the validity and statistical significance of data on American Indians and Alaska Natives.

There is a critical need for accurate, meaningful, and timely data collection in American Indian/Alaska Native (AI/AN) communities. Federal agencies are charged with collecting data in AI/AN communities, as well as from the general US population, in order to determine budget requests; support and strengthen budget justifications; allocate resources; provide services; conduct strategic planning; and comply with statutory and regulatory reporting processes. Accurate data collection and community-based planning captures true needs, and thus can drive larger programmatic investments resulting in a cost-effective use of tribal, federal, and private resources. Without quality data, policymakers and community planners cannot set policy goals, monitor implementation, measure impact, or plan for demographic shifts in an effective way. The absence of American Indian and Alaska Native peoples in data and policy domains reflects the lack of a national public discourse on the status of our nation's First Peoples.

In addition, the research and data on the importance of Native cultures and languages is taking place at a local, and often isolated, level such that national Indian policy research rarely accounts for or highlights the value of Native cultures and languages. A coordinated and comprehensive approach is needed for measuring and reporting how Native cultures and languages matter, especially in light of the rapidly changing demographics in the US and in Indian Country.

Because policymakers use national datasets (both government and private) to shape billions of dollars in funding allocations and develop policy interventions to serve American Indian and Alaska Native communities, it is vital for federal agencies and private entities to collect adequate data in AI/AN communities. Unfortunately, the data describing Native communities is often insufficient, unreliable or completely absent. The lack of data affects policymaking at federal, tribal, and state levels.

Key Considerations in Data Quality:

- What data related to American Indians and Alaska Natives are being collected by federal agencies?
- What is the quality of these data and measures (e.g., sample size, age of report)?
- What is the method of data collection (e.g., individual self-report on a survey, organizational records) and has tribal approval been granted?
- What is the 'definition of Indian' used?
- Are the comparisons used appropriate (e.g., Native to non-Native; Native to Native; regional; international comparisons)
- What measures are important to American Indians and Alaska Native leaders?

Priority Issues

Measurement of Small Populations
Emerging work on the issue of measurement of small populations is being developed with regional Census Information Centers, university researchers, and federal agency partners. This work aims to address the persistent issue of non-inclusion of small and rural populations like American Indian and Alaska Native peoples in national, longitudinal studies due to sampling challenges and high costs. To share insight on this issue, please contact Amber Ebarb at aebarb@ncai.org (mailto:aebarb@ncai.org).

Undercounting of American Indian and Alaska Native Youth & Other Populations
Related to the issue of measurement in small populations noted above, there is a particular issue with undercounting of AI/AN people in major federal efforts such as the American Community Survey. These issues of undercount disproportionately affect those living on or near reservations and AI/AN youth, who make up a large proportion of AI/AN people nationally and in certain states. Analyses by Deweaver (linked below) suggest that these undercounts may be due in part to the smaller reach in the sampling approach used by the American Community Survey as compared to the broader sampling used by the Decennial Census. Other analyses (http://www.aisc.ucla.edu/research/pb1_memo3.aspx) by UCLA Researchers Ong & Ong suggests there may also be weighting issues in the sampling approach. These undercounts have serious impacts as American Community Survey data is used as part of the distribution of over $400 billion in federal and state funds each year, some of which the federal government has a trust responsibility to provide to tribal nations.

Trends in Size of AI/AN Alone Youth Population by Type of Land Area – 1990 to 2010 (/policy-research-center/initiatives/Declining_AI-AN_Alone_Youth_Population.docx) (Deweaver, 2013) (/policy-research-center/initiatives/Declining_AI-AN_Alone_Youth_Population.docx)

US Census Bureau Analysis of the American Community Survey and Puerto Rico Community Survey Coverage (/policy-research-center/initiatives/ACS13-RER-1_ACS_Coverage.pdf)(January 16, 2013) (/policy-research-center/initiatives/ACS13-RER-1_ACS_Coverage.pdf)

Comments on Census Bureau Evaluation Report on ACS Coverage Measured by Comparison with the 2010 Decennial Census (Deweaver, 2013) (/policy-research-center/initiatives/Census_Evaluation_of_ACS_coverage_-_DeW_comments.docx)

American Community Survey Data on the American Indian/Alaska Native Population: A Look behind the Numbers (Deweaver, 2013) (/policy-research-center/initiatives/ACS_data_on_the_AIAN_Population_paper_by_Norm_DeWeaver.pdf)

The American Community Survey: Serious Implications for Indian Country (Deweaver, 2010) (/policy-research-center/initiatives/ACS_Serious_Implications.PDF)

International efforts in countries with significant populations of Indigenous peoples are emerging to strengthen methodologies related to improving estimates of Indigenous populations in national and other important data sets:

Improving Estimates of Indigenous Under-Identification in Key Data Sets

- The Indigenous Identification in Hospital Separations Data Quality Report (http://www.aihw.gov.au/publication-detail/?id=60129543215)
- *An Enhanced Mortality Database for Estimating Indigenous Life Expectancy: A Feasibility Study (http://www.aihw.gov.au/publication-detail/?id=10737422286%20)*
- *A Comparative Analysis of Indirect Methodologies for Estimating Indigenous Life Expectancy (http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442472791)*
- Comparative Life Expectancy of Indigenous People in the Australia, New Zealand, Canada and the United States: Conceptual, Methodological and Data Issues (http://file://localhost/%E2%80%A2%2509http/:www.aihw.gov.au:WorkArea:DownloadAsset.aspx%3Fid=10737418932&libID=107

Measuring Joblessness

The Secretary of the Interior, in consultation with the Secretary of Labor, is statutorily required to publish, not less than biennially, a report that includes gender-specific information on the population eligible for services provided to Indian people by the Secretary of the Department of the Interior (DOI). The report is required to include, at a minimum, information (i) at the national level by state; (ii) at the Bureau of Indian Affairs Service area; and (iii) at the tribal level for the:

- Total service population;
- Service population under age 16 and over 64;
- Population available for work, including those not considered to be actively seeking work;

- Employed population, including those employed with annual earnings below the poverty line; and
- Numbers employed in private sector positions and in public sector positions.

Enacted as Section 17 of Public Law 102-477 in October of 1992, as amended (codified at 25 U.S.C. 3416), the American Indian labor market report ("Report") was mandated by the Indian Employment, Training and Related Services Demonstration Act of 1992 ("Act"). The Act allows Indian tribes to integrate federally-funded employment, training and related services programs provided by the Departments of the Interior, Labor, Education, and Health and Human Services. The last Labor Market Report issued by DOI was provided to Congress in 2007 for the year 2005.

Data from this Report are used to develop economic policy approaches to address the unique demographic and labor force contexts in tribal contexts that other Department of Labor (DOL) and US Census Bureau measures do not capture. Specifically, the Report's measure of "joblessness" – or "the population available for work, including those not considered to be actively seeking work" – is not currently captured by other federal data collection efforts and is the most cited aspect of the Report. These data are used to inform the Congress' policymaking, serving as the subject of a Senate Committee on Indian Affairs hearing during the 112th Congress and regularly used in hearings by the House and Senate. They are also used locally for planning and program purposes to identify appropriate economic development approaches and gauge particular community needs and resources. Another critical use of these data is to determine levels of federal funding for tribes under the Workforce Investment Act, the Indian Housing Block Grant program, and the BIA Tribal Transportation program.

Any significant changes to data collection and the continued non-reporting of data impacts the ability of tribal governments to adequately provide for their citizens, and affects the federal government from carrying out its trust responsibility in essential social and economic areas. While DOI has traditionally relied on tribes to provide data for this report, tribes should not bear sole or primary responsibility for providing quality data with little to no resources, training, or other support from DOI to do so. As stated in statute, this Report is the responsibility of the Department of the Interior. It is also an essential mechanism for monitoring the quality of services that DOI is responsible to provide to American Indian and Alaska Native people. DOI's 2012 request for comments on the AIPLF Report (http://www.gpo.gov/fdsys/pkg/FR-2012-05-29/pdf/2012-12906.pdf) includes questions about the possibility of using Census data on unemployment rather than tribal data on joblessness in order to improve data quality and consistency, especially given the Office of Management and Budget's data quality standards. At times, it appears that tribes are being held responsible for a lack of federal agency coordination around the issue of data quality and the measurement of small populations. Specifically, there needs to be greater coordination between DOI, DOL, Census, and OMB to address the widespread problems that plague data collection for Indian Country.

[The above section was excerpted from the official Comments NCAI filed in 2012 that can be viewed here. (/policy-research-center/initiatives/NCAI_Comments_to_the_AIPLF_Report.pdf)]

Other information from the Bureau of Indian Affairs at the US Department of the Interior on the American Indian Population and Labor Force Report can be found at: http://www.bia.gov/cs/groups/public/documents/text/idc-024548.pdf (http://www.bia.gov/cs/groups/public/documents/text/idc-024548.pdf).

US Department of Education (USDOE) Non-Reporting of Key Education Data on American Indian and Alaska Native Students.

When the USDOE released its 2007 Final Guidance on Maintaining, Collecting and Reporting Racial and Ethnic Data, (http://www2.ed.gov/legislation/FedRegister/other/2007-4/101907c.html)the impacts across Indian Country were felt almost immediately. While the USDOE will continue to collect data on American Indian and Alaska Native (AI/AN) students whether or not they report a racial/ethnic status that is in combination with other racial/ethnic groups (e.g., Hispanic/Latino, White), the USDOE will only report AI/AN specific data for students who indicate they are not Hispanic/Latino ethnically and select only American Indian and Alaska Native as their race. American Indian/Alaska Native students who indicate that they are also Hispanic/Latino ethnically will only be reported in the Hispanic/Latino category. Regardless of whether they indicate Hispanic/Latino ethnicity, American Indian/Alaska Native students selecting an additional racial category will only be reported as multiracial. The effect is major and detrimental at local, state, and national levels as AI/AN communities have historically relied on USDOE data as a quality source of information for planning and development efforts (see image below from the 2012 NCES STATS-DC Presentation prepared by NCAI and NIEA):

The USDOE has data that it can disaggregate for AI/AN alone, AI/AN in combination with other ethnicities and races, and AI/AN alone and in combination as the Census does, but it has opted not to do so. Stemming from the Executive Order of May 9, 2013, *Making Open and Machine*

Readable the New Default for Government Information, President Obama established an Open Data Policy (http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf) through Memorandum that:

> "establishes a framework to help institutionalize the principles of effective information management at each stage of the information's life cycle to promote interoperability and openness…Specifically, this Memorandum requires agencies to collect or create information in a way that supports downstream information processing and dissemination activities."

The USDOE Guidance does not support downstream information processing or dissemination activities in American Indian and Alaska Native contexts.

2012 NCES STATS-DC PowerPoint Presentation (/policy-research-center/initiatives/STATS-DC_2012_070612.pptx)

Gaps in Existing Data

Another major data quality issue has to do with gaps in existing data, which can relate to non-existence of data on key indicators or the inconsistent reporting over time that leads to gaps in data. For example, the American Indians and Crime Series (http://www.bjs.gov/index.cfm?ty=pbse&sid=11) published by the Bureau of Justice Statistics at the US Department of Justice provided essential data between 1999 and 2004 but has not been published since. Also, an analysis (http://www.minneapolisfed.org/indiancountry/pastevents/2012_Aug27/Todd_Data_and_Data_Gaps_Paper.pdf) by Richard Todd, the Vice President of the Minneapolis Federal Reserve Bank, identified a range of gaps in economic data with relevance to tribal and reservation communities. Todd notes that there is a particular need for longitudinal data on tribal government economic development, reservation business activity, and data on individual reservation residents and households. A 2007 report (http://aspe.hhs.gov/hsp/07/AI-AN-NA-data-gaps/report.pdf) by Westat details the gaps in data related to American Indian and Alaska Native health data and offers strategies for improvement.

Lack of Coordination and Data Linkage across Sectors
Emerging research on Native youth (http://www.firstalaskans.org/documents_fai/Final%20Full%20version%20GBN%2010-07.pdf) suggests that we need data that can be compared across sectors like education, health, labor, and justice, for example. Knowing the high school dropout rate for AI/AN students may tell a particular story in a region, but having information about where students who leave school go (e.g., workforce, military, justice system) could assist community leaders in planning robust and innovative initiatives to support these students' development over time. There needs to be improved efforts to coordinate federal and state data across agencies and sectors. Other countries like Australia have invested in developing guidelines for linking data sets that include information on Aboriginal and Torres Strait Islander peoples to improve data quality:

Guidelines for Data Linkage Activities Relating to Aboriginal and Torres Strait Islander People

- *National Best Practice Guidelines for Data Linkage Activities Relating to Aboriginal and Torres Strait Islander People* (http://www.aihw.gov.au/publication-detail/?id=10737422216)
- *Report on the use of linked data relating to Aboriginal and Torres Strait Islander people* (http://www.aihw.gov.au/publication-detail/?id=60129543448)
- *Thematic list of projects using linked data relating to Aboriginal and Torres Strait Islander people* (http://www.aihw.gov.au/igihm-2012/related/publication-detail/?id=60129543449)

Definition of Indian
While NCAI does not advocate for any one particular definition in federal policy, the NCAI Policy Research Center has begun to compile information on the various definitions of Indian in use by federal agencies to inform policy development.

While members of federally recognized tribes have a particular status here in the US, this issue of Indigenous identification is one that plagues other nations as well. Australia has developed some guidelines to steward the identification of Aboriginal and Torres Strait Island peoples in health data sets:

Improving Indigenous Identification in Health Data Sets

- *National best practice guidelines for collecting Indigenous status in health data sets* (http://www.aihw.gov.au/guidelines-for-collecting-indigenous-status/)
- *Evaluation of the national best practice guidelines for collecting Indigenous status in health data sets (report on Stage 2) Towards better Indigenous health data* (http://www.aihw.gov.au/publication-detail/?id=60129543454)

- *Taking the next steps: Identification of Aboriginal and Torres Strait Islander status in general practice* (http://www.aihw.gov.au/publication-detail/?id=60129543899%20)
- *Principles on the use of direct age-standardisation in administrative data collections: for measuring the gap between Indigenous and non-Indigenous Australians (http://www.aihw.gov.au/publication-detail/?id=10737420133)*

Judicial Council *of* California

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M E M O R A N D U M

Date
October 19, 2023

To
Hon. Richard C. Blake, (Hoopa) Chief Judge of Redding Rancheria and Hoopa Valley Tribal Courts
Hon. Alison M. Tucher, Presiding Justice of the Court of Appeal, First Appellate District, Division Three

From
Ann Gilmour, Attorney

Subject
Recognition and Enforcement of Tribal Court Orders in California

Action Requested
Please Review

Deadline
N/A

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

This memo provides a very high-level view of issues related to jurisdiction in California Indian Country and recognition and enforcement of tribal court orders in California.

Background

California's Tribal Population

California is home to more people of Indian ancestry than any other state in the nation. Currently there are 109 federally recognized tribes in California, second only to the number of tribes in the state of Alaska. California also has many tribal groups that are not on the list of federally

recognized tribes maintained by the federal Department of the Interior[1], but that state law acknowledges as having some legal rights. Although neither the state nor federal government publish a comprehensive list of "unrecognized" tribal groups in California, the Native American Heritage Commission does maintain a tribal consultation list available upon request from state and local government agencies of "California Native American Tribes" eligible to engage in consultation under SB-18 (consultation in land use planning), AB 52 (CEQA tribal consultation) and which meet the definition of "California Indian Tribe" for the purposes of AB-275 (CalNAGPRA) This list currently contains 67 entities who are not included in the federal government's list of recognized tribes.

Tribal Courts in California

For purposes of recognition and enforcement of court orders, only federally recognized tribes are acknowledged to have the necessary sovereignty and government-to-government relationship to support recognition and enforcement of court orders.

Each federally recognized tribe is sovereign, with powers of internal self-government, including the authority to develop and operate a court system. We are aware of twenty-two tribal courts that are currently operating in California serving roughly forty of California's tribes. Several other courts are under development. It is important to understand that tribes do not need to inform the state when they develop courts. The Judicial Council maintains a list of tribal courts that staff are aware of for informational purposes only.

The California Tribal Court–State Court Forum was established by former Chief Justice Ronald George in May 2010. The forum brings together tribal and state court judges from throughout California. The charge of the forum is "to develop measures to improve the working relationship between California's tribal and state courts and to focus on areas of mutual concern." From the beginning, the forum has identified the recognition and enforcement of tribal court judgments as a priority area of concern.

The Forum has operated under the general principal that robust tribal courts further the Judicial Branch Strategic Plan Goals of Access, Fairness, Diversity, and Inclusion by providing tribal communities with access to justice that is more physically accessible, less costly, and more culturally appropriate to the needs of the tribal communities.

[1] This list is published annually by the federal government. The most recent list is available at: https://www.federalregister.gov/documents/2023/01/12/2023-00504/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of

Jurisdiction of Tribal Courts

Tribal courts in California hear a variety of case types including child abuse and neglect cases; domestic violence and protective orders; domestic relations (e.g., divorce and dissolution); contract disputes and other civil cases for money judgments; unlawful detainers, property disputes, nuisance abatements, and possession of tribal lands; name changes; and civil harassment protective orders. The subject matter jurisdiction of each tribal court is defined by the tribe that establishes it. The extent to which tribes may exercise personal jurisdiction over individual litigants is defined in a body of federal law. Generally, tribes may exercise full civil and criminal jurisdiction over Indians within the tribe's reservation or trust lands ("Indian Country"). Tribes generally have no criminal jurisdiction over non-Indians with limited exceptions under the Tribal Law and Order Act and the Violence Against Women Act 2022 reauthorization.

In general, tribes may exercise civil jurisdiction over non-Indians only where the non-Indians have entered into consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[2]

State courts in California share concurrent jurisdiction with tribal courts in many, but not all, areas because of Public Law 280. This law enacted by Congress in 1953 transferred federal criminal jurisdiction and conferred some civil jurisdiction on states and state courts in the six mandatory Public Law 280 states, including California. Public Law 280 is now codified in federal law as 28 U.S.C. § 1360 regarding civil jurisdiction and 18 U.S.C. § 1162 regarding criminal jurisdiction.

To avoid the problem of forum shopping and conflicts with respect to jurisdiction, the state of Wisconsin (also a PL-280 state) has entered protocols with Wisconsin tribes to develop a process and principles for the allocation of jurisdiction when either court could take the case. These are known as "Teague Protocols" after the case that they sought to address.[3] Early on, the forum considered such protocols, but the project was not pursued.

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[2] For more on jurisdiction in California Indian Country in general, see Jurisdictional Issues in California Regarding Indians and Indian Country

[3] More information about the Teague protocols:https://www.mncourts.gov/mncourtsgov/media/scao_library/TCSCF/Engendering-Tribal-Court-State-Court-Cooperation.pdf, https://www.tribal-institute.org/download/TeagueProtocol.pdf, http://www.wtja.org/assets/pages/Teague%20Packet(1).pdf,

Recognition and Enforcement of Tribal Court Orders

While tribes are recognized as sovereign, they are not "states" for the purpose of the full faith and credit requirements of article IV of the U.S. Constitution. There is consensus (but no United States Supreme Court authority) that tribes are not covered by the federal full faith and credit statute (28 U.S.C. § 1738). In *Wilson v. Marchington* (9th Cir. 1997) 127 F.3d 805, the Ninth Circuit Court of Appeals determined that, as a general matter, the recognition of a tribal court order within the United States federal courts was governed by the principles of comity and not subject to the full faith and credit requirement of the Constitution or title 28 United States Code section 1738.

Nevertheless, several specific federal and state laws mandate full faith and credit for and between tribal and state courts in specific types of actions:

- Indian Child Welfare Act (25 U.S.C. § 1911(d)) requires full faith and credit for tribal court custody orders concerning Indian children. ICWA also addresses the issue of jurisdiction over child welfare proceedings involving Indian children;
- Violence Against Women Act (18 U.S.C. § 2265) mandates full faith and credit for domestic violence protection orders (see also the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (Fam. Code, § 6400 et seq.));
- Child Support Enforcement Act (28 U.S.C. § 1738 B) mandates full faith and credit for child support orders;
- Uniform Interstate Family Support Act (Fam. Code, § 4900) mandates recognition of other forms of family support orders;
- Uniform Child Custody Jurisdiction and Enforcement Act (Fam. Code § 3404) mandates recognition of child custody orders;[4] and
- Tribal Court Civil Money Judgment Act (Code of Civil Procedure §§ 1730-1741) sets out the process for recognition of a money judgment.

Where there is no specific statutory mandate for full faith and credit or statutory procedures for recognition of tribal court judgments or orders, the general rule is that tribal court orders are entitled to comity.

Some states have taken a comprehensive approach to the issue of recognition and enforcement of tribal court orders.

Minnesota has an entire section of their statutory rules of court devoted to the treatment of Tribal Court Orders and Judgments:

[4] In addition, the Interstate and International Depositions and Discovery Act (Code of Civil Procedure § 2029.200–2029.900) includes a federally recognized Indian tribe within the definition of "State".

https://www.revisor.mn.gov/court_rules/gp/id/10/. It states that the courts must follow other applicable state and federal laws regarding recognition and enforcement of judgments and orders, has a special provision for civil commitment orders, and then provides generally that "…Courts of this state shall recognize and enforce an order or judgment of a tribal court of record of a federally recognized Indian tribe…" unless an objecting party can demonstrate grounds not to enforce.

California does not currently have a comprehensive approach. The statutes listed above are the only ones that discuss treatment of tribal court orders and judgments.

Problem Areas

Tribal courts would like a comprehensive approach to the recognition and enforcement of all tribal court orders and judgments. However, there are specific areas that have been of particular concern because they represent gaps in enforcement in important areas that create public safety concerns. Case types that have been of particular concern include:

- Traffic – Indian reservations are often very remote. Some roads are state owned; some are county owned; and some are owned in trust for the tribe. Many reservations are remote and rugged, while some are close to major urban areas and have major highways running through them. Some get a lot of non-reservation traffic; others get very little. Although some tribes have their own police, most do not. State and local law enforcement are primarily responsible for traffic enforcement and for criminal investigation, arrests, and prosecutions of crimes that occur in Indian country. In many instances, however, there is little state and local law enforcement presence on the reservation, and tribal law enforcement (where they exist) are the first responders to traffic incidents, including incidents that can impact public safety such as driving under the influence and reckless driving. Currently, the effectiveness of tribal law enforcement and tribal courts to deal with such issues is undermined by the lack of adequate enforcement mechanisms.[5] If tribal police issue citations, these are often ignored. Currently there is no mechanism to have tribal traffic orders recognized and enforced within the state system either by registration with state courts or through the systems in place under the Department of Motor Vehicles (DMV). Even repeated findings of drunk or reckless driving in tribal court do not affect an individual's California driver's license or record.

Potential solutions

[5] See discussion of importance of cooperation in traffic issues in "Improving the Administration of Justice in Tribal Communities through Information Sharing and Resource Sharing" by Kimberly Cobb and Tracy Mullins, Bureau of Justice Assistance, 2010, available at https://www.bja.gov/Publications/APPA_TribalInfoResourceSharing.pdf.

Some options to provide for recognition and enforcement of tribal court orders related to traffic issues may include amending section 15021(a) of the California Vehicle Code to include federally recognized tribes within the definition of "state" under the driver's license compact[6], or an amendment to section 1800 *et seq.* of the Vehicle Code to include tribal courts in the definition of courts that may input convictions of offenses currently reported to DMV by state courts.

- Domestic Violence – notwithstanding that under state and federal law DV protective orders are entitled to full faith and credit, tribal courts continue to have issues with enforcement of their protective orders. California law enforcement will not enforce these orders unless they can find the orders during a search of the California Law Enforcement Telecommunications System (CLETS). CLETS access has been challenging for tribal law enforcement and tribal courts. The California Department of Justice which maintains CLETS has consistently objected to tribal entities having access. The Judicial Council has attempted to assist by revising the DV-600 form and adopting California Rules of Court, rule 5.386 to facilitate registration of these orders, but tribes still report challenges. Very few courts seem to have adopted procedures under rule 5.386. One exception is the Mendocino County Superior Court. Local Rule 1.7 b. authorizes the electronic filing of a tribal court protective order as follows:

  > Tribal Court Protective Orders. Tribal Court Protective Orders that are entitled to be registered under Family Code § 6404 may be filed directly with the clerk's office by email at tribal.orders@mendocino.courts.ca.gov pursuant to California Rules of Court rules 2.300 – 2.305, and 5.386.

- Child Custody Orders - Tribal courts may issue child custody orders in cases under their jurisdiction. These custody orders may be issued in cases that are akin to California juvenile, family, or probate guardianship proceedings. State and federal law mandate recognition of these orders. The Indian Child Welfare Act[7] provides at § 1911:

  > **(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes**
  > The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody

[6] For terms of the compact more generally see Vehicle Code §§ 15000–15028

[7] 25 U.S.C. §1911(d)

> proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Neither the Welfare and Institutions Code nor the Probate Code have any specific provisions regarding the recognition of either tribal or out of state child custody orders. However, in states that have adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), state courts must comply with the UCCJEA when custody and visitation issues arise in proceedings for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence.[8]

The UCCJEA, implemented in California statutes at Family Code §§ 3400-3465, provides for the recognition and enforcement of out of state child custody orders. The Judicial Council adopted form FL-580, *Registration of Out-of-State Custody Order*, for this purpose. Although the UCCJEA is implemented in the Family Code, it is not limited to out of state child custody cases arising in what would be family law cases in California. With respect to child custody orders issued by tribes, section 3404 excludes cases governed by ICWA (which does not apply to tribal court cases) from its application and provides that "[a] child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognized and enforced …."[9]

Tribal court judges and personnel report that they are experiencing problems having their custody orders (in all case types) recognized and enforced because of confusion around the use of form FL-580 for tribal court orders and in case types that would not be defined as "family law" cases under California law. In several instances, state court clerks have refused to accept tribal court orders for filing. Further, tribal court personnel report that district attorneys will not act under section 3131 of the Family Code on a tribal court order that is not registered with the state court, nor will law enforcement assist in enforcement of these tribal court orders. Tribal court judges report that in certain counties investigators are informing parents that they do not need to abide by child custody orders made by tribal courts.

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[8] See U.S. Department of Justice Office of Justice Programs Bulletin and section 3402(d) of the Family Code which defines the proceedings to which it applies: "Child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for dissolution of marriage, legal separation of the parties, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Chapter 3 (commencing with Section 3441).

[9] See Family Code §3404

- Trespass and Exclusion – Because tribes lack criminal jurisdiction over non-Indians and states do not have jurisdiction to regulate the use of tribal lands, even in PL-280 states like California, reservations can be a haven for activity that affects public safety both on and off the reservation. There has been confusion over whether California law enforcement can or must enforce tribal exclusion orders. The Department of Justice recently issued Information Bulletin 2022-DLE-04 to clarify that a violation of a tribal exclusion order may be a Penal Code section 602(m) trespass if it meets all of the required elements. It may also constitute contempt of court under Penal Code section 166 (a)(4). However, this relies upon local officials being willing to bring a prosecution.

34 N.M. L. Rev. 381

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The New Mexico Law Review Presents a Symposium on Enforcing the Judgments of Tribal Courts
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FULL FAITH AND CREDIT, COMITY, OR FEDERAL MANDATE? A PATH THAT LEADS TO RECOGNITION AND ENFORCEMENT OF TRIBAL COURT ORDERS, TRIBAL PROTECTION ORDERS, AND TRIBAL CHILD CUSTODY ORDERS

> I have heard talk and talk, but nothing is done. Good words do not last long unless they amount to something. I am tired of talk that comes to nothing.... When the white man treats an Indian as they treat each other, then we will have no more wars.
>
> Chief Joseph, Nez Perce Tribe (1879)[1]

A recent article surveyed tribal court judges in the lower forty-eight states with respect to state recognition and enforcement of all types of tribal court orders.[2] Eighty percent of the tribal courts that responded indicated that their enforcement difficulties arose in a state forum.[3] But the most striking results of the study arose where states failed to recognize tribal court judgments-even when required to do so by federal law.[4] Over forty percent of the difficulties with state court recognition of tribal court orders stemmed from subject matters covered by the federal full faith and credit mandates of the Violence Against Women Act[5] and the Full Faith and Credit for Child Support Orders Act.[6]

There has been much debate over all aspects of enforcing tribal judgments by another sovereign (a state or the federal government).[7] This article will discuss three possible avenues focused on obtaining enforcement of tribal court judgments:[8] the Full Faith and Credit Clause of the U.S. Constitution,[9] the doctrine of comity, and ***382** the enactment of federal statutes[10] that mandate full faith and credit for certain judgments such as the Violence Against Women Act (VAWA)[11] and the Indian Child Welfare Act (ICWA).[12] The Supreme Court of the United States has not given practitioners or lower courts a clear and concise answer to some of the most basic questions that arise out of enforcing tribal judgments.

INTRODUCTION

This article is divided into three major sections. The first section of the article begins by examining whether Congress intended for the Full Faith and Credit Act[13] to be applied to tribal judgments.[14] Specifically, this section analyzes whether the term "territory" in the Full Faith and Credit Act is applicable to Indian tribes and how changes in federal Indian policy play a role in such interpretation.[15] The second section of the article examines whether the doctrine of comity is a better method for recognition of tribal judgments.[16] The third section of this article examines congressional mandates of full faith and credit through protection orders obtained by way of VAWA and full faith and credit of tribal custody orders through the enactment of ICWA.[17]

I. THE FULL FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION

The Full Faith and Credit Clause under Article IV of the U.S. Constitution, section I states, "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[18]

The Supreme Court of the United States has interpreted the Full Faith and Credit Clause of the Constitution to give the same conclusive effect to the judgment of all the states so as "to promote certainty and uniformity in the rule among them."[19] As of the date of this writing, the Supreme Court has not struck down any congressional legislation that incorporates the Full Faith and Credit Clause of Article I as being beyond the scope of congressional authority.

***383** Congress, since the "form[ation] [of] a more perfect Union,"[20] has had the plenary power to regulate Indian tribes.[21] Article I, Section 8, Clause 3 of the Constitution states, "The Congress shall have power toregulate commerce with foreign nations, and among the several states, and with the Indian tribes."[22] This unfettered control, held by the federal government to the detriment of all Indian tribes, allows for the Congress of the United States to extend the doctrine of full faith and credit into the realm of tribal jurisdiction at its own discretion.[23] As will be discussed later in this article, Congress has only extended the Full Faith and Credit Clause of the Constitution to tribal judgments in very limited circumstances.

Exercising their power annunciated in Article I of the Constitution, Congress enacted the Full Faith and Credit Act (FFCA).[24] The Act, as amended, reads as follows:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[25]

At first blush, the FFCA extends its constitutional benefits to "States" and "Territories or Possessions."[26] While the definition of "State" within the context of the FFCA has not generated much discourse within the legal community, the same cannot be said for the term "Territory."

A. "Territory" within the Full Faith and Credit Act

In examining whether the Full Faith and Credit Act's definition of "Territories" includes Indian tribes, it is important to look at the literal language of the statute, caselaw, and the effects of current Indian policy.

***384** The first question that must be addressed is whether the term "Territories," in general American jurisprudence, has ever included Indian tribes. It is important to look at the literal language of the statute to see if the dispositive answer lies within the writing itself. Examining the enumerated sovereigns that fall under the provisions of the Act, the terms "tribe" or "Indian Country" or "Indian land" are absent from the Act. It could be argued that, if Congress wanted to include Indian tribes in the FFCA, Congress would have added the term "Indian tribes" in the enumerated list. This argument is strengthened by the fact that Congress, in post-FFCA statutory creation, has explicitly stated when Indian tribes fall under the exercise of a particular act.[27]

Looking beyond the literal language of the statute, the congressional records of the Act are silent as to whether Indian tribes should benefit from the FFCA. It is a reasonable assumption that if the term "territories" was intended to encompass Indian tribes, then some member of the congressional body would have memorialized such an important classification in the congressional record.[28] This inclusion within the congressional record is noticeably absent.

B. Caselaw

Many prominent legal scholars, such as Felix Cohen, have pointed to one particular Supreme Court case that addressed the "Territory" issue, and they have concluded that tribes may fall within the definition of the term "Territory."[29] In 1856, the Supreme Court, in Mackey v. Coxe,[30] held that the term "Territory," as defined in the applicable federal probate statute,

encompassed Indian tribes.[31] In constructing this holding, the Mackey Court contemplated the issue of whether an Indian tribe is a U.S. Territory.[32] Based on the United States and Cherokee Nation Treaty of 1835, which stipulated that the Cherokee Nation would adhere to the U.S. Constitution, the Supreme Court concluded that Indian nations were appropriately designated U.S. Territories.[33] The Court in Mackey did not, nor has it in any subsequent cases, determined whether Indian tribes are "Territories" under the Full Faith and Credit Clause of the Constitution.[34]

On the heels of Mackey, there were a few federal appellate decisions that addressed whether tribal judgments are afforded the right of full faith and credit. In 1893, the Eighth Circuit Court of Appeals held in Mehlin v. Ice[35] and Exendine v. Pore[36] that judgments derived from **tribal courts** are on the same footing as decisions ***385** and judgments derived from U.S. Territories.[37] However, in closely examining the opinions of the appellate court, it is quite clear that none have ever conclusively determined that tribes are indeed "Territories," and, thus, the precise question of whether the constitutional mandate of affording full faith and credit to Indian tribal judgments has still not been answered.

It can be argued, however, that Mackey, combined with the Eighth Circuit cases, shows that the federal courts have not been hesitant to place **tribal courts** on the same level as "Territories" of the United States, and, thus, full faith and credit should follow tribal judgments. These courts' **recognition** of the proper status of Indian tribes was never predicated on whether the parties involved in the **tribal court** judgment were Indian or non-Indian. The **recognition** by the federal and state judiciary was predicated solely on the status of the Indian tribe during the late nineteenth century.[38] The basis for this policy, while beneficial for tribes at the time,[39] is malleable and has dramatically changed with the passing of time. In fact, shortly after these pivotal cases were decided, a dramatic shift in federal Indian policy was initiated.[40] This shift in policy was sparked by the controversial decision in Ex Parte Crow Dog.[41]

As a consequence of Ex Parte Crow Dog, the Congress of the United States, pressured by the westward expansion into Indian land, enacted the Major Crimes Act.[42] This highly invasive action by Congress marked the first major incursion into the power of the Indian tribes to control their internal affairs based on their national sovereignty. The federal government assumed jurisdiction over the crimes; however, the exclusiveness of federal jurisdiction over the enumerated crimes remains ***386** unclear.[43] What is clear by the passage of the Major Crimes Act is that Congress would no longer abstain from being involved in the internal affairs of Indian tribes. This departure demonstrated that the U.S. government's view of Indian tribes, compared to the Mackey years, had changed dramatically.

C. Current Indian Policy

The last consideration directly relates to the status of Indian sovereignty in today's judicial and legislative climate. Relatively recent Supreme Court cases such as United States v. Wheeler,[44] Oliphant v. Suquamish Indian Tribe,[45] and Duro v. Reina[46] have reiterated that the sovereignty enjoyed by the modern Indian tribes is limited and restricted.[47] In Duro, the Court reinforced its earlier holding in Wheeler, holding that the sovereignty tribes currently enjoy is only that needed to control the tribes' internal relations and no more.[48] Despite these rulings, the long arm of the federal government has continued to disturb some of the internal relations of Indian tribes.[49] The federal government's view of Indian sovereignty during the Mackey years has dramatically diminished, and its current state is but a ghostly reflection of its pre-constitutional existence. Consequently, any deference that Congress or the Supreme Court afforded the Indian nations during the nineteenth century has all but disappeared.

With respect to state courts providing full faith and credit to **tribal court** judgments, it must be noted that some states, such as New Mexico and Washington, have afforded full faith and credit to tribal **orders** in certain cases.[50] However, the Supreme Court has not reviewed these cases, and an overwhelming majority of other states have been reluctant to follow the lead of their two sister states. Thus, reviewing the plain meaning of the statute (including the silence of the congressional record), caselaw, and today's shift in Indian policy, it would amount to judicial activism for the judiciary to interpret "Territory" to include Indian tribes within the meaning of the FFCA.

***387** In support of preserving Indian sovereignty and preventing further erosion of the ability of Indian tribes to self-govern, the doctrine of full faith and credit as expressed in the FFCA would challenge the essence of tribal government. In its current form, the FFCA demands that all sovereigns that fall under the Act shall not only have their judgments **recognized**, but they must **recognize** other sovereigns' judgments.[51] As Indian tribes struggle to reverse the lethal effects of assimilation, demanding that **tribal courts recognize** state judgments is counterproductive to the survival of Indian culture and norms.

While it would be beneficial for tribes to have their **orders** given full faith and credit by the states, the price of reciprocity is too taxing and costly for Indian tribes. To impose the judgments of states, which have historically been unsupportive of Indian tribes,[52] would not support Indian self-government and would infect the Indian judiciary with state influence. This influence would soften the resistance of the Indian tribes to assimilation.

II. COMITY

A more sovereign-friendly path by which tribal **orders** can receive due respect from states involves the doctrine of comity. The federal government first **recognized** the doctrine of comity in the U.S. Supreme Court's decision in Hilton v. Guyo.[53] The Hilton Court laid the foundation for the acceptance of comity within the federal common law by stating:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.[54]

Over the years, many states have **recognized** **tribal** **court** judgments based not on a full faith and credit doctrine but on the principles of comity. Unlike the FFCA, which does not apply to judgments of foreign nations,[55] comity requires that the parties involved be foreign nations. Many states have determined that there is enough of a parallel between Indian tribes and foreign nations to satisfy this requirement of comity. Such states include Arizona, Minnesota, Montana, Oregon, North Dakota, South Dakota, and Wisconsin.[56] Consequently, these states have used ***388** the doctrine of comity to ensure that **tribal** **court** judgments are **recognized** outside of Indian country.[57]

A. Foreign Nations-Comity

While the Supreme Court has not **recognized** Indian tribes as "foreign nations" in relation to the U.S. Constitution,[58] the Court has failed to apply such reasoning to the term "foreign nations" within the context of comity.[59] A foreign nation is characterized by the Hilton Court as

> [a] sovereign [not] bound, unless by special compact, to execute within his [Foreign Nation] dominions a judgment rendered by the tribunals of another State; and if execution be soughtthe tribunalis, on principle, at liberty to examine into the merits of such judgments, and to give effect to it or not, as may be found just and equitable.[60]

Indian tribes are not "bound by special compact" to **recognize** other jurisdiction's judgments. Further, Indian tribes have the authority to execute, within their dominions, judgments rendered by tribunals of other jurisdictions. Therefore, there is a strong argument that Indian nations fall under the definition of "foreign nations" within the context of comity based upon international law.

B. Standards of Comity

The Hilton Court has identified certain standards that must be met before comity is applicable. The first standard requires that the parties in the case have been afforded an impartial tribunal and that the procedures used to litigate the matter were also impartial.[61] Second, the foreign court must have had territorial and subject matter jurisdiction over the original case.[62] Third, the judgment of the foreign nation must not be repugnant to a public policy associated with the **recognizing** nation.[63] Finally, the Hilton Court requires the nations to have reciprocity of judgment **recognition** in **order** for comity to be effective.[64] For example, a receiving nation can reject the judgment of a foreign nation, on a case-by-case basis, if a specific judgment violates the public policy of the receiving jurisdiction. Therefore, the purpose of comity, which is to preserve and respect

foreign nations' sovereignty, is upheld. Comity, in its bare essence, upholds and demands that a nation's sovereignty be recognized and cherished.[65] A failure to give recognition to tribal judgments by foreign sovereigns, like states, weakens an Indian tribe's ability to control its internal relations.

*389 In conclusion, tribes are most likely "foreign nations" under the doctrine of comity. Recognition of tribal judgments will vary from jurisdiction to jurisdiction based upon the differing attitudes toward comity and tribal court orders in general.

The next major section of this article addresses the third avenue regarding full faith and credit of tribal judgments: federal mandate. Congress has utilized its plenary power over Indians to promulgate a few federal statutes in critical areas that mandate states to give full faith and credit to tribal orders in certain types of cases, namely, tribal protection orders and tribal custody orders.

III. THE FEDERAL MANDATES OF FULL FAITH AND CREDIT OF TRIBAL PROTECTION ORDERS

A. Purpose of the Violence Against Women Act

The purpose of VAWA focuses on reducing all aspects of domestic violence and promoting victim safety.[66] One of the most common methods for victims of domestic violence to obtain court ordered protection is known as the protection order.[67] Prior to VAWA, protection orders were only enforceable within the jurisdiction that issued the order, leaving victims unprotected as they moved from jurisdiction to jurisdiction.[68] In 1994, Congress addressed this issue by inserting a federal mandate in VAWA's statutory language requiring states and tribes to give full faith and credit to each jurisdiction's protection orders if certain requirements are met.[69] VAWA requires certain substantive language to be included in the protection order to invoke the full faith and credit provisions of the Act.[70] A brief discussion of the Act and an analysis of the requirements to invoke the mandate follow.

1. Full Faith and Credit under VAWA

a. Protection Order Filing

The Act defines a protection order as "any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact *390 or communication with or physical proximity to, another person, issued in response to a complaint, petition, or motion filed by, or on behalf of, a person seeking protection"; this should be explicitly in the language of the protection order.[71] Therefore, the first requirement is a court filing by, or on behalf of, the person seeking protection. The additional requirements involve an analysis of subsection (b) of the Act: the protection order must be issued by a state or tribal court that has subject matter jurisdiction and in personam jurisdiction, and there must be reasonable notice and opportunity to be heard.[72] If the order is ex parte, the notice and opportunity to be heard must be granted within the time required by state or tribal law, or at least within a reasonable time after the ex parte order is issued.[73] Each of these requirements is addressed in order.

b. Subject Matter Jurisdiction

Subject matter jurisdiction is the power of a court to hear a certain type of case.[74] Subject matter jurisdiction cannot be consented to or waived by the parties.[75] A thorough review of the issuing court's constitution will assist in determining what types of cases a particular court has the power to hear.[76] However, determining tribal court jurisdiction over nonmembers in Indian Country is a vast, complex maze. This article will set forth some basic guidelines for obtaining criminal and civil subject matter jurisdiction in Indian Country since domestic violence protection orders may involve both criminal and civil issues.[77]

Criminal subject matter jurisdiction in Indian Country revolves around whether the batterer is an Indian or a non-Indian.[78] In cases involving non-Indians in Indian Country, the Supreme Court has ruled that tribes do not have criminal subject matter jurisdiction over non-Indians.[79]

Tribes have criminal subject matter jurisdiction over all member Indians for crimes arising within Indian Country, unless the tribe is located in a Public Law 280 state.[80] For purposes of this jurisdictional discussion, it is assumed that there is no Public Law 280 jurisdiction. In some instances,[81] the U.S. Attorney may exercise ***391** concurrent subject matter jurisdiction with the tribe regarding criminal matters.[82] With respect to tribes exercising criminal jurisdiction over nonmember Indians, Congress has passed legislation commonly known as the "Duro-Fix."[83] The statute basically sets forth that tribes have always possessed criminal jurisdiction over all Indians, whether they are members or nonmembers of the tribe that is exercising jurisdiction over a matter.[84]

Civil subject matter jurisdiction in Indian Country is even more complex. Civil jurisdiction will require a finding of whether the parties are member or nonmember Indians,[85] keeping in mind that the Supreme Court has categorized all non-Indians and nonmember Indians into one class labeled "nonmembers" for civil jurisdictional purposes.[86] Another critical component of the analysis will include a distinction between trust and fee land.[87]

Civil subject matter jurisdiction involving Indians who are members of the tribe exercising civil jurisdiction over matters arising in the tribe's Indian Country is with the **tribal court**, unless limited by the tribal constitution or tribal codes.[88] Montana v. United States[89] sets forth a presumption that tribes do not have regulatory jurisdiction over nonmembers on fee land located in Indian Country, unless one ***392** prong of a two-prong test can be met.[90] In the first prong, the tribe must establish that the nonmember has entered into a consensual relationship with the tribe or its members.[91] Alternatively, in the second prong, the tribe must demonstrate that the nonmember's conduct threatens or has some direct effect on the political integrity, economic security, or health and welfare of the tribe.[92]

Historically, the Supreme Court distinguished between regulatory and adjudicatory jurisdiction in civil matters involving nonmembers on fee land in Indian Country.[93] However, in Strate v. A-1 Contractors, the Supreme Court held that a tribe's adjudicatory jurisdiction does not exceed its regulatory jurisdiction[94] and applied the Montana test to an adjudicatory jurisdiction case.[95] Thus, the Montana test appears to control in any tribal case involving the actions of a nonmember on fee land.[96]

For these reasons, the language of the protection **order** will need to address, in detail, the statutory authority or common law basis for exercising subject matter jurisdiction over civil or criminal cases. Furthermore, the Montana requirements, and how those requirements are satisfied, should be set forth in the language of the **order**, specifying if either of the parties is a nonmember Indian or a non-Indian, and should include the status of the land on which the cause of action arose.

c. In Personam Jurisdiction

Unlike subject matter jurisdiction, personal jurisdiction can be consented to and may be waived by the parties.[97] The next full faith and credit requirement of VAWA is that the issuing court must have jurisdiction over the person or in personam jurisdiction.[98] There typically is no issue of personal jurisdiction over a plaintiff as ***393** that person has consented to jurisdiction by filing the suit. There are three bases for personal jurisdiction over the defendant: (1) personal service on a defendant while the defendant is physically present in the jurisdiction, irrespective of domicile;[99] (2) establishing that the defendant has minimum contacts with the jurisdiction such that an exercise of personal jurisdiction over the defendant would not offend traditional notions of fair play and substantial justice;[100] or (3) establishing that a defendant comes into a jurisdiction and commits a tortious act while in the jurisdiction.[101]

The protection **order** language should set forth, with specificity, how the **tribal court** established personal jurisdiction over the defendant, citing to the tribal code and the tribal constitution, in addition to the Montana factors set forth above.

d. Due Process

Due process[102] protects against fundamental unfairness by requiring, among other things, that parties receive the procedural protections of notice and an opportunity to be heard.[103] VAWA requires that the constitutional mandate of due process be satisfied.[104] Therefore, the protection **order** language should set forth what type of notice and opportunity to be heard was afforded the defendant, and that the requirement of due process was satisfied. Service by publication is highly questionable in this type of proceeding and requesting a continuance of the ex parte **order** is perhaps the best way to continue the case until

personal service can be obtained.

e. Dual Protection Orders

VAWA places limitations on the validity of mutual protection **orders** in two ways. First, each party must file a request for a protection **order** with the court. Second, the court must make specific findings of fact regarding why each party is entitled to a protection **order**.[105] In addition, all of the other substantive requirements of VAWA, set forth above, must be included in the language of the protection **order**.

***394 2. What Is Not Included in VAWA**

VAWA does not cover federally issued **orders**.[106] Thus, **orders** issued by CFR courts (Courts of Indian Offenses)[107] are not included in the Act's protections and full faith and credit mandate.[108] CFR courts were created by the Bureau of Indian Affairs as a method of maintaining law and **order** in Indian Country.[109] In addition, the Act, by its provisions, does not extend the full faith and credit requirements to child support **orders** or tribal custody **orders**.[110]

3. Drafting Tribal Court Protection Orders That Require Full Faith and Credit

In addition to the mandatory language set forth above, the **order** should also set forth detailed findings regarding the danger to the victim and the need for the **order** of protection. The duration of the **order** should be included. If the **order** pertains to custody of children, the **order** should state, with specificity, the statutory source entitling the custody **order** to full faith and credit, such as the Parental Kidnapping Prevention Act (PKPA),[111] the Uniform Child Custody Jurisdiction Act (UCCJA),[112] the Uniform Child Custody Jurisdiction **Enforcement** Act (UCCJEA),[113] or the Indian Child Welfare Act (ICWA).[114] These requirements are addressed more fully in the section addressing full faith and credit of tribal custody **orders**.

The **order** should set forth contact information, such as the clerk's name and telephone or fax number, where the **enforcing** jurisdiction can ask for additional information if needed. The **order** should cite to VAWA and state that the **order's** provisions meet all of the full faith and credit requirements. The **order** should also provide that all parties have been informed of the scope and terms of the **order**. Further, the **order** may provide a notice that sets forth what acts amount to a violation of the **order**. All parties should be provided with a copy of the **order** and that fact should also be noted in the **order** itself.

Some jurisdictions provide a protection **order** coversheet that sets forth that the requirements of VAWA have been met. Tribes should create their own coversheets since law **enforcement** officers may tend to **enforce orders** of protection that look familiar to them. In addition, VAWA's federal gun law provisions require the **order** ***395** to contain language finding that the defendant is a credible threat to the physical safety of the intimate partner or the child, and the terms of the **order** must explicitly prohibit the use, attempted use, or threatened use, of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.[115]

In conclusion, all protection **orders** issued by a tribe must contain specific language to invoke the full faith and credit mandates of VAWA, which requires tribal and state jurisdictions to work together to promote victim safety and hold batterers accountable. Victim safety requires further congressional action to close the jurisdictional loopholes in Indian Country created by the Supreme Court, preferably by returning territorial jurisdiction to Indian nations.

4. Enforcement of Protection Orders by States and Tribes

VAWA's full faith and credit provisions include the power to **recognize** and **enforce** protection **orders**. VAWA requires the **enforcing** jurisdiction to **enforce** a protection **order** issued by another state or tribe as if it were the **order** of the **enforcing** jurisdiction.[116] The **enforcing** jurisdiction cannot refuse to **enforce** the **order**, even if the terms of the **order** could not have been obtained in the **enforcing** jurisdiction.[117] This mandate presents some interesting and complex jurisdictional queries as the Act did not take into consideration the differences between state and tribal jurisdictional issues.

VAWA sets forth that "**tribal courts** shall have full civil jurisdiction to **enforce** protection **orders**, including authority to

enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe."[118] Thus, the question becomes whether the Act intended to alter or expand tribal civil jurisdiction. A likely interpretation is that it did not expand tribal civil jurisdiction since it used the phrase "in matters arising within the authority of the tribe." Thus, the jurisdictional parameters for tribal court civil jurisdiction, set forth above, most likely still apply.

Batterers who are not Indian themselves committed seventy percent of the violence experienced by Indian victims of domestic violence.[119] Tribes should consider establishing clear-cut civil penalties for violations of a protection order within its jurisdictional boundaries, such as fines, posting of peace bonds, exclusion from tribal lands, and even imprisonment for civil contempt,[120] all in an effort to force compliance with protection orders. Tribes should also consider promulgating ***396** statutes that require a court filing by, or on behalf of, the person seeking protection, as well as procedures and timelines for obtaining orders of protection.[121] In addition, tribal governments, when enacting civil legislation that will include jurisdiction over nonmember Indians and non-Indians, should set forth in the resolutions or meeting minutes details explaining how the issue involves a nonmember's consensual relationship with the tribe or its members, or how that nonmember's conduct directly affects the tribe's political integrity, economic security, or the health and welfare of the tribe.[122] Tribes should also consider establishing procedures for recognizing orders of protection from other jurisdictions.[123]

Tribes may establish criminal penalties for violations of protection orders. However, tribal courts do not have criminal jurisdiction over non-Indians.[124] In many instances, this causes a jurisdictional void in the criminal realm when it comes to non-Indian violations of protection orders that occur in Indian Country.[125] In addition, the state will not have criminal jurisdiction over a non-Indian that violates a protection order in Indian Country, unless the state has jurisdiction under Public Law 280.[126] The U.S. Attorney may have jurisdiction over the non-Indian violator,[127] but in reality will not exercise jurisdiction unless the injuries to the victim were egregious.[128] The failure of Congress to address the jurisdictional difference between tribes and states undercuts the purpose of the Act by ignoring the fact that tribes cannot prosecute non-Indians for protection order violations that occur in Indian Country. This gap in jurisdiction is extremely dangerous for victims. Congress must address this discrepancy by further legislation granting tribes the ability to prosecute and enforce violations of all protection orders occurring in Indian Country, irrespective of the identity of the violator.

Since VAWA's full faith and credit statutes do not cover child custody orders, the next section of the article will address the purpose and substantive requirements of the ICWA and other key statutes that provide an avenue for full faith and credit of tribal custody orders.

*397 IV. THE FEDERAL MANDATES OF FULL FAITH AND CREDIT OF TRIBAL CUSTODY ORDERS

A. Purpose of the Indian Child Welfare Act

The Indian Child Welfare Act was codified as a result of Indian children having been taken from their families and tribes and placed in foster-care homes that were primarily non-Indian.[129] Ninety percent of the Indian children that were adopted were placed in non-Indian homes.[130] Congress, with the enactment of ICWA, wanted to change the former policy and promote and preserve the unique nature of Indian traditions and culture.[131] Congress states that the policy and purpose behind ICWA is to "promote the stability and security of Indian tribes and families by the establishment of minimum Federal standardswhich will reflect the unique values of Indian culture."[132]

B. ICWA's Full Faith and Credit Provisions

ICWA has a provision in which states must recognize tribal orders that arise out of custody proceedings involving an Indian child. Specifically, the Act states:

> The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.[133]

In examining the literal language of the full faith and credit provision of ICWA, the United States, all states, and all territories or possessions of the United States, must **recognize** all Indian child custody **orders** derived from **tribal courts**.[134] This section of ICWA provides for **recognition** of **tribal court orders** by other Indian tribes, states, and the federal government, with some limitations.

The first limitation is that the court **orders** that are afforded full faith and credit must be derived from Indian tribes.[135] States and federally-derived **orders** are not afforded full faith and credit under ICWA.[136] Second, only tribal **orders** involving custody proceedings regarding Indian children satisfy this section of ICWA.[137] Custody proceedings, as defined in ICWA, involve a vast array of cases: foster care ***398** placements, termination of parental rights, pre-adoptive placements, and adoptive placements.[138] Most noticeably absent from the definition is custody determined through a divorce decree.[139] The third limitation involves the term "Indian Child." This type of person is defined as any unmarried person, under the age of eighteen, who is a member of a tribe or is eligible for membership of a tribe and is the biological child of a member of a tribe.[140]

Therefore, ICWA allows for full faith and credit to follow tribal **orders** that involve custody proceedings of a child who is a member of a tribe or who is eligible for membership and is the biological child of a tribal member.[141] This **recognition** of tribal **orders** transcends the boundaries of ICWA as it does not limit its full faith and credit mandate to include only **orders** that arise out of, or are made consistent with, ICWA.[142] For example, if a **tribal court** issues a custody **order** that is not consistent with ICWA's provisions, or is made independent of ICWA, the tribal **order** (as defined by ICWA) will enjoy full faith and credit, as long as it involves an Indian child (as defined by ICWA), and the **order** involves a custody proceeding (as defined by ICWA).

Some states have liberally applied ICWA's full faith and credit clause. In Mississippi, the state supreme court **recognized**, in a custody dispute, that full faith and credit can be given to any tribal **order** that can be attributed to a custody proceeding.[143] The state supreme court in Alaska, however, has a much narrower view of ICWA's full faith and credit mandate. The court there concluded that ICWA does not apply to **tribal court** custody disputes between Indian parents and, therefore, full faith and credit also does not apply.[144] This interpretation by Alaska and its supporting states limits the applicability of full faith and credit under ICWA to just ICWA-based cases. However, as already presented, the literal language of section 1911(d) of ICWA does not limit full faith and credit to just ICWA-derived cases.

Finally, the fourth limitation involved with ICWA's full faith and credit mandate of tribal **orders** is that the state's **recognition** of tribal **orders** must be of the same degree as the state's **recognition** of other "entity's" (state's) **orders**.[145] One interpretation is that ICWA mandates that states **recognize**, in the same fashion and extent, tribal custody **orders** involving Indian children as they would any sister state's **orders** under the Full Faith and Credit Act. However, a second interpretation requires states to **recognize** tribal custody **orders** to the same "extent" as states ***399 recognize** another state's custody **orders**, namely through the Parental Kidnapping Prevention Act (PKPA).

C. PKPA's Purpose

PKPA was enacted by Congress as a result of several problems arising out of the state court systems in the area of custody disputes.[146] It was observed that parties involved in custody cases were seizing the children involved and fleeing to different jurisdictions in **order** to obtain favorable custody **orders**. In some cases, children were transported across state lines, even after a custody determination had already been made in the original state. As a result, custody **orders** were not uniformly **recognized**, conflicting **orders** were often obtained, and excessive litigation clogged the court system.[147] Congress intended PKPA to bring uniformity to the **recognition** of custody **orders** throughout the country.

D. PKPA's Full Faith and Credit Provisions

Like ICWA and VAWA, PKPA also has a version of full faith and credit. In general, PKPA provides the framework as to which custody **orders** shall be given full faith and credit in sister states. PKPA provides the following: "The appropriate authorities of every State shall **enforce** according to its termsany custody determination or visitation determination made consistently with the provisions of this section by a court of another State."[148] The term "state" is defined in PKPA as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United

States."[149] While PKPA's definition of "state" does not include Indian tribes specifically, many state courts have interpreted PKPA to be applicable to Indians. For example, in a divorce case, the Washington Appeals Court concluded that PKPA applies to custody and visitation **orders** entered by **tribal courts**.[150] Some federal circuit courts have also determined that PKPA's full faith and credit provision applies to tribes because **tribal court orders**, under certain circumstances, are entitled to full faith and credit, and tribes are similar to states for the purpose of sovereignty and jurisdiction.[151]

While not actually written in the text of PKPA, some **tribal courts** have applied the full faith and credit provision of PKPA to **tribal court** cases that arise out of the PKPA. A Mashantucket Pequot **tribal court** addressed the issue of whether PKPA is applicable to **tribal court** decisions.[152] The court concluded that PKPA does apply to tribal decisions, even if not explicitly stated in the Act.[153] However, in the particular case before the **tribal court**, there was no previous **order**, so the court ruled that PKPA's substantive requirements were not satisfied and the Act did not ***400** apply.[154] It must be noted that PKPA's full faith and credit is limited to only those custody **orders** that satisfy PKPA's requirements.[155]

E. PKPA's Substantive Requirements

In **order** for PKPA's full faith and credit section to be applicable to tribal **orders**, states must not only interpret the term "state" to include Indian tribes, but PKPA's substantive requirements must also be followed. First, the **tribal court** issuing the original **order** must have jurisdiction based on tribal law.[156] In addition, the tribe must satisfy the jurisdictional requirements of section 1738(A)(c)(2)[157] and the Act's due process requirements.[158]

There are also two other ways to obtain full faith and credit for tribal custody **orders**: the Uniform Child Custody Jurisdiction Act (UCCJA)[159] and the Uniform Child Custody Jurisdiction **Enforcement** Act (UCCJEA).[160]

F. UCCJA and UCCJEA

The UCCJA was drafted in 1968 and was enacted by all fifty states over the subsequent decade.[161] The purpose of UCCJA was to bring uniformity by eliminating multiple, inconsistent custody **orders**.[162] The Act's purpose also included ***401** a desire to deter and prevent parental abduction of children across state lines.[163] In addition, the Act was codified in **order** to reduce re-litigation of custody decisions and promote and expand the exchange of information between courts of different states.[164]

The Uniform Child Custody Jurisdiction **Enforcement** Act was promulgated thirty years after the UCCJA and accomplishes two major purposes. First, the Act provides clearer standards by which a state can exercise original jurisdiction and provides a standard for continuing jurisdiction.[165] Second, the Act provides a uniform procedure for interstate **enforcement** of custody **orders**.

G. UCCJA-Recognition of Out-of-State Custody Decrees

The UCCJA does provide for one state to **recognize** another state's custody **order**, as long as certain requirements are met.[166] The first requirement is that the custody **order** be from a "state" court. The term "state" in the UCCJA means any state, U.S. territory or possession, the Commonwealth of Puerto Rico, and the District of Columbia.[167] The term "Indian tribes" is not included in the definition and some state courts have determined that since the term is absent, tribes do not fall under the application of the UCCJA.[168] However, other state courts have interpreted "state" to include Indian tribes. In Martinez v. Superior Court,[169] the Arizona Court of Appeals stated that an Indian tribe qualifies as a territory of the United States and, therefore, an Indian tribe is a "state" for UCCJA purposes.[170] The Washington Appeals Court embraced the Martinez decision and concluded that the term "state" within the UCCJA does include Indian tribes.[171]

The second UCCJA requirement for **recognition** of out-of-state custody **orders** is that the state that rendered the original decision have substantially complied with the UCCJA.[172] If the original state did not adopt the UCCJA, then the original state must have jurisdictional requirements substantially similar to those of the UCCJA.[173] If either of these requirements is not met, then the original state must have had jurisdiction, under the facts of the case, as if the UCCJA had been the law in the state.[174]

Despite this section of the UCCJA, which affords full faith and credit to state **orders**, the **recognition** is not mandatory. State courts have the discretion to adopt all, part, or none of the UCCJA.[175] Therefore, states have full discretion in determining whether they want to give tribes full faith and credit under the UCCJA. In 1980, Congress **recognized** this flaw in the UCCJA and rectified its mistake ***402** through the enactment of PKPA which, as already discussed, requires states to accord full faith and credit to custody decrees of sister states.[176]

H. UCCJA's Procedural Requirements

Before a state can **recognize** a **tribal court order** for custody (this is after the state court has determined that Indian tribes satisfy the UCCJA definition of "state"), notice to all parties must be given.[177] In addition to notice, all parties must be afforded reasonable opportunity to be heard.[178] If one of the parties is outside of the state, notice to such person must be "given in a manner reasonably calculated to give actual notice."[179]

In determining original jurisdiction, the Act provides four different jurisdictional bases: home state, significant connections, emergency, and last resort. These jurisdictional bases are not prioritized within the UCCJA. In addition, complying with the UCCJA does not always equate to compliance with PKPA. Based upon this fact, and the gaps and ambiguities in the UCCJA, the Uniform Child Custody Jurisdiction **Enforcement** Act (UCCJEA) was drafted to provide a more uniform jurisdictional approach to custody disputes and ensure compliance with the PKPA.

I. UCCJEA's Purpose

It is important that practitioners not only understand the requirements of both the UCCJA and the UCCJEA, but they should also have a working knowledge of how they are similar and different from one another. This knowledge is especially beneficial when a practitioner is involved in a case that has passed through the state's jurisdiction and has been exposed to both the UCCJA and the UCCJEA.

The UCCJEA has addressed some problems that arose out of, or were never addressed in, the UCCJA. First, the UCCJEA prioritizes home state jurisdiction where the UCCJA provided no such clarification.[180] Second, unlike the UCCJA, the UCCJEA allows for domestic violence to form the basis of emergency jurisdiction.[181] Third, the UCCJEA is clear that the decree-granting state retains exclusive jurisdiction to modify a decree under certain circumstances; the UCCJA was less clear.[182] Fourth, the UCCJEA specifies exactly which custody proceedings are governed by the Act,[183] since states using the UCCJA were confused as to which proceedings were covered.[184] Fifth, the UCCJEA eliminates the UCCJA's "best interest of the child" language, which had left the door open for re-litigation of ***403** custody cases, and, thus, the jurisdictional and substantive standards of the UCCJEA are clearly defined.[185] Finally, the overall structure and substance of the UCCJEA is more closely in compliance with the Parental Kidnapping Prevention Act (PKPA)[186] than is the UCCJA.

J. Recognition of Tribal Orders under the UCCJEA

The UCCJEA has a section allowing for states to **recognize** and **enforce** custody **orders** derived from **tribal courts**. States, under the UCCJEA, shall **recognize** and **enforce** other states' child-custody determinations if such determinations were made "under factual circumstances meeting the jurisdictional standards of this Act and the determination has not been modified under this Act."[187] The term "states," as used in the UCCJEA, does not explicitly include Indian tribes. However, section 104 declares that states are to treat Indian tribes the same as other states when applying the UCCJEA.[188] Consequently, when **tribal courts** make a child-custody determination that is substantially consistent with the UCCJEA, states must **recognize** and **enforce** such determination.

As a consequence of the UCCJEA prioritizing home state jurisdiction as superior to the other jurisdictional standards, the loophole created by the UCCJA is resolved. Further, the UCCJEA brings custody **orders** into compliance with the PKPA and the Uniform Interstate Family Support Act.

In conclusion, by understanding how ICWA, PKPA, UCCJA, and UCCJEA work together, and at times in opposition to one

another, a practitioner can ensure that tribal child-custody **orders** will receive the due respect and **enforcement** by the states. This, in turn, will create uniformity among child-custody **orders** and allow for Indian children to have the best chance for a stable and fulfilling life while preserving the sanctity and strength of the Indian nation's sovereignty.

CONCLUSION

Recognition of tribal judgments is a fundamental aspect in the exercise and expansion of tribal sovereignty. The Full Faith and Credit Act may prove to be futile for practitioners seeking **recognition** of tribal judgments in state courts. The plain language of the statute, including the absence of clear congressional intent, coupled with common law and the current status of federal Indian policy, prevents Indian tribes from being considered "territories" under the Full Faith and Credit Act. However, the exercise of comity, within the framework of state **recognition** of tribal judgments, yields a more productive and stable result. Indian tribes, under the protections afforded by international law, can fall within comity's definition of foreign nations, and, thus, the benefits afforded by the doctrine of comity can be realized for tribal judgments.

The federal statutory full faith and credit schemes involving protection **orders** and child-custody **orders** through VAWA and ICWA provide strength to tribal **orders** by ***404** requiring **recognition** and **enforcement** of those **orders**. In exercising full faith and credit under VAWA, it is important that the Act's jurisdictional requirements be explicit in the tribal **order**. To receive the full faith and credit mandated by ICWA requires a practitioner to ensure that the case in which the tribal custody **order** is created satisfies one of the enumerated types of custody **orders** outlined in ICWA, and that the child involved falls within ICWA's definition of "Indian Child." In conjunction with the federal mandates of VAWA and ICWA, the PKPA, the UCCJA, and the UCCJEA may also provide support for tribal custody **orders** across jurisdictional bounds.

Practitioners will be better equipped to address the issue of full faith and credit of **tribal court orders** by taking advantage of the avenues outlined in this article. **Recognition** and **enforcement** of **tribal court orders** will support tribal sovereignty and the sanctity of all Indian nations.

Footnotes

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[1] Carl H. Johnson, A Comity of Errors: Why John v. Baker Is Only a Tentative First Step in the Right Direction, 18 Alaska L. Rev. 1 (2001) (citing The Wisdom of the Great Chiefs: The Classic Speeches of Red Jacket, Chief Joseph and Chief Seattle 58-59, 61 (Kent Nerburn ed., 1994)).

[2] Stacy L. Leeds, Cross-Jurisdictional **Recognition** and **Enforcement** of Judgments: A **Tribal Court** Perspective, 76 N.D. L. Rev. 311 (2000).

[3] Id. at 349, n.246.

[4] Id. at 349.

[5] 18 U.S.C. § 2265 (2000).

[6] 28 U.S.C. § 1738(B) (2000). Although this Act is mentioned, for purposes of this article it will not be discussed.

[7] Other tribes, although considered another sovereign when analyzing possible **recognition** of judgments, will only be addressed in part III of this article, which focuses on the Violence Against Women Act and the Indian Child Welfare Act.

[8] There is an alternative avenue for obtaining full faith and credit of **tribal court orders** in state courts: states may adopt and codify general full faith and credit provisions that apply to **tribal court orders**, independent of the federal mandates.

[9] U.S. Const. art. IV, § 1.

[10] In the absence of controlling federal statutes regarding full faith and credit of **tribal court** judgments, states have the discretion to enact legislation that addresses the issue of **recognition** of **tribal court orders**.

[11] 18 U.S.C. § 2265(a) (2000).

[12] 25 U.S.C. § 1911(d) (2000). A federal mandate of full faith and credit is also addressed in the Child Support **Orders** Act, 28 U.S.C. § 1738(B) (2000). However, that Act will not be addressed in this article.

[13] 28 U.S.C. § 1738 (2000).

[14] See infra Part I.

15 See infra Part I.A.

16 See infra Part II.

17 See infra Part III.

18 U.S. Const. art. IV, § 1.

19 Sandra J. Schmeider, The Failure of the Violence Against Women Act's Full Faith and Credit Provisions in Indian Country: An Argument for Amendment, 74 U. Colo. L. Rev. 765, 771 (2003). The article cites Atherton v. Atherton, 181 U.S. 155, 160 (1901), in which the Court cited Huntington v. Attrill, 146 U.S. 657, 684 (1892). Also note that the 1901 Court did not include Indian tribes in the application of the Full Faith and Credit Clause of the U.S. Constitution. Atherton, 181 U.S. at 160.

20 U.S. Const. pmbl.

21 Congress has maintained, and the Supreme Court of the United States has upheld, that the federal government, as a consequence of Chief Justice Marshall's identifying the Indian tribes as domestic dependent nations, has unyielding and unfettered power over the Indian nations and their efforts to exercise tribal sovereignty in every context. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

22 It should be noted that Chief Justice Marshall, when writing for the majority in Worcester v. Georgia, used this part of the U.S. Constitution, in addition to the Treaty Clause of Article II, Section 2, Clause 2, to justify his assertion that Congress has unfettered power to regulate Indian nations. See Worcester, 31 U.S. (6 Pet.) 515.

23 Throughout Indian law jurisprudence, and more recently in such pivotal cases as Duro v. Reina, Congress has continually exercised, and the Supreme Court of the United States dutifully **recognized**, Congress's ability to allow for Indian tribes, at the discretion of Congress, to exercise their sovereignty in a limited or expanded context. 495 U.S. 679 (1990).

24 28 U.S.C § 1738 (2000).

25 Id.

[26] Id.

[27] See 18 U.S.C. § 2265 (2000).

[28] David S. Clark, State Court **Recognition** of **Tribal** **Court** Judgments: Securing the Blessings of Civilization, 23 Okla. City U. L. Rev. 353, 362 (1998) (citing Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997)).

[29] Felix S. Cohen, Handbook of Federal Indian Law 275 (1942, reprinted 1971).

[30] 59 U.S. (18 How.) 100 (1856).

[31] Id. at 104.

[32] Id. at 103.

[33] Id. at 102-03. Again, this definition of territories was acknowledged by the Court to include Indian nations only in the context of the relevant federal probate statute that was at issue in the case.

[34] Mackey v. Coxe, 18 U.S. (18 How.) 100 (1856).

[35] 56 F. 12 (8th Cir. 1893).

[36] 56 F. 777 (8th Cir. 1893).

[37] Mehlin, 56 F. at 16; see also Exendine, 59 F. at 7780. It should be noted that other decisions from the Eighth Circuit Court of Appeals, such as Standley v. Roberts, 59 F. 836 (8th Cir. 1893), and Cornells v. Shannon, 63 F. 305 (8th Cir. 1894), also reinforced the idea that states should give full faith and credit to tribal **orders** in the same fashion as states giving full faith and credit to U.S. territories' judgments. Again, these post-Mackey cases do not equate tribes to territories. See Leeds, supra note 2, at 318-29.

[38] See the "Marshall Trilogy" for an understanding of nineteenth century federal attitudes toward Indian sovereignty: Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). In general, the federal government's attitude toward the Indian nations during the nineteenth century is one of conquer and isolation. In the Marshall Trilogy, Chief Justice Marshall characterizes the Indian nations as people who were conquered by the newly arrived Europeans and the Indian nations were wholly dependent on the newly-minted federal government for guidance and protection.

[39] The federal Indian policy was "beneficial" for the Indian nations at the time, but only in the context that the Supreme Court appeared, through its holding in Mackey, to follow the benefits of identifying Indian lands as "territories" to Indian nations. This **recognition** of Indian nations as "territories" under the federal probate statute in Mackey does **recognize**, in a limited fashion, Indian sovereignty that pre-dates the U.S. Constitution.

[40] Ex Parte Crow Dog, 105 U.S. 559 (1883); see also B.J. Jones, Welcoming **Tribal Courts** into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Courts Relations, 24 Wm. Mitchell L. Rev. 457 (1998).

[41] Ex Parte Crow Dog involved one Indian killing another Indian on Indian land. The Supreme Court of the United States reinforced the legally-based political autonomy of Indian tribes and found that the state had no jurisdiction in the case. See Leeds, supra note 2, at 322-23 (citing Sidney L. Harring, Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century 110-18 (1994)).

[42] Major Crimes Act, 18 U.S.C. § 1153 (2000). The legislative history of the Act clearly supports the proposition that the Act was a direct response to the decision in Ex Parte Crow Dog. Congress was outraged at the sentence handed down by the **tribal court**. One sponsor of the Act stated, "the law of the tribe...is just no law at all." See Robert N. Clinton et al., American Indian Law: Cases and Materials 276 (1991) (quoting 16 Cong. Rec. 934 (1885)).

[43] The jurisdictional query in the Major Crimes Act arises out of the terminology Congress used in establishing which sovereign had jurisdiction over the enumerated crimes. Congress used the term "exclusive" when describing the federal government's jurisdiction to the said crimes. However, it is unclear whether the term "exclusive" abrogates Indian **tribal courts**, exercising their inherent sovereignty, to maintain jurisdiction over the said crimes, or whether such tribal jurisdiction is concurrent with the federal government's jurisdiction.

[44] 435 U.S. 313 (1978).

[45] 435 U.S. 191 (1978).

[46] 495 U.S. 676 (1990).

[47] Wheeler, 435 U.S. at 319; Oliphant, 435 U.S. at 200; Duro, 495 U.S. at 686.

[48] Duro, 495 U.S. 676 (citing United States v. Wheeler, 435 U.S. 313 (1978)). The Duro Court emphasized the distinction between member and nonmember Indians in the realm of "internal relations." The Court **recognized** the ability of Indian tribes "to prescribe and **enforce** rules of conduct for its own members." Id. at 686.

[49] Id.

[50] Daina B. Garonzik, Full Reciprocity for **Tribal** **Courts** from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act, 45 Emory L.J. 723, 740 (1996). The article cites Jim v. CIT Financial Services Corp., 87 N.M. 362, 533 P.2d 751 (N.M. 1975), in which the New Mexico Supreme Court held that the Navajo Nation's laws are afforded full faith and credit, as provided by 28 U.S.C. § 1738, because the Navajo Nation satisfied the "territory" requirement of the Act. Jim, 87 N.M. at 363, 533 P.2d at 752. The Washington Supreme Court, in In re Buehl, 555 P.2d 1334 (Wash. 1976), came to the same conclusion as Jim. Both state courts found that Indian tribes satisfy the definition of "territories" for the purposes of the Full Faith and Credit Act.

[51] 28 U.S.C. § 1738 (2000).

[52] The federal government's reason for establishing a trust relation with the Indian tribes was based upon the notion that the states were often the tribe's deadliest enemies.

[53] 159 U.S. 113, 202-03 (1895).

[54] Id. This part of the case has been widely quoted in many articles addressing the use of comity with **tribal** **court** decisions. However, the authors of this article felt the necessity to include the quote in full.

[55] See 28 U.S.C. § 1738 (1994).

[56] Johnson, supra note 1.

[57] The use of comity by these states facilitates a path in which **tribal** **court** judgments transcend Indian land and **recognition** and **enforcement** of such judgments is expanded.

[58] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[59] Hilton, 159 U.S. at 227; see also United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Duro v. Reina, 496 U.S. 676 (1990).

[60] Hilton, 159 U.S. at 166 (quoting Wheaton's International Law § 147 (8th ed.)).

[61] Id. at 205.

[62] Id.

[63] Id.

[64] Id. at 228.

[65] See Hilton, 159 U.S. at 227.

[66] 18 U.S.C. § 2265 (2000).

[67] 18 U.S.C. § 2266(5) states:

The term "protection" **order** includes any injunction or other **order** issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final **order** issued by a civil and criminal court (other than a support or custody **order** issued pursuant to State divorce and child custody laws, except to the extent that such an **order** is entitled to full faith and credit under other Federal law) whether obtained by filing an independent action or as a pendente elite **order** in another proceeding so long as any civil **order** was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

Id.; see also Margaret Martin Barry, Protective **Order** **Enforcement**: Another Pirouette, 6 Hastings Women's L.J. 339, 348 (1995).

[68] See Catherine F. Klein, Full Faith and Credit: Interstate **Enforcement** of Protection **Orders** Under the Violence Against Women Act of 1994, 29 Fam. L.Q. 253, 254, 257 (1995); see also Melissa L. Tatum, A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts, 90 Ky. L.J. 123 (2001-2002).

[69] 18 U.S.C. § 2265 (2000); see also S. Rep. No. 103-138, at 41.

[70] 18 U.S.C. § 2265 (2000).

[71] 18 U.S.C. § 2266(5) (2000).

[72] 18 U.S.C. § 2265(b)(1)-(2) (2000).

[73] 18 U.S.C. § 2266(b)(2) (2000).

[74] See Black's Law Dictionary 856 (7th ed. 1999) (defining "judicial jurisdiction" as "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it"); see also 21 CJS § 10 (2003) (citing Sierra Life Ins. Co. v. Granata, 586 P.2d 1068 (Idaho 1978)).

[75] Sosna v. Iowa, 419 U.S. 393, 398 (1975).

[76] Sierra Life Ins. Co., 586 P.2d at 1073 (quoting Boughton v. Price, 215 P.2d 286, 289 (Idaho 1950) ("Such jurisdiction the court acquires by the act of its creation and possesses inherently by its constitution....")).

[77] For an in-depth explanation of civil jurisdiction in Indian Country, see Tatum, supra note 68, at 149-65.

[78] See Oliphant, 435 U.S. 191. There is no federal definition of who is an Indian for purposes of criminal or civil jurisdiction. It is widely accepted that a member of a federally **recognized** tribe is an Indian for jurisdictional purposes. See William C. Canby, Jr.,

American Indian Law in a Nutshell 10 (4th ed. 2004).

79 Oliphant, 435 U.S. 191 (It is inconsistent with a tribe's dependent status to exercise criminal jurisdiction over non-Indians.).

80 Public Law 280 authorizes some states to exercise jurisdiction over criminal and certain civil matters in Indian Country. 18 U.S.C. § 1162 (2000); 25 U.S.C. §§ 1321-1326 (2000); 28 U.S.C. § 1360 (2000). Whether a tribe has jurisdiction over a matter should be reflected in the tribal code enacted by the tribe.

81 Major Crimes Act, 18 U.S.C. §§ 1152-1153 (2000); see also Assimilative Crimes Act, 18 U.S.C. § 13 (2000); Canby, supra note 78, at 169 ("Tribes may exercise concurrent jurisdiction with the federal government over major crimes.").

82 Major Crimes Act, 18 U.S.C. §§ 1152-1153 (2000); see also Assimilative Crimes Act, 18 U.S.C. § 13 (2000). However, see also 18 U.S.C. § 1162(a), the mandatory provisions of Public Law 280, which state that the General Crimes Act and Major Crimes Act are inapplicable to Indian Country.

83 25 U.S.C. § 1301 (1994).

84 United States v. Lara, 124 S. Ct. 1628 (2004). In Lara the Appellant was tried and convicted in **tribal court** and then tried for the same offense in federal court. The Appellant raised double jeopardy as a bar to the subsequent federal action. The issue in Lara was whether the "Duro Fix" federal statute is constitutional, and, if so, whether tribes exercise criminal jurisdiction over nonmember Indians as a result of inherent sovereignty or as a delegation of federal power via the "Duro Fix" statute. The Supreme Court held that Congress has the power to lift or relax restrictions previously imposed on tribal inherent authority. Hence, the exercise of tribal prosecutorial power over Lara originated from inherent tribal authority and not the federal government so no double jeopardy violation occurred. In essence, Lara had been tried by two separate sovereigns.

85 Montana v. United States, 450 U.S. 544, 565-66 (1981). The Court held that the tribe's domestic dependent sovereignty extended only to self-government of internal relations. The Court held that the inherent sovereign powers of an Indian tribe do not extend to activities of nonmembers of the tribe, unless one of two exceptions can be met: (1) if the nonmember entered into a consensual relationship with the tribe or its members or (2) if the conduct on the reservation threatens or has some direct effect on the political integrity, economic security or health and welfare of the tribe. Id.; see also Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1980) (stating that for most practical purposes, nonmember Indians stand on the same footing as non-Indian residents on the reservation); Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (referring to nonmembers, as opposed to tribal members, in the case despite the fact that the litigants were non-Indians).

86 Some reasons cited for treating nonmember Indians the same as non-Indians include (1) nonmembers may not know where tribal jurisdiction begins and ends; (2) the special nature of Indian tribunals as they differ from American courts; (3) **tribal courts** apply tribal law; (4) the U.S. Constitution does not apply to **tribal courts**; and (5) the nonmember, nor the non-Indian, consented to tribal

jurisdiction, and neither can vote in tribal elections or participate in tribal governments. See Nevada v. Hicks, 533 U.S. 353 (2001) (Souter, J., concurring).

87 See Canby, supra note 78, at 381-91. Some land is held in trust and, in some cases, the uses for the land are restricted by the federal government on behalf of tribal members; these lands are referred to as "Indian lands" or "aboriginal lands." Conversely, some land is held in fee simple, either by Indians or non-Indians, and is referred to as "fee land."

88 Montana, 450 U.S. at 565. For purposes of this jurisdictional section, assume the tribe is located in a non-Public Law 280 state. If the tribe is located in a Public Law 280 state, the state and tribe may have concurrent jurisdiction over civil matters or jurisdiction may vest exclusively with the state. Public Law 280 does not grant regulatory jurisdiction to the state.

89 Id. at 544.

90 Id. at 565-66.

91 Id. at 565; see Strate, 520 U.S. at 456-57 (holding that an accident that occurred between nonmembers on a state highway did not meet the consensual relationship prong because the relationship between the parties was personal in nature, not commercial, as required by Montana).

92 Montana, 450 U.S. at 566. The Court in Strate held that the second prong of Montana should be read narrowly. In doing so, the Court held that the prong was not met in Strate since the accident, which occurred on a state highway within the reservation and was between two nonmembers, did not directly affect the political integrity, economic security, or health and welfare of the tribe. See Strate, 520 U.S. at 459; see also Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657-59 (2001); Nevada v. Hicks, 533 U.S. 353 (2001) (holding that the second prong of the Montana test must be read narrowly).

93 Strate, 520 U.S. at 447-52. Prior to Strate, the Court distinguished civil jurisdiction in Indian Country as "regulatory" or "adjudicatory." Regulatory jurisdiction governed the tribe's power to regulate the conduct of persons in Indian Country, Montana, 450 U.S. at 565, while adjudicatory jurisdiction denotes the power of the tribe to adjudicate the case. See Williams v. Lee, 358 U.S. 217, 220 (1959).

94 Strate, 520 U.S. at 453.

95 Id. at 456-60. Strate involved a car accident between nonmembers that occurred on the reservation, but on a state highway that ran through the reservation. Although the nonmember Plaintiff was a widow of a tribal member, had children who were tribal members, and resided on the reservation, id. at 442-43, the Court held there was no adjudicatory jurisdiction in the case because, under the Montana analysis, there was a presumption against finding **tribal court** jurisdiction unless one of the two Montana exceptions applied. Id. at 456-60. The Court went on to state that a finding of the second Montana exception ("directly affects the political integrity, economic security, health and welfare of the tribe"), based upon the tribe's interest in safe driving, would

severely shrink the Montana rule. Id. at 457-58.

96 However, see Nevada v. Hicks, 533 U.S. 353 (2001), for the Supreme Court's latest declaration regarding the weight to be given to the status of the land when applying the Montana test.

97 Hoffman v. Blaski, 363 U.S. 335, 343 (1960).

98 18 U.S.C. § 2265(b)(1) (2000).

99 Pennoyer v. Neff, 95 U.S. 714 (1877).

100 Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

101 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). However, see analysis of tribal civil and criminal jurisdiction set forth in this section at Part III.A.1.b.

102 The Fourteenth Amendment of the U.S. Constitution reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or **enforce** any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV. Procedural due process protects against fundamental unfairness by requiring parties to receive notice and have an opportunity to be heard. Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

103 Armstrong, 380 U.S. at 550.

104 18 U.S.C. § 2265(b)(2) (2000).

105 18 U.S.C. § 2265(c); see also Jennifer Paige Hanft, What's Really the Problem with Mutual Protection **Orders**?, 22 Wyo. Law. 22 (1999).

[106] See 18 U.S.C. § 2265(a) (2000) ("[A]ny protection **order** issued that is consistent with subsection (b) of this section by a court of one State or Indian tribe...."); 18 U.S.C. § 2266(8) (2000) ("[T]he term 'State' includes a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States.").

[107] In 1883, CFR (Code of Federal Regulations) courts were created by Congress to be utilized as federal educational and disciplinary tools to civilize the Indians. Neither the courts, nor the codes found in 25 CFR, were tailored to reflect Indian cultures. See Canby, supra note 78, at 20.

[108] See 18 U.S.C. §§ 2265-2266 (2000). A CFR court is neither a state court nor a **tribal** **court**. The CFR courts were created by Congress and are governed by 25 C.F.R. As such, CFR Courts are more akin to a federal/tribal hybrid.

[109] See generally Vine Deloria, Jr., & Clifford M. Lytle, American Indians, American Justice 113-15 (1983).

[110] See Canby, supra note 78, at 20.

[111] 28 U.S.C. § 1738A (2000). The language of the PKPA does not address tribes, but at least one court has held that tribes are states for purposes of the PKPA. See E. Band of Cherokee Indians v. Larch, 872 F.2d 66, 68 (4th Cir. 1989).

[112] Unif. Child Custody Jurisdictional Act, 9 U.L.A. 261 (1999).

[113] Id. at 649.

[114] 25 U.S.C. § 1911 (2000).

[115] 18 U.S.C. § 922(g)(8).

[116] Id.

[117] Id.

[118] 18 U.S.C. § 2265(e) (2000).

[119] U.S. Dept. of Justice, Bureau of Justice Statistics, American Indians and Crime, Feb. 1999, available at http://www.ojp.usdoj.gov/bjs/abstract/aic.htm.

[120] See 18 U.S.C. § 2265(e) (2000). However, note that at least one author has indicated that the full faith and credit provisions of VAWA are not self-authenticating, and thus require tribes to enact legislation to invoke the mandates of VAWA. Schmieder, supra note 19. However, the more likely analysis is that VAWA's full faith and credit provisions are a clear federal mandate that does not require states or tribes to enact legislation to invoke the mandate. See Sarah Deer & Melissa L. Tatum, Tribal Efforts to Comply with VAWA's Full Faith and Credit Requirements: A Response to Sandra Schmieder, 39 Tulsa L. Rev. 403 (2003).

[121] Samples of tribal domestic violence codes, including model tribal domestic violence codes, can be found at **Tribal Court** Clearing House, Domestic Violence Resources, at http://www.tribal-intitute.org/lists/domestic.htm (last visited Apr. 28, 2004).

[122] Montana v. United States, 450 U.S. 544, 565-66 (1981).

[123] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[124] Id.

[125] In Oliphant v. Suquamish Indian Tribe, the Supreme Court held that it was inconsistent with the tribes' domestic dependent status to exercise criminal jurisdiction over non-Indians. Therefore, the tribes have no criminal jurisdiction over non-Indian violators of Protection **Orders**.

[126] See 18 U.S.C. § 1162 (2000); 25 U.S.C. §§ 1321-1326 (2000); 28 U.S.C. § 1360 (2000).

[127] Major Crimes Act, 18 U.S.C. §§ 1152-1153 (2000); see also Assimilative Crimes Act, 18 U.S.C. § 13 (2000). However, see 18

U.S.C. § 1162(a), the mandatory provisions of Public Law 280, which state that the General Crimes Act and Major Crimes Act are inapplicable to Indian Country. Note that the United States will not have jurisdiction over crimes committed in Indian Country by a non-Indian against a non-Indian. See generally United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896).

128 U.S. Attorneys experience high caseloads and are not equipped to handle all of the criminal cases in Indian Country allowed by federal law. Therefore, only the cases that demonstrate the most egregious violations have a realistic probability of being prosecuted.

129 Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32-37 (1989) (citing Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1978)).

130 Holyfield, 490 U.S. 30 (citing Indian Child Welfare Program, Hearings Before the Subcommittee on Indian Affairs of the Senate Committee of Interior & Insular Affairs, 93rd Cong. 75-83 (1974) (statement of William Byler)).

131 See 25 U.S.C. § 1902 (congressional declaration of policy).

132 Id.

133 25 U.S.C. § 1911(d) (full faith and credit to public acts, records, and judicial proceedings of Indian tribes).

134 Id.

135 Id.

136 However, states are afforded full faith and credit from the Full Faith and Credit Act derived from the Full Faith and Credit Clause of the U.S. Constitution.

137 25 U.S.C. § 1911(d) (full faith and credit to public acts, records, and judicial proceedings of Indian tribes).

138 25 U.S.C. § 1903(1).

139 Id.

140 25 U.S.C. § 1903(4).

141 See 25 U.S.C. § 1902. ICWA's full faith and credit clause does not mandate that the child must be eligible for membership in the tribe in which the biological parents are members. 25 U.S.C. § 1911(d).

142 Of great import is the fact that the provisions of ICWA are not binding on tribes unless the issuing tribe has copied these ICWA revisions into its tribal code. B.J. Jones, Indian Child Welfare Act Handbook (1995). In other words, tribes do not have to follow ICWA's provisions unless the tribe has adopted ICWA into the tribal code. However, ICWA provisions will bind state court adjudications in relevant cases and will also require **enforcement** and **recognition** of **tribal court orders** that meet ICWA requirements.

143 In re B.B., 511 So. 2d 918 (Miss. 1982), rev'd, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

144 John v. Baker, 982 P.2d 738 (Alaska 1999).

145 See 25 U.S.C. § 1903.

146 28 U.S.C. § 1738A.

147 Id.

148 28 U.S.C. § 1738A(a).

149 28 U.S.C. § 1738A(b)(8).

150 In re Marriage of Susan C. & Sam E., 60 P.3d 644, 648-50 (Wash. Ct. App. 2002).

151 See, e.g., E. Band of Cherokee Indians v. Larch, 872 F.2d 66, 68 (4th Cir. 1989).

152 Father v. Mother, No. 3 Mash. 204, ¶ 34 (1999).

153 Id.

154 Id.

155 25 U.S.C. § 1738A(a).

156 25 U.S.C. § 1738A(c)(1).

157 25 U.S.C. § 1738A(c)(2)(A). Jurisdictional basis for custody determinations is as follows:

(A) such State

(i) is the home State of the child on the date of the commencement of the proceeding, or

(ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under paragraph (A), and

(ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have significant connection with such State other then mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and

(i) the child has been abandoned, or

(ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and

(ii) it is the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

Id.

158 25 U.S.C. § 1738(A)(e).

159 Unif. Child Custody Jurisdiction Act, 9 U.L.A. 261 (1999).

160 Unif. Child Custody Jurisdiction **Enforcement** Act, 9 U.L.A. 649 (1999).

161 Unif. Child Custody Jurisdiction Act, 9 U.L.A. 262-65, prefatory note.

162 Id. § 1, 9 U.L.A. 271.

163 See id. § 1, 9 U.L.A. 271.

164 Id.

165 Id. 9 U.L.A. 650.

166 Id. § 13, 9 U.L.A. 559.

167 Id. § 2(10), 9 U.L.A. 286-87.

[168] In re Custody of Stagstock, 477 N.W.2d 310, 314 (Wisc. Ct. App. 1991).

[169] 731 P.2d 1244 (Ariz. Ct. App. 1987).

[170] Id. at 1247.

[171] In re Marriage of Susan C. & Sam E., 60 P.3d 644, 648-51 (Wash. Ct. App. 2002).

[172] Unif. Child Custody Jurisdiction Act, 9 U.L.A. 580 (1999).

[173] Id.

[174] Id.

[175] Id.

[176] Kelly Gaines Stoner, The Uniform Child Custody Jurisdiction & **Enforcement** Act (UCCJEA)-A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA), 75 N. D. L. Rev. 301, 303 (1999) (citing Greg Waller, When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act to Interstate Adoption Proceedings, 33 Harv. J. on Legis. 271, 274 (1996)).

[177] Unif. Child Custody Jurisdiction Act § 4, 9 U.L.A. 458 (1999).

[178] Id.

[179] Unif. Child Custody Jurisdiction **Enforcement** Act § 5(a), 9 U.L.A. 466 (1999).

[180] Id. § 201, 9 U.L.A. 671.

[181] Id. § 204, 9 U.L.A. 676.

[182] Id. § 203, 9 U.L.A. 676.

[183] Id. § 102, 9 U.L.A. 658.

[184] Id. 9 U.L.A. 651-52.

[185] Id. 9 U.L.A. 652.

[186] Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A.

[187] Unif. Child Custody Jurisdiction **Enforcement** Act § 13, 9 U.L.A. 673 (1999).

[188] Id. § 104(b), 9 U.L.A. 661.

OREGON STATE BAR
BULLETIN

AUGUST/SEPTEMBER 2021

Strengthening Tribal Justice

State and Tribal Cooperation Lead to Changes in Oregon Law

Also Inside:

Turning Over the Reins

Hiring Professional Managers Frees Attorneys to Practice Law

A Light in the World

Justice Adrienne Nelson Honored as New School Namesake

Strengthening TRIBAL Justice

State and Tribal Cooperation Lead to Changes in Oregon Law

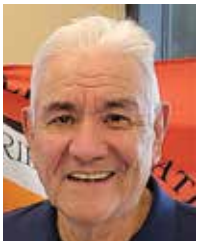
— By Janay Haas —

A large majority of the bills introduced in an Oregon legislative session don't make it to the finish line. One bill that did make it in 2021 will save lives. And it will likely be a model that other states emulate.

Beginning Jan. 1, 2022, Senate Bill 183 becomes law. It explicitly extends full faith and credit to judgments, decrees and orders of tribal courts of all federally recognized Indian tribes. It also strengthens the existing requirements and process for law enforcement and courts throughout the state to respond to and enforce violations of tribal orders and strengthens and clarifies requirements for sheriffs' offices to enter tribal court protection orders into the state's Law Enforcement Data System (LEDS) and the National Crime Information Center (NCIC) database when requested.

Article IV, Section 1 of the United States Constitution requires that "[f]ull [f]aith and [c]redit shall be given in each [s]tate to the public [a]cts, [r]ecords, and judicial [p]roceedings of every other state." But the Constitution never contemplated a government-to-government relationship with Native people. The concept of tribes as sovereign nations developed slowly in Anglo-American jurisprudence, and at a relatively late date in U.S. history. The extension of full faith and credit to tribal judgments and orders is still evolving.

For lawyers whose experience with full faith and credit is limited to matters between states, it may come as a surprise that federally recognized Indian nations — 574 of them in the United States — face significant obstacles in having their judgments and orders honored outside their own jurisdictions. In Oregon and around the country, the result has been that repeat drunk drivers have kept their licenses, juveniles have been subjected to federal incarceration, child support has gone unpaid, damage awards have gone uncollected, and victims of domestic violence and sexual assault have been unable to rely on sheriffs' and police departments to enforce protection orders.


William Johnson

At the same time, federal statutes and the U.S. Supreme Court and lower federal courts have constrained the authority of tribal governments to enforce their laws against nontribal members. In consequence, says the Hon. William D. Johnson, chief judge of the Confederated Tribes of the Umatilla Indian Reservation, "drug dealers, child abusers, sex traffickers, and rapists have perceived Indian country as a safe haven from law enforcement."

The severity of the problem is difficult to overstate. Native Americans are victims of violent crime at rates more than double those of any other demographic group in the United States. According to the U.S. Department of Justice, Native American women are 10 times more likely to be murdered than any other U.S. citizens. More than a third of Native women experience rape, and almost 40 percent are victims of domestic violence — most often by a nontribal member. These statistics motivated Congress to add a provision specifically addressing Native women's safety in the Violence Against Women Act (VAWA) when it was reauthorized in 2005 and later in 2013 (S. 47, 113th Congress, 2013-2015). VAWA made clear that nontribal members would be subject to tribal court jurisdiction in circumstances constituting domestic violence.

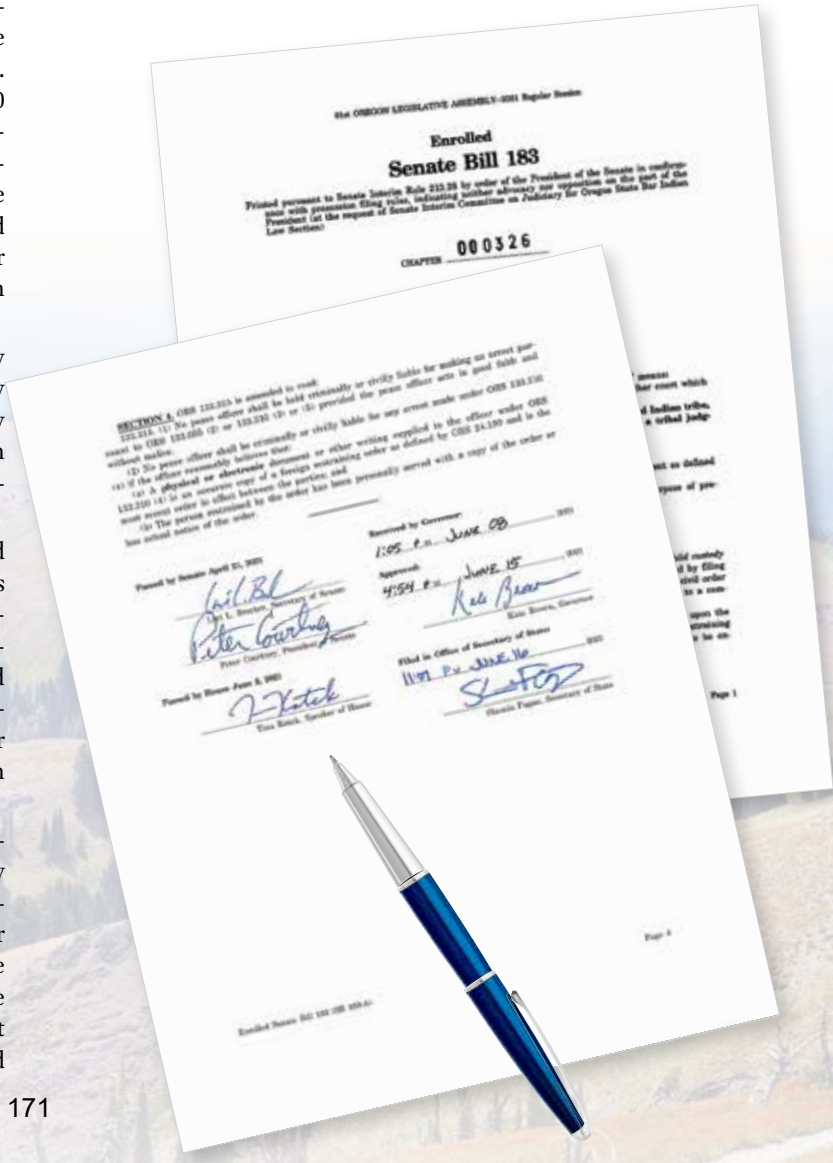
VAWA also specifically requires that protection orders issued by a state, Indian tribe or territories be accorded full faith and credit by the court of another state, Indian tribe or territory, and enforced by the court and law enforcement personnel of the other state, Indian tribal government or territory as though it were the order of the enforcing state (18 USC sec. 2265).

Before the passage of SB 183, tribal members who experienced domestic violence or sexual assault could obtain protection orders from tribal court. If they left the reservation and their attacker pursued them, however, Oregon law enforcement agencies rarely arrested the violator. It is specifically prohibited under federal and state law to require petitioners of foreign protection orders to register or file orders with state agencies. Therefore, it is common for tribal protection orders, considered "foreign orders" under Oregon law, not to be entered into LEDS or NCIC.

"Many law enforcement officers would expect to see tribal protection orders entered into a data system and would not properly respond to or enforce protection orders that were not entered," explains Sarah Sabri, the domestic violence resource prosecutor for the Oregon Department of Justice Criminal Justice Division. "The lack of response puts victims/survivors in danger not just from the incident that occurred, but also by reinforcing to an offender that the state will not take action." While existing Oregon law has laid out a process for the enforcement of foreign protective orders that are not in LEDS/NCIC, there were too many gaps and misinterpretations of the statutory language that resulted in lack of enforcement. Similarly, the current statutes created a framework for a petitioner to request entry of an order into LEDS/NCIC, but it too has left gaps that have prevented the system from working in the way that it was intended. SB 183 remedies these issues.

The Hon. Lisa Lomas, chief judge of the tribal court for the Confederated Tribes of Warm Springs for the past five years, says that all nine federally recognized Oregon tribes have had similar experiences to her own: victims who obtained protection orders from her court were told by outside law enforcement that they would need to get another restraining order from a state circuit court — experiencing the trauma of the courtroom again off-reservation and signaling their whereabouts to their abuser. People were afraid to trust the system, she says; women essentially were "trapped on the reservation" where they remained vulnerable.

"The right to travel is meaningful," says Naomi Stacy, lead counsel for the Confederated Tribes of the Umatilla Indian Reservation. For victims of abuse, leaving the jurisdiction should not mean




Naomi Stacy

leaving rights behind. "Protection shouldn't end at the border."

A related problem Chief Judge Lomas saw was that, even in counties that recognized the protection orders issued by tribal courts, clerks nonetheless required petitioners to pay to file them as "foreign judgments" when Oregon law prohibits charging a filing fee for domestic violence, elder abuse, sex abuse and related orders. "This should never have occurred."

Protection orders were only one of many civil transactions that didn't cross jurisdictional lines, adds Chief Judge Lomas. "Marriages, divorces, name changes — the Vital Records Office for Oregon would not register them."

Chief Judge Johnson relates a problem with citing drunk drivers and suspending their licenses. "We submitted our judgments to DMV for action. DMV would respond with, 'You're not a court in our jurisdiction. We can't suspend.' A driver with five or six DUII convictions would still be on the road."

In his testimony before the Senate committee on the judiciary, Chief Judge Johnson gave more examples:

> When someone moves from one state to another, they need to know that a divorce decree they obtained in the first state will be recognized in the new state. When a person sues another person for damages in one state, they need certainty that the order can be enforced even if the person who owes the money moves to another state. When a court issues a parenting plan, certainty is necessary to ensure that a parent cannot simply take the child to another state and avoid having to abide by the order.

Oregon finally created an avenue for those issues to be heard, when the Oregon Judicial Department and the tribes convened a Tribal Court State Court Forum in 2016. Attendees came from Umatilla, Warms Springs, the Confederated Tribes of Grande Ronde, the Klamath Tribes, the Burns Paiutes of Harney County, the Cow Creek Band of Umpqua Indians, the Coquille Tribe, the Confederated Tribes of Siletz, and the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw — all corners of the state. The group, made up of judges from the tribes and the state, has met annually since then.

Oregon Supreme Court Chief Justice Martha Walters has participated in the forums. In 2018, she asked the Indian Law Section of the bar to craft a proposal to address the gaps in recognition and enforcement of tribal judgments and orders. The section enlisted Martha Klein Izenson of the Native American Program of Legal Aid Services of Oregon to research how other states had approached these problems; Izenson and three law students produced extensive research in response.

The few states that had addressed the problems tended to impose procedural rules, but for Walters, it made more sense for statutory gaps to have statutory remedies. As she explained in a letter to Izenson, "The UTCRs are intended to provide Oregon courts and litigants with procedural directions, but not to fill statutory gaps, impose certain standards for judicial decision-making, or affect the rights of the parties."


Kristen Winemiller

"Justice Walters deserves a lot of credit for the development of this bill," says Chief Judge Johnson, who first had written about the need to facilitate recognition in a 1996 article appearing in *The Tribal Court Record* (pictured below). Chief Judge Lomas agrees: "She gave us really good help." Kristen Winemiller, a member of the executive committee of the section, remembers, "When Chief Justice Walters, Warm Springs Chief Judge Lomas and Umatilla Chief Judge William Johnson added their weight — and wisdom — to the effort, everyone took notice. The chief justice was instrumental in bringing this about, and an agreement was hammered out with dispatch once she turned her attention to the bill."

With input from all the tribes, the state bar's public affairs committee, the Indian Law Section, the Oregon Department of Justice, judges participating in the forum, the U.S. Attorney's office and the Oregon State Sheriffs' Association, and after review and approval by the bar's Board of Governors, the bill was ready for the 2021 session. It passed unanimously.

Under SB 183, ORS 24.105 now redefines "foreign judgment" to include "any judgment, decree or order of a tribal court of a federally recognized Indian tribe, except when another Oregon statute provides a different process to enforce a tribal judgment, decree, or order, or as provided in ORS 426.180."

The definition of "foreign restraining order" in ORS 24.190 now includes "sexual violence against another person" as grounds for a protective order that is afforded the full faith and credit protections under VAWA.

Respondents to restraining orders who object to their enforcement on jurisdictional grounds or lack of due process can raise those objections as affirmative defenses under ORS 24.190.

Under the new law, a person who has a foreign (including a tribal) restraining order can present a copy to a county sheriff. The sheriff must promptly verify the validity of the order and that the respondent in the case was personally served with a copy or has actual notice of the order. Then the sheriff must enter the order into LEDS and NCIC. "The order is fully enforceable as an Oregon order in any county or tribal land in this state." ORS 24.190(3)(a).

Anyone with a foreign restraining order, or someone acting on behalf of that person, can present a certified copy of the order and proof of service at any circuit court clerk's office in the state. The clerk's office cannot charge a fee for filing a foreign restraining order. ORS 124.190(6).

Where a protected party has elected to file a copy of the order with the sheriff or circuit court, law enforcement responding to a reported violation can rely on the entry into LEDS/NCIC to confirm the existence and conditions of the order.

Sarah Sabri

However, any foreign protection order is valid and enforceable in Oregon immediately on the petitioner's arrival in the state *without* the need to file with either the sheriff or the circuit court. If there has been a violation of a foreign restraining order, the protected party may present an electronic or physical copy to the responding officer and provide information regarding service and validity; an officer with probable cause that the order has been violated shall arrest, just as the officer is required to do when there is a violation of an Oregon-issued protective order.

One of the problems previously voiced by law enforcement responding to violations of protective orders not entered into LEDS/NCIC was the possibility of claims of false arrest. SB 183 also added a liability disclaimer that state or local agencies, law enforcement officers, prosecuting attorneys, court clerks or governmental officials acting within an official capacity are immune from civil and criminal liability for the registration, entry or enforcement of foreign restraining orders or the arrest or detention of an alleged violator if the act was done in good faith and without malice in an effort to comply with state and federal law.

Once the new law takes effect, training for judges and law enforcement will begin. The Oregon Department of Justice has already been engaged with police about the issue for the past two years, says Sabri. According to Jason Myers, executive director of the Oregon State Sheriffs' Association, the Civil Command Council offers training in the spring and fall and will include SB 183 in its instruction.

Compared to approaches taken by other states, Oregon's stance is unequivocal in its recognition of tribal authority. As Izenson puts it, "Tribal members are citizens of tribal sovereign nations, in addition to being citizens of the state in which they reside, as well as United States citizens since 1924. Accessing justice through one's own sovereign court is an essential and pivotal right for any citizen. For that to be meaningful, judgments from one court need to be recognized by another court in order to be enforced."

"This statute reinforces what we know: that we are equal," adds Chief Judge Lomas. ■

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Michigan Court Rules Practice | August 2023 Update

Text
Ronald S. Longhofer, Daniel D. Quick, Sheila Deming, Alan Saltzman

Chapter 2. Civil Procedure

Subchapter 2.600. Judgments and Orders; Postjudgment Proceedings
Ronald S. Longhofer[a0]

Rule 2.615. Enforcement of Tribal Judgments

(A) The judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of a tribal court of a federally recognized Indian tribe are recognized, and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of any court of record in this state, subject to the provisions of this rule.

(B) The recognition described in subrule (A) applies only if the tribe or tribal court

(1) enacts an ordinance, court rule, or other binding measure that obligates the tribal court to enforce the judgments, decrees, orders, warrants, subpoenas, records, and judicial acts of the courts of this state, and

(2) transmits the ordinance, court rule or other measure to the State Court Administrative Office. The State Court Administrative Office shall make available to state courts the material received pursuant to paragraph (B)(1).

(C) A judgment, decree, order, warrant, subpoena, record, or other judicial act of a tribal court of a federally recognized Indian tribe that has taken the actions described in subrule (B) is presumed to be valid. To overcome that presumption, an objecting party must demonstrate that

(1) the tribal court lacked personal or subject-matter jurisdiction, or

(2) the judgment, decree, order, warrant, subpoena, record, or other judicial act of the tribal court

(a) was obtained by fraud, duress, or coercion,

(b) was obtained without fair notice or a fair hearing,

(c) is repugnant to the public policy of the State of Michigan, or

(d) is not final under the laws and procedures of the tribal court.

(D) This rule does not apply to judgments or orders that federal law requires be given full faith and credit.

[Adopted May 14, 1996, effective July 1, 1996, 451 Mich.]

Comments

Staff Comment to 1996 Adoption

The 1996 amendment of MCR 2.112(G) and (J) and the 1996 promulgation of MCR 2.615 were prompted by proposals from the Indian Tribal Court/State Trial Court Forum and from the State Bar of Michigan. The adopted rules reflect a synthesis of those sources, of a corresponding rule of the North Dakota Supreme Court, and of the model rules generated by the Michigan Indian Judicial Association.

West's Key Number Digest

West's Key Number Digest, Indians 27(7)
West's Key Number Digest, Judgment 830

Legal Encyclopedias

C.J.S., Indians § 12

C.J.S., Indians § 23

C.J.S., Indians § 81

C.J.S., Indians § 100

C.J.S., Indians § 102

C.J.S., Indians § 103

C.J.S., Indians § 107

C.J.S., Indians § 175

C.J.S., Judgments §§ 1356 to 1363

Footnotes

[a0] Of The Michigan Bar.

End of Document

Florida Jurisprudence, Second Edition | September 2023 Update

Indians or Native Americans
Judith Nichter Morris, J.D.

I. In General

§ 6. Domestic relations; proceedings related to children

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 131, 133 to 138

Forms

Am. Jur. Pl. & Pr. Forms, Adoption § 294 (Complaint in federal district court—By biological father—Adoption in violation of Indian Child Welfare Act)
Florida Pleading and Practice Forms § 45:72 (Affidavit—Regarding applicability of Indian Child Welfare Act [Form 12.981(a)(5)])

State statutes pertaining generally to proceedings related to children[1] do not supersede the requirements of the Federal Indian Child Welfare Act,[2] the Multi-Ethnic Placement Act of 1994,[3] as amended, the Servicemembers Civil Relief Act,[4] or the implementing regulations for such acts.[5] The Department of Children and Families is encouraged to enter into agreements with **recognized** American Indian tribes in **order** to facilitate the implementation of the Indian Child Welfare Act.[6] The Department of Children and Families must ensure that the Servicemembers Civil Relief Act is observed in cases where a parent, legal custodian, or caregiver responsible for a child's welfare, by virtue of their service, is unable to take custody of the child or appear before the court in person.[7]

Under the Federal Indian Child Welfare Act, any adoptive placement of an Indian child under state law, a preference must be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family, (2) other members of the Indian child's tribe, or (3) other Indian families.[8] In this regard, a state trial court did not abuse its discretion in deviating from the Indian Child Welfare Act by declining to place a four-year-old Indian child with a tribal foster family where the tribal family could not presently meet the child's unique needs given their unfamiliarity with his medical conditions.[9] Furthermore, the Federal Act confers on tribes the right to intervene at any point in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child. Under the Act, on petition of either parent or the tribe, state court proceedings for foster care placement or termination of parental rights involving an Indian child must be transferred to the **tribal** **court**, except in cases of good cause, objection by either parent, or declination of jurisdiction by the **tribal** **court**.[10] And, under the Act, if an involuntary proceeding for termination of parental rights is

pending in state court, the Indian child's tribe has a right to notice. More specifically, in an involuntary proceeding in state court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child must notify the parent or Indian custodian and the child's tribe by registered mail, return receipt requested, of the pending proceedings and their right of intervention.[11]

In this regard, a state trial court, in a termination of parental rights proceeding, had reason to believe that a child was an "Indian child" within the meaning of the Indian Child Welfare Act, and thus the provisions of the Act requiring notice to the child's tribe or tribes were triggered and mandatory where the mother filed notice stating that the child's maternal grandfather was half Navajo and the maternal grandmother was three-fourths Cherokee.[12]

Observation:

Although the party asserting the applicability of the Indian Child Welfare Act in a termination of parental rights proceeding has the burden to produce the necessary evidence for the trial court to determine if the child is an "Indian child" within the meaning of the Act, the threshold information necessary to trigger the Act's notice requirement was not intended to be high.[13]

Practice Tip:

The notice requirements enumerated in the Indian Child Welfare Act are mandatory and preempt state law, and the failure to follow the Act may be raised for the first time on appeal.[14]

However, the provisions of the Indian Child Welfare Act were not adequately invoked in a termination of parental rights proceeding where the record contained no evidence of an oral or written application for transfer of the matter to the jurisdiction of the tribe, the record did not provide evidence of a proffer to the court of an intent to invoke the provisions of the Act, and a statement by the mother's counsel, prior to the rebuttal closing argument of the attorney for Department of Child and Family Services, that the child might have Indian ancestry, did not constitute a petition for transfer to the jurisdiction of the tribe.[15]

Recommendation:

To ensure compliance with the Federal Indian Child Welfare Act in a termination of parental rights proceeding, and to avoid expenditure of state resources when a child's tribe should and wants to exercise its jurisdiction, the state Department of Children and Families, at the initiation of the proceedings, or the trial court, when it first is involved, should inquire of the parents or relatives to determine the applicability of the Indian Child Welfare Act.[16]

Observation:

While the Bureau of Indian Affairs' guidelines for Indian child custody proceedings under the Indian Child Welfare Act are not binding on state courts, the guidelines are considered important.[17]

A state administrative regulation makes specific provision as to child protective investigations and out-of-home care in consideration of the Federal Indian Child Welfare Act.[18]

With regard to permanency determinations regarding children in the dependency system, under state law, if a court finds that reunification is not in the best interests of a child, among the factors which may be considered compelling to show that placement in another planned permanent living arrangement is the most appropriate permanency goal, is the case of a child for whom an Indian tribe has identified another planned permanent living arrangement for the child.[19]

A child custody proceeding that pertains to an Indian child, as defined in the Indian Child Welfare Act, is not subject to the Child Custody Jurisdiction and **Enforcement** Act to the extent that it is governed by the Indian Child Welfare Act.[20] A court of the state must treat a tribe[21] as if it were a state of the United States for purposes of applying certain provisions of the Uniform Act.[22] A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of the Uniform Act must be **recognized** and **enforced** under certain provisions of the Uniform Act.[23] However, where a **tribal court** in which an unmarried mother who was a member of an Indian tribe filed a custody petition did not substantially comply with the jurisdictional standards of the Uniform Child Custody Jurisdiction and **Enforcement** Act, a state circuit court had jurisdiction over the father's later-filed custody petition.[24]

A trial court was authorized to deviate from the child support guidelines in a manner as to require a father to pay no child support upon a finding that the needs of the children were met by tribal disbursements to each of the four children in a specified amount, in addition to free medical, dental, and vision coverage and free child care.[25]

Under the Uniform Interstate Family Support Act, which provides for, inter alia, the **enforcement** of a support **order** and income-withholding **order** of another state without registration, and the registration of an **order** for spousal support or child support of another state for **enforcement**,[26] the term "state" includes an Indian nation or tribe.[27]

Observation:

It is provided by statute that, effective a specified date, or upon the enactment of the Interstate Compact for the Placement of Children into law by the 35th compacting state, whichever date occurs later, the Governor is authorized and directed to execute a compact on behalf of the state with any other state or states legally joining therein in the form substantially as specified by statute, one of the purposes of such compact being to provide for the promulgation of guidelines, in collaboration with Indian tribes, for interstate cases involving Indian children as is or may be permitted by federal law.[28]

Provision is also made by state statute as to the **recognition** of foreign protection **orders** issued by, among others, an Indian tribe.[29]

Footnotes

[1] §§ 39.001 et seq., Fla. Stat., discussed, generally, in Fla. Jur. 2d, Family Law §§ 105 to 108.

[2] 25 U.S.C.A. §§ 1901 to 1963, as discussed, generally, in Am. Jur. 2d, Indians, Native Americans §§ 99 to 103.

[3] PL 103-382, October 20, 1994, 108 Stat 3518.

[4] 50 U.S.C. ss. 3901 et seq.

[5] § 39.0137(1), Fla. Stat.

[6] § 39.0137(2), Fla. Stat.

For discussion of the Department of Children and Families, generally, see Fla. Jur. 2d, Welfare §§ 5 to 9.

[7] § 39.0137(3), Fla. Stat.

[8] Am. Jur. 2d, Indians, Native Americans § 117.

[9] Seminole Tribe of Florida v. Department of Children and Families, 959 So. 2d 761 (Fla. 4th DCA 2007).

[10] Am. Jur. 2d, Indians, Native Americans § 116.

[11] Am. Jur. 2d, Indians, Native Americans §§ 113, 118; Am. Jur. 2d, Adoption § 112.

[12] G.L. v. Department of Children and Families, 80 So. 3d 1065 (Fla. 5th DCA 2012), also holding that the trial court's failure to comply with the Indian Child Welfare Act was not harmless error, in light of the Act's explicit language, where although the trial court had reason to believe that child was an "Indian child" within the meaning of the Act, it failed to ensure that notice of the proceeding was given to child's tribe or tribes.

Under state law, a petition for termination of parental rights must include, among other things, all information required by the Indian Child Welfare Act. § 63.087(4)(e)2, Fla. Stat.

As to termination of parental rights, generally, see Fla. Jur. 2d, Family Law §§ 305 to 316.

[13] G.L. v. Department of Children and Families, 80 So. 3d 1065 (Fla. 5th DCA 2012).

[14] G.L. v. Department of Children and Families, 80 So. 3d 1065 (Fla. 5th DCA 2012).

15 In re T.D., 890 So. 2d 473 (Fla. 2d DCA 2004).

16 In re T.D., 890 So. 2d 473 (Fla. 2d DCA 2004).

17 Seminole Tribe of Florida v. Department of Children and Families, 959 So. 2d 761 (Fla. 4th DCA 2007).

18 Fla. Admin. Code R. 65C-28.013.

19 § 39.6241(1)(d)2, Fla. Stat.

As to permanency determinations, generally, and other planned permanent living arrangements, see Fla. Jur. 2d, Family Law § 298.

20 § 61.505(1), Fla. Stat.

As to the Uniform Child Custody Jurisdiction and **Enforcement** Act, generally, see Fla. Jur. 2d, Family Law §§ 894 to 905.

21 The term "tribe," for such purposes, is defined in § 61.503(16), Fla. Stat.

22 § 61.505(2), Fla. Stat. (referring to §§ 61.501 to 61.523, Fla. Stat.).

23 § 61.505(3), Fla. Stat. (referring to §§ 61.524 to 61.540, Fla. Stat.).

24 Billie v. Stier, 141 So. 3d 584 (Fla. 3d DCA 2014), where (1) the father did not receive notice of the reason for the proceedings in the **Tribal Court** as required by § 61.509(3), Fla. Stat., and he had not submitted himself to the jurisdiction of the **Tribal Court**; (2) at the temporary child custody hearing the father did not have the opportunity to be heard; (3) the father's attorney was not allowed into the tribal proceedings even as an observer; (4) although the father was allowed to attend the proceedings, he was unable to understand what was happening as the proceedings were conducted largely in the Miccosukee language and he was not given an interpreter; and (5) the mother testified in Miccosukee for over 20 minutes and the **Tribal Court** gave the father only a two-minute summary in English before granting temporary custody to the mother.

25 Cypress v. Jumper, 990 So. 2d 576 (Fla. 4th DCA 2008).

As to child support **orders**, generally, see Fla. Jur. 2d, Family Law §§ 148, 149.

[26] Fla. Jur. 2d, Family Law § 570.

[27] § 88.1011(26), Fla. Stat.

[28] § 409.408, Fla. Stat.

[29] Fla. Jur. 2d, Family Law § 76.

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Minnesota Law Review
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Note

Tribal Law
Robert J. Wild[a1]

THE LAST JUDICIAL FRONTIER: THE FIGHT FOR RECOGNITION AND LEGITIMACY OF TRIBAL COURTS

On July 2, 2018, the Minnesota Supreme Court adopted a new rule governing the **recognition** and **enforcement** of **tribal court orders** and judgments in Minnesota district courts.[1] Through clearer language and diminished judicial discretion, the new rule is a significant step toward respecting tribal sovereignty and ensuring tribal and state courts work together to promote justice. This Note pushes the new Minnesota rule further and proposes a solution that is designed to address issues that exist in Minnesota under the old rule and other states who have similar rules. The new rule in Minnesota is untested, but the old rule led to delays in **recognition** and to the refusal to **enforce tribal court orders** where **recognition** was mandated by state or federal law. One such example of these issues is illustrated by the story of Steven and his son, Walter.[2]

***1604** Steven was born and raised on a Native American Indian Reservation in Northern Minnesota and, but for the four years he served in the U. S. Navy, he spent his entire life on the reservation.[3] For over ten years, Steven was embroiled in a fierce and contentious child custody battle in his tribe's **tribal court** regarding his son, Walter, with Walter's biological mother, Carol. Over those ten years, Steven gained and lost custody and visitation rights to Walter. At what seemed to be the end of the custody dispute, Steven finally received a court **order** issuing him and Carol equal custody and visitation rights. However, the heartache and legal battle was far from over.

Instead of complying with the court **order** for custody and visitation, Carol chose to move off the reservation so that the Tribe no longer had jurisdiction over her and Walter. This effectively allowed Carol to disregard the **tribal court order** and escape any repercussions. Steven contacted state police, but upon asking the police to **enforce** the **tribal court order**, the police refused because the **tribal court order** was not from a state court. Steven was left devastated. He felt like his child had been kidnapped.

Not giving up hope, Steven contacted different law offices and legal organizations, but they were either unwilling to help or told him that there was nothing he could do. Two years went by without seeing Walter, but Steven continued to search for a solution. After doing some research on his own, Steven filed a petition in Minnesota state court to have the **tribal court** custody **order enforced** in Minnesota. The state court judge wrongly[4] denied Steven's petition, citing Rule 10.02 of the Minnesota General Rules of Practice, which, prior to the implementation of the new rule, gave judges broad discretion in deciding to **recognize tribal court orders**.[5] The state court judge was required to grant ***1605** Steven's petition pursuant to Rule 10.01 of the Minnesota General Rules of Practice because child custody **orders** from a **tribal court** were required to be **recognized** by statute.[6]

With yet another setback, Steven was left feeling like the country he served to protect was preventing him from seeing his son. Finally, after two years of searching, Steven found a legal organization who drafted a petition on his behalf and represented him in Minnesota state court. The Minnesota court subsequently granted Steven's petition and after thirteen years, his fight to have custody and visitation rights to Walter was finally over.

This story has a happy outcome, but it illustrates why it was imperative to amend the old rule that gave judges broad

discretion when deciding to enforce a tribal court order. The story further illustrates why states with similar rules should also consider enacting change. Minnesota's recognition scheme was not fully responsible for the thirteen-year legal battle Steven faced,[7] but it certainly delayed justice and, as the adage goes, justice delayed is justice denied.

This Note explores the level of deference and process in which tribal court orders[8] are recognized and enforced in state courts.[9] This Note focuses on the tribal-state relationship instead ***1606** of tribal-federal because there is greater interaction between tribes and states. Particular emphasis will be given to Minnesota, given it is the most recent state to consider and promulgate significant changes to the way tribal court orders are recognized in the state. The recent amendment and historical development of the rule in Minnesota will be used to show the direction this area of the law is heading.

Part I introduces the basics of tribal courts and briefly discusses their sovereignty and jurisdiction as related to state and federal courts. It also discusses the unique features of tribal courts. Part II addresses the question of how much deference should be given to tribal court orders and describes differing viewpoints on that question. The historical development of the rule in Minnesota and the recent changes made by the Minnesota Supreme Court will be discussed and will serve as an example of a recent approach to address these issues. Finally, Part III argues that state legislatures should amend their state constitutions to give full faith and credit to tribal court orders to best increase tribal sovereignty and clarify the status of tribal courts in the American legal system.

I. TRIBAL COURTS: STARTED AT THE BOTTOM AND THEY ARE STILL THERE

Although tribal courts have been a part of the American legal landscape since the nineteenth century, their judicial authority is not considered equal to that of state and federal courts.[10] Section A discusses the historical evolution and unique features of tribal courts. This Section also covers the current jurisdictional framework many tribal courts operate under and explains how this jurisdictional framework fits into the overall framework for tribal sovereignty. Section B concludes with a discussion of the amount of deference that different state courts currently give to tribal court judgments.

***1607** A. Tribal Courts: The Judicial System of the Forgotten Third Sovereign

There are three distinct sovereign entities in the United States: the federal government, state governments, and Indian tribes.[11] Each sovereign has its own distinct judicial system.[12] Just like state and federal courts, tribal courts have jurisdiction over certain disputes,[13] but "[t]ribal courts are not United States courts."[14] Many people, including those with a legal education, know little about tribal courts.[15] Despite this, tribal courts have been developing steadily and have increasingly "becom[e] an important part of the judicial fabric of the United States."[16] To understand the current status of tribal courts and the problems they face, a discussion of their historical development is necessary.[17]

1. The Historical Development of Tribal Courts is Marked by a Confusing Array of Statutes and Changing Policies.

The relationship between tribal courts and the United States is characterized by paternalism. Through myriad statutes enacted since the 19th century, the growth of tribal judicial systems have been constrained by dense and confusing statutory frameworks. Given that the United States federal government ***1608** possesses plenary power[18] over tribes,[19] Congress is free to control the development of tribal courts as it sees fit.[20] In the federal Indian policy context, there is considerable disagreement surrounding the nature of plenary power.[21] Some argue that this power is exclusive to Congress and Congress may exercise it over Native Americans without regard for constitutional restraints.[22] Others view Congress's exercise of plenary power over Native Americans as nothing more than an arbitrary means by which it is able "to oppress or even eradicate tribal or individual political, civil, or property rights."[23] For now, tribes have the power and ability to govern themselves by creating and enforcing their own policies and laws, but that power could be taken away by Congress at any time, spelling the end of tribal judicial systems.[24] The policy of the United States, today, is to respect the independence of tribal courts and help them develop into competent legal bodies.[25] However, these goals have not always been advanced, which leaves tribal courts no choice but to operate in a state of uncertainty, not knowing if Congress will take away their authority unexpectedly. A brief historical overview of the development of tribal courts illustrates this uncertainty.

1609** ***a. First Glimpse: From* Ex parte Crow Dog *to the Major Crimes Act

Most **tribal courts** were brought into being because of the Indian Reorganization Act of 1934.[26] Prior to the passage of the Indian Reorganization Act of 1934, the first signs that tribes may be able to have their own judicial systems came in 1883 when the United States Supreme Court held in *Ex parte Crow Dog* that territorial courts did not have jurisdiction over criminal offenses committed by one Indian against another within Indian country.[27] This decision allowed Native Americans to determine the appropriate punishment for crimes that one band member commits against another band member.[28] While *Ex parte Crow Dog* illustrated the need for a reservation-based dispute system, it also served as the catalyst for the creation of law and policies aimed at taking away tribal sovereignty.[29]

In an attempt to address the need for a reservation-based dispute system, the Bureau of Indian Affairs (BIA) started establishing "Courts of Indian Offenses" in the late 1880s.[30] These courts were nothing like the **tribal courts** of today.[31] The Courts of Indian Offenses furthered the values and customs of the BIA, not tribes.[32] The BIA used "these courts [as] the agents of assimilation, and followed laws and regulations designed to assimilate the Indian people into both the religious and jurisprudential mainstream of American society."[33] Instead of being used as a mechanism designed to enhance tribal sovereignty and legitimacy, the Courts of Indian Offenses were used as a mechanism to perpetuate racism and oppression; strip Native Americans of ***1610** their customs, culture, and heritage; and erase any notion of tribal sovereignty and legitimacy.[34]

Congress, viewing the *Ex parte Crow Dog* decision as creating a void in the **enforcement** of criminal law, and wishing to claw back the sovereignty and jurisdiction tribes gained from the decision,[35] passed the Major Crimes Act in 1885.[36] The Major Crimes Act grants federal courts jurisdiction over certain crimes that are committed by a Native American against another Native American on tribal lands.[37] The passage of the Act erased any progress towards the creation of a tribal judicial system by restoring the legal landscape to what it was prior to *Ex parte Crow Dog*.[38]

b. Turbulent Times: Shifting Federal Indian Policy and Laying the Groundwork for the Tribal Courts of Today

It was not until the passage of the Indian Reorganization Act of 1934 "and the subsequent promulgation of a revised Code of Indian Offenses for Indian tribes," that Indian tribes were able to create and adopt their own codes and laws and were free to create a judicial system to **enforce** those laws.[39] This was the start of a new era of Indian policy whereby Congress sought to strengthen and protect tribal culture, and political and social organizations.[40] The dramatic shift in policy and the passage of the Indian Reorganization Act laid the foundation for modern **tribal courts** even though this era did not last long.[41]

***1611** After the Indian Reorganization Act, the next important statute for **tribal court** development was Public Law 83-280 ("Public Law 280") in 1953, which enabled states to assume criminal, as well as civil, jurisdiction in matters involving Native Americans as litigants on reservation land.[42] Public Law 280 furthered "Congress's long term design to terminate the special relationship that Indian tribes had with the United States, end tribal governance, and subject individual Indians ... to the general laws of the states."[43] Public Law 280 embodied this termination policy, and both the BIA and tribes ceased to invest money in **tribal courts**.[44]

After experiencing a growth stunt at the hands of Public Law 280, the passage of The Indian Civil Rights Act ("ICRA") of 1968 further controlled the development of **tribal courts**.[45] The ICRA is the last statute that has played a major role in the formation of modern **tribal courts**.[46] The ICRA mandates that tribes "base their judicial system on Anglo-American notions of due process by superimposing many of the fundamental rights of the United States Constitution upon tribal justice systems ...."[47] While this could be seen as a positive, some commentators have noted that this is an example of paternalism making its way into the development of **tribal courts**.[48] With a brief understanding of ***1612** the confusing, and at times contradictory, policies and laws that have impacted the development of **tribal courts**, this Note's proposal serves as a way to clear up the confusion and uncertainty that surrounds **tribal courts**.

2. The Modern Tribal Court

Despite a history of ups and downs, **tribal courts** have survived years of laws and policies aimed at their termination.[49] Because Congress created the statutes that grant power to **tribal courts**, tribal judicial systems mirror state and federal courts.[50] **Tribal courts** typically operate the same divisions, such as criminal, juvenile, and civil divisions.[51] Judges and lawyers are "law trained," which means they have graduated from law schools in the United States and many of them are

members of state bar associations.[52] Judges are often screened by a branch of government that is separate from the judiciary.[53] **Tribal courts** have their own rules of procedure.[54] Just like state and federal courts, **tribal courts** typically have both a trial court and appellate court.[55] Increasing use of alternative dispute resolution in state and federal courts is paralleled by **tribal courts**' use of less-formal and less-adversarial mechanisms for dispute resolution.[56]

***1613** Even though there are many similarities between state, federal, and **tribal courts**, there are also some unique characteristics and struggles that are unique to **tribal courts**.[57] The starkest difference between **tribal courts** and US courts is the incorporation of Native American values into the judicial process.[58] A nation's conception of justice is shaped by its cultural values and customs, which in turn dictates the way its judicial system operates.[59] It is difficult to describe how a foreign court adjudicates in the context of its nation's cultural values and customs.[60] It is even harder to discuss how those values and customs are implemented.[61] "Explaining how disputes are resolved extra-judicially among any group of people is a little akin to empirically describing how one puts his pants on in the morning: it is done subconsciously without attributing some method or technique to the experience."[62]

Characteristics that make **tribal courts** unique range from the physical presence of tribal courtrooms to the collaborative and inclusive judicial procedures many **tribal courts** employ.[63] Differences also present themselves in the context of punishment of offenders.[64] For example, the Leech Lake Band of Ojibwe Juvenile Justice Code allows the **tribal court** to impose punishment on juvenile offenders that is reflective of the traditions and customs of the tribe.[65] The Code also allows tribal judges to **order** a convicted child "to apologize ... in a traditional manner or ceremony to any persons who have been victimized by the minor's ***1614** conduct; including family members, Band officials, and/or community at large."[66] One such example of this type of punishment is **ordering** a minor who violates the tribe's tobacco code to attend meetings with a tribal elder to learn about the historical role of tobacco in the tribe's culture and then give a presentation on what they learned to a panel of elders.

Although culture and custom may play a role in state and federal courts by, for instance, shaping conceptions of justice, they are much more significant in **tribal courts**.[67] The codification of tribal customs and traditions into the laws and procedures of **tribal courts** reflects a different set of priorities from state and federal courts. It may well be these differences in priority and conceptions of justice that lead to an unwillingness to **enforce tribal court orders** by American courts. Despite the differences, tribal and American courts are both competent judicial bodies capable of administering justice that comport with their nation's cultural values.

3. Tribal Sovereignty and Tribal Court Jurisdiction: Intertwined from the Start

The degree of a **tribal court's** sovereignty influences its jurisdictional reach.[68] The history of tribal sovereignty and the jurisdiction **tribal courts** can exercise has ebbed and flowed through the statutory framework that led to the creation of **tribal courts**.[69] To understand **tribal courts**, one needs to have a grasp on the development of tribal sovereignty and jurisdiction. In the following subsections, the status of tribal sovereignty will be discussed, followed by a discussion of tribal jurisdiction.

***1615** *a. An Overview of Tribal Sovereignty*

Tribal sovereignty is a difficult concept to grasp and is even more difficult to define given tribes have inherent sovereignty and sovereignty that is granted by the United States. The inherent sovereignty that tribes possess is unusual in that their sovereignty predates the United States Constitution,[70] yet the ability to operate as an autonomous nation is subject to the control of Congress.[71] Tribal sovereignty has long been **recognized** and is well established in the United States.[72] Tribes are not considered states;[73] rather, they are "denominated domestic dependent nations,"[74] which leaves them with less sovereignty than a foreign nation.[75] "[Indian tribes] are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."[76] Indian tribes can set up their own governments and exercise authority over their lands and members.[77] Tribal sovereignty goes beyond the powers given to a tribe to embody a cultural/spiritual dimension.[78] Tribal sovereignty "'can be said to consist more of continued cultural integrity than of political powers and to the degree that a nation loses ***1616** its sense of cultural identity, to that degree it suffers a loss of sovereignty.'"[79]

The United States Supreme Court has concluded that tribal sovereignty extends as far as is necessary "to protect tribal

self-government or to control internal relations."[80] Even though "tribes are pre-constitutional entities whose sovereignty does not spring from either the federal government or the Constitution,"[81] the status of their sovereignty is ultimately controlled by Congress, who can choose to broaden or narrow it.[82] Since 1980, the federal government has only added to the confusion regarding the status of tribal sovereignty by adopting laws and policies that enhance tribal sovereignty on one hand, while simultaneously taking it away and denying Native Americans Constitutional rights at the same time.[83] All of this has led to confusion and uncertainty as to how autonomous tribes can be.

b. Tribal Court Jurisdiction

Tribal courts have wide jurisdiction within their territory and even some outside of it.[84] Tribes retain the authority to prosecute members for crimes committed in Indian country, a power "justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent."[85] For tribes subject to Public Law 280, the federal government has jurisdiction over certain crimes committed on Indian lands.[86] And, under Public Law 280, ***1617** states have concurrent criminal jurisdiction over some crimes arising in Indian country.[87] Under federal common law, tribes generally do not possess inherent prosecutorial authority over non-Indians.[88] This is not, however, an absolute rule.[89] Moreover, Congress may delegate federal prosecutorial authority to tribes if it wants.[90]

With respect to civil jurisdiction, tribes retain inherent authority over their members and their territory.[91] This includes the "power of regulating their internal and social relations."[92] Thus, tribes may exercise civil adjudicatory jurisdiction over the conduct of their members and the conduct of nonmembers that enter onto tribally owned lands. Except under certain circumstances, tribes do not have the power to exercise civil jurisdiction over nonmember conduct on non-tribal land.[93] Congress, however, is free to clarify the confines of tribal inherent power to exercise civil jurisdiction, to limit that power, or to delegate additional federal power. Indeed, Congress has reaffirmed that tribes retain concurrent jurisdiction with the federal government over specified civil matters.[94] Even though tribes have the authority to adjudicate over certain matters, that does not mean that states respect tribal adjudicatory authority by **recognizing**, as legitimate, **tribal court** judgments.

*1618 B. Giving Deference to Tribal Court Orders in State Courts: Full Faith and Credit Versus Judicial Comity

The extent to which **tribal court orders** should be **recognized** and **enforced** in state courts is fiercely debated.[95] "Currently, tribal, federal, and state courts generally **recognize** the judgments and other public acts of one another in one of two ways: on the basis of a judicial determination of comity, or pursuant to a legislative or constitutional full faith and credit command."[96] Some authors argue that tribes should be treated as a state or territory of the United States and therefore **tribal court orders** should be given full faith and credit.[97] Others argue that there should not be any rules or procedures governing the **recognition** and **enforcement** of **tribal court orders** because any rule is simply a perpetuation of colonialism and paternalism.[98] The way in which states choose to **recognize tribal court orders**, if at all, is inconsistent. There are many important distinctions between judicial comity and full faith and credit, and this section will introduce both concepts.[99]

1. Full Faith and Credit Represents the Highest Level of Deference Given to a Foreign Judicial Order

At its core, full faith and credit essentially mandates that courts **recognize** and **enforce** another court's judgment, even if they would rather leave the judgment unenforced.[100] Courts can still exercise a modicum of discretion, such as determining whether the issuing court had proper jurisdiction.[101] The concept ***1619** of full faith and credit as a legal term and full faith and credit as a constitutional concept are distinct. The concept of full faith and credit is found in the Full Faith and Credit Clause of the United States Constitution.[102] Congress made the Full Faith and Credit Clause applicable to all states, territories, and possessions of the United States by enacting 28 U.S.C. § 1738.[103] There is some dispute as to whether the Full Faith and Credit Act extends to tribes.[104] However, individual states are able to extend full faith and credit to **tribal court orders** through state court decisions or by establishing it through the state legislature.[105]

The purpose of full faith and credit is to bring many different sovereigns together to promote unity by requiring the judicial and political processes of each sovereign to be respected.[106] When it comes to giving deference to **tribal court orders** because of a full faith and credit mandate, under a plain reading of the concept, state courts are required to **recognize** and **enforce** the **tribal court order** without question.[107] Full faith and credit represents the highest level of deference given to **tribal court** judgments.[108]

2. Judicial Comity Often Gives Judges Broad Discretion When Deciding to Enforce a Foreign Judicial Order

Judicial comity is a much less rigid concept; courts are able to exercise broad discretion in deciding whether to **recognize** and **enforce** another court's **order**.[109] Comity is best described as "the ***1620 recognition** which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[110] "Comity is a nebulous concept ... [that] describes a set of reciprocal norms among nations that call for [states] to **recognize**, and sometimes defer to, the laws, judgments, or interests of another ... [and is] ... motivated by a desire to preserve and promote harmony among nations."[111] If a state decides to **recognize** and **enforce tribal court** judgments based on comity, the Supreme Court has held that states can choose to give deference, but they are under no obligation to do so,[112] and that if they decide to defer, how much they decide to is up the individual state.[113] Further, the burden of showing the judgment is not entitled to **enforcement** rests with the party whom the judgment is sought against, but this varies from state to state.[114] While comity allows a reviewing state court to apply its normative values and compare them to the **tribal court** in determining whether to give deference to the **order** at issue, full faith and credit does not allow such comparison and makes **recognition** and **enforcement** an absolute obligation.[115] The most important distinction is that judicial comity does not guarantee a **tribal court order** will be given effect, but, absent a determination of lack of jurisdiction, full faith and credit does.[116]

*1621 II. HOW MUCH DEFERENCE SHOULD BE GIVEN TO TRIBAL COURT ORDERS: ARGUMENTS THAT COVER THE SPECTRUM

There is no agreement on the correct level of deference to give to **tribal courts**. The choice of judicial comity or full faith and credit to afford deference to **tribal court orders** varies by state, and the arguments in support of a state's decision are vast. Section A provides an overview of the level of deference shown to **tribal court orders** in various states--including the previous version of Minnesota's Rule 10. The arguments in support of each position will be discussed. Section B covers the new Rule 10 that was accepted by the Minnesota Supreme Court on July 2, 2018. The new Minnesota rule provides an example of the most recent attempt of a state to balance the interests of justice with tribal sovereignty.

A. Overview of Deference Given to Tribal Court Orders: The Spectrum

Previous authors have pointed out that the level of deference state courts give to **tribal court orders** can be seen as a spectrum, ranging from a high, to a moderate, to a low amount of deference.[117] As discussed previously, when a state gives full faith and credit to **tribal court** judgments, this represents the highest amount of deference.[118] Comity is a lower level of deference, and the ultimate level of deference given varies from state to state within the states that use comity to decide whether to **enforce** a **tribal court order**. There are a variety of factors that may influence why a given state affords a high or low level of deference. Although that inquiry is outside the scope of this Note, it is worth noting that the population of Native Americans in a state and the amount of time a tribe's judicial system has been in place may play a part.[119] The discussion that follows gives specific examples ***1622** of where certain states fall on the spectrum and identifies the rationales for why a state may choose to give more or less deference.

1. Full Faith and Credit: The Highest Level of Deference on the Spectrum

a. State Examples of Full Faith and Credit

New Mexico is currently the only state that gives full faith and credit to **tribal court** judgments.[120] In *Jim v. CIT Financial Services Corp.,* the New Mexico Supreme Court held that the Navajo Nation's laws are afforded full faith and credit, as provided by the Full Faith and Credit Act,[121] because the Navajo Nation satisfied the "territory" requirement of the Act.[122] Consequently, judgments rendered by a **tribal court** are given the highest level of deference.

Seven years after *Jim*, in *Sheppard v. Sheppard*, the Idaho Supreme Court also ruled that **tribal court** judgments are entitled to full faith and credit per the Full Faith and Credit Act, 28 U.S.C. § 1738.[123] Even though the Idaho Supreme Court held that **tribal court orders** are not equivalent to **orders** from another state, **tribal court orders** were still entitled to full faith and credit because Indian tribes are considered territories under the Act.[124]

***1623** However, in 2017, the Idaho Supreme Court overruled *Sheppard* in *Coeur d'Alene Tribe v. Johnson*.[125] In overruling

Sheppard, the Idaho Supreme Court followed Ninth Circuit case law that held tribes are not entitled to full faith and credit pursuant to the Full Faith and Credit Act because "[n]othing in debates of the Constitutional Convention concerning the [Full Faith and Credit] clause indicates the framers thought the clause would apply to Indian tribes."[126] Now **tribal court orders** are only afforded deference via judicial comity in Idaho.[127] Even though Idaho no longer provides full faith and credit to **tribal court orders**, it still serves as an example of a state being willing to extend full faith and credit to **tribal court orders**. Despite the lack of states giving full faith and credit to **tribal court orders**, there are many sound arguments in support of extending it to tribes.

b. Reasons to Give Tribal Court Orders Full Faith and Credit

i. The Reality of Tribes in America and the Will of Congress

As was seen in the *Jim* and *Sheppard* cases, courts have been willing to extend full faith and credit to **tribal court orders** by finding that the Full Faith and Credit Act applies to tribal nations.[128]

Most scholarship argues that the Full Faith and Credit Clause of the U.S. Constitution, via the Full Faith and Credit Act, requires states and the federal government to give full faith and credit to **tribal court** judgments.[129] The crux of this approach centers around the realities of how tribes function in the United States, the goals of the Full Faith and Credit Act, and the complex history of federal American Indian policy.[130]

***1624** Congress has enacted a multitude of laws that apply to tribes--many of which have shaped **tribal courts** into judicial entities that resemble American courts.[131] The goal of these enactments has been to increase the economic, social, and political interactions between tribes and the United States.[132] The increase in interactions between sovereigns makes tribal governments "a critical element of the American political reality and our system of government."[133] Given this, extending full faith and credit to tribes will further increase interaction between the sovereigns and embrace the reality that the sovereigns are more akin to sisters.[134]

ii. Breaking down the Full Faith and Credit Act

As some commentators have noted, applying the Indian canon[135] to the Full Faith and Credit Act, it is reasonable to interpret the statute as applying to tribes because the statute is ambiguous as to whether it applies to tribes.[136] The goal of the Full Faith and Credit Act is to provide "for the **orderly** administration of justice throughout the United States."[137] The argument is that extending full faith and credit to **tribal court orders** furthers the goal of the Act by providing finality to judicial decisions that have already been litigated, and eliminates the delay created by petitioning a state court to **recognize** and **enforce** an **order**.[138] Interpreting the Full Faith and Credit Act as applying ***1625** to tribes is consistent with current federal Indian policy of respecting **tribal courts**.[139] This interpretation would accomplish two things: (1) continue the growth and development of **tribal courts** by helping legitimize the courts in the eyes of Anglo-American litigants who may be more inclined to use **tribal courts** as a judicial forum; and (2) "increase the prestige of **tribal courts** by preventing state courts from ignoring **tribal court** judgments at their discretion."[140]

A final point to address regarding the Full Faith and Credit Act is the fact that the Act's language seems to indicate that tribes are required to give state court judgments full faith and credit regardless of whether **tribal court** judgments are extended full faith and credit. The relevant part of 28 U.S.C. § 1738 reads: "[State] Acts, records and judicial proceedings ... shall have the same full faith and credit in every court within the United States."[141] As the Supreme Court found in *U.S. v. Wheeler*, tribes are "physically within the territory of the United States ...."[142] Accordingly, a strict reading of § 1738 leads to the conclusion that tribes are to give full faith and credit to state court judgments because **tribal courts** are located within the United States. The Idaho Supreme Court in *Sheppard v. Shepard* focused on this language and ruled that tribes owe full faith and credit to Idaho court decisions.[143] This interpretation of the Full Faith and Credit Act can be used to support arguments that tribes should be treated as a territory under the Act. Here, "territories" is ambiguous because tribal lands are in the United States, therefore making them a territory, so a court should apply the Indian canon and interpret the term in favor of tribes.[144] This "should result in tribes being owed full faith and credit, since to hold otherwise would be to deny them the benefit of full faith and credit while imposing the burden on them."[145]

***1626 iii. Increased Interaction**

Moving beyond arguments in the context of the Full Faith and Credit Act, in *Sheppard v. Sheppard*, the Idaho Supreme Court was right to believe that extending full faith and credit to **tribal court orders** would facilitate better relations between the **tribal courts** in Idaho and the state courts of Idaho.[146] Fostering a positive relationship between state and tribal governments leads to more efficient administration of justice and increases tribal sovereignty and the legitimacy of **tribal courts**.[147]

An example of such a relationship is the execution of a Joint Powers Agreement between the Leech Lake **Tribal Court** and the Cass County District Court.[148] The Agreement was made in response to the severe alcohol and drug abuse issues plaguing both communities and ultimately led to the creation of the Leech Lake-Cass County Wellness Court.[149] The Wellness Court was the first problem-solving court of its kind in the nation.[150] The goal of the Wellness Court was to make sure that public safety is protected, that people get the help they need, and to improve the quality of life for all in the community.[151] The Leech Lake **Tribal Court** and the Cass County District Court worked together to accomplish these goals, and judges from both courts presided over hearings together.[152] The Wellness Court even alternated between holding hearings in tribal courtrooms and district court courtrooms.[153] "This ground-breaking agreement allows the Courts to more effectively and efficiently achieve their mutual goals of improving access to justice; administering justice for effective results; and fostering public trust, accountability, and impartiality."[154] Involvement of the Leech Lake **Tribal Court** in the Agreement "brought unprecedented **recognition** not only for the [**tribal court**], but also for tribal sovereignty in general."[155] The Wellness Court serves as an example of the positive ***1627** results that can occur when tribes and states work together. By extending full faith and credit to **tribal court orders**, litigants are more likely to choose **tribal courts** as their judicial forum and there will be more positive communication between the sovereigns due to the likely increase in **orders** being **recognized**. It is that increase in positive interaction that can lead to the best outcomes for both tribal and state governments.

iv. Extending Full Faith and Credit to Tribal Court Orders Will Help Clarify Tribal Sovereignty and Prevent the Wrongful Denial of Tribal Court Orders that are Required to be Enforced by Statute

Another strong argument for giving full faith and credit to **tribal court orders** is that doing so will help clarify the status of tribal sovereignty, which will in turn help clarify where tribal governments fit in the American federal system.[156] By establishing full faith and credit for **tribal court orders**, states can help ensure that justice under the law is maintained. If **tribal court orders** are **enforced** just as **orders** from another state are, it will prevent individuals who have a tribal judgment leveled against them from simply fleeing the jurisdiction or engaging in forum shopping by re-litigating the issue in a state district court.[157]

Lastly, one of the most significant problems that exists in states that use comity instead of full faith and credit is that many **tribal court orders** are wrongfully denied.[158] There is a startling lack of empirical data regarding the **recognition** and **enforcement** of **tribal court orders**, but one commentator conducted a survey that found fifty-six percent of tribal judges who responded to the survey had had at least one **order** that another ***1628** jurisdiction refused to **enforce**.[159] Of the reported refusals, eighty percent happened in a state court, while the other twenty percent happened in another **tribal court**.[160] The most significant finding from the survey was that forty percent of the refusals that happened in state courts were wrongfully denied.[161] These wrongful denials involved subject matters specifically covered by an explicit federal full faith and credit command statute, such as the Full Faith and Credit for Child Support **Orders** Act.[162] While it is not a guarantee that extending full faith and credit would lead to all **tribal court orders** being **enforced**, it is sure to mitigate instances of judges abusing their discretion under the auspice of judicial comity and would make it much harder for judges to circumvent the **recognition** and **enforcement** of **tribal court orders**.

2. Judicial Comity: The Middle and Low End of the Spectrum

The rationales for affording **tribal court** judgments a moderate or low level of deference are similar. The rationales for why one state chooses to give more or less deference under the doctrine of comity are not clear, but some factors may include the inherent (mis)trust the state has in **tribal courts** as a competent judicial forum and the working relationship that exists between the sovereigns. The arguments in support of **recognizing** and **enforcing tribal court orders** via comity will be

covered simultaneously, given that they apply to both middle and low levels on the deference spectrum. The difference between moderate and low levels of deference is slight. In a moderate deference jurisdiction, there is a presumption of **enforcement**; in a low deference jurisdiction, there is no presumption. A low deference jurisdiction typically places the burden of proving **enforceability** on the person seeking **enforcement** and gives judges broad discretion in coming to their ruling.

a. Moderate Level of Deference

Oklahoma is a state that provides a moderate amount of deference to **tribal court orders**. In 1992, the Oklahoma legislature passed legislation that used the phrase "full faith and credit" to ***1629** describe the treatment of **tribal court orders** in the state, but the statute goes on to establish a level of deference that gives less respect to **tribal court** decisions compared to other states.[163] The statute states:

> A. This act affirms the power of the Supreme Court of the State of Oklahoma to issue standards for extending full faith and credit to the records and judicial proceedings of any court of any federally **recognized** Indian nation, tribe, band or political subdivision thereof, including courts of Indian offenses.
>
> B. In issuing any such standard the Supreme Court of the State of Oklahoma may extend such **recognition** in whole or in part to such type or types of judgments of the **tribal courts** as it deems appropriate where **tribal courts** agree to grant reciprocity of judgments of the courts of the State of Oklahoma in such **tribal courts**.[164]

By granting the Supreme Court of the State of Oklahoma the power to extend full faith and credit as they see fit, the Oklahoma statute is more in line with judicial comity than it is full faith and credit. When the Oklahoma Supreme Court exercises its power given by the statute, a state court must **recognize** and **enforce** a **tribal court** judgment if (1) "the **tribal court** that issued the judgment grants reciprocity to judgments of the courts of the State of Oklahoma,"[165] (2) "the court rendering the judgment [had] jurisdiction,"[166] and (3) extrinsic fraud was not used to obtain the **tribal court** judgment.[167] There is a presumption that the **tribal court order** will be **enforced**.[168] Multiple states legislatures and even some courts erroneously claim to afford **tribal court orders** full faith and credit, but in reality they are giving deference via judicial comity.[169] The result is that Oklahoma uses comity to determine the level of deference afforded **tribal court orders**, but still gives more deference than other states, given its presumption of **enforcement** and the limited number of factors a district court can consider when deciding whether to **recognize** the **order**.

***1630** Alaska is another example of a moderate amount of deference afforded to **tribal court** judgments. In Alaska, a district court is required to **recognize** and **enforce tribal court** judgments unless "the **tribal court** lacked personal or subject matter jurisdiction" or "any litigant is denied due process."[170] Given that a district court in Alaska is "required" to **recognize** and **enforce tribal court** judgments, that sounds a lot like full faith and credit. However, because a district court can consider specific factors, Alaska does not grant full faith and credit; rather, it is a comity jurisdiction. The Supreme Court of Alaska confirmed this assertion when they stated that Alaska courts should "respect **tribal court** decisions under the comity doctrine."[171] Just as in Oklahoma, the presumption of **enforcement** and the limited factors a judge can deny **enforcement** of a **tribal court order** on result in a moderate level of deference for **tribal court orders**.

b. Low Level of Deference: Minnesota's Old Rule

Minnesota's previous rule governing the **recognition** and **enforcement** of **tribal court orders** was an example of the lowest level of deference given to **tribal court orders**. The Minnesota Supreme Court established Rule 10 of the Minnesota General Rules of Practice to control the level of deference afforded **tribal court orders**.[172] Rule 10 was divided into two sub rules: Rule 10.01 and Rule 10.02.[173]

Rule 10.01 controlled when a **tribal court order** had to be given effect because "**recognition** [was] mandated by law."[174] Rule 10.01(a) mandated that if a state or federal statute requires a **tribal court order** be given effect, courts must do so.[175]

The Advisory Committee notes on the rule listed some state and federal statutes that had to be followed, but the specific statutes were not found in the text of the rule itself.[176] Rule 10.01(b) mandated that "[w]here an applicable state or federal statute establishes a procedure for **enforcement** of any **tribal court order** or judgment, ***1631** that procedure must be followed."[177] Rule 10.01 also established that a **tribal court order** pertaining to the Violence Against Women Act, 18 U.S.C. § 2265 (2003), was presumed to be **enforceable**.[178]

Rule 10.02 was more problematic. Rule 10.02(a) established that if a **tribal court order** was not **enforceable** under Rule 10.01, the **enforcement** of the tribal judgment was purely discretionary.[179] Rule 10.02 provided ten factors that a state court "may" consider when making their decision.[180] Some of these factors included whether there was adequate notice to the party against whom **enforcement** was sought, and whether the **tribal court** had subject-matter jurisdiction.[181] In the end, the factors did not mean much, if anything, in light of the final factor, which allowed a state court to consider "any other factors the court deems appropriate in the interest of justice."[182] Under the old Rule 10.02(b), the **tribal court** or the individual seeking **enforcement** of the **tribal court** judgment was not entitled to a hearing on the matter, which further reduced the level of deference afforded to **tribal courts**.[183] Above all else, the discretionary nature of the previous version of Rule 10 in Minnesota made it fall on the low side of the deference spectrum.

c. Why Many States Prefer Judicial Comity Over Full Faith and Credit

Proponents of restricting deference to **tribal court orders** include state and federal judges and, surprisingly, **tribal courts** themselves. The most common argument advanced in support of restricting the deference given to **tribal court orders** is that **tribal courts** are legal bodies that lack the competency, sophistication, and resources to be trusted.[184] Given the supposed lack of competence, ***1632** state courts should be cautious when deciding to **recognize** and **enforce** a **tribal court order**. The only way that caution can be exercised is by allowing judges to have discretion in deciding whether to **enforce orders**. Discretion in the context of **enforcing** a **tribal court** judgement can only be exercised under the doctrine of judicial comity--not under a full faith and credit mandate.[185]

When the previous version of Rule 10 of the Minnesota General Rules of Practice was promulgated in 2003, there was concern regarding the competency of **tribal courts**.[186] These same arguments were brought forth again in opposition to the recent amendment to Rule 10.[187] These concerns are difficult to pin down because they are only supported by anecdotal evidence.[188] To the contrary, **tribal courts** in Minnesota and around the country have invested significant resources into their judicial systems.[189] Tribal judges hold law degrees from some of the best law schools in the country and many have practiced outside of **tribal courts**.[190]

One of the strongest arguments for comity comes from the perspective of tribes themselves. Given tribal government sovereignty, comity is the only means by which **tribal court orders** can ***1633** be given effect in state courts without degrading their sovereign status.[191] The rationale behind this position is that full faith and credit presumes that when full faith and credit is extended to another sovereign, they are brought closer together as one nation.[192] Tribes may not want to be seen as one nation with the United States because their sovereignty pre-dates the United States.[193] Therefore, to maintain their unique sovereignty, comity should be the mechanism that states use to decide whether they want to **enforce tribal court** judgments.[194] The crux of this argument is that comity, not full faith and credit, bolsters tribal sovereignty.[195]

Lastly, **tribal court orders** are not easily accessible to practicing attorneys.[196] Access to published **tribal court** opinions is limited on research platforms such as Westlaw.[197] This poses some issues because practitioners are not able to readily conduct research to ensure that they best represent their clients' interests. The argument that follows is that if attorneys are not able to best represent their clients' interests in **tribal courts**, reviewing courts should have the discretion to evaluate whether the interest of the party was adequately represented. This is a fair argument of which **tribal courts** should take note. Publishing opinions, especially on an electronic database, will provide all persons with better access to the **tribal courts**. Given that each tribe has their own inherent sovereign authority, the publication of **tribal court** records will vary from tribe to tribe.[198]

*1634 B. Minnesota's Recent Change: The Petition to Amend Rule 10 and Acceptance by the Minnesota Supreme Court

On November 30, 2016, the Minnesota **Tribal Court**/State Court Forum ("the Forum") submitted a petition to the Minnesota

Supreme Court to amend Rule 10 of the Minnesota General Rules of Practice for the District Courts.[199] The Forum is comprised of tribal judges from each **tribal court** in Minnesota, judges from the Minnesota state courts, and attorneys.[200] The Amendment proposed a total overhaul of Rule 10 of the Minnesota General Rules of Practice.[201] The Forum's petition represented the culmination two decades of work.[202] On July 2, 2018, the Minnesota Supreme Court adopted a new rule that gives a moderate amount of deference to **tribal court orders**.[203] This Section covers the brief historical development of the rule in Minnesota and gives an overview of the recent changes promulgated by the Minnesota Supreme Court.

Prior to 2004, Minnesota did not have a rule in place that governed the **recognition** and **enforcement** of **tribal court orders**.[204] Around 2000, the Forum started working on a proposal for a rule focused on the **recognition** of **tribal court orders**.[205] After years of work and multiple drafts of the rule, the Minnesota Supreme Court finally adopted Rule 10 and it became effective on January 1, 2004.[206] Some commentators at the time criticized Rule 10 for not giving enough respect to **tribal courts**.[207] However, the rule was still an important first step to giving **tribal courts** the respect they deserve because it established procedures ***1635** for how a **tribal court order** could be **recognized** in Minnesota state courts.

Even though Rule 10 was an important first step, over the years since its promulgation, its problems became evident.[208] The Amendment proposed by the Forum in 2016 sought to address these problems,[209] and the overhauled Rule 10 promulgated by the Minnesota Supreme Court in 2018, largely reflects the proposed changes. The changes to Rule 10 became effective on September 1, 2018.[210]

As the proposed changes were considered by the Minnesota Supreme Court, many people expressed their opinions regarding the changes.[211] The new rule remains a rule of comity, but it does establish a presumption of **enforcement**.[212] As explained below, the rule clarifies procedures for **enforcement** and provides more guidance to district court judges by eliminating the broad discretion judges had under the previous version of the rule.

1. Rule 10.01: Mandatory Recognition

The new Rule 10.01 remains largely the same as the previous version. However, the Rule has been reframed and further clarifies when a **tribal court order** is required to be **recognized**. Several statutory references from the Advisory Committee comments have now been moved into the body of the rule, such as the Indian Child Welfare Act, 25 U.S.C. § 1911.[213] In addition, two new statutory citations were added to the list of laws mandating **recognition** of **tribal court orders** and judgments.[214] The changes clarify the language of Rule 10.01 and help guide the district courts' decisions by identifying specific laws that mandate **recognition** of **tribal court** judgments and **orders**.

1636** ***a. Rule 10.02: Civil-Commitment Proceedings

Rule 10.02 was completely rewritten to focus specifically on the **recognition** of **tribal court orders** and judgments governing civil-commitment proceedings.[215] The Minnesota Supreme Court found persuasive the Advisory Committee's recommendation that a specific rule was needed to govern the **recognition** of tribal civil commitment **orders**.[216] The Court noted "the mental-health and financial issues that may ... be of concern in [these] proceedings favor adopting a separate rule that provides specific guidance to the district courts."[217] The updated Rule identifies the circumstances that require **enforcement** of civil-commitment **orders** entered by certain **tribal courts**, or the circumstances in which the **enforcement** determination will be made under the new discretionary-**recognition** rule, Rule 10.03, discussed below.[218]

b. Rule 10.03: Discretionary-Recognition

Rule 10.03 is now the discretionary-**recognition** rule that was previously found in Rule 10.02. The new rule specifies that a party seeking **enforcement** of a **tribal court order** needs to proceed by petition or a motion within an existing action.[219] Going back to Steven and his custody dispute from the introduction to this Note, under this rule, Steven could have simply petitioned the court to **recognize** the **tribal court order**. Steven would not need an existing cause of action to be able to petition the court. Instead of the burden of proving that the **order** should be **recognized** being placed on the party seeking **enforcement**, the burden is now on the party whom **enforcement** is being sought against.[220] Additionally, a presumption of **enforcement** is established if the party is not able to carry its burden.[221]

The Minnesota Supreme Court **recognized** that the catchall factor found in the previous version of the rule "effectively swallowed the rule."[222] Accordingly, the catchall factor was deleted and the list of ten factors has now been reduced to five: (1) the ***1637 order** or judgment is invalid on its face or no longer remains in effect; (2) the **tribal court** lacked personal or

subject-matter jurisdiction; (3) the affected party was not afforded due process rights; (4) the order or judgment was obtained by fraud, duress, or coercion; or (5) the tribal court does not reciprocally recognize and enforce orders, judgments and decrees of the courts of Minnesota.[223] This effectively removes the unbridled discretion judges previously had, while maintaining the rule as one of comity.[224]

Of importance is the Supreme Court's justifications for reducing and clarifying the relevant factors to enforcement. First, the changes to the rule will help lead to more consistent outcomes.[225] Lastly, "the presumptive-recognition language is a more robust acknowledgement of the independent sovereignty of the Tribal Nations that have established tribal courts ...."[226]

Overall, the changes to Rule 10 are, yet again, another important step towards showing tribal courts the respect they deserve. However, the changes still fail to adequately address all the issue that existed under the previous Rule 10. The simple fact that the Rule 10.03 remains one of comity and there are specific factors that a judge can consider could continue to lead to delays in enforcement. It is also important to note that Rule 10.03 does not establish and outright presumption of enforcement. Rather, there is only a presumption of enforcement when the party against whom the order is sought fails to demonstrate that the order should not be enforced. This demonstrates that the Minnesota Supreme Court continues to approach tribal courts with caution instead of embracing them as an equally qualified judicial body. Accordingly, the rule does little to clarify tribal sovereignty or where tribal courts fit into the judicial framework of the United States.

Many states have made changes over the past decade that afford more deference to tribal courts.[227] This historical development ***1638** of Rule 10 in Minnesota is important to understand because it illustrates where this area of the law is heading: toward affording tribal court judgments more deference.[228] As Kevin Washburn stated in a letter written in support of the 2018 Amendment, "[The] proposed amendments represent progress. The proposed amendments offer a significant step in the right direction ...."[229] What this means is that even though the Minnesota Supreme Court adopted significant changes to Rule 10, there is still room for improvement. This Note's proposal represents where that progress is striving to get to--affording tribal court orders full faith and credit in state courts.

III. STATE LEGISLATURES SHOULD ADOPT AN AMENDMENT TO THEIR STATE CONSTITUTIONS EXTENDING FULL FAITH AND CREDIT TO TRIBAL COURT JUDGMENTS

Using judicial comity to determine whether a tribal court order should be recognized and enforced in state courts continues the oppression and colonialism Native Americans have faced for hundreds of years under the guise of being respectful and deferential. Accordingly, extension of full faith and credit is preferred over judicial comity. This Note argues that state legislatures should amend their state constitutions to give full faith and credit to tribal court orders.[230] This Part begins by explaining why a constitutional amendment is preferable over other judicial or legislative action and is followed by a discussion of the challenges this proposal may provoke. Lastly, counterarguments are considered.

A. Why a Constitutional Amendment is the Best Way to Extend Full Faith and Credit to Tribal Court Orders

As noted previously, there are two ways that full faith and credit can be extended to tribal court orders: (1) judicial action and (2) legislative action.[231] There have only been two examples ***1639** of states extending full faith and credit to tribal court orders. Both were through judicial action, and only one is still in force today; the other was overturned by a subsequent court decision. There is yet to be a state that extends full faith and credit to tribal court orders through legislative action.[232]

Legislative action is preferable to judicial action because legislative action is inherently more stable. One need not look further than the Idaho Supreme Court's decision to overturn its previous decision to extend full faith and credit to tribal court orders. The stability of legislative action is particularly true in the context of a constitutional amendment. For example, in Minnesota, a constitutional amendment needs to be approved by a simple majority of both chambers of the legislature and then be ratified by a simple majority of voters at the next general election.[233] This same process would apply to overturning the amendment after it is passed. Once the constitution is amended, it will take much more than a panel of judges to decide the state no longer wishes to extend full faith and credit to tribal court orders.

A constitutional amendment is also preferable because it communicates the will of the people more than a judicial action. Minnesota's requirement that voters approve the amendment ensures that citizens are involved in the decision. Extending full faith and credit to tribal court orders in this way allows Minnesota voters to directly communicate to tribal governments and members: "We want to respect your rights as a sovereign nation." Even in states where citizens do not vote on

constitutional amendments, the legislators communicate the same message, because they are elected by the people and speak on behalf of the electorate. This in turn leads to the positive impact of good relations between tribes and states. As discussed in Part II, increased relations and positive interactions leads to more efficient and effective administration of justice that is beneficial for all.

Next, a constitutional amendment extending full faith and credit to **tribal court** judgments is preferable over judicial action because it is unclear whether a state supreme court can extend full faith and credit to **tribal court orders**.[234] The two cases where ***1640** a court extended full faith and credit to **tribal court** judgments did so by interpreting the Full Faith and Credit Act, a federal statute, as applying to tribes. This Note does not advance that position. A court is not able to simply rule that full faith and credit should be extended to **tribal courts** without finding a basis in the law that would allow them to rule in such a way.[235] The only "rulings" that a court may promulgate that are not predicated on a set of specific facts are procedural rules designed to control the litigation process.[236] Rule 10 of the Minnesota General Rules of Practice is an example of a procedural rule.[237] A court is not able to create substantive rights.[238] Only a legislative body has the authority to create substantive rights.[239] "[S]ubstantive rights [are] rights 'granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.'"[240] A mandate of full faith and credit would certainly be regarded as creating a substantive right because it would creating, defining, and regulating the right to have **tribal court orders enforced** without question.[241] Therefore, by the state legislature adopting a constitutional amendment, it ensures that the proper authority is being exercised. The distinction between a substantive right and a procedural rule becomes irrelevant in this context if full faith and credit is extended to **tribal court orders** via a state constitutional amendment.

***1641** Building off the distinction between a substantive and procedural right, the only way that judicial action could extend full faith and credit to **tribal court orders** is by interpreting the Full Faith and Credit Act as applying to tribes. Extending full faith and credit to **tribal court orders** via the Full Faith and Credit Act has the potential to create a slippery slope. The Full Faith and Credit Act is a generally applicable statute.[242] Interpreting the Act as applying to tribes would open the door for the argument to be made that other generally applicable statutes should apply to tribes. Based on the already muddled and confusing network of laws and policies that are applicable to tribes, applying more laws to tribes is likely to add confusion. Further, if tribes are considered a "territory" of the United States, that would rid them of the unique sovereignty they enjoy.[243] Overall, a state constitutional mandate of full faith and credit is preferable because the decision will be more stable, it communicates the will of the people more effectively, there are no separation of powers issues, and tribes will retain their unique sovereignty.

B. Potential Challenges and Counterarguments

The most significant challenge to extending full faith and credit to **tribal court orders** via a constitutional amendment would be the difficulty of passing the amendment. In Minnesota, as of 2018, 213 constitutional amendments have been voted on with 120 of them adopted.[244] Because a little over half of proposed amendments pass, this bodes well for the success of getting the amendment adopted. However, proposing the amendment is only one step in the process. It could be challenging to get popular support in the legislature.

Considering the recent changes to Rule 10 of the Minnesota General Rules of Practice, there is at least some awareness and desire to give more respect to **tribal court orders**. The fact that the recent amendment had overwhelming support and no organized opposition makes it more likely a constitutional amendment could succeed.[245] There have also been other signs in the ***1642** political arena that indicate passage of a constitutional amendment would be possible. One such example is the 2013 Executive **Order** issued by Minnesota Governor Mark Dayton that called for increased interaction with Tribal nations and the strengthening of the bond between the two sovereigns.[246] **Tribal courts** have come a long way since the *Ex parte Crow Dog* decision.[247] Due to the work of dedicated individuals and groups, **tribal courts** have survived and thrived despite the ups and downs they have faced. Nonetheless, amending the Minnesota State Constitution is no easy task and will require a lot of advocating and educating to help legislators and voters arrive at an informed decision.

Individuals who oppose extending full faith and credit to **tribal court orders** are likely to employ the same paternalistic arguments that have always been made in this area of the law. Chief among these arguments is that **tribal courts** are simply not competent and cannot be trusted.[248] Perhaps critics simply cannot accept the fact tribal judicial systems further a different set of cultural customs and values as compared to American courts and are not fully adversarial. Advancing a different set of

cultural customs and values is not an indication of how competent a judicial system is. There have been plenty of examples of non-adversarial courts having tremendous results, such as the Leech Lake-Cass County Wellness Court.[249] These arguments lack weight and should not gain any traction considering the realities of tribal judicial systems today.[250] There are, however, three opposition positions that have some merit, but are not sufficient to overcome the benefits of full faith and credit.

1. The Fairness and Error Concerns

The first counterargument that holds some water is that, if we extend full faith and credit to **tribal court orders**, there is no way to ensure that due process was required. The argument that follows is that we should be performing a "fairness check" on ***1643** **tribal court orders** because a judgment from another foreign nation are normally subject to such a check. The Restatement (Third) of Foreign Relations Law § 482 (1987) lays out the grounds for **recognition** of foreign court judgements.[251] Some of the factors a court can consider are (1) whether the issuing court had jurisdiction, (2) whether the judgment was obtained by fraud, and (3) whether the judgment contravenes the public policy of the United States.[252] Accordingly, the same principle should apply to the **recognition** of tribal judgments because tribes are more similar to a foreign nation than they are to a state.

To the contrary, tribes are more similar to states than they are to a foreign nation.[253] Even if tribes were to be more like a foreign nation, tribal judgments should be given more deference than they are now because tribes receive less deference than a foreign nation. Comparing the level of deference given to an **order** under Minnesota's Rule 10 and the Restatement of Foreign Relations Law, the Restatement gives significantly more deference.[254] It simply does not make sense that a **tribal court**, presided over by a judge who graduated from an American law school, that is ten miles down the road from the **recognizing** court is given less deference than a court that is thousands of miles away. Further, this disparity is even more striking when you consider **tribal courts** are sure to mirror courts of the United States more than courts of a foreign nation because of the plethora of statutes that have sought to control the development of **tribal courts** to be reflective of Anglo-American values.[255] A state constitutional mandate of full faith and credit to **tribal court orders** would **recognize** the differences between tribal and foreign courts and help settle the disparity in deference that exists.

Another response to the fairness and error counterargument is that even if the tribal judgment lacked fairness, or an error was made, there are still ways that a judgment can be attacked ***1644** under a full faith and credit mandate. The losing litigant could challenge the tribal judgment through those avenues of review that remain open within the **tribal court** where the original adjudication took place, such as filing an appeal in the **tribal court**.[256] If **recognition** of the tribal judgment is sought in state court, a litigant could oppose on three grounds: (1) collateral attack on jurisdiction; (2) public policy exception; and (3) state court equivalent of a Federal Rules of Civil Procedure Rule 60 attack.

Under a full faith and credit mandate, one can still attack the judgment on grounds that the issuing court did not have jurisdiction.[257] If the litigant is able to establish this, the **order** would not be **recognized**.[258] Supreme Court precedent seems to suggest that when a judgment is sought to be **recognized** via a full faith and credit mandate, the **recognizing** court can refuse to **enforce** the **order** if it does not comport with public policy.[259] This is an escape hatch for litigants to utilize if the tribal judgment does not seem fair or significant errors were made. Lastly, a Rule 60 attack allows a litigant to obtain relief from a judgment that is based on factors such as whether the judgment was obtained through fraud, whether the judgment is void, and whether the judgment was made under excusable neglect.[260] Takings these safeguards together, there are adequate protections against judgments being **recognized** that are not "fair" or were made via error.

Lastly, if the **recognizing** court is allowed to perform a "fairness check" to the extent that judicial comity allows, this would not be in keeping with principles of res judicata. The three main principles of res judicata are to: (1) conserve judicial economy; (2) establish certainty and respect for the judgments of courts; and (3) protect the interests of the party relying on the judgment.[261] If a "fairness check" was allowed, similar problems that ***1645** are seen under judicial comity, such as delay and lack of **recognition** for **orders** that are required to be **recognized** pursuant to a state or federal mandate, would occur. In sum, this counterargument raises some fair points, but is not persuasive for the reasons stated above.

2. Disparity of Justice

The second counterargument tracks closely with the first. The argument is that the level of justice and competency of

individual **tribal courts** will vary from court to court, so there needs to be a "check" on the **tribal courts** to ensure that justice is being administered evenly. The argument continues that judicial comity is the only way that this concern can be addressed.

This argument is correct to assert that the competency of each **tribal court** will vary. However, this is true in any judicial system, and is not cause to be less deferential to **tribal courts**. Further, this argument is paternalistic in that it posits that Anglo-American conceptions of justice should be strictly applied to **tribal courts**. The same concern about uneven administration of justice applies to state judicial systems.[262] Even though the same concerns exists with state courts, state court judgments receive full faith and credit while tribal judgments do not. There will always be a disparity in skill and competence among courts, but to categorically exclude **tribal courts** without concrete evidence of a lack of competence is itself uneven justice. Getting rid of the "checks" on **tribal courts** that exist under judicial comity and opting to extend deference via a full faith and credit mandate will increase "a reviewing court's ability to appreciate the possibilities of a deep diversity model of tribal-national relations, whereby tribal norms can diverge from federal and state norms and yet still be **recognized** as valid expressions of American identity deserving respect and legal **recognition**."[263]

*1646 3. A Full Faith and Credit Mandate Could Lead to Forum Shopping

The last concern that some may raise is that granting full faith and credit to **tribal court orders** might lead to forum shopping. A litigant might choose to file their case in a state court because they know the law is more favorable to the facts of their case, which is a form of forum shopping. To the contrary, a grant of full faith and credit is likely to decrease forum shopping as compared to judicial comity.[264] Safeguards such as the Erie doctrine, which helps reduce forum shopping,[265] do not exist between tribal and state courts because they are separate sovereigns and have different laws. "[T]he full faith and credit doctrine is fairly toothless as a choice-of-law mechanism, as states may often simply ignore the laws of other states by invoking the public policy exception, and that it operates primarily as a means for establishing the finality and uniformity of judgments throughout the nation."[266] On its face, this may seem to be a less than desirable fact. However, what this means is that if a litigant brought a case in state court instead of **tribal court** because the law is more favorable, the state court judge could choose to apply tribal law. The discretion that judges have in the choice-of-law context under a mandate of full faith and credit would mean that judges can prevent forum shopping as they see fit.

CONCLUSION

Tribal courts are a unique entity that have a long and storied history. The law that creates the framework that tribal, state, and federal courts interact in is complex and muddled. The level of respect and deference shown to **tribal courts** as competent judicial forums is grossly out of line with reality. The low level of deference shown to **tribal courts** not only complicates the relationship between the three sovereigns, it also leads to unjust results that are a holdover of hundreds of years of oppression and colonialism. The delay and wrongful denial of tribal judgments in Minnesota led the Minnesota Supreme Court to promulgate significant changes to ***1647** Rule 10 of the Minnesota General Rules of Practice. The recent changes are a step in the right direction, but they fail to adequately address the problems in this area of the law, given that the new rule is still one of judicial comity. This Note argues that state legislatures should amend their state constitutions to give full faith and credit to **tribal court orders** to best increase tribal sovereignty and clarify the status of **tribal courts** in the American legal system. The policy reasons and mutual benefits that tribes and states will see under such a mandate make now the optimum time for state legislatures to start considering a change.

Footnotes

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progress is being made. Copyright © 2019 by Robert J. Wild.

[1] **Order** Promulgating Amendments to the General Rules of Practice for the District Courts (Rule 10 - **Tribal** **Court** Judgments and **Orders**), No. ADM09-8009 (Minn. Sept. 1, 2018) [hereinafter Rule 10 **Order**].

[2] The facts of this story are based on a case the author of this Note helped litigate. To protect the identity of the client, the names of the parties have been altered and the location of the dispute has been omitted.

[3] David E. Wilkins, American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice 19 (1997) (noting that tribes have traits, practices, and a culture that is different from predominant Euro-American cultural characteristics). Many tribal members residing on reservations face abject poverty, alcoholism, and substance abuse problems. *Id*. ("[M]ost tribal nations are severely disadvantaged economically and have astounding levels of unemployment and poverty.").

[4] *See* Minn. Gen. R. Prac. 10.01(a) (2003) (mandating child custody determinations, including those of **tribal** **courts**, be **recognized** and **enforced** pursuant to the Uniform Custody Jurisdiction and **Enforcement** Act, Minn. Stat. § 518D.104 (2018)).

[5] Minn. Gen. R. Prac. 10.02 (2003). The previous version of Rule 10.02 gave judges unlimited discretion in deciding if they wish to **recognize** a **tribal** **court** **order**, whereas Rule 10.01 afforded judges zero discretion. *See infra* Part II.A.2.b (discussing the previous Minnesota rules).

[6] *See* Minn. Gen. R. Prac. 10.01 (2003) (requiring **tribal** **court** **orders** be **recognized** and **enforced** as mandated by statute); *see also* Minn. Stat. § 518D.104.

[7] The amount of time Steven's family law issues were litigated for is similar to the amount of time some family law cases are litigated in state family courts. The long time that the case was litigated in the **tribal** **court** should not be looked at as a poor reflection of the **tribal** **court**.

[8] This Note uses "**tribal** **court** **order**" and "**tribal** **court** judgment" interchangeably.

[9] The use of "deference" in this Note refers to how much respect **tribal** **courts** are shown as competent legal bodies. This Note will use the terms "**recognized**" and "**enforced**" interchangeably at times to refer to **tribal** **court** **orders** being given effect in state courts. As one author points out,

> [a]lthough often used interchangeably, the terms "**enforcement**" and "**recognition**" of foreign judgments refer to two distinct concepts. **Enforcement** occurs when a court compels a defendant to satisfy a judgment that has been rendered against him or her in

the court of a foreign nation. While a court must **recognize** a judgment in **order** to **enforce** it, **recognition** may also occur independently of **enforcement**. **Recognition** occurs when a court precludes litigation of a claim or issue because that claim or issue was previously litigated in the court of a foreign nation. Cedric C. Chao & Christine S. Neuhoff, ***Enforcement*** *and* ***Recognition*** *of Foreign Judgments in United States Courts: A Practical Perspective*, 29 Pepp. L. Rev. 147, 147 (2001).

[10] *See* United States *ex rel*. Mackey v. Coxe, 59 U.S. (100 How.) 104 (1855) (noting the existence of the Cherokee judicial system).

[11] Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian* ***Tribal*** ***Courts***, 33 U. Tulsa L.J. 1, 1 (1997) (asserting that there are three separate sovereign governments in the United States).

[12] *Id*. This Note will refer to the judicial systems and individual courts operated by any tribal governments as **tribal** **courts**.

[13] *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1986) (holding **tribal** **courts** have jurisdiction over disputes in their territory); *infra* Part I.A.3.

[14] Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 Washburn L.J. 733, 733 (2008).

[15] B.J. Jones, *Welcoming* ***Tribal*** ***Courts*** *into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 Wm. Mitchell L. Rev. 457, 467 (1998) (explaining that some attorneys avoid litigation in **tribal** **courts** because they perceive the applicable law to be inaccessible).

[16] Kevin K. Washburn & Chloe Thompson, *A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the* ***Recognition*** *of* ***Tribal*** ***Court*** *Judgments with the Recent Arizona Rule*, 31 Wm. Mitchell L. Rev. 479, 480 (2004).

[17] *See* Jones, *supra* note 15, at 467-68 (asserting that it is important for someone who does not know much about **tribal** **courts** to understand the historical evolution of the courts to begin to understand and appreciate them).

[18] *Plenary Power*, Black's Law Dictionary (10th ed. 2014) ("Power that is broadly construed; esp., a court's power to dispose of any matter properly before it."). The Supreme Court first cited "plenary power" in 1824 to describe the powers of Congress. *See* Gibbons v. Ogden, 22 U.S. (1 Wheat.) 17 (1824).

[19] Nat'l Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985) ("[T]he power of the Federal Government over the

Indian tribes is plenary."); Charles J. Hyland, *The **Tribal** **Court**: Where Does It Fit?*, 65 J. Kan. B. Ass'n 14, 15 (1996) ("[T]he power of the federal government over Indian Tribes is plenary.").

[20] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

[21] Wilkins, *supra* note 3, at 25.

[22] *Id*.

[23] *Id*.

[24] *See* Daina B. Garonzik, *Full Reciprocity for **Tribal** **Courts** from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 Emory L.J. 723, 744 (1996) ("[T]he federal government has the ability to extinguish tribes, **tribal** **courts**, and tribal procedures."); Wahwassuck, *supra* note 14, at 734.

[25] Robert N. Clinton et al., American Indian Law: Cases and Materials 398 (3d ed. 1991).

[26] Indian Reorganization Act of 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (2012)).

[27] *See Ex parte* Crow Dog, 109 U.S. 556, 571-72 (1883).

[28] *Id*. ("[O]ffences committed by Indians against ... each other [are] left to be dealt with by each tribe for itself, according to its local customs.").

[29] Wilkins, *supra* note 3, at 68 (describing the decision in *Ex parte Crow Dog* as enhancing tribal sovereignty and also taking it away).

[30] Jones, *supra* note 15, at 469; *see also* O'Connor, *supra* note 11.

[31] *Id*. at 470.

[32] *Id*. The BIA decided what rules and policies would be **enforced** by the Courts of Indian Offenses, which left tribes with little control over their governance. *See id*. at 469-70 n.43 (explaining that the BIA was setting up the courts illegally, but challenges to their authority were unsuccessful, which left the BIA free to do as it pleased with the court system it created).

[33] *Id*. at 470.

[34] *See* Wilkins, *supra* note 3, at 64 ("The congressional acts and policies responsible for most of these vast reductions of tribal sovereignty, property, and civil and political rights include[s] ... the establishment of the Courts of Indian Offenses ...."); *cf*. United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) ("These 'courts of Indian offenses' are ... but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.").

[35] *See* Wilkins, *supra* note 3, at 68-69; *see also* Jones, *supra* note 15, at 469.

[36] *See* 18 U.S.C. § 1153 (2013).

[37] *Id*.

[38] Wilkins, *supra* note 3, at 68-69.

[39] Jones, *supra* note 15, at 470-71.

[40] Wilkins, *supra* note 3, at 118.

[41] *Id*. (noting the favorable policy shift towards Native Americans only lasted from 1934-45).

[42] Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (Aug. 15, 1953) (codified as amended at 18 U.S.C. § 1162 (1994), 25 U.S.C. §§ 1321-26 (1994), 28 U.S.C. § 1360 (1994)).

[43] Washburn & Thompson, *supra* note 16, at 519; *see also* Wilkins, *supra* note 3, at 166-67 (explaining that the passage of Public Law 280 and the Federal government's policy of physically relocating Native Americans contributed to the goal of assimilating Native Americans into United States culture).

[44] Jones, *supra* note 15, at 472.

[45] 25 U.S.C. §§ 1301-03 (2012).

[46] For other influential statutes that led up to the passage of the ICRA, see Wilkins, *supra* note 3, at 64 ("The congressional acts and policies responsible for most of these vast reductions of tribal sovereignty, property, and civil and political rights included the assignment of Indian agencies to religious societies; the establishment of the Courts of Indian Offenses; the Major Crimes Act of 1885; the General Allotment Act of 1887; the 1891 amendment to the General Allotment Act; the Curtis Act of 1898; and the Burke Act of 1906.").

[47] Jones, *supra* note 15, at 474.

[48] *Id*. at 474-75 ("This history of externally imposed justice is not an auspicious foundation for the development of indigenous justice systems, and may explain why the uninitiated may find tribal justice systems especially confounding."). Setting aside arguments for the merits of following the Bill of Rights, forcing legal concepts and laws upon another nation which has a distinct culture, different customs, and markedly different conceptions of justice is seen by some as a form of cultural imperialism. *See* Wilkins, *supra* note 3, at 19-20.

[49] *See supra* Part I.A.1.

[50] Cohen's Handbook of Federal Indian Law § 4.04[3][C], at 267 (Nell Jessup Newton ed., 2012) [hereinafter Cohen's Handbook].

[51] *Id*.

[52] O'Connor, *supra* note 11, at 5.

[53] Cohen's Handbook, *supra* note 50. For a more in-depth discussion of how tribal judges are vetted, see Shakopee Mdewakanton Sioux Community, the Lower Sioux Indian Community, the Upper Sioux Community, and the Prairie Island Indian Community, Supplemental Filings for Petition of Minnesota **Tribal Court**/State Court Forum to Amend Rule 10 at 5, No. ADM09-8009 (filed July 2, 2018), http://www.mncourts.gov/mncourtsgov/media/Tribal-**Orders**/Supplemental%20Hearing%20Submissions/SMSC-LSIC-USC-PIIC-Supplemental-Filing-to-Rule-10-Petition-final.pdf.

[54] Washburn & Thompson, *supra* note 16, at 517; *see also* O'Connor, *supra* note 11, at 2.

[55] Cohen's Handbook, *supra* note 50; *see also* O'Connor, *supra* note 11, at 5 ("[M]ore and more tribal judicial systems have established mechanisms to ensure the effective appealability of decisions to higher courts.").

[56] O'Connor, *supra* note 11, at 4-5 (noting that **tribal courts** have been developing alternative ways to settle disputes that are less adversarial, more agreeable, faster, and less expensive).

[57] *See, e.g.*, Wahwassuck, *supra* note 14, at 734-35 (discussing the similarities and differences between state, federal, and **tribal courts**).

[58] O'Connor, *supra* note 11, at 3; *see, e.g.*, ***Tribal Court***, Leech Lake Band Ojibwe, http://www.llojibwe.org/court/court.html (last visited Nov. 8 2018) (stating that the mission of the Leech Lake **Tribal Court** is "[t]o Establish [sic] a fair and effective justice system incorporating research-based practices and Ojibwe culture and values; to protect the rights of the Leech Lake Band of Ojibwe people; to preserve natural and Band resources; and to promote peace, health and public safety within the Leech Lake Reservation").

[59] Jones, *supra* note 15, at 466.

[60] *Id*.

[61] *Id*.

[62] *Id*.

[63] O'Connor, *supra* note 11, at 2; *see also* Carl H. Johnson, *A Comity of Errors: Why* John v. Baker *Is Only a Tentative First Step in the Right Direction*, 18 Alaska L. Rev. 1, 39-40 (2001).

[64] *See, e.g.*, Leech Lake Band of Ojibwe Judicial Code tit. 4, § 4-13(E) (establishing that a **tribal court** may impose punishment on juvenile offenders that is reflective of the traditions and customs of the tribe).

[65] *Id*.

[66] *Id*.

[67] *See, e.g.*, *id*. § 4-1 ("[The goal of this code is] [t]o **recognize** and acknowledge the tribal customs and traditions of the Leech Lake Ojibwe and to utilize the same whenever applicable to promote the well-being of Indian children who come before the Juvenile Division ... [and] [t]o provide culturally specific programming whenever possible.").

[68] Richard W. Garnett, *Once More into the Maze:* United States v. Lopez*, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. Rev. 433, 438 (1996) (asserting that jurisdiction is essential to and defines sovereignty); Jones, *supra* note 15, at 485 ("**Tribal courts** tend to be very jealous about the exercise of their valid jurisdiction, simply because they see that jurisdiction as an extension of their sovereignty and erosions upon it as threats to their survival as distinct nations.").

[69] *See supra* Part I.A.1. See Wilkins, *supra* note 3, for an exhaustive discussion of the legislation and landmark cases that have affected tribal sovereignty.

[70] Clinton et al., *supra* note 25, at 312; *see also* Talton v. Mayes, 163 U.S. 376, 384 (1896) (asserting that the rights to self-govern were not delegated by Congress and thus not powers arising from or created by the federal Constitution).

[71] Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014) ("As dependents, the tribes are subject to the plenary control by Congress.").

[72] Gordon K. Wright, ***Recognition*** *of Tribal Decisions in State Courts*, 37 Stan. L. Rev. 1397, 1401 (1985) (referencing Supreme Court cases from 1832 and 1975, both of which affirmed tribal sovereignty).

[73] Clinton et al., *supra* note 25, at 317-18.

[74] Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 17 (1831).

[75] *Id*. at 17-18 (evidencing this relationship, *inter alia*, by describing how an act of war against an Indian Tribe would be "considered by all" to be an invasion of the United States).

[76] Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959); *see also* Clinton et al., *supra* note 25, at 320 ("[W]hat is not expressly limited [by the Federal government] remains within the domain of tribal sovereignty." (quoting Cohen's Handbook, *supra* note 50, at 122)).

[77] *Cherokee Nation*, 30 U.S. at 16 (explaining how the treaties made between the United States and tribes evidences their sovereignty); *see also* Wilkins, *supra* note 3, at 20 (detailing the rights that tribal sovereignty affords tribal governments).

[78] Wilkins, *supra* note 3, at 20.

[79] David E. Wilkins, *The U.S. Supreme Court's Explication of "Federal Plenary Power": An Analysis of Case Law Affecting Tribal Sovereignty, 1886-1914*, 18 Am. Indian Q. 349, 350 (quoting Vine Deloria Jr.).

[80] Montana v. United States, 450 U.S. 544, 546 (1981).

[81] Craig Smith, *Full Faith and Credit in Cross-Jurisdictional* ***Recognition*** *of* ***Tribal*** ***Court*** *Decisions Revisited*, 98 Calif. L. Rev. 1393, 1415 (2010).

[82] Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014) (stating that tribes retain their "historic sovereign authority" up

to and until Congressional action).

[83] Wilkins, *supra* note 3, at 235 (explaining that the federal Indian policy and statutes applicable to tribes have been in conflict, whereby policy dictates that tribal governments should be bolstered and promoted, while some statutes do the opposite).

[84] *See* Cohen's Handbook, *supra* note 50, at 145-46.

[85] Duro v. Reina, 495 U.S. 676, 694 (1990).

[86] *See* Assimilative Crimes Act, 18 U.S.C. § 13 (2012) (extending "State, Territory, Possession, or District" jurisdiction over any crimes committed in places, such as including Indian country, within those areas); Indian Country Crimes Act, *id*. § 1152 (2012) ("[T]he general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States ... shall extend to the Indian country.").

[87] *Id*. § 1162 ("[J]urisdiction over [Indian country] shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.").

[88] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

[89] *See* Violence Against Women Reauthorization Act of 2013 (VAWA), 25 U.S.C. § 1304 (2016) (affirming tribal authority to exercise "special domestic violence criminal jurisdiction over all persons" under certain circumstances).

[90] *See Oliphant*, 435 U.S. at 208 ("[E]ven ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.").

[91] *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) ("Indian tribes retain attributes of sovereignty over both their members and their territory." (citations omitted)).

[92] United States v. Kagama, 118 U.S. 375, 382 (1886). However, this power is not absolute. *See id*. at 379-80 (finding that because the Indians are within the geographical boundary of the United States, Congress has the power to grant them the authority to make their own laws, but that power could be withdrawn, modified, or repealed at any time by Congress).

[93] Montana v. United States, 450 U.S. 544, 563-66 (1981) (specifying circumstances when tribes have the power to adjudicate over non-member conduct on non-tribal land).

[94] *See* Cohen's Handbook, *supra* note 50, at 145 (citing examples).

[95] *See generally* Stacy L. Leeds, *Cross-Jurisdictional **Recognition** and **Enforcement** of Judgments: A **Tribal** **Court** Perspective*, 76 N.D. L. Rev. 311 (2000) (providing an overview of different arguments and concluding that non-**tribal** **courts** have several problematic reasons for not **recognizing** **tribal** **court** judgments).

[96] Smith, *supra* note 81, at 1394. There is also a third category that is characterized by courts simply ignoring the judgements of other courts. *Id*. at 1394 n.4.

[97] *Id*. at 1434-35, 1434 n.267.

[98] Frank Bibeau, Public Comment to Petition to Amend Rule 10 of the Minnesota General Rules of Practice for the District Courts, File No. ADM09-8009 (2018).

[99] B.J. Jones, *Tribal Considerations in Comity and Full Faith and Credit Issues*, 68 N.D. L. Rev. 689, 689-91 (1992) (discussing differences between comity and full faith and credit).

[100] Wright, *supra* note 72, at 1412.

[101] *See* Pink v. A.A.A. Highway Express, 341 U.S. 201, 210 (1941) (positing that the Full Faith and Credit Clause is not an "inexorable and unqualified" command); *see also* Wright, *supra* note 72, at 1413 (noting that a reviewing court may not alter judgment on the merits of the **order**, but the court can adjust the remedy).

[102] U.S. Const. art. IV, § 1 (requiring states to extend full faith and credit to the judgment and public acts of another state).

[103] *See* 28 U.S.C. § 1738 (2018) (granting full faith and credit to all judicial proceedings from courts in the United States, and any U.S.

territory or possession).

104 Smith, *supra* note 81, at 1427-32 (describing how some of the confusion is due, *inter alia*, to unfollowed Supreme Court dicta).

105 *Id*. at 1434-35, 1434 n.267 (citing examples of states that have established that full faith and credit is to be given to **tribal court orders**). It is important to note that some of the examples cited do not technically give "full" full faith and credit to **tribal court orders** because a reviewing court is authorized to consider one or more factors in deciding to **recognize** the **tribal court order**. *See infra* Part II.A.2 (discussing states erroneously claiming to give **tribal court** judgments full faith and credit when in reality they only afford a moderate amount of deference via judicial comity).

106 Smith, *supra* note 81, at 1408.

107 *Id*.

108 *Id*.

109 Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 Notre Dame L. Rev. 1309, 1313 (2015) (describing the ambiguity of comity as appearing "to be a kind of shorthand deployed by judges in the hope that reliance on a concept that is familiar from one set of intergovernmental relations ... will give us a better sense of how a different set of intergovernmental relations ... operates").

110 Hilton v. Guyot, 159 U.S. 113, 164 (1895).

111 Seinfeld, *supra* note 109, at 1309.

112 *Hilton*, 159 U.S. at 163-64 (describing comity as "neither a matter of absolute obligation ... nor of mere courtesy and good will").

113 Smith, *supra* note 81, at 1394 (describing how some courts believe that "because tribes are sovereign political units, their judgments are entitled to a degree of comity," but not total full faith and credit).

[114] *See id. But see* Shen v. Daly, 222 F.3d 472, 476 (8th Cir. 2000) ("The burden of proof in establishing that the foreign judgment should be **recognized** and given preclusive effect is on the party asserting it should be **recognized**.").

[115] *See* Seinfeld, *supra* note 109, at 1319-20 (describing the difference between the two as full faith and credit being an outgrowth of the notion of comity).

[116] *See id*. at 1332 n.93 (describing comity usage between tribal and state courts).

[117] Washburn & Thompson, *supra* note 16, at 483 ("The differing approaches to the question of the **recognition** of **tribal** **court** judgments reflects a wide spectrum."); *cf.* Seinfeld, *supra* note 109, at 1332 n.93 (portraying the spectrum in a similar way).

[118] *See supra* note 108 and accompanying text.

[119] As is illustrated below, states that afford a high or moderate amount of deference to **tribal** **court** judgments are primarily located in the Western United States. *See infra* Part II.A.1-2. The largest population levels of Native Americans are concentrated in the Western United States. *See* Tina Norris et al., The American Indian and Alaska Native Population: 2010, 7 tbl.2 (2012). One of the oldest tribal judicial systems, as we conceive of a judicial system today, that still exists, belongs to the Cherokee Nation. *See* United States *ex rel*. Mackey v. Coxe, 59 U.S. (100 How.) 103 (1855) (noting the Cherokee judicial system predates the U.S. Constitution). The Cherokee Nation, not to be confused with other populations of Cherokee throughout the country, is located in Oklahoma, which is defined as being within the Western United States. Norris et al., *supra*, at 8. Therefore, it is possible that population and the number of years a **tribal** **court** has been around may influence how much deference a state chooses to afford **tribal** **court** judgments.

[120] Washburn & Thompson, *supra* note 16, at 483.

[121] 28 U.S.C. § 1738 (2018).

[122] Jim v. CIT Fin. Servs. Corp., 533 P.2d 751, 753 (N.M. 1975). For a more in-depth discussion of the Full Faith and Credit Act and how it relates to **tribal** **courts**, see generally Smith, *supra* note 81. For a more in-depth discussion of the Full Faith and Credit Act, see *infra* Part II.A.1.b.ii.

[123] Sheppard v. Sheppard, 655 P.2d 895, 902 (Idaho 1982) (finding that the term "Territories and Possessions" was "broad enough to include Indian tribes, at least as they are presently constituted under the laws of the United States").

[124] *Id*. at 901 ("**Tribal court** decrees, while not precisely equivalent to decrees of the courts of sister states, are nevertheless entitled to full faith and credit.").

[125] Coeur d'Alene Tribe v. Johnson, 405 P.3d 13, 16-17 (Idaho 2017).

[126] Wilson v. Marchington, 127 F.3d 805, 808 (9th Cir. 1997).

[127] *Johnson*, 405 P.3d at 17. The Idaho Supreme Court also clarified that they were not overruling *Sheppard* in its entirety. *Id*. ("We will continue to apply [*Sheppard*'s] requirement that a party attacking the validity of a **tribal court's** judgment bears the burden of proving its invalidity." (citing *Sheppard*, 655 P.2d at 901)).

[128] *See supra* Part II.A.1.a.

[129] *See, e.g.*, Smith, *supra* note 81, at 1393-95, 1427-32 (providing an overview of scholarship in the former page range, while the second page range advances the position that the Full Faith and Credit Act requires the federal government and state governments to extend full faith and credit to **tribal court orders**).

[130] *Id*. at 1427. See *supra* Part I.A.1 for an overview of the complex and convoluted history of Indian policy in the United States. See *supra* Part I.A.3 for a better look at the realities of how tribes function in the United States; how tribes function in the United States can be gleaned from understanding the status of tribal sovereignty and the jurisdiction tribal judicial systems have.

[131] *See supra* Part I.A.1.

[132] *See* Smith, *supra* note 81, at 1430 (arguing that increased Congressional oversight during the past century has resulted in greater control of the American society and, with it, Indian tribes).

[133] *Id*. (asserting that it is beyond dispute that tribes are a key component to the American political reality).

134 *Id*.

135 The Indian canon is a tool of statutory construction employed by judges that instructs them to settle statutory ambiguity in favor of tribes. *See* Philip P. Frickey, *Indian Canon Originalism*, 126 Harv. L. Rev. 1100, 1100-01 (2013) (explaining that because so many of the early American dealings with tribes were inherently one-sided and exploitive, this doctrine emerges from the idea that texts should be read in the way the tribes would have understood them to mean at the time of their ratification or enactment).

136 Smith, *supra* note 81, at 1427-28 (analyzing the arguments of both sides of the ambiguity debate under the Indian canon).

137 *Id*. at 1430.

138 *Id*.

139 *See generally* Clinton et al., *supra* note 25 (arguing that interpreting the Full Faith and Credit Act as applying to tribes is consistent with federal Indian policy).

140 Smith, *supra* note 81, at 1431.

141 28 U.S.C. § 1738 (2018).

142 United States v. Wheeler, 435 U.S. 313, 322 (1978).

143 Sheppard v. Sheppard, 655 P.2d 895, 902 n.2 (1982). Because *Sheppard* was functionally (if not directly) overruled less than a year prior to this writing, it is unclear whether the Idaho Supreme Court still holds this position.

144 It should be noted that "territory" is not defined in the Full Faith and Credit Act.

145 Smith, *supra* note 81, at 1407 n.85.

146 *Sheppard*, 655 P.2d at 902; *see also, e.g.*, Smith, *supra* note 81, at 1394 (asserting that the extension of full faith and credit to **tribal court orders** will lead to better relations between tribal, state, and federal courts).

147 Wahwassuck, *supra* note 14, at 755.

148 *Id*. at 747.

149 *Id*.

150 *Id*.

151 *Id*.

152 *Id*.

153 *Id*.

154 *Id*.

155 *Id*. at 748.

156 Smith, *supra* note 81, at 1435 (arguing that providing **tribal courts** full faith and credit "will advance the cause of tribal sovereignty while acknowledging and respecting the legitimacy of tribal practices and institutions in American life").

157 *Id*. at 1404; *see also* Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 Kan. L. Rev. 387, 406 (1974) (explaining that because tribes are a separate sovereign, collateral estoppel does not

apply to situations like this).

158 *See, e.g.*, Leeds, *supra* note 95, at 349 (covering statistics regarding the **recognition** of **tribal court orders** in district courts). Even though this data is useful to illustrate that state courts refusing to **recognize** and **enforce tribal court orders** is a problem, the data would not pass as scientifically reliable. Respondents were self-selected, and the response rate was approximately thirty-four percent, and the results provide no information regarding why an **order** was refused. *Id*. at 348. Accordingly, the data should be approached with caution and any generalizations drawn should bear this in mind.

159 *Id*. at 349 n.245 (fifteen out of twenty-seven respondents reported refusals).

160 *Id*. at 349 n.246 (twelve **tribal courts** reported state court refusals, and three tribes reported refusals by other **tribal courts**).

161 *Id*. at 349.

162 *Id.*; 28 U.S.C. § 1738B (2018).

163 Washburn & Thompson, *supra* note 16, at 483 n.17.

164 Okla. Stat. tit. 12, § 728 (1992).

165 Okla. St. Dist. Cts. Rule 30(B) (2011).

166 Barrett v. Barrett, 878 P.2d 1051, 1054 (Okla. 1994) (citation omitted).

167 *Id*.

168 *Id*.

[169] In addition to Oklahoma, Wisconsin, and Wyoming are examples of states erroneously using the label of full faith and credit to describe the mechanism and level of deference given to **tribal court orders**. *See, e.g.*, Smith, *supra* note 81, at 1434 n.267 (citing the relevant statutes in Oklahoma, Wisconsin, and Wyoming).

[170] *See* John v. Baker, 982 P.2d 738, 763 (Alaska 1999).

[171] *Id*.

[172] Minn. Gen. R. Prac. 10 (2004) (repealed 2018).

[173] *Id*.

[174] *Id*.

[175] Minn. Gen. R. P. 10.01(a) (2004) (repealed 2018) ("Where mandated by state or federal statute, **orders**, judgments, and other judicial acts of the **tribal courts** of any federally **recognized** Indian tribe shall be **recognized** and **enforced**.").

[176] *Id*.

[177] Minn. Gen. R. P. 10.01(b) (2004) (repealed 2018).

[178] *Id*.

[179] Minn. Gen. R. P. 10.02(a) (2004) (repealed 2018).

180 *Id*.

181 For the complete list of factors, see *id*.

182 Minn. Gen. R. Prac. 10.02(a)(10) (2004) (repealed 2018).

183 Minn. Gen. R. Prac. 10.02(b) (2004) (repealed 2018) ("The court shall hold such hearing, if any, as it deems necessary under the circumstances.").

184 *Cf.* Minnesota **Tribal Court**/State Court Forum, Comment Letter on Proposed Amendments to the General Rules of Practice for the District Courts No. AD-M09-8009, at 1 (filed Jan. 19, 2018) (on file with author) (noting that the 2003 proposed Minnesota rule regarding the **recognition** and **enforcement** of **tribal court orders** was met with public opposition that centered primarily on concerns about the efficacy of **tribal courts**).

185 *See supra* Part I.B (explaining that comity allows discretion, while full faith and credit does not).

186 Minnesota **Tribal Court**/State Court Forum, *supra* note 184.

187 *See, e.g.*, Joe Walsh, Mille Lacs County Attorney, Comment on to [sic] Petition to Amend Rule 10, at 1-2, http://www.mncourts.gov/mncourtsgov/media/Tribal-**Orders**/Mille-Lacs-County-Attorney-Comment.pdf (expressing opposition to the 2018 Amendment to Rule 10 on grounds that can be equated to **tribal courts** lacking competency).

188 *See, e.g.*, Oral Argument at 45:00, Proposed Amendments to the Gen. Rules of Practice for the Dist. Courts (Mar. 14, 2018) (No. AD-M09-8009), http://www.mncourts.gov/SupremeCourt/OralArgumentWebcasts/ArgumentDetail.aspx?vid=1193 (depicting Minnesota Supreme Court Justice Barry Anderson explaining that concerns regarding the efficacy of **tribal courts** are only supported by anecdotal evidence). Justice Anderson also pointed out the fact that there had been little to no opposition to the proposed changes and there had been overwhelming support for the Amendment. *Id*.

189 *See, e.g.*, Leech Lake Band of Ojibwe **Tribal Court**, Comment Letter on Proposed Amendments to the General Rules of Practice for the District Courts No. AD-M09-8009, at 1 (Mar. 16, 2017), http://www.mncourts.gov/mncourtsgov/media/Tribal-**Orders**/Leech-Lake-Band-of-Ojbwe-**Tribal-Court**-Comment.pdf (describing how the Leech Lake Band of Ojibwe invested seven million dollars into a new Judicial Center).

190 *Id.*; *see also* O'Connor, *supra* note 11, at 2.

191 Smith, *supra* note 81, at 1433-34.

192 *See supra* Part I.B.1.a (discussing full faith and credit).

193 Smith, *supra* note 81, at 1433-34.

194 *Id*.

195 *But see supra* Part II.A.1.b (arguing that full faith and credit enhances tribal sovereignty and judicial comity degrades it).

196 Randy V. Thompson, Response by Randy V. Thompson to Supplemental Information Request regarding **Recognition** of **Tribal Court Orders** and Judgments, at 8-9 (Apr. 24, 2017), http://www.mncourts.gov/mncourtsgov/media/Tribal-**Orders**/Supplemental%20Hearing%20Submissions/Thompson-04-24-2017-Supplemental-Response-FINAL.pdf.

197 *Cf. id*. (explaining that **tribal court** opinions are published by **tribal courts**).

198 Charles Vig et al., Response by the Shakopee Mdewakanton Sioux Community, the Lower Sioux Indian Community, the Upper Sioux Community, and the Prairie Island Indian Community to Supplemental Information Request regarding **Recognition** of **Tribal Court Orders** and Judgments, at 8 (Apr. 24, 2017), http://www.mncourts.gov/mncourtsgov/media/Tribal-**Orders**/Supplemental%20Hearing%20Submissions/SMSC-LSIC-USC-PIIC-Supplemental-Filing-to-Rule-10-Petition-final.pdf.

199 *See generally* Petition of the Minnesota **Tribal Court**/State Court Forum, In Re Petition to Amend Rule 10 of the Minn. Gen. Rules of Practice for the District of Minn. No. AD-M09-8009 (Nov. 30, 2016) [hereinafter The Amendment], http://www.mncourts.gov/mncourtsgov/media/Tribal-**Orders**/Forum-Petition-filed-Nov-30-2016.pdf (explaining the Amendment and noting that it was filed on Nov. 3, 2018).

200 *Id*. ¶ 1.

[201] *Id*. ¶¶ 41-71.

[202] Rita Coyle Demeules, Overview: 2003 and 2011 Petitions to Amend Court Rules to **Recognize** **Tribal** **Court** Judgments 1 n.1 (Jan. 3, 2016), http://www.mncourts.gov/mncourtsgov/media/Tribal-**Orders**/Memo-to-MHC-re-**tribal**-**court**-judgments-170106.pdf [hereinafter *Rule 10 History*] (noting that the Forum was created in 1996).

[203] *See* Rule 10 **Order**, *supra* note 1, at 1.

[204] *See Rule 10 History*, *supra* note 202, at 1.

[205] *Id*.

[206] *Id*.

[207] *See generally* Washburn & Thompson, *supra* note 16 (critiquing the previous version of Rule 10 of the Minnesota General Rules of Practice).

[208] As was previously discussed, the previous version of Rule 10 created delays in the **recognition** and **enforcement** of **tribal** **court** **orders**. *See, e.g.*, Leeds, *supra* note 95, at 349 (discussing statistics regarding the denial of **tribal** **court** **orders** where **recognition** and **enforcement** is mandated).

[209] *See* The Amendment, *supra* note 199, ¶ 39.

[210] *See* Rule 10 **Order**, *supra* note 1, at 2.

[211] Memorandum in Support of **Order** Promulgating Amendments to the Gen. Rules of Practice for the Dist. Courts, No. ADM09-8009, at 2 (Minn. July 2, 2018), http://macsnc.courts.state.mn.us/ctrack/docket/docketEntry.do?action=edit&deID=978702&csNameID=66710&csInstanceID=727

60&csIID=72760 (follow “Administrative - **Order** - Other (Corrected)” hyperlink).

212 *Id*. at 6.

213 *Id*. at 3.

214 *Id*. (adding 25 U.S.C. § 3106 and 25 U.S.C. § 3713).

215 *See id*.

216 *Id*.

217 *See id*.

218 *See id*. at 3-4.

219 *Id*. at 4-5.

220 *Id*. at 5.

221 *Id*.

222 *Id*.

223 Minn. Gen. R. Prac. 10.3(c) (2018).

[224] Memorandum in Support of **Order** Promulgating Amendments to the Gen. Rules of Practice for the Dist. Courts, No. ADM09-8009, at 5 (Minn. July 2, 2018), http://macsnc.courts.state.mn.us/ctrack/docket/docketEntry.do?action=edit&deID=978702&csNameID=66710&csInstanceID=72760&csIID=72760 (follow "Administrative - **Order** - Other (Corrected)" hyperlink).

[225] *Id*.

[226] *Id*. at 6.

[227] *See* The Amendment, *supra* note 199, ¶¶ 52-62 (discussing examples of states giving more deference to **tribal courts**).

[228] *See id*.

[229] Kevin Washburn, Comment Letter on Amendment to Rule 10 of The Minnesota General Rules of Practice for the District Courts No. AD-M09-8009, at 3 (Mar. 13, 2017), http://www.mncourts.gov/mncourtsgov/media/Tribal-**Orders**/Professor-Kevin-Washburn-Comment.pdf.

[230] The amendment should specify that it applies to all federally **recognized** Indian tribes.

[231] Smith, *supra* note 81, at 1394.

[232] There have been states that claim to give full faith and credit to **tribal court orders** via statute, but, as was discussed *supra* Part II.A.2.a., these statutes use the label of full faith and credit incorrectly when in reality the statute extends deference through comity. *Supra* note 169 and accompanying text.

[233] Minn. Const. art. IX.

[234] *See* Memorandum in Support of **Order** Promulgating Amendments to the General Rules of Practice for the District Courts No. ADM09-8009, at D-1 to D-3 (Minn. July 2, 2018) [hereinafter Memorandum Gildea Dissent] (Gildea J., dissenting),

http://macsnc.courts.state.mn.us/ctrack/docket/docketEntry.do?action=edit&deID=978702&csNameID=66710&csInstanceID=72760&csIID=72760 (follow "Administrative - **Order** - Other (Corrected)" hyperlink).

235 *See id*.

236 *See* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 Minn. L. Rev. 26, 36 (2008).

237 Rule 10 is procedural because it simply provides for the process in which a **tribal court order recognized** in Minnesota District courts.

238 *Cf*. Redish & Murashko, *supra* note 236 (explaining that courts can only make procedural rules).

239 *Cf. id*. at 35-36 (explaining that courts can only make procedural rules).

240 *Id*. at 36 (quoting John Hart Ely, *The Irrepressible Myth of* Erie, 87 Harv. L. Rev. 693, 723-24 (1974)). "Substantive rules are based on legislative and judicial assessments of the society's wants and needs, and they help to shape the world of primary activity outside the courtroom." *Id*. at 28 n.14 (quoting Michael Wells, *The Impact of Substantive Interests on the Law of Federal Courts,* 30 Wm. & Mary L. Rev. 499, 504 (1989)).

241 *Cf*. Memorandum Gildea Dissent, *supra* note 234 (arguing that the recent amendment to Rule 10 creates a substantive right).

242 Smith, *supra* note 81, at 1428.

243 *See supra* Part I.A.1.

244 *State Constitutional Amendments Considered*, Minn. St. Legislature, https://www.leg.state.mn.us/lrl/mngov/constitutionalamendments (last visited Dec. 21, 2018).

[245] *See generally* ***Tribal*** ***Court*** ***Orders*** *and Judgments: Hearings and Submissions*, Minn. Jud. Branch, http://www.mncourts.gov/SupremeCourt/Court-Rules/**Tribal**-**Court**-**Orders**-Hearing-Submissions.aspx (last visited Sept. 14, 2018) (demonstrating that only two submissions received by the Minnesota Supreme Court opposed the recent amendment).

[246] Governor Mark Dayton, *Exec.* ***Order*** *No. 13-10*, Minn. Executive Dep't (Aug. 8, 2013), https://mn.gov/governor/assets/EO-13-10.pdf_tcm1055-92492.pdf.

[247] *See supra* Part I.A.1.a.

[248] *See supra* Part II.A.2.c.

[249] Wahwassuck, *supra* note 14, at 755.

[250] *See supra* Part I.A.2.

[251] Restatement (Third) of Foreign Relations Law § 482 (Am. Law Inst. 1987).

[252] For a complete list of factors, see *id*.

[253] *See supra* Part I.A.3.A

[254] *Compare* Minn. Gen. R. Prac. 10.02 (2004) (repealed 2018) (granting judges unlimited discretion to decide to **recognize** a **tribal court order** because of the incorporation of a "catchall" provision), *with* Restatement (Third) of Foreign Relations Law § 482 (Am. Law Inst. 1987) (limiting judicial discretion to the factors listed).

[255] *See supra* Part I.A.1.

[256] O'Connor, *supra* note 11, at 5.

[257] *See* Nat'l Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 852-53 (1985).

[258] *See, e.g.*, *id*. at 847 (noting that a federal district court entered an injunction against further proceedings in a **tribal** **court** after finding a lack of jurisdiction).

[259] Pacific Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939) ("[A] state [is not compelled] to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.").

[260] Fed. R. Civ. P. 60. For a full list of the factors, see *id*.

[261] *See* David P. Currie et al., Conflict of Law: Cases-Comments-QuestionsS 477-79 (7th ed. 2006).

[262] *Cf. Issues Overview: The Threat to Fair and Impartial Courts*, Just. Stake, http://www.justiceatstake.org/issues [https://web.archive.org/web/20170726010658/http://www.justiceatstake.org:80/issues] (last visited Dec. 21, 2018) (asserting that concerns over special interest money flooding state court elections and pressure on judicial candidates to promise specific rulings compromises the competency of state courts).

[263] Smith, *supra* note 81, at 1408.

[264] *Cf. id*. at 1406 (discussing statistics on state courts' frequent refusal to **enforce** tribal **orders**).

[265] *What Is "Forum Shopping"?*, Rottenstein L. Group LLP, http://www.rotlaw.com/legal-library/what-is-forum-shopping (last visited Dec. 21, 2018).

[266] Smith, *supra* note 81, at 1399.

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Tribal Healing to Wellness Courts & Joint Jurisdiction Courts in California How to Support and Expand

Background resources:

Tribal Healing to Wellness Courts: Intergovernmental Collaboration *(2021),* is intended to assist Tribal Healing to Wellness Courts interested in building intergovernmental collaborations, including tribal-state collaborations. Whether a Wellness Court has been operational for decades or is still in the planning process, collaboration is essential. This resource frames the subject by providing a brief history of Tribal Healing to Wellness Courts, discusses some common traits found in existing collaborations, and then uses those common traits to discuss actual collaborations that are operating in the Tribal Wellness Court context.

California's Yurok Tribe reclaiming lost lives with old tribal values, spiritual healing

Yurok Tribe, Humboldt District Attorney and Superior Court Launch Program to Increase Access to Wellness and Reduce Recidivism

Tribal/State Joint-Jurisdiction Courts

In California, state and tribal courts share concurrent jurisdiction over many case types. Rather than choosing between either state or tribal court jurisdiction, in a joint-jurisdiction court the tribal court judge and the state (or federal) court judge come together to simultaneously exercise their respective jurisdiction. Sharing and coordinating jurisdiction allows the leveraging of resources from each jurisdiction to improve outcomes. There are currently joint-jurisdiction courts operating in El Dorado, Humboldt, and Del Norte Counties. This page includes information on how these courts work and how they can be established in California.

Issues

What are the experiences and challenges in developing these courts?

How can we address these challenges?

How can we expand these courts into other case types?

CRIME

California's Yurok Tribe reclaiming lost lives with old tribal values, spiritual healing

BY ELIZABETH COOK

APRIL 19, 2023 / 6:45 PM / CBS SAN FRANCISCO

KLAMATH, Del Norte County -- The Yurok Tribe is taking bold steps to address the crisis of missing and murdered Indigenous women.
The tribe has issued an emergency declaration, is building its first crime database, and seeking a way to regain sovereignty in investigating the cases.
It is also using centuries-old tribal values as building blocks of a new tribal justice system, including starting up a wellness court.

CRIME
California's Yurok Tribe reclaiming lost lives with old tribal values, spiritual healing

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-

Unseen: A California crisis of missing, murdered Indigenous women - Part 4
Part 1* | *Part 2* | *Part 3

KLAMATH, Del Norte County -- The Yurok Tribe is taking bold steps to address the crisis of missing and murdered Indigenous women.
The tribe has issued an emergency declaration, is building its first crime database, and seeking a way to regain sovereignty in investigating the cases.
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Top Videos00:2801:30Acting US Secretary of Labor visits as thousand of KaiserPermanente workers strike

The idea of the court is to use a holistic approach drawing upon Yurok teachings, activities, and rituals to provide a path to mental, physical and spiritual healing.

Among those who have benefited from the court is Lawrence Orcutt, a tribal member with a long rap sheet that includes drugs, domestic violence, and DUIs.

When Orcutt got arrested again, he was on the cusp of losing everything. Then, he got a dose of tribal justice and it's transforming his life.

"I used to be, to say it bluntly, a criminal," he told KPIX. "[The court] fought for me. And if they didn't, I would have ended up in prison again."

"There is a lot more traditional aspects to it," he continued. "It's not like we are going to get you in trouble and put you in jail if you mess up. It's more like let me help you. And that's huge to me."

The program was created by Yurok Tribal Chief Judge Abby Abinanti.

"I don't think humans respond well to punishment and consequence," Abinanti said. "I think they respond well to our approach."

Abinanti is highly qualified to know. Born in San Francisco, she grew up in Humboldt County. As a youngster growing up, she was encouraged by female tribal leaders to become an attorney.

"That's the first lesson," Abinanti said. "You cannot win an argument with three old Indian ladies. So I went to law school."

Abinanti became California's first Native American female lawyer. She spent 20 years as a commissioner for San Francisco Superior Court.

When she returned home, she saw a community overburdened with domestic violence, substance abuse, and mental illness.

"All that behavior came from somewhere and once you understand that, then you have a fighting chance of getting on the other side of it," Abinanti said.

That means recognizing real harm was done by Indian boarding schools, indentured servitude, and massacres - traumas that are passed down as destructive behavior within families.

The wellness court is structured to help halt this downward spiral.

"How do you want to stop this?" Abinanti said. "Do you want your children to do this? Or do you want to stop it with you?"

ALSO READ: 'Our children deserve to be found;' The painful legacy of Native American boarding schools

Many believe this history plays a role in the crisis of the murdered and missing Indigenous women.

Rosemary Deck is a prosecutor for the Yurok Tribe. Her office recently hired an investigator who will only focus on cases involving these women. U.S. Marshals are now also involved. The unseen are finally becoming less invisible.

"I think that they are starting to pay attention," Deck said. "It's too late but it's better late than never."

As for Orcutt, he now owns his own construction company, has plenty of work and is closer to his family.

TRIBAL HEALING TO WELLNESS COURTS: INTERGOVERNMENTAL COLLABORATION

TRIBAL HEALING TO WELLNESS COURTS: INTERGOVERNMENTAL COLLABORATION

May 2021

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Tribal Healing to Wellness Courts: Intergovernmental Collaboration

May 2021

A product of the

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Table of Contents

Preface ..... **i**

About This Resource ..... **iii**

Chapter 1: Tribal Healing to Wellness Courts—Historical Context **1**

The Drug Court Movement 1

Wellness Courts 2

Wellness Courts as Opportunities for Tribal-State Collaboration 4

Chapter 2: Building a Collaboration **7**

Intra-governmental and *Inter*-governmental Collaborations 9

Informal and Formal Agreements 9

Informal Agreements 10

Formal Agreements 10

Levels of Interaction 11

Co-Training 13

Chapter 3: Wellness Court Collaboration Profiles **15**

Minimal Cooperation 16

Makah Nation and Port Angeles Court Observations 16

Pueblo of Laguna and Tulalip Tribes Hosts Tribal Wellness Court Teams 16

Forest County Potawatomi Community Wellness Court and the Paiute Indian Tribe of Utah Partnerships to Host Naloxone Trainings 17

Multi-Tribal Michigan Tribal Healing to Wellness Court Training 17

Reflection on Minimal Cooperation 18

Full Cooperation 19

Yurok Tribe, Humboldt County, and Del Norte County Supervision MOUs 19

Pueblo of Pojoaque Path to Wellness Court Referral Collaborations 20

National Judicial Opioid Task Force—Sample Court Transfer Agreement 21

Reflection on Full Cooperation 22

Collaboration 23

Ho-Chunk Nation Drug Testing Collaboration 23

Chickasaw Nation Recovery Resource Services 23

Saginaw Chippewa Indian Tribe of Michigan Tribal-County MAT Agreement, Co-Trainings, and Informal Joint Staffings 24

Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians Coos County and Lane County Joint Team Members and Cotraining 24

Saint Regis Mohawk Healing to Wellness Court Inter-Sovereign Team Members and Information Sharing 25
Reflection on Collaboration 26
Co-Creation 27
Leech Lake Joint Jurisdiction Adult Wellness Courts 27
Shingle Springs Joint Jurisdiction Family Wellness Court 28
Kenaitze Joint Jurisdiction Henu' Community Wellness Court 29
Yurok Joint Jurisdiction Family Wellness Courts Hoopa Valley Joint Jurisdiction Family Wellness Court 30
Reflection on Co-Creation 30
Closing Comments 31
Appendix A: Collaboration Resources 33
Appendix B: Tribal-State-Local Collaboration Dos and Don'ts 34

Preface

Sovereignty is the ability to regulate the community within a territory. It is also the responsibility to do so. Inter-sovereign collaboration tempts concern of infringement, resulting in diminished or divested sovereign authority. However, experience with tribal-state Wellness Court collaborations has revealed the opposite. Innovative collaborations between tribal Healing to Wellness Courts and state courts have enhanced each sovereignty's capacity to serve, producing a healing community that is stronger than the sum of its parts. This publication seeks to examine the ways in which sovereigns have dared to cross the border and highlight how those approaches have resulted in enhanced Wellness Courts.

This publication would not have been possible without the generosity of a wonderful network of Healing to Wellness Court practitioners, tribal communities, state partners, and technical assistance providers. The Tribal Law and Policy Institute (TLPI) would like to acknowledge our joy and privilege of working with these trailblazers for the past twenty years. TLPI's experience as a training and technical assistance provider with courts innovating in this area has gifted us with an enormous amount of knowledge and the opportunity to witness tribally-driven Wellness Court innovations and collaborations as they have developed.

> *Healing to Wellness Courts are the manifestation of a community coalescing to heal. They are a modern take on restorative traditions. It is fitting, that in Wellness Court we strive to listen and care, and in our pursuits our community bonds also heal.*
>
> *Lauren van Schilfgaarde, Technical Assistance Provider*

Every community we work with has been incredibly generous with their time and resources: willing to speak to other tribal practitioners and share lessons learned and documents used to operate their own court. As a technical assistance provider, TLPI shares these stories with the Wellness Court community—linking individual tribal practitioners to their peers working on similar issues in other regions. Despite this, in the tribal-state collaboration context, many fruitful and effective collaborations are not well known or well-documented outside of the jurisdiction served. This publication is an attempt to make the information about the collaborations we've encountered available more broadly.

We thank each tribal practitioner who has taken the time to share or verify the information in this publication. Special thanks to our frequent partner, the National American Indian Court Judge's Association (NAICJA) for its work building and maintaining an important and relevant web resource *Tribal Access to Justice Innovation* (TAJI). TAJI helps tribal justice practitioners learn about emerging and promising justice-related programs in Indian country by putting a

spotlight on practical information detailing how Native nations are addressing common challenges. TAJI has put a spotlight on several Wellness Court collaborations that will be discussed later in this publication and served as an essential reference. We encourage readers to explore the TAJI site by visiting www.TribalJustice.org.

About This Resource

The Healing to Wellness Court model is premised on bucking the siloed status quo in favor of multi-disciplinary collaboration to improve the outcomes of court-involved substance abusers. Collaboration is essential. Intergovernmental collaboration is merely an extension of this premise. This publication is intended to assist Tribal Healing to Wellness Courts that are interested in building intergovernmental collaborations, including tribal-state collaborations. Whether the Wellness Court has been operational for decades or is still in the planning process, collaboration is essential.

Like the Wellness Court model, intergovernmental collaborations have developed organically, through innovation that meets the needs and contexts of the courts and their communities. As a result, there are many different existing collaborations that take many different forms. This resource will frame the subject by providing a brief history of Tribal Healing to Wellness Courts, discuss some common traits found in existing collaborations, and then use those common traits to discuss actual collaborations that are operating in the Tribal Wellness Court context.

For a more comprehensive examination of the Wellness Court model, we highly recommend TLPI's *Tribal Healing to Wellness Courts Publication Series*.[1] Similarly, for a further examination of tribal-state collaborations more generally, we recommend TLPI's *Tribal-State Collaboration Project*[2] and the *Tribal Justice Collaborative Project*.[3] These resources, along with others, are referenced throughout this publication and listed in the appendix. This publication builds upon those resources and seeks to stimulate discussions within Wellness Courts as they determine what kinds of collaborations would best serve their communities.

[1] TRIBAL LAW AND POLICY INSTITUTE, TRIBAL HEALING TO WELLNESS COURT PUBLICATION SERIES, https://www.home.tlpi.org/tribal-healing-to-wellness-courts.

[2] TRIBAL LAW AND POLICY INSTITUTE, TRIBAL-STATE COLLABORATION PUBLICATIONS, https://www.home.tlpi.org/tribal-healing-to-wellness-courts.

[3] TRIBAL LAW AND POLICY INSTITUTE, TRIBAL JUSTICE COLLABORATIVE, https://www.home.tlpi.org/tribal-justice-collaborative.

Chapter 1: Tribal Healing to Wellness Courts—Historical Context

The adversarial justice system, like substance use disorders, is a colonial import, imposed on tribes regardless of how it likened to traditional justice systems. In many ways, the story of Tribal Healing to Wellness Courts and the collaborations they imbue are a testament to the resurgence of indigeneity. They are as diverse as the communities they serve. The following section discusses the history of Healing to Wellness Courts to contextualize their role in tribal justice systems and as collaborators.

The Drug Court Movement

The modern Wellness Court is linked to the formation of drug courts in state systems. The United States' "War on Drugs" resulted in a large increase of drug-related cases in state criminal justice systems, increased drug-related convictions, and overcrowded jails and prisons.[4] Those who were imprisoned as a result of this policy were often subject to traumatization by the prison system and, upon release, faced stigma and other barriers to re-integrating with society. Compounding the problem, those who were imprisoned were usually not afforded meaningful treatment for their substance abuse and its underlying causes—the very reason they were incarcerated in the first place.[5] Criminal justice systems quickly became overburdened and, ultimately, it was found that incarceration was not having the desired deterrent or rehabilitative effect policy makers may have hoped. In response, the drug court approach was developed to process substance abuse cases in a way that systematically prioritized treatment—tethering treatment to judicial authority,

The term *Healing to Wellness Court*

Early on, Native nations that were developing their own Wellness Courts preferred to avoid the term "drug court" and searched for a new term that would connect culturally to the tribal community and clearly incorporate alcohol abuse cases. Today, Tribal Healing to Wellness Courts have several names including: Wellness Court, Healing Court, Treatment Court, Substance Abuse Court, Alternative Court, and many Native names that reflect the communities they serve. TLPI prefers the term "Tribal Healing to Wellness Court," a nod to both the healing and wellness aspects of the approach as well as the idea that wellness is on ongoing journey. This publication will use "Healing to Wellness Court" and "Wellness Court" interchangeably.

[4]Joseph Thomas Flies-Away, Jerry Gardner, and Carrie Garrow, *Overview of Tribal Healing to Wellness Courts*, 1 (Tribal Law and Policy Institute, 2014).

[5] Ingrid A. Binswanger et al., "Return to drug use and overdose after release from prison: A qualitative study of risk and protective factors," *Addiction Science & Clinical Practice* 7, No. 1, 3 (2012); C. J. Mumola & Jennifer C. Karberg, *Drug Use and Dependence, State and Federal Prisoners, 2004* (Department of Justice, Office of Justice Programs, Bureau of Justice Statistics 2006).

The Wellness Court Model

A Wellness Court is a docket of cases for participants diagnosed with a substance use disorder. The "types" of Wellness Courts can vary depending on the target population and/or reasons for court involvement (triggering case). They can range from criminal, to child abuse or neglect, to targeting juveniles or veterans. Multi-disciplinary teams coordinate services. Participants' needs are assessed, and a case plan is developed. The team, along with the participant, meet weekly to ensure participant engagement, and pivot as needs change. Accountability is collective and immediate. The participant progresses through phases, generally taking at least one year to complete.

multi-disciplinary input, and personal accountability. These drug courts were successful, and what began as a grassroots initiative became a nation-wide trend.[6]

Wellness Courts

Word of the drug court movement spread to Indian country, where many tribal communities were confronting intergenerational substance use issues and severe alcoholism. As interest and research grew, tribal advocates explored how the drug court model could have a positive impact within Native nations. They also noted that the model could easily be tailored to reflect traditional tribal justice systems and reinforce tribal values related to restorative justice. The nature of the Wellness Court model reflects many consensus-based, non-adversarial, traditional indigenous dispute-resolution systems.[7] In August 2003, tribal-specific drug court curriculums were drafted and adapted from state and national efforts and were used for the first formal tribal drug court training sessions.[8]

Tribal Healing to Wellness Courts are not simply tribal courts that hear cases involving alcohol- and drug use–related issues. A Wellness Court is a special court docket-collaborative with the responsibility to hear diverted cases involving individuals who struggle with substance use–related issues. The court partners with all the service providers to create a bundle stronger than the sum of its parts. Participants must complete a program of extensive supervision and treatment. The team must gather, listen to each other, and determine how best to respond and support the participant in real time. The Wellness Court thus brings the full weight of all interveners.

[6] Lurigio, Arthur J., *The First 20 Years of Drug Treatment Courts: A Brief Description of their History and Impact*, 72: 1 FED. PROBATION J. 2008 ("By April 2007, more than 1,000 specialized drug courts were operational in all 50 states as well as the District of Columbia, Guam, and Puerto Rico.").

[7] Flies-Away et al., *Overview of Tribal Healing to Wellness Courts*, 1.

[8] TRIBAL LAW AND POLICY INSTITUTE, TRIBAL HEALING TO WELLNESS COURTS: THE KEY COMPONENTS (U.S. Department of Justice, Bureau of Justice Assistance, April 2003).

In criminal cases, this can include the judge, prosecutor, defense counselor, treatment specialists, probation officers, law enforcement and correctional personnel, educational and vocational experts, community leaders, and traditional healers. In child welfare cases, the team will also include child welfare workers, those who serve families, and others who have expertise in child development. Because team members represent formerly siloed agencies, the team must develop new, and frequently innovative, information-sharing protocols. Their hierarchal chains of command must adapt to accommodate the consensus and community of the team.

The participant is asked to address their struggle with substance use in a non-confrontational, but frequently meeting forum. Participant case plans can include bi-weekly therapy, bi-weekly drug testing, weekly community service, education or vocational training, sobriety meetings, and, critically, weekly court. The structure of the court supports a higher level of accountability for participants by leveraging the coercive power of the judicial system to achieve abstinence and alter their behavior through the combination of judicial supervision, treatment, drug testing, incentives, sanctions, case management, and appropriate cultural components.

Yet, the structure of the court, the representatives on the team, the components of the case plan—all the Wellness Court is designed locally. The resulting design of a Wellness Court program reflects the unique strengths, circumstances, and capacities of each Native nation.[9]

Tribal Healing to Wellness Courts are guided by the *Tribal Ten Key Components*[10]—the fundamental essentials of the drug court concept. Fashioned after the *Ten Key Components* initially formatted for state drug courts,[11] the *Tribal Healing to Wellness Court Ten Key Components* were crafted to reflect tribal notions of healing and wellness, particularly the concept of a healing to wellness journey, and the collaborative effort involved with supporting such a journey.[12] The *Tribal Ten Key Components* are the basic operational characteristics that all Healing to Wellness Courts should share as benchmarks for performance. They are also used by the federal Bureau of Justice Assistance in consideration of drug court grant awards. Additional information and tips for implementing the 10 Key Components can be found in the *Family Treatment Court Best Practice Standards* and the *Tribal 10 Key Components*' *Suggested Practices with the (National Association of Drug Court Professionals) NADCP's Best Practices*[13] as well as in the Appendix.

[9] Flies-Away et al., *Overview of Tribal Healing to Wellness Courts*, 2–3.

[10] Joseph Thomas Flies-Away, Carrie Garrow, and Pat Sekaquaptewa, *Tribal Healing to Wellness Courts: The Key Components*, 2nd ed. (Tribal Law and Policy Institute, 2014), [hereinafter *The Key Components*].

[11] National Association of Drug Court Professionals Drug Court Standards Committee, *Defining Drug Courts: The Key Components* (U.S. Department of Justice, Bureau of Justice Assistance, reprinted October 2004).

[12] Flies-Away et al., *The Key Components*.

[13] Hon. Carrie Garrow, TRIBAL 10 KEY COMPONENTS' SUGGESTED PRACTICES WITH NADCP'S BEST PRACTICES.

Collaboration Benefits in Wellness Court

- Delivery of culturally appropriate services
- Provision of geographically relevant services
- Enhanced supervision
- Coordination of multiple case plans
- Leveraged legal incentives
- Maximization of shared resources
- Reduction of administrative costs
- Increased cultural competency
- Better ability to stay ahead of issues
- Reduced litigation costs
- Increased funding opportunities
- Coordinated jurisdictional authority
- Development of positive relationships that can benefit other programs
- Increased assertions of sovereignty

Wellness Courts as Opportunities for Tribal-State Collaboration

Wellness Courts are collaborative by design. The model is an intentional disruption of the siloed, adversarial approach, in which services are offered only after a protracted battle and providers rarely interact. To better serve participants, all the agencies that interact with the participant, including the court, supervision, treatment, and other service providers come together for weekly meetings to update each other. This multi-disciplinary and multi-departmental effort is dynamic, outside the typical procedures, and requiring participation and cohesion among staff from different agencies, with different job responsibilities and different training backgrounds.

In flipping the focus from the case to the participant, the Wellness Court must ask whether the participant's needs truly end at the jurisdictional border. Many communities find their participants not only have needs but also have prior and even simultaneous cases in neighboring communities. Many courts find their jurisdictional limitations impede their ability to effectively serve their participants.

Wellness Courts, with their experience in building collaborations, have the skills needed to develop strong partnerships with state and local entities. Conversely, states and local entities such as counties see Wellness Courts reducing social and economic costs of substance abuse that can ripple throughout an entire region.

Yet, collaborations between tribes and states are historically limited. The U.S. Supreme Court noted in 1903 that tribes

"own no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies."[14] For many, the barriers impeding collaboration have not eased in the subsequent decades. The systems—framed in imperial sovereign versus sovereign jurisdictional battlegrounds, clouded with heavy historical traumas—are poor settings for alliances. There are legitimate legal, political, and social reasons for refraining from inter-jurisdictional collaborations.

But in the Wellness Court context, we have found reasons to engage. The participant continues to benefit from the breakdown of silos, including those between sovereigns. And in the midst of coming together, courts have embarked on healing for themselves, their systems, and their communities. The Wellness Court, a tool for participants suffering internally, brings the community together to heal the person. In doing so, it happens that the coming together is also bringing external healing. In a 2012 working group report on Tribal-State court collaboration, attendees specifically identified Wellness Courts as a ripe collaborative forum, in which "[t]hey appear to be created locally to specifically handle the issues of the tribe and county involved."[15]

The following chapter discusses ways to frame discussions about collaborations generally to set the stage for discussions about the specific methods of collaboration.

[14] *Lone Wolf v. Hitchcock,* 187 U.S. 553, 567 (1903).

[15] Maureen White Eagle and Heather Valdez Singleton, *Tribal-State Court Collaboration Working Group Report*, 12 (Tribal Law and Policy Institute, April 2013).

Chapter 2: Building a Collaboration

Wellness Court collaborations are only one type of governmental collaboration. States, local jurisdictions, tribes, and agencies collaborate in many areas, from natural resource management to healthcare. Inter-governmental collaborations have produced numerous benefits including better services, increased amount and range of services, increased insight, and regional solutions to problems that do not recognize jurisdictional boundaries.[16] In TLPI's 2019 publication *Crossing the Bridge: Tribal-State-Local Collaboration*,[17] Judge William Thorne and Suzanne Garcia reflected on the process of how governments can build successful collaborations. They identified some general best practices:

- Set initial goals
- Create your team
- Set realistic timelines and expectations
- Define collaboration
- Assess the groups' readiness to collaborate
- Establish communication and internal decision-making ground rules
- Establish common values
- Know the history and the context

A collaboration's initial goals should be rooted in coming together, rather than solving the largest, most systemic challenges (that's for later). For some Indigenous communities, the initial goal is simply to share and understand each other's perspective.[18] To foster this, collaborations must seek a conciliatory and welcoming atmosphere. An atmosphere of "yes, and" instead of "no, but."[19] Some collaborations have proceeded too quickly, charging into implementation before the collaborators had a chance to coalesce through consensus.

[16] William Thorne and Suzanne Garcia, *Crossing the Bridge: Tribal-State-Local Collaboration*, 2 (Tribal Law and Policy Institute, February 2019).
[17] *Id.*
[18] *Id.,* 9.
[19] *Id*.

Teams must be willing to engage in a respectful exchange of ideas, a commitment to learning about each other, and a willingness to jointly own a challenge and build a solution together.[20] Membership must therefore be selective. Not every person is ready to participate on a team. There should be a balance of power and representation; diverse perspectives; and demonstrated interest, expertise, and experience.[21] While team members should not be selected simply based on their position within a particular department, team members should have the ability to commit themselves and their departments to the collaboration—a tricky balance.

> With open minds, we can learn much from each other. The wisdom of collaboration becomes apparent as the common ground is uncovered and explored.
>
> Hon. Michael Petoskey

The team should take time to learn about each other, their families, and the community they represent. Through regular meetings and learning about each other's practices, collaborative partners have built trust and developed professional relationships—rippling benefits beyond the collaborative project.[22] Especially when working with tribes, working relationships must be based on an understanding of the history, culture, and present concerns of the tribe and their justice system.[23] Building trust requires a willingness to dig in and listen. Perceived disinterest, ignorance, and bias have thwarted would-be collaborations. So too has comparing or categorizing systems as better or superior to others. "People don't have to like each other to work together, but they do need to know each other and have a level of trust."[24]

The team should build upon small successes. Small "wins" build relationships of trust that allow for ongoing work, as well as permitting an opportunity to circle back.[25] Collaborations should be given a space in which to succeed. This means working toward realistic goals, parsed out into bite-sized phases with enforced timelines and feasible assignments. It also means that the process of coming together is ongoing. Broad-based participation exists at both the first meeting and the thirtieth. Collaborations with longevity utilize personal relationships, but solidify their impact through communication plans, regular meetings, mutual commitments, and ongoing education.

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[20] Jennifer Walter and Heather Valdez Freedman, *Emerging Strategies in Tribal-State Collaboration: Barriers and Solutions to Enforcing Tribal Protection Orders: December 6, 2017 Meeting Report*, 2 (Tribal Law and Policy Institute, February 2019).

[21] Thorne and Garcia, *Crossing the Bridge: Tribal-State-Local Collaboration*, 13 and Appendix C.

[22] Walter and Valdez Freedman, *Emerging Strategies*, 8.

[23] *Id.,* 12.

[24] White Eagle and Valdez Singleton, *Tribal-State Court Collaboration Working Group Report*, 9.

[25] Thorne and Garcia, *Crossing the Bridge: Tribal-State-Local Collaboration*, 17.

> "[T]his commitment to solve problems together is what drives them to be persistent and creative in their efforts to reach out across jurisdictions and educate one another and their partners."
> Walter and Freedman at 12.

Intra-governmental and *Inter*-governmental Collaborations

The Healing to Wellness Court model generally consists of *intra*-governmental collaboration. ***Intra*-governmental** collaborations cross different agencies of one government. For example, the court, the police department, and the department of social services attending the same staffing for a Wellness Court participant is intra-governmental collaboration. ***Inter*-governmental** collaborations cross multiple governments. For example, the county district attorney's office contacting the adjacent Native nation's Wellness Court when a tribal citizen under the age of 18 has been arrested or charged with a crime is inter-jurisdictional collaboration. Intergovernmental collaborations tend to occur between physically adjacent governments.

In many cases, developing an inter-governmental collaboration will be more complex than developing an intra-governmental collaboration. Creating cohesion and developing trusting relationships within one government can be a heavy lift. Creating those trusting relationships between two separate governments in which they both may be facing funding shortages, staff turnover, and bureaucracies can double the work. Separate sovereigns must also navigate potentially different goals, different lines of supervision, different historical contexts, and no mandate for good-faith cooperation. While noting the critical importance (and often daunting task) of intra-governmental collaborations, this publication will focus largely on inter-governmental collaboration activities.

Informal and Formal Agreements

Collaborations can be categorized as informal or formal. Many collaborations require minimal cooperation and the partners may agree there is no need to document their process. In other circumstances, the partners memorialize their commitment and process in writing. While informal agreements tend to develop organically, formal agreements can originate either organically or with the original intent that the collaboration will be reinforced in writing. Each type of collaboration has its benefits and challenges.

Informal Agreements

Informal agreements can take many shapes but are generally a verbal agreement based on personal relationships. Here, the term "informal" simply means an unwritten arrangement or understanding based upon the trust of the parties. An informal agreement can be mutually beneficial—but does not have to be. Typically, simple, informal collaborations are most successful when the incentives to cooperate are high and the cost of collaborating is low. Minimal, informal collaborations are often a vital first step toward building positive relationships that can lead to future collaborations.

The benefits of an informal agreement:

- Can include plasticity: the collaboration can quickly shift and adapt to new contexts;
- Needs quick and responsive implementation;
- Requires fewer resources to develop and maintain;
- May not require explicit legislative, executive, or even agency approval; and
- Can be a steppingstone to stronger relationships and further collaborations.

Some disadvantages:

- Include no or few enforcement mechanisms;
- Are often personal-relationship dependent and are therefore vulnerable to staff turnover;
- Are difficult to apply to complex issues with multiple stakeholders;
- Are difficult to bring to scale, that is serve many participants or offer multiple services;
- Are ripe for a perception of unfairness; and
- Limit the role of other team members, and thereby their buy-in and ability to contribute or innovate.

Informal agreements have spawned the sharing of information, joint trainings, and even whole Wellness Courts.

Formal Agreements

Formal agreements can also take many shapes but are generally a written, institutional agreement intended to withstand changes in staff and elected leadership. These agreements can be legally binding (i.e., they have an enforcement mechanism). Normally, with formal agreements, each party to the agreement is gaining a benefit. In the Wellness Court context, formal inter-governmental collaborations can ensure smooth operations in complex cases and projects with long durations.

The benefits of a formal agreement:

- Clearly defined collaboration tasks and roles of each collaborator;
- Increased accountability, both within a government and between governments;
- Survival of staff turnover;
- Added participant, department, and community assurance;
- Increased perception of fairness;
- The full resources of each partner are leveraged;
- Increased likelihood of buy-in from hesitant agencies; and
- A model for other agencies and governments.

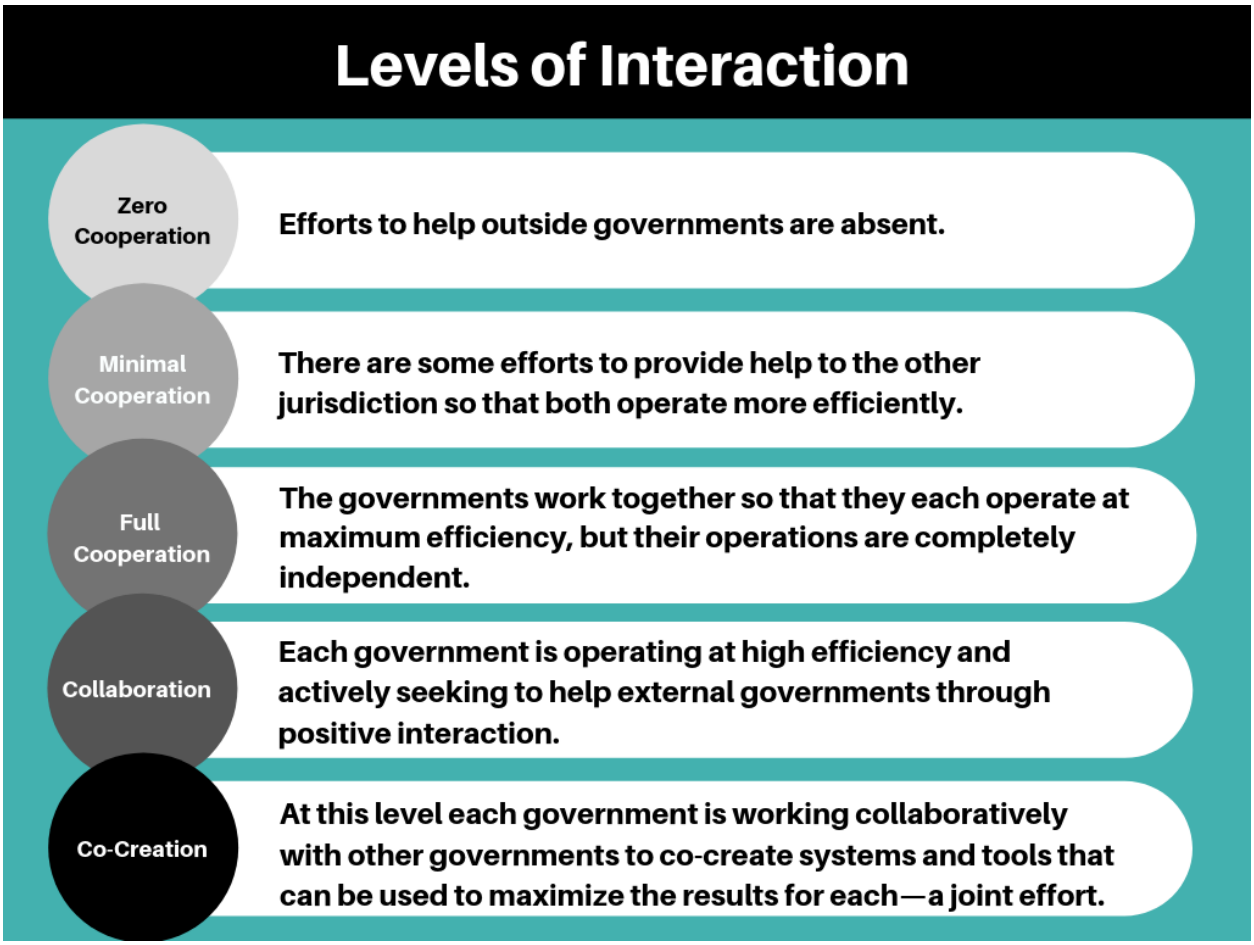
Some disadvantages:

- Slow and long implementation process, both to get partners to consensus and to commit a complex arrangement to writing;
- Increased rigidness: difficult and time consuming to modify the agreement;
- Concerns of liability must be overcome;
- Lack of clear funding stream; and
- A thwarted attempt to formalize an agreement can sabotage an otherwise successful informal agreement.

Levels of Interaction

Another way of thinking about collaborations is to consider the nature of the interaction needed to meet the goals of the partnership. First, formalized and fully integrated collaborations can be effective, but are not necessarily superior to informal, narrow-scope partnerships. Both can be roads to success. Collaborators must consider the dynamics of their tribal/state relations and their goals, common and otherwise. Second, this work appears to assume that a more integrated level of collaboration is necessarily better than a less integrated level of collaboration. Third, and significantly, this work does not consider the role and importance of tribal self-determination: that it is for each tribe to decide what level of interaction is in the best interests of their community. Thorne and Garcia in *Crossing the Bridge*[26] propose the following model to conceive of levels of interaction:

[26] Thorne and Garcia, *Crossing the Bridge: Tribal-State-Local Collaboration*, 15.



These "levels" are fluid. In situations in which there is minimal cooperation the jurisdictions or agencies are not necessarily at cross-purposes. There are some efforts to work together, just not on a regular basis. When a partner needs something, like information about a participant, they call the other jurisdiction. But there is no written agreement or regular meeting. When there is full cooperation the two jurisdictions work together regularly on an issue with a set process—such as a calendared day on which they share information without being asked. When agencies or jurisdictions are collaborating, they might meet to think about how they can accomplish mutual goals, but each continues to use their own process. And finally, when jurisdictions or agencies are co-creating, they find ways to merge their processes, so the method used to accomplish a task, and perhaps the paperwork used to memorialize that process, has been developed together.

Keep in mind that no one level of collaboration is preferable to another. A Tribal Healing to Wellness court team may decide that only minimal cooperation with a county or state partner is warranted given their participants' needs, the current relationship with that partner, and the partner's ability to provide services. For example, the county's behavioral health may have no expertise or interest in delivering culturally grounded services and, therefore, minimal cooperation is in the best interests of the Native community. In the alternative, the same court team may have a long-standing, trusting relationship with a different county program and may

want a relationship with that agency that involves co-creation of programs and integrated service delivery. “Successful” collaboration is defined by individual communities and the optimum level of interaction will always depend on their goals and the context in which the collaboration takes place.

Co-Training

One type of oft-overlooked collaboration is co-training. Wellness Courts are unique in their blending of legal, behavioral health, and social service expertise to create a program model that tethers a court’s authority to prosecute crime to the latest substance abuse treatment modalities. This hybrid model is rife with learning curves. A court and legal staff that is accustomed to practicing retributive and adversarial criminal court will need to learn the science of addiction and restorative justice models. Likewise, counselors and medical professionals must adapt to a court model and learn to balance its sanction authority with solid treatment principles. As such, treatment courts are rapidly evolving and the evidence base, particularly for Healing to Wellness Courts, can only expand. What constituted a best practice a decade ago may no longer be supported by the latest research. Whether the court is in the planning stages or has been operational for decades, continuing training is essential. Fortunately, co-training and peer-to-peer learning is widely practiced among Wellness Court professionals.

With minimal collaboration required, Wellness Courts have many collaboration possibilities when it comes to training.

1. A tribe can learn and benefit from another tribe’s expertise.
2. A tribe can learn from their county or state counterparts (or vice versa).
3. A tribe can work with their county, state, and/or tribal counterparts to conduct a mutually beneficial training event.

Regardless of approach, co-trainings are usually mutually beneficial and a great opportunity to share resources or address an issue impacting the collaborating jurisdictions.

Chapter 3: Wellness Court Collaboration Profiles

The following section will examine different inter-governmental collaborations using the characteristics of informal/formal and the *Five Levels of Interaction* to frame the conversation. By using these characteristics, this resource attempts to emphasize that collaboration is a fluid spectrum of informal and formal agreements and may include both "zero cooperation" and "co-creation" collaborations within any one Wellness Court. For example, a Wellness Court may have a cooperative relationship with state law enforcement but may not be cooperating with state child welfare. This chapter will not examine examples of "zero cooperation." For more information on any collaboration highlighted in this section, or to request contact information for a Wellness Court, please contact the TLPI at **wellness@TLPI.org** or visit **www.WellnessCourts.org**.

Minimal Cooperation

Makah Nation and Port Angeles Court Observations

The Port Angeles drug court has a high caseload of nearly 100 participants and the judge has extended a standing invitation to the Makah Nation of Washington's Healing Court to observe their staffings and hearings. After the court observations, the Makah Healing Court team can meet with the judge and case workers to debrief and ask questions. The conversations have led to some changes to the Makah Healing Court and has been a valuable partnership. Makah Nation has used these staffing and drug court observation sessions as a way of gaining exposure to new ideas and to build relationships with Port Angeles court staff to strengthen their informal and minimal collaboration in cases involving supervision of probation cases and case transfers. The Makah Nation's Healing Court informal collaborations with the local country drug court in most instances requires no cooperation on cases and requires minimal cooperation in others.

Website: makah.com

Pueblo of Laguna and Tulalip Tribes Hosts Tribal Wellness Court Teams

The Pueblo of Laguna of New Mexico's Community Wellness Court began in 2005. The Tulalip Tribes Healing to Wellness Court (in Washington) began in 2016. Given their longevity and experience, the courts have become valuable peer-to-peer learning resources. As part of the National Drug Court Institute's Mentor Court Program, these courts have worked with new and developing Wellness Courts across Indian country.[27] In addition to working as a mentor court, both the Pueblo of Laguna and the Tulalip Tribes have an informal open-door policy in which any Healing to Wellness Court can request to observe staffing and hearings to learn from the tribes' experience and dialogue with their Wellness Court team. The tribes collaborate with

[27] National Drug Court Institute, Mentor Court Program.

other Wellness Courts informally to provide mentorship, but requires no cooperation on court cases.

Website: https://www.lagunapueblo-nsn.gov/pol-judicial-services.aspx
Website: tulaliptribalcourt-nsn.gov/ProgramsAndServices/WellnessCourt

Forest County Potawatomi Community Wellness Court and the Paiute Indian Tribe of Utah Partnerships to Host Naloxone Trainings

The Forest County Potawatomi Community of Wisconsin's Wellness Court and the AIDS Resource Center of Wisconsin work together to conduct free Naloxone trainings. The training events are organized by the Forest County Potawatomi Wellness Court Coordinator. Trainings are provided to Forest County Potawatomi employees and a separate set of trainings are offered both to interested tribal members on and off reservation land and to non-members in the neighboring county. [28]

Similarly, the State of Utah provides free Naloxone training programs to individuals and organizations to address the opioid crisis. In March 2018, the Paiute Indian Tribe of Utah approved Naloxone trainings for their community. The Tribal Behavioral Services Department conducts a truncated version of the Utah state training and provides trainees with Naloxone kits from the Utah Naloxone Program. This collaboration has been mutually beneficial: the Paiute Indian Tribe benefits from the state-funded Naloxone kits and gets to provide valuable training to the community. The State of Utah conserves staff time and resources and can reach more individual trainees.

Website: www.fcpotawatomi.com
Website: www.utahpaiutes.org

Multi-Tribal Michigan Tribal Healing to Wellness Court Training

Northern Michigan–area tribes collaborated with TLPI to provide a free, one-day Wellness Court and Treatment Court training available to all area tribes, which included the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Keweenaw Bay Indian Community, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, the Little Traverse Bay Bands of Odawa Indians, the Saginaw Chippewa Indian Tribe, and the Sault Ste. Marie Tribe of Chippewa Indians. The training covered medication-assisted treatment, tele-health, a judge's and coordinator's panel, substance-exposed newborns and maternal health, and engaging child welfare. The Saginaw Chippewa Indian Tribe donated a large training forum and extended an invitation to others. This joint training is an example of a way to share resources and build relationships within the tribal and non-tribal community.

[28] Val Niehaus, "Free Naloxone Training Held," Potawatomi Traveling Times, Vol. 23, No. 7 (October 1, 2017).

For the Saginaw Chippewa Indian Tribe, this joint training is part of an ongoing education outreach effort. They work with the local chapter of Families Against Narcotics (FAN); have sponsored two tribal, state, and federal opioid summits;[29] have hosted a judges' summit, inviting all neighboring county judges to the tribe for lunch, a cultural experience, court tour, and presentation of available tribal services; and serve on a substance abuse committee with six counties to better address opioid misuse in the region.[30]

Website: wellnesscourts.org/events/?a=668

Reflection on Minimal Cooperation

Jurisdictions practicing minimal cooperation are putting forth effort to provide help to the other jurisdiction so that both operate more efficiently. These collaborations generally entail a nominal sharing of information in exchange for significant gains in trust and camaraderie. The Makah Nation, the Pueblo of Laguna, and the Tulalip Tribes each participate in court observations, providing opportunities for current and future practitioners to see a court in action, followed by an intimate dialogue about how the court functions and what best practices emerge. The Pueblo of Laguna and the Tulalip Tribes were each designated by the National Drug Court Institute as a Mentor Court, signifying external endorsement of their practices and thereby drawing visitors from across the country. However, court observations need not be exclusive to Mentor Courts. In fact, as the Makah Nation exemplifies, by visiting their Port Angeles Court neighbor they can share both ideas and resources. Similarly, Forest County Potawatomi, the Paiute Indian Tribe, and the Michigan-area tribes each pooled their training resources with neighbors—maximizing efficiency and bringing the tribal and non-tribal community together for a common goal. By thinking regionally, the communities balanced the need to train on national best practices coupled tailored regional topics of concern, all with the monumental benefit of networking with neighbor practitioners.

[29] *See e.g.,* Michigan Statewide Tribal Opioid Summit, June 12–13, 2019.

[30] For an excellent resource, *see* Hon. Patrick M. Shannon, "A Tribal Court's Response to the Prescription Drug and Opioid Crisis," Michigan Bar J. 35 (August 2019).

Full Cooperation

Yurok Tribe, Humboldt County, and Del Norte County Supervision MOUs

In 2012, the Yurok Tribe signed a Memoranda of Understanding (MOU) with the neighboring counties of Humboldt and Del Norte in California that allowed for the transfer of cases to the tribal court. Under this agreement, cases involving Yurok citizens transfer from the county to tribal court for supervision and linkage to services.[31] The agreement applies to both adult nonviolent criminal and juvenile delinquency cases.

The MOU with Humboldt County allows for discretion by the county court. Transfer to tribal court is optional, not mandatory. Humboldt County retains jurisdiction and defendants may be subject to county ankle monitors even when the case is transferred. The Yurok Tribal court, however, takes the lead on the probation and supervision and keeps the county apprised of the defendant's progress with their case plan and any probation violations. For many defendants, this makes both logistical and cultural sense, as they reside within the tribal community and travel to the county courthouse can be burdensome.

As with the MOU with Humboldt County, under the MOU with Del Norte County the Yurok Tribe shares concurrent jurisdiction over juvenile cases. Adult cases, however, are handled differently. Under this MOU, Del Norte's probation, district attorney, and police departments have agreed to notify the Yurok Tribal Court when they have a formal probation, arrest/citation interaction with a Yurok citizen so that citizens might be diverted to the Tribal Court rather than having the case heard in the Del Norte County Court. Under the MOU, Del Norte County has the option of acknowledging concurrent jurisdiction when Yurok (1) writes a direct citation to tribal court or (2) petitions for the transfer of the case.

[31] For more information on this and other collaborations, please see the Native American Indian Court Judges Association Tribal Access to Justice Innovation (TAJI) initiative at: http://www.TribalJustice.org/.

"Although the MOUs themselves did not cost the Tribe or State courts anything, the capacity developed through the Wellness Program is primarily responsible for the expansion of jurisdiction and the resulting caseload of non-violent offenders and juveniles on probation."[32]

Website: www.yuroktribalcourt.org

Pueblo of Pojoaque Path to Wellness Court Referral Collaborations

Inter-Tribal

The Pueblo of Pojoaque of New Mexico's Path to Wellness Court is a robust program, serving an average of twenty participants at a time. The Pueblo of Pojoaque is near several pueblos and members of other tribes frequently cross jurisdictions. As a result, it is not uncommon for a tribal member to have multiple ties, or criminal cases, across multiple jurisdictions. In consultation with the Pueblo of Pojoaque Path to Wellness Court, other tribal pueblos, especially those that do not operate their own Wellness Court, may order eligible defendants to complete Pojoaque's Path to Wellness Court as a condition of the sentencing court's probation or parole. In each case, the partnering tribe retains jurisdiction over the Wellness Court participant, but supervision and Wellness Court participation is monitored by the Pojoaque Wellness Court and its multi-disciplinary team. The Pojoaque's Path to Wellness Court has sole discretion and governance over staffing, funding, and policies and procedures. No formal referral protocol exists, but once accepted, each participant is formally enrolled in the program and subject to its written policies. All participants must agree to submit to jurisdiction of the Pojoaque Wellness Court for purposes of sanctions, including short jail terms. The Wellness Court probation officer provides periodic updates, usually monthly, to participating tribes. In turn, supervision of the participant, including drug and alcohol testing, is generally turned over to the Pueblo of Pojoaque probation officer. The referring jurisdiction determines the frequency of reports and may impose its own requirements on the participants.

Tribal-County

If a Native person with ties to the Pojoaque Valley area has a case before a state court, the state court can make the Path to Wellness Court program a condition of probation for eligible defendants. For these cases, the Pojoaque probation officer maintains a relationship with the various public defender offices and coordinates most of the referrals. The probation officer shares eligibility information for the program and their current capacity. The county public defender uses this information to discuss the possibility of a Wellness Court referral with the client, judge, and prosecution team. Once referred, the Wellness Court issues its own orders, officially enrolling the participant in the program and provides updates to the county court. The state courts must agree that the Pojoaque Path to Wellness court can jail the participant as a

[32] Tribal Access to Justice Innovation Website, "Yurok Tribe—Criminal Assistance Program—Memoranda of Understanding with Del Norte and Humboldt Counties", available at: www.tribaljustice.org/places/specialized-court-projects/yurok-tribe-criminal-assistance-program-memoranda-of-understanding-with-del-norte-and-humboldt-counties/.

sanction if needed. The referring jurisdiction determines frequency of reports and may impose other requirements on the participant.

Reentry

The Pueblo of Pojoaque Path to Wellness Court program has sober living apartments as a resource. Because sober housing is an essential part of a parole plan, people in reentry have self-referred to the Path to Wellness Court, agreeing to its jurisdiction and program policies to get the assistance and services they need to successfully transition out of incarceration. The Path to Wellness Court has assisted Indians and non-Indian alike, accepting participants into the program as part of their reentry plan. There are capacity restrictions, but the Court has informally received and fulfilled requests from the county at the behest of individuals in reentry.

Website: www.pojoaque.org/community/tribal-courts

National Judicial Opioid Task Force—Sample Court Transfer Agreement

The National Conference of Chief Justices is a membership association of the highest judicial officers of the states aimed at improving the administration of justice, rules and methods of procedure, and the organization and operation of state court and judicial systems. In 2019, the Conference adopted a resolution to encourage greater collaboration between state and tribal courts to address the opioid epidemic.[33] Acknowledging that treatment and program outcomes are often more successful for Native offenders when they are provided services that are culturally appropriate, the Conference encourages more state-tribal collaboration, including the use of transfer agreements from state courts to Tribal Healing to Wellness Courts. The National Judicial Opioid Task Force,[34] formed in 2017 by the Conference of Chief Justices and the Conference of State Court Administrators, developed a sample Memorandum of Understanding for Tribal Healing to Wellness Court case transfers to serve as a template to better facilitate these types of inter-jurisdictional cooperation.[35]

Supplemental Material:

- **Sample Memorandum of Understanding for Tribal Healing to Wellness Court Case Transfers**

Website: www.ccj.ncsc.org

[33] Conference of Chief Justices and Conference of State Court Administrators, Resolution 1: To Encourage Greater Collaboration between State and Tribal Courts to Address the Opioid Epidemic (February 13, 2019).
[34] National Center for State Courts, National Judicial Opioid Task Force: https://www.ncsc.org/opioidtaskforce.
[35] Hon. Gregory G. Pinski and Lauren van Schilfgaarde, "Sample Memorandum of Understanding for Tribal Healing to Wellness Court Case Transfers," National Judicial Opioid Task Force (September 2018).

Reflection on Full Cooperation

Full cooperative jurisdictions work together so that they each operate at maximum efficiency, but their operations are completely independent. The "case transfer" is most emblematic of the full cooperation model. While sovereigns operate independently, they openly acknowledge each other and work together to maximize resources for the participant—in this case—by transferring state supervision authority to the tribe. The National Conference of Chief Justices has acknowledged this beneficial arrangement, particularly in the Wellness Court context. In their 2019 resolution and sample MOU, they endorse the practice of state case transfers to Tribal Healing to Wellness Courts. While their sample MOU promotes one formalized version of case transfer, the Yurok Tribe and the Pueblo of Pojoaque each practice variations on this inter-jurisdictional "case sharing" concept. It is likely no coincidence that jurisdictions engaging in full cooperation are in fact engaging in multiple forms of cooperation.

The Yurok Tribe encompasses two different counties, and with it two distinct MOUs. The case transfer MOU with Humboldt County provides for significant county discretion, while the case transfer MOU with Del Norte County provides for more direct tribal input. Yet both MOUs provide for continuous tribal-county communication and collaboration. The Pueblo of Pojoaque similarly serves tribal citizens prosecuted by the county. The Pueblo of Pojoaque has expanded the eligibility of their services beyond just tribal members. In a unique variation, the Pueblo of Pojoaque has additionally negotiated case transfers from other neighboring tribes, previewing a collaborative approach detailed in the following text.

Collaboration

Ho-Chunk Nation Drug Testing Collaboration

The Ho-Chunk Nation operates an adult and a family Healing to Wellness Court. Several participants had cases in the neighboring Jackson County Circuit Court that were transferred over to the Wellness Court as a sentencing option, a condition for expungement, or to effect faster family reunification. Each Wellness Court participant is subject to random drug testing.

The Ho-Chunk Nation historically handled all drug testing for their Wellness Court participants, including holidays and weekends. Holidays and weekends, however, became a challenge because the Assistant Clerk for Healing to Wellness Court and Family Wellness Court had to be available twenty-four hours a day, seven days a week. The solution was to enter into an agreement with the Black River Memorial Hospital to conduct drug testing on holidays and weekends. Because of this agreement, Ho-Chunk staff are able to have full holidays and weekend leave while maintaining the best practice of randomized and weekend drug testing for their participants. The Wellness Court provides the testing supplies and training to the hospital staff and hospital lab technicians conduct the drug testing. If a positive result is obtained, the sample is sent to a second laboratory for confirmation and all results are e-mailed to court coordinators on a regular basis.[36]

Website: www.ho-chunknation.com

Chickasaw Nation Recovery Resource Services

Pontotoc County is home to the first rural state drug court in Oklahoma, serving approximately 130 participants, a third of which are Native. On an informal basis, the Chickasaw Nation of Oklahoma provided transportation and case management services for the court. In 2014, the

[36] Ken Luchterhand, "Ho-Chunk Treatment Court Programs Join Forces with Black River Memorial Hospital," Hocak Worak (May 12, 2017).

Chickasaw Nation signed a Memorandum of Agreement (MOA) with the county, formalizing and increasing the level of cooperation between both governments. Under the MOA, the Chickasaw Nation's holistic services became fully integrated into the drug court.[37] These services include therapeutic, navigational (case management), transportation, peer support, twelve-step sponsorship groups, community involvement, employment, compliance, education, health integration, and cultural enhancement opportunities.[38] Eligible participants include Chickasaw citizens and citizens of other Native nations who have a Chickasaw spouse and/or Chickasaw dependents.

Website: **www.chickasaw.net/Services/Recovery-Resource-Services.aspx**

Saginaw Chippewa Indian Tribe of Michigan Tribal-County MAT Agreement, Co-Trainings, and Informal Joint Staffings

The Saginaw Chippewa Indian Tribe of Michigan developed their Wellness Court in 2013. Since its creation, the staff have worked diligently to educate themselves about substance use–related issues and to develop both inter- and intra-governmental collaborations. First, the tribe has a Medically Assisted Treatment (MAT) program in operation for almost seven years. They have an informal agreement with county law enforcement that allows them to continue administering MAT to incarcerated individuals.[39] Second, the tribe's Wellness Court staff enjoy a positive working relationship with the Saginaw County drug court. On an informal basis, staff are invited to participate on county drug court cases involving tribal members. Finally, the court is active in educating and raising awareness about substance use issues.

Website: **www.sagchip.org**

Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians Coos County and Lane County Joint Team Members and Cotraining

The Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (CTCLUSI) do not have a land base, but they do provide services in five counties. The CTCLUSI Wellness Court collaborates most often with Coos County. Coos County Community Corrections, which provides post-sentencing supervision, refers cases to the CTCLUSI Wellness Court and serves as a member of the Wellness Court team for that case. This partnership has led to both co-training and additional discussions about expanding the existing collaborations into other areas. CTCLUSI is providing training about Indian law (that include Continuing Legal Education [CLE] credits) to defense attorneys and municipal judges. The juvenile court judge for the county has facilitated expressed an interest in sharing cases. CTCLUSI has visited the Lane County juvenile

[37] Gene Lehmann, "Unique Chickasaw Nation partnership improving lives, community," Chickasaw Times (June 2018).

[38] Amber Hoover, Regena Frye, and C. J. Aducci, "Unconquered and Unconquerable: A Chickasaw Nation Approach to Wellness and Recovery for Native American Treatment Court Participants," National Association of Drug Court Professionals Conference, PowerPoint Slide 11 (July 2019).

[39] *See e.g.,* Isabella County Sheriff Office Memo: "Medical Assisted Treatment of Inmates (M.A.T.)," September 13, 2017.

and adult treatment courts and discussed the coordination of cultural services for tribal member participants.

Website: www.ctclusi.org/tribalcourtpeacegiving

Saint Regis Mohawk Healing to Wellness Court Inter-Sovereign Team Members and Information Sharing

Inpatient Provider as Team Member

The Saint Regis Mohawk Healing to Wellness Court has been operational since 2010 and has developed both a criminal Wellness Court and a family Wellness Court. To better serve participants, the Wellness Court developed a collaboration with Partridge House—an inpatient addiction provider for American Indians. Partridge House is supervised by the tribe's alcohol and chemical dependency program and is an active member of the Wellness Court team. Frequently tribal members will go to Partridge House as a condition of their plea agreement with the county. The Wellness Court limits entry until participants have finished their inpatient treatment. The partnership allows enrollment into the Wellness Court to be a seamless process—participants graduate and immediately are accepted into the Wellness Court. The Wellness Court similarly structures seamless entry for self-referrals and for cases part of a family court proceeding.

County Probation Provides Supervision and Attends Wellness Court Hearings

The Saint Regis Mohawk Healing to Wellness Court works with the Franklin County Department of Probation as an essential partner for participants who are mandated to community supervision. Franklin County Probation provides supervision services to the St. Regis Mohawk court. Participants remain within the jurisdiction of the county courts while they enter the Healing to Wellness Court. Franklin County Probation is technically not a part of the Wellness Court team—workers do not attend staffings. But they do attend hearings to share and receive information to ensure all providers are on the same page. As Chief Judge Carrie Garrow has pointed out, it is a problem-solving relationship. In having probation at hearings, they ensure that they are unified in what they tell the participant and also that the participant is consistent with what the participant tells the court, probation, and service providers.

International Information Sharing

The Saint Regis Mohawk Healing to Wellness Court has collaborated with the Akwesasne Justice Program and the Akwesasne Mohawk Police to ensure systematic information sharing with the Canadian justice system. The northern portion of the Saint Regis Mohawk territory is contiguous with Canada, overlapping the international boundary between the United States and Canada. Given this geography, people can have warrants or cases on both sides of the border. The Mohawk Council of Akwesasne governs the northern portion of the territory and

through the partnership with the St. Regis Mohawk Wellness Court, information on these cases is shared. This not only increases accountability; it helps participants manage both cases. Both the courts and the participants are more aware of services that are available through each partner which gives the participants more opportunities and more choices. Finally, the partners have worked out a process to facilitate home visits across jurisdictions.

Supplemental Materials:

- **Assessment of The Criminal Justice System on the St. Regis Mohawk Indian Reservation**

Website: www.srmt-nsn.gov

Reflection on Collaboration

Collaborative jurisdictions operate at high efficiency and actively seek to help external governments through positive interaction. Like the full cooperation models detailed in the preceding text, the Ho-Chunk Nation has a case transfer agreement with their neighboring Jackson County. Yet their agreement with Black River Memorial Hospital showcases the benefits of approaching collaborations creatively. Collaborations need not always be judge-to-judge or court-to-court. They also need not always entail a comprehensive MOU outlining the responsibilities of multiple agencies (though many do!). By sharing resources, in this case drug-testing responsibilities, the jurisdictions maximize participant outcomes.

Conversely, the Chickasaw Nation offered its resources to the county. The Chickasaw Nation did not originally intend to have a formal MOA with Pontotoc County. But the occasional supply of transportation and case management services organically transitioned into a full integration of services. Chickasaw citizens and families have access to Chickasaw services, and the county can more efficiently disperse county resources to other participants. Similarly, while tribal members are incarcerated by the state, the Saginaw Chippewa Tribe cooperates with the county to integrate medication-assisted treatment to its citizens.

A different, but innovative expression of the collaboration model are inter-jurisdictional team members. The Saginaw Chippewa Tribe, the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, and the Saint Regis Mohawk each had a need for more information sharing. As needed, county personnel will sit in on either hearings and/or staffings, ranging from probation officers to inpatient treatment providers. The full integration of these new team members, and the accompanying role and authority they bring to the team, varies. The jurisdictions continue to operate separately. Yet, the welcoming of a new inter-jurisdictional team members not just overcomes the enormous information gaps inherent between separate sovereigns but it is also a nod to the restorative approach upon which Wellness Courts are built. The participants' needs, as opposed to the system's needs, drive the team and their actions.

Co-Creation

Under the right circumstances, co-creation can be a brilliant solution to a regional issue. A truly equal partnership between sovereigns can conserve resources, streamline operations, encourage comprehensive approaches to cross-jurisdictional problems, and provide tribal members easier access to state and county services. The following collaboration profiles are designed to highlight the possibilities for co-creation in the Wellness Court context. While joint jurisdiction courts are prominently featured, they are not the only co-creation project possible. In addition, while joint jurisdiction courts have shown incredible promise and have worked for some communities, the context that allows them to work is crucial. Joint jurisdiction will not be a good fit for every community. Conversely, not all joint jurisdiction courts must operate within a Wellness Court model. The joint jurisdiction framework might also be applied to non-drug related cases. Co-creation can potentially increase communication and implementation barriers because it can double the number of partners and team members if each government is represented at every level of the project.

Leech Lake Joint Jurisdiction Adult Wellness Courts

The Leech Lake Band of Ojibwe (Leech Lake) tribal court has been in operation for decades, hearing child welfare cases since the 1980s and slowly expanding court operations to cover other civil matters. Minnesota is a Public Law 280 state[40] and Leech Lake does not exercise criminal jurisdiction, so tribal members are criminally charged and prosecuted by the state. The Leech Lake reservation overlaps with four Minnesota counties: Beltrami, Cass, Hubbard, and Itasca. Under the leadership of Judge Korey Wahwassuck and Judge John P. Smith, the Leech Lake Band, Cass County, and Itasca County developed a novel joint jurisdiction approach, circumventing centuries of sovereign clashes.

[40] Public Law 83-280 (commonly referred to as Public Law 280 or P.L. 280) was a transfer of legal jurisdiction from the federal government to state governments that significantly changed the division of legal authority among tribal, federal, and state governments. Public Law 280 generally brought about an increased role for state in criminal and civil matters and prompted numerous obstacles to individual tribes in the development of their justice systems. For additional information on Public Law 280, please see the Tribal Law and Policy Institute's Public Law 280 publication series at https://www.home.TLPI.org/public-law-280-publications-.

Joint Jurisdiction Court with Cass County

Cass County and Leech Lake have a cooperative law enforcement agreement. In March 2006, Cass County asked Leech Lake to join in the development of a Wellness Court to address high rates of driving while intoxicated (DWI) cases. The Court has a two-judge model—the tribal court judge and the state court judge sit together to hear cases. A joint powers agreement, the paperwork that articulates the vision, mission, and the authority under which each court operates, was signed about a year later. As the Court teams worked together, they developed procedures and other paperwork as needed.

Joint Jurisdiction Court with Itasca County

In 2008, primarily due to the success of the first joint jurisdiction court with Cass County, Leech Lake implemented a second joint jurisdiction court with Itasca County. As with Cass County, the agreement to work together is memorialized through a joint powers agreement. The Court uses a family-centered model, in which all cases involving a family—from juvenile delinquency and diversion issues to child in need of protection or services (CHIPS) cases, can be heard by the two judges and the family can be wrapped in services to meet their needs. When a family decides not to participate in the two-judge court model, Itasca County judges will often travel to the tribal court and hear cases in the tribes' courtroom.

Both joint jurisdiction courts have been incredibly successful for participants and have served as a model for possibilities in the tribal-state collaboration realm. The Leech Lake success has increased the prominence of, and respect for, tribal courts within the state, and the tribe and neighboring counties collaborate as the need arises. A treatment program used by the Wellness Courts is licensed by both the tribe and the county.

Supplemental Materials:

- Hon. Korey Wahwassuck, Hon. John P. Smith, and Hon. John R. Hawkinson, ***Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction***, 36:2 William Mitchell L. Rev. 859 (2010)
- Jennifer Fahey, Hon. Korey Wahwassuck, Allison Leof, and Hon. John Smith, ***Joint Jurisdiction Courts: A Manual for Developing Tribal, Local, State & Federal Justice Collaborations*, 2nd ed**. (Project T.E.A.M., Center for Evidence-Based Policy, Oregon Health & Science University, 2018).

Website: **www.llojibwe.org/court/court.html**

Shingle Springs Joint Jurisdiction Family Wellness Court

The Shingle Springs Band of Miwok Indians (Shingle Springs) and the El Dorado Superior Court in California have a Joint Jurisdiction Collaborative Court. The court has a two-judge model—the tribal court judge and the state court judge sit together and offer one unified proceeding. The

Court hears a wide range of issues, including substance-related juvenile justice, child welfare, child custody, and protection orders related to domestic violence. The Court is intended to provide system-involved youth and their families with a court-supervised alternative that emphasizes culturally appropriate restorative justice practices. The program's wraparound continuum of care consists of prevention, intervention, and post-adjudication services. Program staff uses a teamwork approach to address needs of program participants using a culture-specific, trauma-informed, strength-based, and evidence-based approach.

Prior to implementation of this system, the state court and the tribal court would hear these cases separately, often making conflicting orders, working at purposes, or failing to address the entirety of the families' issues in a holistic fashion. This Family Wellness Court aims to break down these silos. As soon as a child or youth comes to the attention of tribal or county authorities, the court can wrap the child and family with a multitude of tribal and county services specially designed to meet the needs of each family member. The goal of the court is to break the school to prison cycle of dysfunctional behavior to provide parents and children with achievable goals to improve self-confidence; result in positive life choices; and give children and their families a true connection to tribal history and culture, inspiring them to become leaders in their community. This Joint Jurisdiction Family Wellness Court was the first of its kind in California.

Supplemental Materials:

- **Family Wellness Court Participant Manual**
- **Family Wellness Court Program Manual**

Website: **www.shinglespringsrancheria.com/tribal-court/**

Kenaitze Joint Jurisdiction Henu' Community Wellness Court

The Henu' Community Wellness Court is a collaboration between the Kenaitze Indian Tribe (Kenaitze) and the Kenai Superior Court on the Kenai peninsula in Alaska. This court is a joint-jurisdictional therapeutic court that serves adults and their families, Native or non-Native, who face legal troubles stemming from substance use. Cases can involve criminal issues and/or child dependency issues. In addition, individuals charged with property crimes may also be considered if the offense stems from substance use. Participants work closely with a probation officer and court team, complete frequent random drug screenings, and receive substance use treatment and mental health counseling as needed. Each jurisdiction has a separate project coordinator to manage the program and weekly status hearings are held in the Kenaitze tribal courthouse.

Website: **www.kenaitze.org/tribal-government/tribal-court/henu-community-wellness-court/**

Yurok Joint Jurisdiction Family Wellness Courts
Hoopa Valley Joint Jurisdiction Family Wellness Court

The Yurok Tribe worked with neighboring Humboldt County to implement a joint jurisdiction family wellness court. The partnerships that were developed during the planning phase of this court's creation led to additional partnerships. The Yurok Tribe and neighboring Del Norte County agreed to work together to create an additional joint jurisdiction family wellness court, and the Hoopa Valley Tribe came together with Humboldt County to create a third joint jurisdiction family wellness court.

The joint jurisdiction courts are voluntary. Tribal and county child welfare work together to assess and serve the family before a petition is filed. If a child dependency petition is filed by county child welfare in the state court, the family is screened for eligibility for the joint jurisdiction court and asked if they would like to participate.

All three joint jurisdiction courts depend on grant funding. The courts that were created with Humboldt County have one court coordinator designated to the program, but the majority of the remaining staff are a combination of tribal and county agency professionals with many team positions dually filled by each government. Staffings are held prior to each hearing. Core operational team meetings are held monthly. Steering Committee meetings are convened by the judges and held quarterly.

All three courts are formalized using joint powers agreements between the tribe and county, and an operation manual.

Website: **http://yuroktribe.org**

Reflection on Co-Creation

Co-creation governments work collaboratively with other governments to co-create systems and tools that can be used to maximize the results for each—a joint effort. It is no coincidence that joint jurisdiction courts are *the* prominent example of co-creation systems. Joint jurisdiction courts leverage the jurisdictional authority and menu of services of each government for the benefit of the community. It is also no coincidence that joint jurisdiction courts are predominantly located within P.L. 280 jurisdictions. Jurisdiction in Indian country is famously complex, and P.L. 280 exacerbates that complexity in many ways, while also lifting the role and participation of the states. Of course, joint jurisdiction need not be limited to P.L. 280 jurisdictions, just as co-creation collaborations need not be limited to joint jurisdiction courts. Critically, co-creation is a joint effort. In each profile, the planning, the staffing, and the leadership was a partnership. These collaborations are time intensive, responsive to community needs, and, at least at this moment, rare. Yet their existence, particularly evidenced by the Yurok and Hoopa, suggest a tendency to spread.

Closing Comments

Wellness Courts capacity to solve problems creatively through collaboration has unsurprisingly expanded inter-jurisdictionally. Yet still, the variety and scope of inter-jurisdictional collaborations showcase the critical consideration that each collaboration must be suitable for the context and partnerships in which they operate. Teams, agencies, courts, governments, and communities must each be ready and open to collaboration. Though, small collaborations are often the fuel for more expansive collaborations down the road. In the right context, in which a solid relationship exists, an informal collaboration based on a verbal agreement and goodwill can provide terrific results for a community. In other contexts, formalized agreement provide stability. The kind of collaboration that best meets the needs of your Wellness Court will be specific to your situation. We hope these profiles spark an idea. Whether you are revisiting a current collaboration to improve it or thinking about how to initiate an entirely new collaboration, have a discussion about will work best for your community. There may not yet be a model for the collaboration you are envisioning. We are eager for you to make one.

Appendix A: Collaboration Resources

- William Thorne and Suzanne Garcia, ***Crossing the Bridge: Tribal-State-Local Collaboration*** (Tribal Law and Policy Institute, February 2019).

- Jennifer Fahey, Hon. Korey Wahwassuck, Allison Leof, and Hon. John Smith, ***Joint Jurisdiction Courts: A Manual for Developing Tribal, Local, State & Federal Justice Collaborations, 2nd ed***. (Project T.E.A.M., Center for Evidence-Based Policy, Oregon Health & Science University, 2018).

- Hon. Korey Wahwassuck, Hon. John P. Smith, and Hon. John R. Hawkinson, ***Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction***, 36:2 WILLIAM MITCHELL L. REV. 859 (2010)

- Hon. Korey Wahwassuck, ***The New Face of Justice: Joint Tribal-State Jurisdiction***, 47 WASHBURN L. J. 733 (2008).

- Jennifer Walter and Heather Valdez Freedman, ***Emerging Strategies in Tribal-State Collaboration: Barriers and Solutions to Enforcing Tribal Protection Orders: December 6, 2017 Meeting Report*** (Tribal Law and Policy Institute, February 2019).

- Heather Valdez Singleton, Kori Cordero, and Carrie Garrow, ***Tribal State Court Forums: An Annotated Directory*** (Tribal Law and Policy Institute, January 2016).

- Carole Goldberg and Duane Champagne, ***Promising Strategies: Tribal-State Court Relations*** (Tribal Law and Policy Institute, March 2013).

- Carole Goldberg and Duane Champagne, ***Public Law 280*** (Tribal Law and Policy Institute, March 2013).

- Walking on Common Ground – Resources for Promoting and Facilitating Tribal-State-Federal Collaboration: ***http://walkingoncommonground.org/.***

Appendix B: Tribal-State-Local Collaboration Dos and Don'ts

Membership

- ✓ DO select team members from diverse perspectives who have demonstrated interest, expertise, or experience in addressing Indian law issues.
- ✗ DON'T select members based only on their position within a particular department or elsewhere.

Mutual Respect

- ✓ DO acknowledge differences between tribal and state systems and seek ways of cooperating consistent with those differences.
- ✗ DON'T characterize either system as better or worse or less sophisticated than the other.

Scope

- ✓ DO proceed in phases with predetermined time frames, including a study phase in which issues are identified, before implementing recommendations.
- ✗ DON'T devote resources to implementation until a consensus is reached concerning priority issues and recommendations.

Persistence

- ✓ DO design a process that invites broad-based participation in identifying issues and making recommendations.
- ✗ DON'T be discouraged by lack of participation or lack of progress.

Performance

- ✓ DO assign manageable tasks to team members or subcommittees to be accomplished within established time frames.
- ✗ DON'T delay too long before dividing the work of the team into tasks that can be accomplished within the time frames established.

Solutions

- ✓ DO emphasize creative solutions to issues that are consistent with the rights of the parties, sovereignty, and judicial independence.
- ✗ DON'T emphasize jurisdictional limitations.

Communications

- ✓ DO emphasize person-to-person communication and education to address issues.
- ✗ DON'T seek to address issues solely through large-scale change in the law or legal systems.

William Thorne and Suzanne Garcia, ***Crossing the Bridge: Tribal-State-Local Collaboration***, 28 (Tribal Law and Policy Institute, February 2019).