

# TRIBAL-STATE COLLABORATIONS



PRESENTED BY:

Lauren van Schilfgaarde

Tribal Law Specialist

Tribal Law and Policy Institute

[www.Home.TLPI.org](http://www.Home.TLPI.org)



NADCP Conference ~ April 20, 2017

## COLLABORATION BETWEEN SOVEREIGNS

- Collaboration has long been impeded by
  - Jurisdictional,
  - administrative,
  - bureaucratic,
  - historical, and
  - cultural conflicts
- But, we have mutual interests and intertwined futures



## COLLABORATIVE BENEFITS

- Expression and exercise of sovereignty – community and nation building
- Provide assistance in culturally-appropriate ways
- Increased participation in decision-making
- Maximize resources
- Cross sovereign education and understanding



## HISTORICAL PERSPECTIVE

- Understanding historical treatment of Indian Nations and sovereignty is critical to understanding current perspectives
- Each Indian Nation has a unique history of contact with non-Indians, but there are common themes
- Each Indian Nation has unique culture, norms and values
- No “one size fits all”



# PHASES OF INDIAN POLICY



# TRIBAL LAW VS. FEDERAL INDIAN LAW

- Tribal law is the law of each Indian Nation and pre-dates the Constitution
- U.S. law attempts to regulate Indian nations and Indian people



# THE FOUNDATION OF FEDERAL INDIAN LAW

- Framework of Dominance - Johnson v. McIntosh, 8 Wheat. 543 (1823)
  - Discovery gave title to discoverers, Indian people hold right to occupancy
- Cherokee Nation v. Georgia, 30 U.S. 1 (1831)
  - “Guardian-ward”; “Domestic dependent nations”
- U.S. v. Wheeler, 435 U.S. 313 (1978)
  - Tribal sovereignty subject to limitations - Plenary Power



# PHASES OF FEDERAL INDIAN POLICY

- Colonial Period (1492 - 1774)
  - Sovereign-to-sovereign relationships
- Confederation Period (1774 – 1789)
  - Indian support for new government
  - High priority of good relations
  - Indians feared and hated
- Trade and Intercourse Era (1789 – 1825)
  - Federal relationship with the Indians
  - Department of War responsible for Indians
  - Trade and Intercourse Act





# PHASES OF FEDERAL INDIAN POLICY



- Removal Era (1825 – 1850s)
  - US Military response to Indians
  - Forced removal to west of the Mississippi River
  - Removal Act of 1830
    - Tribes relocated to “Indian Territory” – now Oklahoma
- Treaty of Guadalupe Hidalgo - 1848

# PHASES OF FEDERAL INDIAN POLICY

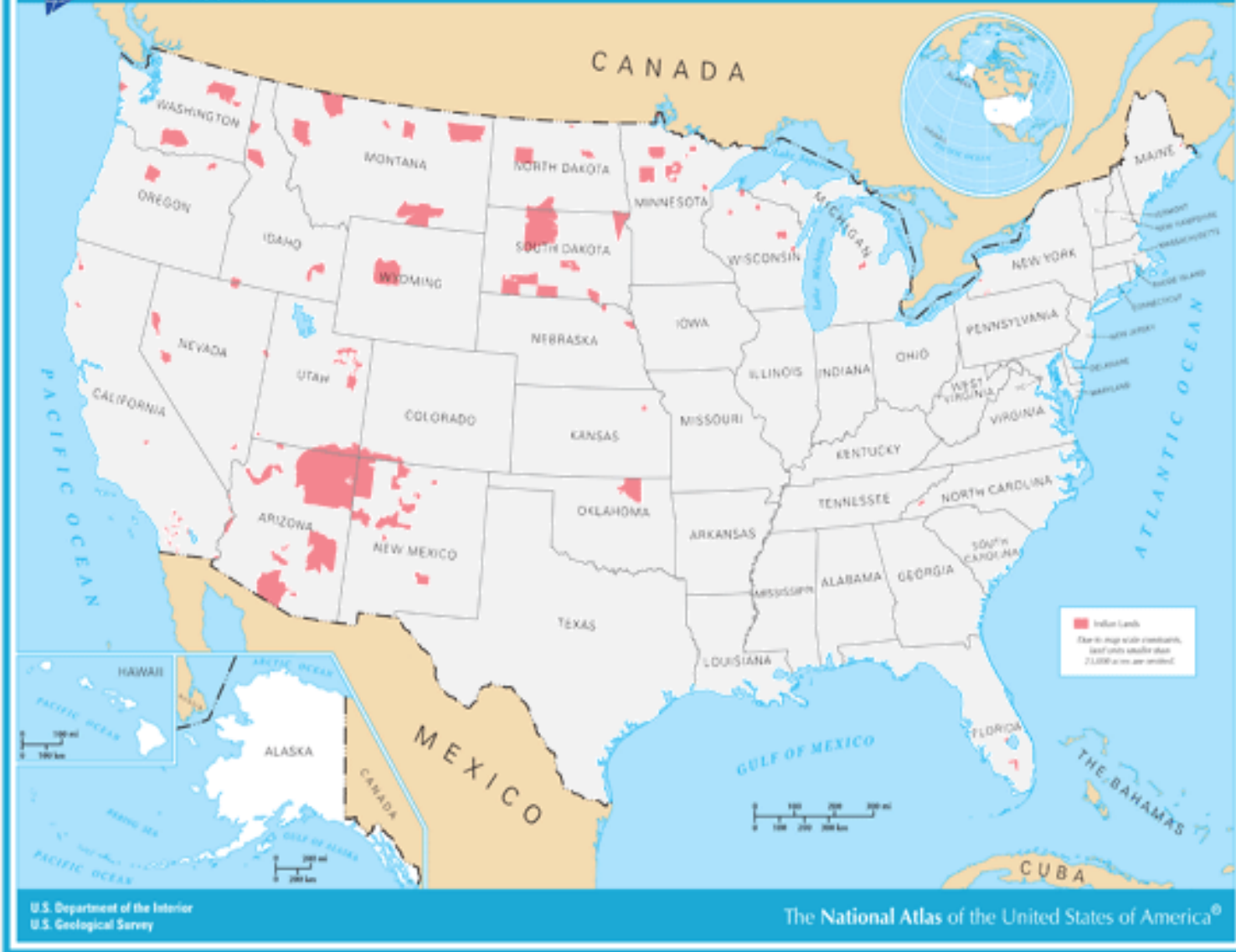
- Reservation Era (1850 – 1887)
  - Gold discovered in California
  - Treaties, statutes and executive orders
  - Set aside tracts of land for Indian occupation and use – social experiment
  - Implemented by force, starvation, and disease



# PHASES OF FEDERAL INDIAN POLICY

- Allotment (1887 – 1934)
  - Assimilate the Indian and destroy Indian way of life
  - General Allotment Act (Dawes Act)
    - Impose land ownership and farming/ranching
    - Tribal land converted to individual allotments
    - Allotments held in trust
  - Significant loss of tribal land
    - Land not allotted was “surplus” and sold to non-Indians





U.S. Department of the Interior  
U.S. Geological Survey

The National Atlas of the United States of America®



# PHASES OF FEDERAL INDIAN POLICY

- Indian Reorganization Era (1934 – 1940s)
  - 1928 Report – Assimilation attempt “total failure”
  - New Deal
    - Ended allotment
    - Revitalize and support tribal governments and tribal sovereignty
    - BIA drafted model constitutions
- Termination Era (1940s – 1961)
  - Attempts to protect tribal sovereignty abandoned
  - Sought end to federal/tribal relationship
  - 109 Indian nations were denied or terminated federal recognition
  - 1.3 million acres of tribal land lost



# PHASES OF FEDERAL INDIAN POLICY

- Self-Determination Era (1961 – present)
  - President Kennedy’s administration refused to terminate more tribes
  - President Johnson’s Poverty Programs invested money into tribal programs and infrastructure (mid 1960s)
  - President Nixon declared policy of “Self-Determination”
  - Indian Self-Determination and Education Assistance Act of 1975
    - Tribes may contract with federal government for delivery of federal services and programs on the reservation
    - Protect and support tribal governments and courts



# TRIBAL JUSTICE TODAY



# TRIBAL COURTS

Prior to European contact, Indigenous peoples practiced various forms of meaningful dispute resolution.



1883: First modern iteration of tribal courts:  
“Courts of Indian Offenses” (CFR)

1934: Indian Reorganization Act: permitting tribes  
to organize and adopt constitutions under  
federal law.

Today: tribal justice systems are diverse in concept and character.



# COMPLEX JURISDICTIONAL FRAMEWORK

Criminal and Civil Jurisdiction is complex; often depends on the

- Indian status of the offender/defendant
- Indian status of the victim/plaintiff
- Location of the offense/act
- The nature of the offense/act



Additional factors include

- Federal prosecutorial discretion
- Development of the Tribal Court and/or Tribal Code
- Possible state jurisdiction (e.g. PL 280)
- Joint Powers Agreements and/or Memorandums of Understanding



# COURT COLLABORATION

Diversion courts

Recognition of tribal court judgments

Family law

Truancy and other juvenile matters

Indian Child Welfare Act (ICWA) cases

Motor vehicle licensing

Child support enforcement

Enforcement of protection orders

Recognition of customary marriages

Probation and reentry support

Registration and management of sex offenders

*Consider Tribal-State  
Court Forums*



# PROMISING PRACTICES GENERALLY

- State Police Officer Status and Cross Deputization Agreements
- Arizona Court Rule Providing State Recognition of Tribal Court Judgments
- Arizona Recognition and Enforcement of Tribal Court Involuntary Commitment Orders
- Washington Joint Executive-Legislative Workgroup on Tribal Retrocession
- New York Federal-State-Tribal Courts Forum
- Tribal Representatives in Maine Legislature
- Intertribal Court of Southern California



# TRIBAL HEALING TO WELLNESS COURTS



Healing to Wellness Courts are tribal drug courts.

Particular interest in addressing alcoholism, especially in a non-adversarial nature.

The term “Healing to Wellness Courts” was adopted to

- (1) incorporate two important Indigenous concepts - Healing and Wellness; and
- (2) promote wellness as an on-going journey.

# HEALING TO WELLNESS COURTS

## [WWW.WELLNESSCOURTS.ORG](http://WWW.WELLNESSCOURTS.ORG)

Resources  
& Tools

Wellness Court Resources

Tribal Key Components

Forms & Policies

Drug Court Research

State Resources

Search by Tribe:



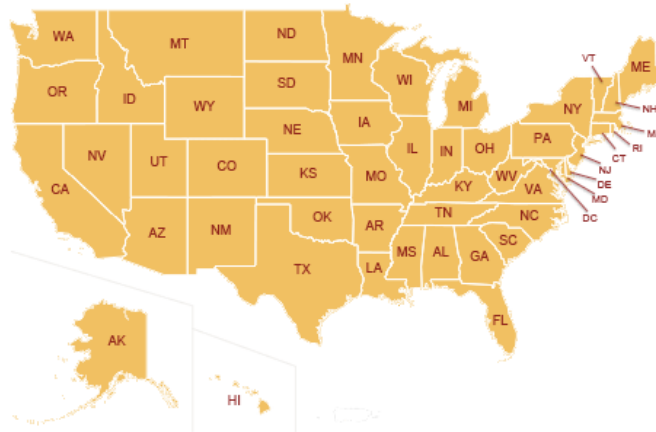
Indian Nations

Tribal Justice Systems

Tribal Wellness Courts

Tribal-State Collaborations

Wellness Court Collaborations



## OPPORTUNITIES FOR COLLABORATION IN IN WELLNESS COURT

- ***Transfer Agreement*** for eligible participants
- Provision of drug testing and other oversight services
- Sharing of database information
- Consultation for particular subject matter (e.g. cultural activity or treatment)
- Consultation for particular participants
- Joint team members (probation, behavioral health, treatment)
- Communication between Coordinators
- Observation of each other's hearings



# MOU LANGUAGE CONSIDERATIONS

Referral and Transfer Agreements



## TRANSFER CONSIDERATIONS

- Pre- or Post-adjudication
  - Similarity to other similarly situated state case
  - Ability to prosecute
  - Carrot for participation
  - Coordination between prosecutors and defense counselors
- Will Tribe be informed for every tribal member arrested, or only for those the County decides to refer?





# TRANSFER CONSIDERATIONS

- Screening and Assessment
  - How will the County identify tribal members?
  - How long between arrest/conviction and clinical assessment?
  - What tools will be used? By whom?



# TRANSFER CONSIDERATIONS

- **Extraneous Legal Requirements**
  - Are there other state/county supervision requirements?
  - Can other cases be consolidated into Wellness Court?
- **Services**
  - Does participant reside in the community/otherwise have access to services?
- **Incentives and Sanctions**
  - Ability to use jail as a sanction



# TRANSFER CONSIDERATIONS

- Discharge
  - Does the Wellness Court have the authority to determine discharge?
  - What are the benefits of a successful discharge?
    - Case dismissal
    - Sentence suspension
    - Expungement
  - Unsuccessful discharge?
  - Is the case transferred back to the County?



## TRANSFER CONSIDERATIONS

- Data management and other information sharing expectations
- Agreement modification clause
  - Joint steering committee
  - Judges
- Specify agencies and departments
- Who needs to sign?

# Stepping Forward

Collaboration begins with a first step.



# COLLABORATION CONSIDERATIONS

- Personal connections
- Common ground on specific issue
- Shared leadership and responsibility
- Find the low hanging fruit
- Better to start local
- Look for other partners
- Identify needed staff and resources
- Develop a communication plan



# BARRIERS TO COLLABORATION

- Collaboration is not telling or being told what to do
- Slippery Slope to becoming a State or Tribal Actor
  - Assume responsibilities without compensation
  - Assume liability
  - Appearance of surrendering sovereignty and/or independence
- When Historical Issues have not been addressed
  - Collaborators must understand the cultural trauma underlying each community
  - Simultaneously, we must move on: empathy over guilt





## Joint Jurisdiction Courts: The Henu' Community Wellness Court





THANK YOU

The Tribal Law and Policy Institute is a Native American non-profit organized to design and deliver education, research, training, and technical assistance programs which promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples.



[www.home.tlpi.org](http://www.home.tlpi.org)

[www.WellnessCourts.org](http://www.WellnessCourts.org)

[www.WalkingOnCommonGround.org](http://www.WalkingOnCommonGround.org)



# RESOURCES

- Susan Johnson, Jeanne Kaufmann, John Dossett, and Sarah Hicks, ***Government to Government: Models of Cooperation Between States and Tribes***, National Conference of State Legislatures and National Conference of American Indians (2009).
- Christine A. Klein, [\*Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo\*](#), 26 NEW MEXICO L. REV. 201 (1996).
- Tribal Law and Policy Institute, ***Tribal-State Court Forums: An Annotated Directory*** (2016).
- Maureen White Eagle and Heather Valdez Singleton, [\*Tribal State Court Collaboration: Working Group Report\*](#), Tribal Law and Policy Institute (2013).

