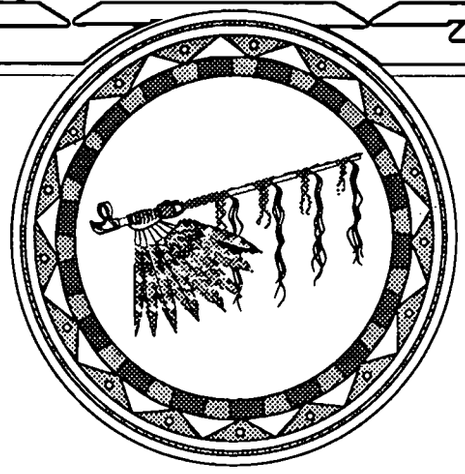

# BUILDING ON COMMON GROUND:

## A LEADERSHIP CONFERENCE TO DEVELOP A NATIONAL AGENDA TO REDUCE JURISDICTIONAL DISPUTES BETWEEN TRIBAL, STATE, AND FEDERAL COURTS

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# TAB 6

## The Tribal Courts and State Courts Project: A Fourth-Year Report by H. Ted Rubin

This article will appear in a forthcoming issue of the *State Court Journal*, published by the National Center for State Courts.

# THE TRIBAL COURTS AND STATE COURTS PROJECT: A FOURTH-YEAR REPORT

H. Ted Rubin[1]

"The current allocation of criminal jurisdiction in Indian country is based in large part on historic policies which are not consistent with the law enforcement needs of Indians tribes or the self-determination policy. Indian tribes whose communities are directly affected by the commission of a crime are generally better suited to enforce law in Indian country than state or federal government. The maintenance of law and order is vitally important to the peace and stability of the tribal community, as it is to any community. Indian tribes, long recognized as sovereign entities, are well suited to assume this responsibility. Indian tribes are distinct, independent political communities, exercising governmental power which is inherent in their sovereignty."

Douglas B. L. Endreson (Navajo), a prominent Washington, D.C., attorney who specializes in Indian law and the representation of Indian tribes, made this statement in his "Survey of Criminal Jurisdiction Issues" commissioned by the coordinating council that guides the Tribal Courts and State Courts: The Prevention and Resolution of Jurisdictional Disputes Project, which is administered by the National Center for State Courts.

The project, sponsored by the Conference of Chief Justices, entered into the criminal jurisdiction dispute arena in 1992, following approval by the Conference of Chief Justices. Its earlier work, and much of its ongoing work, has focused on civil jurisdiction disputes such as Indian Child Welfare Act (ICWA) matters, child support enforcement, state-taxing authority in Indian country, state hunting and fishing regulations when exact boundaries of a reservation are not clear, full-faith and credit or comity issues related to recognition or non-recognition of each other's decrees, and other basically civil concerns.

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[1]Editor's Note: This article and the research it describes were supported by a grant from the State Justice Institute to the National Center for State Courts. The views and opinions expressed do not necessarily reflect the views or policies of the grantor of grantee.

H. Ted Rubin has been a senior staff attorney for the National Center for State Courts in Denver. He directed the project, Tribal Courts and State Courts: The Prevention and Resolution of Jurisdictional Disputes, during its first four years and continues as a consultant to the project during its 1993 program year when it will execute a leadership conference to develop a national action agenda to prevent or resolve disputes and conflicts between tribal and state court systems.

The project has worked at reduction of civil disputes through survey research that ascertained the nature of civil problems, the implementation of tribal-state court forums in selected states, a national conference where teams from 22 states with Indian country designed action plans to reduce civil conflicts, and other education, legislation, court rules, and intersystem coordination approaches. This article summarizes the criminal survey, reviews tribal-state court forum accomplishments in Michigan and South Dakota, and reports on other project-related activities.

Criminal Survey

Federal statutes and court judgments have clarified certain boundary markers between tribal court and state court civil jurisdiction. In the criminal sphere, tribal court jurisdiction is constrained by federal law, and there is a strong federal prosecution role for crimes that occur in Indian country. State courts are also the centers for the prosecution of certain crimes that occur in Indian country. State authorities may prosecute offenses committed by non-Indians, but have more general authority over crimes committed in Indian country in a limited number of states known as Public Law 280 states.

Endreson summarizes criminal jurisdiction in Indian country as:

> First, Indian tribes have jurisdiction over criminal offenses committed by Indians within Indian country, including offenses committed by an Indian against a non-Indian. Tribal jurisdiction is exclusive over crimes committed by one Indian against another, unless one of the "major crimes" is involved.
>
> Second, the federal government has concurrent jurisdiction to prosecute crimes committed by an Indian against a non-Indian or vice versa. Indian tribes lack criminal jurisdiction over non-Indians. The federal government may also have exclusive jurisdiction over specific crimes created by federal statute, such as criminal prosecution under the Indian Gaming Regulatory Act.
>
> Third, state criminal jurisdiction in Indian country is generally limited to crimes committed by one non-Indian against another. However, in Public Law 280 states, Congress has given the state jurisdiction over crimes committed by both Indians and non-Indians through special jurisdictional acts.

Even when the criminal jurisdiction boundary is clear, it is not at all certain that either the federal or state authorities will assert jurisdiction over particular crimes. The Major Crimes Act, approved in 1885, provides for concurrent jurisdiction between federal and tribal courts for more serious felonies such as murder, manslaughter, kidnapping, incest, certain violent assaults, arson, burglary, robbery, and felonious theft committed by Indians. Another Congressional act, the Indian Civil Rights Act, limits the sanctions that tribal

courts can impose to a $5,000 fine and one-year imprisonment. Obviously, these limited sanctions are insufficient for certain felonies, and federal courts are the more appropriate forum. However, prosecutions for major crimes in the federal courts may not occur. Crimes that occur in Indian country may not be a priority for the Federal Bureau of Investigation of the Office of the U.S. Attorney. Further, Indian country may be distant from the nearest U.S. attorney or, for that matter, from a state prosecutor. The consequence is that, reportedly, crimes committed on reservations may go unpunished or insufficiently punished. A tribal court may prosecute and hold an offender accountable, but only to the extent of the limited sanctions it holds authority to order.

The lack of adequate probation, rehabilitative intervention, community correctional resources, and secure incarceration in Indian country is well known. Life in Indian country and in off-reservation communities may be imperiled when there is federal disinterest and, for example, a tribal court sentences a chronic Indian sexual offender to a brief jail stay without intervening rehabilitation. Endangerment occurs, also, when the state fails to prosecute the non-Indian, on-reservation sexual offender. The coordinating council that guides this project is particularly interested in encouraging meetings and informal and formal agreements between tribal, state, and federal officials to find common ground in investigations and prosecutions and to work out procedures so that no case falls through the cracks. Three governmental entities need to come together to solve this problem.

The Endreson survey directs attention to the legal factors used in determining jurisdiction in Indian country. First is the determination of who is an *Indian*. Second is the determination of what constitutes *Indian country*. These determinations may be difficult.

In criminal cases, the Indian or non-Indian status of a defendant and victim often determines which sovereign may exercise criminal jurisdiction over the defendant.

Endreson notes that courts formerly used the simple test, whether an individual was an enrolled member of a recognized Indian tribe or nation, to determine whether one was an Indian. But this test, Endreson notes, was found problematic and underinclusive. Some persons whom the law would ordinarily expect to be viewed as Indians for jurisdictional purposes were not enrolled for various reasons, such as the expression of religious or cultural convictions or as the result of flaws in the updating practices of some tribal rolls. Further, whether a non-Indian adopted by an Indian tribe, or whether one whose mother was an Indian but whose father was not (or whose father was a mixed blood) qualifies as an Indian for jurisdictional purposes, as well as other complex nonhypotheticals, has been the subject of court rulings. There is also certain authority that

holds that members of terminated tribes, tribes no longer federally recognized, are not Indians for purposes of federal jurisdiction even though "racially" they are Indians. Legal tests for who is an Indian now consider totality of the circumstances and include whether there is a preponderance of Indian blood, the habits of the person, and actual racial status as an Indian. Enrollment is no longer an absolute requirement.

Defining *Indian country* is important since the state would have jurisdiction over nonfederal crimes occurring outside of Indian country irrespective of the Indian or non-Indian status of the parties, unless state prosecution would interfere with a treaty right, such as off-reservation hunting and fishing rights. Moreover, some federal jurisdictional statutes applied, by their terms, only to Indian country. The test, as one state supreme court held, is whether the land has been set apart for the use of Indians, not how the Indians acquired the land. Federal provisions define as Indian country reservations, Indian allotments, and land occupied by "dependent Indian communities" outside of reservations, regardless of whether these lands are tribally governed. The term *dependent Indian community* includes communities that are "Indian" in character and federally dependent but are not part of an Indian allotment or a federal reservation. Determining whether a community is a dependent Indian community rests on such considerations as the nature of the area, the relationship of the Indian tribes and the federal government, and the established practices of federal and tribal government agencies toward the community. This must be done on a case-by-case analysis.

In some states, highway traffic administration poses significant issues of jurisdiction, as when state highways pass through Indian country. In Public Law 280 states, such as California, were granted civil adjudicatory and criminal jurisdiction over most of the reservations within their boundaries, although this did not affect Indian hunting and fishing rights. While these states have enlarged criminal jurisdiction, questions arise whether or not they can enforce state traffic regulations in Indian country when states treat certain violations, such as speeding, as civil matters. At least one such case has held that the state cannot enforce decriminalized traffic statutes. Instead, tribal governments have made a number of traffic violations civil infractions so that non-Indians as well as Indians may be brought before a tribal court.

In this scenario, as well as in non-Public Law 280 states where tribal governments enforce their own traffic regulations on highways in Indian country, an offending driver's point score has become an issue. One can accrue a certain number of points in a tribal court and a certain number of points in a state court and still be a legal driver, whereas if this offender had acquired all of his points in one court or the other, his or her license would have been suspended. Wisconsin and North Dakota have started working out

arrangements that will authorize intergovernmental point transfers so that "justice can be done."

Tribal Court Concerns Regarding Criminal Jurisdiction

The project surveyed a number of tribal court judges to ascertain the types of criminal and quasi-criminal dispute problems they experienced with other governments. The problems included:

- Serving subpoenas on witnesses located off-reservation
- Obtaining prosecutions in state courts
- Obtaining FBI investigations
- Obtaining prosecutions in federal courts
- Extraditing off-reservation Indians to tribal courts
- Seeking extradition due to cost, complexity of the process, and skepticism by state law enforcement over whether the tribal court had authority to obtain extradition
- Obtaining criminal or traffic records from state officials promptly
- Enforcing violations by non-Indians of domestic violence protection orders through contempt when the tribe lacks facilities to house these individuals and the state chooses not to incarcerate them
- Obtaining the testimony of a state chemist in drug cases
- Obtaining payment by the Bureau of Indian Affairs to the local governmental entity for providing jail space to the tribe
- Obtaining evidence from outside the reservation when the tribal court has exclusive jurisdiction over the crime and the accused

Tribal judges referred, also, to a more-than-desired turnover of law enforcement officers, to an absence of suitable facilities and intervention resources with juvenile and adult offenders, to problems obtaining mental hospitalization of reservation residents in state hospitals until they commit a serious crime off-reservation and receive some belated form of mental health treatment via a state criminal court, and to insufficient resources for drug abuse matters. These shortcomings haunt the suggestion, posed by Endreson, that Indian communities generally are better suited to enforce the law in Indian country than the state or federal government. But facilitating agreements to provide state resources to tribal courts or reservation residents is an attractive direction that can assist tribal administration of criminal law. Further, increased federal assistance to help tribes develop criminal justice intervention programs, in concert with increased authority over offenses that occur in Indian country, could help make tribes self-sufficient. In effect, were more resources made available so that tribal courts could provide more correctional programs,

tribes might then be granted greater authority to administer criminal law within their confines.

One respondent judge set forth the existence of misconceptions or misunderstandings between tribal and state officials: "Neither jurisdiction believes the other jurisdiction understands, or puts forth an effort to respect or understand issues in the respective jurisdictions." It has been a central strategy of this project to bring together tribal and state court officials to help them understand each other's court, uncover the problems and disputes that weaken the effectiveness of both court systems, and design strategies to prevent or resolve these conflicts. During 1990, under project sponsorship, the chief justices of Arizona, Oklahoma, and Washington appointed tribal-state court forums for this purpose (see *State Court Journal*, spring, 1991, pp 36-40). In 1992 the chief justices of Michigan and South Dakota made similar appointments and provided the services needed to enable these tribal-state court forums to complete a plan to reduce intersystem disputes. Reports from these states follow.

Michigan Tribal-State Court Forum

This forum, appointed by Chief Justice Michael F. Cavanagh, met four times. The morning sessions of the second and third meetings, held in Peshawbestown and Sault Ste. Marie, were reserved for public comment. A large cross-section of people having contact with tribal courts, such as tribal attorneys and social workers, Michigan Department of Social Services workers, state and local law enforcement personnel, and state judges, participated in these meetings. The seven tribal courts in Michigan are provided for by tribal constitutions or created through tribal ordinances. The forum devised a three-part strategy. First, resolution of many issues requires the consistent application of full faith and credit (in certain other states referred to as *comity*) between tribal and state courts. Second, the forum supported proposed legislative efforts in child welfare and law enforcement certification. Third, the forum recommended approaches to institutionalized relationships by putting systems in place to foster ongoing education and cooperation.

1. Court rule for consistent application of full faith and credit.

The forum drafted a supreme court rule that, if approved, would require that state courts grant the same full faith and credit to tribal court records and judgments as they would to the records and judgments of any other state if the particular tribal court grants full faith and credit to the records and judgments of the courts of Michigan.

Similarly, the forum drafted a rule requiring tribal courts to grant full faith and credit to the records and judgments of a Michigan court to the same extent as state courts recognize and enforce the records and judgments of the tribal court.

Assuming passage of these rules, the forum recommended a particular mechanism for the state court administrative office to catalog tribal full-faith and credit rules and to make this information available to state courts.

2. Support of present legislative efforts.

a. The forum announced its support of the proposed Michigan Indian Family Preservation Act, comprehensive legislation to protect and preserve Indian families, which will answer such concerns as the provision of funding for placements of children by tribal courts.

b. The forum announced support for pending legislation that would provide for state certification of law enforcement officers trained by the U.S. Bureau of Indian Affairs, thus overcoming the present bar against applying this training toward certification as a state law enforcement officer. Cross-deputization of tribal law enforcement officers and police officers from local units of government, based on written agreements, will aid in the apprehension of criminals regardless of jurisdiction.

3. Institutionalized relationships.

The forum entered a number of recommendations.

a. Make state court resources available to tribal courts.

The forum supported tribal court interest in obtaining technical assistant with caseflow management, recordkeeping, and computerization from the state court administrative office. Tribes should contract with this office to obtain administrative services now provided to state trial courts. Further, the forum recommended the continuing legal education programs and Michigan Judicial Institute educational programs be opened to tribal judges and court staff.

b. Cross-visitation.

Tribal court judges should be invited to annual meetings and conferences of state judges, and state court judges should be invited to visit reservations and attend tribal judges' seminars.

c. Listing tribal courts in state bar journal directory.

The forum consultant prepared a directory of tribal courts for the overall forum report. Arrangements were made to include this directory in the annual directory edition of the *Michigan Bar Journal*. The Michigan Tribal Judges Association will provide the Michigan Bar Association with annual updates of tribal court information.

d. Materials at state law library.

The forum established the Michigan Law Library as a central repository for tribal codes, ordinances, and court decisions. This will provide many attorneys in the state with a ready source of information on Indian law issues and the laws of the individual

tribes. The forum consultant will initially collect these materials. Thereafter, it will be the responsibility of the Michigan Tribal Judges Association and the chief judge of each tribal court to update library information.

e. Formation of an Indian law section of the state bar.

The forum arranged for a committee of six attorneys to perform the initial organization work needed to enroll enough attorneys to create an Indian law section of the state bar. Tribal attorneys, legal services attorneys, U.S. attorneys, Michigan attorneys general, county prosecutors, state judges, and private attorneys can all now appear in tribal courts or encounter Indian law issues. A goal was set to obtain an official charter for this section at the state bar's 1993 annual meeting and to provide that associate memberships be made available to nonattorneys who work with tribal courts.

f. Inform attorneys through *Michigan Bar Journal.*

The forum chair and consultant wrote an article for the May 1993 *Michigan Bar Journal* to make members aware of the forum's agenda.

g. Implementation through formation of ongoing committee.

In completing the design of its agenda and specifying particular people to take ongoing responsibilities, the forum recognized that at least another year's effort by the forum or a related group is needed to carry out its numerous recommendations. The forum's "final and most critical recommendation" was that "the chief justice appoint an advisory committee to carry on the work the forum had begun in order to further implementation and address ongoing issues as they arise and will arise."[2]

South Dakota Tribal-State Court Forum

This forum, appointed by Chief Justice Robert A. Miller, held six meetings to develop its action agenda plan. Four meetings were open hearings to receive testimony from the public and from professional communities. The forum asked those who testified at the open hearings to focus on the Indian Child Welfare Act (ICWA) and tribal-state comity, the two issues the forum considered most pertinent for South Dakota. Two open hearings were held on Indian country reservations, and two were held in urban areas located near Indian reservations: Eagle Butte on the Cheyenne River Sioux Reservation, Sinte Gleska University on the Rosebud Sioux Reservation, and the cities of Aberdeen and Rapid City. More than 60 individuals testified. Speakers included state, Bureau of Indian Affairs, and tribal social workers, lawyers, probation officers in tribal and state courts, and

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[2]Further information on the Michigan Tribal-State Court Forum Report can be obtained from Jack C. Crandall, Region IV Administrator, Administrative Office of the Courts, P.O. Box 100, Gaylord, MI 49735, (517) 732-3311.

tribal and state judges. Interested members of the public, both Indian and non-Indian, also testified.

1. Indian Child Welfare Act (ICWA).

To address concerns regarding lack of resources for tribes to participate in these hearings or to obtain expert witnesses and attorneys, recommendations were made to:

- Identify knowledgeable attorneys who will represent a tribe on a pro bono basis
- Identify psychologists and psychiatrists who will serve as expert witnesses on a pro bono basis
- Reform state regulations governing the licensing of Indian foster care homes
- Vigorously recruit more (state licensed) Indian foster care families and adoptive parents. The tribes and the state should participate in this activity jointly.

Several circuits in South Dakota have already established a precedent for tribal and state sharing of courthouses. In those areas, when impaneling a jury or taking the testimony of expert witnesses--as a matter of convenience and cost savings--a state judge will use a tribal court or a tribal court judge will use a state court facility.

- On recommendation of the forum, the chief justice has indicated he will immediately send a letter to all state circuit judges instructing them to make their facilities available for tribal court proceedings under the ICWA.

To further appropriate use of ICWA, the forum made additional recommendations:

- Preparation of an ICWA handbook for the public. This would be in addition to a new section on ICWA for the revised edition of the *South Dakota Tribal Court Handbook* that the forum consultant will prepare.
- Inclusion of an ICWA summary and checklist in the *South Dakota Trial Judges Benchbook*
- Inclusion of a listing of tribal ICWA officials in the *South Dakota Bar Directory*
- Request that the publisher of the South Dakota Code publish ICWA as an appendix to the Title 26 (Juveniles) of the code
- That each tribe, as well as Congress, consider whether that portion of the definition of Indian child in the ICWA that states "or is eligible for membership in an Indian tribe" is sufficiently precise to meet both tribal objectives and federal concerns. If not, that appropriate action be taken at the tribal and federal level

- That a comprehensive training seminar on ICWA involving social workers (state, tribal, BIA), state and tribal judges, state's attorneys, and private attorneys be held in Indian country, perhaps with joint University of South Dakota and tribally controlled college sponsorship.

2. Comity.

While comity is not an issue because ICWA requires that federal and state courts give full faith and credit to the records and judgments of tribal courts, recognition of judgements is an issue with other case types, such as enforcement actions based on judgments. It is an issue not just between tribal and state courts but between tribal and tribal courts as well. The Rosebud Sioux and the Ogalala Sioux tribes, among the nine tribes in South Dakota, have comity statutes. These laws parallel the state recognition-of-judgment statutes. Most tribal judges in the state proceed on a case-by-case basis and believe that tribal common law grants them authority to grant comity. While the report included suggestions of intertribal comity agreements, amending relevant federal statutes, such as the Uniform Reciprocal Enforcement of Support Act and the Parental Kidnapping Prevention Act to apply to Indian tribes, and continuing to proceed on a case-by-case basis, the sole recommendation was:

- Preparation of standardized forms for state judges to use in applying the state's statutory provision. (The forum considered this especially important in the case of pro se actions to get judgments enforced.)

3. Other recommendations.

The forum entered additional recommendations:

- Given the prevalence of Indian law questions that arise in the general practice of law in the state, request that the supreme court make Indian law a mandatory essay on the state bar examination
- That there be regular meetings of tribal and state judges within each circuit to improve communication, to explore common problems, and to better use scarce resources
- That every effort be made to develop a repository of tribal constitutions and codes, as well as a South Dakota Indian Law Report, to compile and distribute the trial and appellate court decisions of the state's nine tribal courts.
- That the policy of inviting tribal court judges, tribal probation officers, and tribal court clerks to relevant state-sponsored training sessions continue
- That the Northern Plans Tribal Judges Association seek funding to host a training session on important Indian law issues and invite state court judges to attend.

Its final recommendation dealt with an ongoing committee to address the issues that mark tribal-state court concerns. Chief Justice Miller, in 1991, hosted a joint judicial conference of state and tribal judges and, following that, created a joint state-tribal judicial liaison committee to explore tribal-state judicial issues. Accordingly, the forum recommended:

- That the chief justice authorize the continued existence of the joint judicial liaison committee to pursue realization of recommendations enumerated in the report and to serve as an ongoing forum for tribal-state judicial concerns in South Dakota.

Chief Justice Miller, in accepting the report of the forum, issued a formal memorandum responding to each recommendation. The chief justice stated specifically what he would do to seek implementation of each recommendation.[3]

A How-to-Do-It Guide

Based on the now-proven value of tribal-state court forums, the project prepared and published *Tribal Court-State Court Forums: A How-to-Do-It Guide to Prevent and Resolve Jurisdictional Disputes and Improve Cooperation Between Tribal and State Courts*. The *Guide* was mailed to 600 state, tribal, and federal officials, particularly to officials in those states that have not yet initiated a forum. The *Guide*, in a question and answer format, describes the purpose of a forum; the history of forums and their achievements; the selection of members by the chief justice; consultant and staff roles; the initial and subsequent meetings; public hearings; the value of a second year to facilitate implementation of the state action plan; and other information derived from experience in the five states that have sponsored forums. North Dakota was the first jurisdiction to actively use the *Guide* when it launched its organization and program in January 1993.

1993 Plan for a Leadership Conference

The State Justice Institute has awarded the project a continuation grant to conduct a national leadership conference in the fall of 1993. The essential purpose of the leadership conference is to develop a set of recommendations regarding actions that should be taken at local, tribal, state, and federal levels to further reduce conflicts between the two court systems. The scope of the recommendations will include criminal as well as civil proceedings. For the first time, the project will address issues and concerns that involved federal participation or intervention. The national action agenda will be supported by a plan to implement conference recommendations. The coordinating council

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[3]Further information on the *South Dakota Tribal-State Court Forum Report* can be obtained from Dan Schenk, Personnel and Training Officer, Supreme Court, 500 East Capitol Avenue, Pierre, SD 57501, (605) 773-4869.

will invite specialists, practitioners, and experts on tribal-state-federal court concerns to help design and develop this important agenda.