

## The New Face of Justice: Joint Tribal-State Jurisdiction

The Honorable Korey Wahwassuck\*

### I. INTRODUCTION

Incidents of drug and alcohol abuse, gang activities, violence of all kinds, truancy, unsupervised juveniles, and dysfunctional families continue to escalate and head the list of problems faced by all governments, tribal and state. In Northern Minnesota, the situation is no different, but local tribal and state judicial systems have teamed up to address these issues in an innovative way. In 2006, the first joint tribal-state court in the nation was created. Made possible by a Joint Powers Agreement between the Leech Lake Band of Ojibwe Tribal Court and the Cass County District Court, the two jurisdictions can now work collaboratively and creatively toward better outcomes for those involved in the adult and juvenile justice systems. Following the lead of the Leech Lake and Cass County courts, joint tribal-state jurisdiction is quickly catching on. This article gives an overview of tribal court development, discusses how this unique system of joint jurisdiction evolved in Northern Minnesota, and provides practical suggestions for cooperation in other jurisdictions.

### II. THE DEVELOPMENT OF MODERN TRIBAL COURTS

In all states there are two parallel judicial structures, the state and federal systems. In many states, however, there is a third judicial entity—the tribal court system. Since their emergence, which has been only fairly recently in Minnesota, tribal courts have provided a unique challenge in the administration of justice in those states in which they operate. Tribal courts are not United States courts. Although Congress

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has plenary power over all Indian affairs, Indian tribes remain independent sovereigns with the power and ability to govern themselves by creating and enforcing their own laws.<sup>1</sup> Challenges arise when both tribal and state courts hold concurrent jurisdiction over the same matter or when a court in either system is faced with the choice of whether to recognize and enforce the other court's judgment.

Tribal courts are created as an exercise of inherent tribal sovereignty, a sovereignty that predates the United States and its Constitution.<sup>2</sup> "[T]he effective operation of [such courts is] essential to promote the sovereignty and self-governance of . . . tribes."<sup>3</sup> And, as one observer notes, "it is increasingly clear that tribal government is the only government that can create and maintain the social, political, economic, and legal environment necessary to meet the needs of [a] growing community."<sup>4</sup> For many Indians, sovereignty and self-governance mean "the ability to operate a justice system that takes into account the goals and traditions of tribal societies, without direct regard for Anglo-American ideals."<sup>5</sup>

There are currently at least 350 tribal justice systems operating within Indian Country.<sup>6</sup> Modern tribal courts are far from uniform in structure, jurisdiction, procedure, and substantive norms.<sup>7</sup> Even though pending issues are remarkably similar, the environments in which tribal courts must operate, and the challenges they face, are markedly distinct from state and federal courts.<sup>8</sup> For example, tribal courts are constantly struggling not only to maintain external credibility through the applica-

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1. Gordon K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1401-02 (1985) (noting that tribal courts are far from uniform in both procedural and substantive law); Office of Tribal Justice, U.S. Dept. of Justice, *Concurrent Tribal Authority Under Public Law 83-280*, Nov. 9, 2006, [http://www.tribal-institute.org/lists/concurrent\\_tribal.htm](http://www.tribal-institute.org/lists/concurrent_tribal.htm).

2. Office of Tribal Justice, *supra* note 1.

3. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 2 (1997); see *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); see also Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1671 (1998) (stating "tribal courts are essential institutions of self-governance"); cf. *United States v. Wheeler*, 435 U.S. 313, 326-28 (1978) (holding that the right to punish Indian offenses is integral aspect of tribal sovereignty); *Klammer v. Lower Sioux Convenience Store*, 435 N.W.2d 379, 384 (Minn. Ct. App. 1995) (holding that unnecessary exercise of jurisdiction over Indian affairs by state courts in lieu of tribal courts interferes with tribal sovereignty and self-governance).

4. Douglas B.L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142, 146 (1995).

5. Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever Be Made into a Right?*, 90 CRIM. L. & CRIMINOLOGY 1317, 1335 (2000).

6. See *National American Indian Court Judges Association Testimony on Fiscal Year 2001 Interior Appropriations, Before the Subcomm. on Interior and Related Agencies of the H. Appropriations Comm.*, 106th Cong. (2000) (statement of the Honorable Mary T. Wynne, President of the National American Indian Court Judges Association (NAICJA)).

7. See Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 89 (2005) (discussing the tendency of United States Supreme Court to treat all tribal courts as essentially the same); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 291 (1997); Wright, *supra* note 1, at 1401 (noting that tribal courts are far from uniform in both procedural and substantive law).

8. See *National American Indian Court Judges Association Testimony*, *supra* note 6.

tion of Anglo-American legal concepts and procedures, but also to retain internal credibility by not straying too far from Indian cultural influences.<sup>9</sup> One of the most crucial tasks for modern tribal courts is successfully incorporating tradition into the dispute resolution process.

Tradition and culture play an important role in tribal justice systems.<sup>10</sup> As many tribal courts have adopted Anglo-American judicial systems, procedures, and laws, one critical way of retaining internal validity is the integration of traditional notions of justice.<sup>11</sup> As one scholar puts it, “[m]odern tribal courts have the unenviable task of doing justice in two worlds.”<sup>12</sup>

The typical Anglo conception of justice consists of two parties pitted against each other in the adversarial setting represented by attorneys who must zealously represent or defend their client’s interests. Case outcomes are embodied in money judgments, injunctions, and declaratory relief, or, as with criminal cases, penal consequences. The Anglo system establishes civil parties as adversaries and a criminal defendant as society’s adversary. Many fail to recognize these characteristics as cultural attributes.<sup>13</sup> Whereas many Americans perceive culture as an aspect of arts and crafts, many Indians perceive culture as pervasive and not an elective identity.<sup>14</sup> For American Indians, tradition and culture paint a markedly different picture.

Not only do tribes use traditional or non-Anglo procedures, they also use traditional laws, and are indeed encouraged to do so under the Indian Reorganization Act (IRA) of 1934<sup>15</sup> and the federal policy of self-governance. While many tribes have developed their own legal codes, few are as extensive as the codes used in state and federal courts. Where tribal law fails to cover certain circumstances, tribal courts will often use federal or state law to fill in the gaps.<sup>16</sup> Tribal law most differs from Anglo law in cases involving hunting and fishing rights, property law, and family issues, and is often passed down orally from one genera-

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9. See Newton, *supra* note 7, at 293 (discussing the effects of colonial origins and how tribal courts constantly strive for internal legitimacy); Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110, 111(1995) (discussing the two-fold challenge of maintaining credibility and legitimacy). See generally Wright, *supra* note 1 (discussing internal legitimacy concerns when tribal courts adopt Anglo-American models).

10. See generally Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995).

11. See B.J. Jones, *Tribal Courts: Protectors of the Native Paradigm of Justice*, 10 ST. THOMAS L. REV. 87, 91 (1997).

12. *Id.* at 87.

13. Cf. Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 135, 135 (1995) (criticizing Anglo conception of culture).

14. See *id.* at 137.

15. 25 U.S.C. §§ 461-79 (2006).

16. Wright, *supra* note 1, at 1402-03; see, e.g., UPPER SIOUX JUD. CODE tit. I, ch. V, §§ 1-3 (2001); Christian M. Freitag, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 IND. L.J. 831, 864 (1997).

tion to the next.<sup>17</sup> This system of recalling and using tradition has made many non-Indian observers skeptical of its appropriateness, especially when non-Indian parties are involved.<sup>18</sup> Some tribal justice systems, however, have specific procedural protocols for the establishment and use of custom and tradition within tribal courts.<sup>19</sup> Many Minnesota tribes, for instance, have sections of their judicial codes detailing both the cases to be referred to traditional forums and the importance of using custom in modern tribal courts.<sup>20</sup>

While critics are often quick to suggest that tribal courts have much to learn from the American justice system, many fail to realize that there is much to be learned by *both* systems. State and federal courts, for instance, can “explore the native paradigm of justice and possibly borrow from that paradigm to dispense justice in non-Indian courts.”<sup>21</sup> Such non-tribal examples of restorative justice can be found here in Minnesota in the form of problem solving courts, such as drug courts. Other examples used in federal courts include alternative dispute resolution methods such as mediation and arbitration.

Tribal courts face many of the same challenges that state and federal courts do. They schedule and manage a growing case load, tackle complex and often ill-defined legal problems, must appease all parties involved, and, through it all, conduct a fair and efficient dispensation of justice. Tribal courts, however, face a myriad of challenges which state and federal courts have long since put behind them.

Perhaps the most pressing problem among tribal justice systems is the dearth of available funding.<sup>22</sup> Indeed, a 1991 Congressional report on the Indian Civil Rights Act (ICRA)<sup>23</sup> and Indian Country revealed

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17. See Melton, *supra* note 10, at 131; Newton, *supra* note 7, at 308.

18. See Minzner, *supra* note 7, at 107 (discussing the Pueblo of Lagona tribe’s use of custom and its seeming arbitrariness to outside observers).

19. Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 120 (2000); see Minzner, *supra* note 7, at 107. The Navajo Nation’s procedures for invoking and using custom in tribal courts is so well recorded that it is often the case that state courts hearing cases involving Navajo members can look to such codes and implement them without transferring the case to tribal court. See Minzner, *supra* note 7, at 107.

20. See, e.g., GRAND PORTAGE BAND OF CHIPPEWA JUD. CODE tit. I, ch. IX (2001) (addressing issues related to traditional forum); GRAND PORTAGE BAND OF CHIPPEWA JUD. CODE tit. I, ch. V, § 4 (2001) (concerning tribal customary and traditional law); UPPER SIOUX JUD. CODE tit. I, ch. V, §§ 1-3 (2001) (addressing applicable law and use of custom); MILLE LACS BAND STAT. ANN. tit. 24, ch. 1, subch. III, pt. I, § 602 (establishing a cause of action for causing cultural harm).

21. 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, 466 (1998); see also O’Connor, *supra* note 3, at 5 (arguing that tribal courts on the one hand, and state and federal courts on the other, have much to teach each other).

22. See Jones, *supra* note 21, at 458-59 (discussing difficulties of dealing with complicated legal issues on a meager budget); Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present and Future*, 79 JUDICATURE 147, 148-49 (1995) (noting decreased funding under Indian Tribal Justice Act (ITJA)); Twetten, *supra* note 5, at 1329 (discussing lack of promised funding under ITJA); cf. *National American Indian Court Judges Association Testimony*, *supra* note 6 (requesting funding under ITJA).

23. 25 U.S.C. §§ 1301-03 (2006).

that tribal court weaknesses stemmed not from pervasive bias or incompetence, but rather from low levels of funding.<sup>24</sup> Funding for tribal courts, as noted above, is largely a federal issue. The situation in a Public Law 280<sup>25</sup> state, however, is slightly different. When Congress passed Public Law 280, it also stopped funding tribal courts in the affected states with the expectation that state judicial systems would pick up the slack.<sup>26</sup> Understandably, states were reluctant to fund tribal court programs without the backing of congressional funds, thus depriving many Public Law 280 tribal courts of any funding.<sup>27</sup> The deleterious effects of Public Law 280 and the ambiguities it has created are discussed below in Section II.A. Regardless of the causes of low funding for tribal courts, it remains a significant impediment to the implementation of justice in Indian Country.

As previously noted, “[m]odern tribal courts have the unenviable task of doing justice in two worlds.”<sup>28</sup> As Indian law and the tribal-state relationship changes, “the challenges facing tribal courts are essentially twofold and interdependent: tribal courts must strive to respond competently and creatively to federal and state pressures coming from the outside, and to cultural values and imperatives from within.”<sup>29</sup> Unlike state and federal courts, “tribal courts act under a constant threat that the dominant legal society, acting through Congress or the federal courts, may react to one out of hundreds of tribal disputes in any given year by diminishing the judicial jurisdiction of *all* tribes.”<sup>30</sup> The concern is not unwarranted: take for example, Congress’s reaction to *Ex Parte Crow Dog*.<sup>31</sup> *Crow Dog* concerned a homicide in which Crow Dog, a Brule Sioux Indian, shot and killed Spotted Tail, a Brule Sioux chief.<sup>32</sup> Crow Dog was brought to trial under Sioux tradition and was ordered to pay restitution to Spotted Tail’s family in the form of horses, blankets, and provisions.<sup>33</sup> Whites saw Crow Dog’s punishment “as inappropriate and not fitting with the ‘civilizing’ plan of the whites.”<sup>34</sup> Thus federal au-

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24. See Newton, *supra* note 7, at 288, 288 nn.15-16 (citing U.S. COMM’N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 63, 72, 73 (1991)).

25. Act of Aug. 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

26. See Twetten, *supra* note 5, at 1322.

27. See *id.*

28. Jones, *supra* note 11, at 87.

29. Pommersheim, *supra* note 9, at 111.

30. Newton, *supra* note 7, at 293.

31. 109 U.S. 556 (1883). The passage of the Major Crimes Act supports this proposition. See 18 U.S.C. § 1153 (1885); Jiménez & Song, *supra* note 3, at 1651.

32. Jiménez & Song, *supra* note 3, at 1651 (explaining the history of *Crow Dog* and the Major Crimes Act).

33. *Id.* at 1651 n.124.

34. Myers & Coochise, *supra* note 22, at 148 (discussing subsequent assimilation and “civilizing” efforts); see Daina B. Garonzik, *Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 25 EMORY L.J. 723, 733 (1996) (explaining that whites were “outraged” by acquittal of Crow Dog); Leeds, *infra* note 52, at 323 (noting that *Crow Dog* altered the trajectory of treatment of Indian law).

thorities arrested Crow Dog and he was tried in the district court for the North Dakota Territory.<sup>35</sup> He was convicted of murder and sentenced to death, a sentence affirmed by the North Dakota Supreme Court.<sup>36</sup> Crow Dog appealed that decision to the United States Supreme Court praying for a writ of habeas corpus, claiming the district court had no jurisdiction over him.<sup>37</sup> In granting the writ of habeas corpus, and thereby denying the jurisdiction of the district court, Justice Matthews wrote:

[This] is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.<sup>38</sup>

Although at times demeaning, the opinion nevertheless strengthened the standing of Indian tribes, their sovereignty, and their traditional justice systems. Public outrage over the case, however, did not end there.

In response to the Court's holding and public outcry, Congress passed the Major Crimes Act (the Act) in 1885.<sup>39</sup> The Act conferred federal jurisdiction over murder and other serious offenses committed by Indians, offenses which had previously been excepted from federal jurisdiction under the General Crimes Act of 1817.<sup>40</sup> Although federal courts exercised concurrent jurisdiction, tribal courts were still permitted to try major crimes which they continued doing, while federal courts upheld their right to do the same.<sup>41</sup> Regardless of the allowance for concurrent jurisdiction, tribal courts and tribal sovereignty had been dealt a serious blow. As some have noted, although the Act supports concurrent jurisdiction, "in practice, external factors frequently deter

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35. *Crow Dog*, 109 U.S. at 557.

36. *See id.*

37. *Id.* at 557-58.

38. *Id.* at 571.

39. 18 U.S.C. § 1153 (1885).

40. 18 U.S.C. § 1152 (1817). Section 1153(a) of the Major Crimes Act (the Act) lists the crimes for which federal courts were to gain concurrent jurisdiction. The General Crimes Act had previously recognized tribal sovereignty and a tribe's right to create and maintain its own laws. *Id.*

41. *See Jiménez & Song, supra* note 3, at 1652 (citing *Wetsit v. Stafne*, 44 F.3d 823, 825-26 (9th Cir. 1995)) ("upholding a tribal court conviction for manslaughter and noting concurrent jurisdiction under the Major Crimes Act").

and impede tribes from fully and effectively exercising their criminal jurisdiction, particularly over major crimes.”<sup>42</sup>

Tribal court unease is heightened even further when non-Indian litigants are involved, so that tribal court judges are “adjudicat[ing] with a kind of sword of Damocles over their heads.”<sup>43</sup> While the exhaustion doctrine is typically viewed as granting deference to tribal courts, some observers are more skeptical. By allowing federal review only after exhaustion of tribal remedies, tribal courts often feel increased pressure to conform to Anglo notions of due process rather than apply customary law.<sup>44</sup>

Tribal courts have an equally difficult time appeasing internal constituents when tribal law and procedure is often viewed as adopted versions of “white man’s law.”<sup>45</sup> The more tribal courts attempt to satisfy the American justice system, the more skeptical Indians become of using their own courts.<sup>46</sup> While it is certainly a benefit to tribal justice systems to be perceived as fair and principled to outside observers, it does little good if those efforts detract from constituents’ confidence in their tribal courts.<sup>47</sup>

The struggle has, at times, led to rather bitter criticism of tribal courts. The source of such animosity is attributable to another significant challenge facing tribal courts—a nearly complete lack of understanding by both lay and legal individuals pertaining to tribal justice. Outside a limited number of Indian law scholars and a handful of judges and attorneys, little is known about tribal courts and tribal justice.<sup>48</sup> This is attributable to at least two factors. First, relatively few tribal courts keep records of their proceedings, and of those that do, even fewer publish those opinions in the *Indian Law Reporter*.<sup>49</sup> The second factor is a general disposition among judges and lawyers that knowing about Indian law is irrelevant to their adjudication and practice.<sup>50</sup>

The consequences of this lack of knowledge are twofold. On the one hand, it shapes the non-Indian conception of tribal courts and makes non-Indians susceptible to believing any of the few popular re-

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42. *Id.* at 1655; see also Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, 123 (1995) (describing how Supreme Court decisions have limited the ability of tribes to maintain order on their lands).

43. See Newton, *supra* note 7, at 294.

44. See Jones, *supra* note 11, at 92-93.

45. See *id.* at 87.

46. See *id.* at 91; Twetten, *supra* note 5, at 1332.

47. See O’Connor, *supra* note 3, at 2.

48. See, e.g., Newton, *supra* note 7, at 287; Pommersheim, *supra* note 9, at 110; cf. Freitag, *supra* note 16, at 842.

49. See Minzner, *supra* note 7, at 107; cf. Freitag, *supra* note 16, at 842.

50. Cf. *Little Horn State Bank v. Crow Tribal Ct.*, 690 F. Supp. 919, 923 (D. Mont. 1988) (refusing to inquire into tribal court procedural posture); Michael F. Cavanagh, *Michigan’s Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. DET. MERCY L. REV. 709, 713, 715 (1999) (discussing need to circulate Indian law materials through Bar Associations and develop Indian law committees).

ports on Indian justice regardless of their truth.<sup>51</sup> On the other hand, it causes lawyers, judges, and lawmakers to act with excessive caution when interacting with tribal courts or to avoid them altogether.<sup>52</sup> It is thus integral to the effective operation of tribal courts that more is done to educate judges, lawyers, and the general public on tribal justice issues.

#### A. Public Law 280

In 1953, Congress enacted Public Law 280 granting certain states, including Minnesota, jurisdiction over criminal and civil matters arising in Indian Country.<sup>53</sup> The challenges embodied in the dual-sovereign structure of state and tribal courts are reinforced and deepened in Minnesota because of the operation of Public Law 280. This law essentially grants Minnesota state courts broad jurisdiction over criminal and civil matters arising in Indian Country. As a result, jurisdiction over Indian matters is a confusing situation in Minnesota; a situation not helped by the fact that Minnesota tribal courts are a relatively recent creation.

Congress implemented Public Law 280 because of a perceived inadequacy of tribal law enforcement and “ostensibly . . . to help . . . tribes by applying state resources to . . . judicial forums and law enforcement for tribes financially unprepared to maintain such a burden.”<sup>54</sup> Congress had at least three purposes in passing Public Law 280: (1) the reduction of lawlessness on federal Indian reservations, (2) the reduction of federal expenditures on Indian reservations, and (3) the furtherance of the then popular policy of assimilation.<sup>55</sup>

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51. See Newton, *supra* note 7, at 285-86. For instance, a 1997 edition of the Washington Post printed a letter to the editor from Bernard Gamache, a father whose son was killed in an accident involving tribal police officers. See *id.* at 285 (citing Bernard Gamache, Letter to the Editor, *Simple Justice*, WASH. POST, Sept. 16, 1997, at A16).

Mr. Bernard Gamache's letter implied that he had no remedy because he could not sue the tribe in state or federal court. He apparently did not even attempt to file suit in tribal court, asserting that the tribe has a “makeshift court system that operates without a constitution.” Mr. Gamache broadened this denunciation of the Yakima Tribal Court system to include *all* tribes: “Indian tribal courts have routinely shown their inability to administer justice fairly.”

*Id.* (quoting Gamache, *supra* at A16). Newton points out that “Mr. Gamache's letter is misleading because federal law has provided [for] a forum for such accidents.” *Id.* at 286. Thus, in addition to already having misconceptions about the fairness of tribal courts, Mr. Gamache went on to instill those misconceptions in the readers who picked up that day's copy of the Post.

52. *E.g.*, Newton, *supra* note 7, at 285 (citing Sen. Slade Gorton, *Equal Justice for Indians, Too*, WASH. POST, Sept. 16, 1997, at A17 (“[N]on-Indians and state governments may not seek justice in an impartial court when they have a dispute with tribal governments.” (alterations in original)). See generally Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311 (2000) (discussing litigants preference for state court so as to avoid difficulties in having state judges enforce tribal judgments).

53. 28 U.S.C. § 1360 (2006).

54. Carol Tebben, *Trifederalism in the Aftermath of Teague: The Interaction of State and Tribal Courts in Wisconsin*, 36 AM. INDIAN L. REV. 177, 177-78 (2001); see also Office of Tribal Justice, *supra* note 1; Jiménez & Song, *supra* note 3, at 1632.

55. See Twetten, *supra* note 5, at 1321 (citing *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 488 (1979)).

Because Public Law 280 stopped funding for tribal courts, it has been a significant impediment in the development of tribal justice systems in Minnesota.<sup>56</sup> Indeed, tribal courts did not begin to emerge in the form we know them today until the 1970s.<sup>57</sup> Lack of understanding pertaining to the reasons behind the retarded growth of tribal courts has led to opinions, such as that of the United States Court of Appeals for the Eighth Circuit in *Krempele v. Prairie Island Indian Community*,<sup>58</sup> holding that exhaustion by the Prairie Island Indian Community Tribal Court was not necessary for the litigant because the Tribe did not have an operational court system.<sup>59</sup> Regardless of how much funding and assistance is put into tribal court development, so long as Public Law 280 remains in effect tribal courts will continue to be courts of limited jurisdiction.<sup>60</sup> Further, tribal courts remain, in many aspects, an optional forum for disputes.<sup>61</sup> The unintended legacy of Public Law 280 has been “an unwarranted disrespect for tribal governmental institutions.”<sup>62</sup>

Regardless of the practical effects of Public Law 280, both the jurisprudence and legislative scheme of the United States continues to affirm that this law was never meant to undermine tribal sovereignty or tribal justice systems.<sup>63</sup> Rather, it was meant to supplement the operation of tribal courts with state funds and resources.<sup>64</sup> Indeed, dismantling the tribal justice systems in mandatory states is directly contrary to the primary goal of the Act—to address lawlessness on reservations.<sup>65</sup> Toward that aim, tribal courts were not entirely deprived of jurisdiction, but have retained concurrent jurisdiction over criminal offenses occurring on reservations within Public Law 280 states.<sup>66</sup> In fact, “[t]he nearly unanimous view among tribal courts, state courts and lower federal courts, state attorneys general, and the Solicitor’s Office for the Department of the Interior, and legal scholars, is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations un-

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56. See Jones, *supra* note 21, at 472; cf. Carole Goldberg & Heather Valdez Singleton, *Public Law 280 and Law Enforcement in Indian Country*, NAT’L INST. JUST. RES. IN BRIEF 9 (Dec. 2005); Twetten, *supra* note 5, at 1327.

57. See Jones, *supra* note 21, at 473; 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, 521 (2004).

58. 125 F.3d 621 (8th Cir. 1997).

59. *Id.* at 622.

60. See Jones, *supra* note 21, at 494.

61. Washburn & Thompson, *supra* note 57, at 521.

62. See *id.* at 526.

63. See *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 383-84 (1976); Goldberg & Singleton, *supra* note 56, at 7; Jiménez & Song, *supra* note 3, at 1680-87; Office of Tribal Justice, *supra* note 1.

64. See Goldberg & Singleton, *supra* note 56, at 7.

65. See Office of Tribal Justice, *supra* note 1.

66. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (giving civil/regulatory jurisdiction but refusing to allow state jurisdiction to preempt tribal jurisdiction); see also Goldberg & Singleton, *supra* note 56, at 7; Jiménez & Song, *supra* note 3, at 1680-87 (discussing Supreme Court cases supporting concurrent jurisdiction); Office of Tribal Justice, *supra* note 1.

touched.”<sup>67</sup>

### B. Tribal Court Systems in Minnesota

The tribes of Minnesota, while governed differently, have all demonstrated a desire to operate an independent court system. Each of the member bands of the Minnesota Chippewa Tribe currently has its own trial court system.<sup>68</sup> The Bois Forte court, formed in 1974, exercises general civil jurisdiction and misdemeanor criminal jurisdiction and is supervised by the Minnesota Chippewa Tribe Court of Appeals.<sup>69</sup> The White Earth Court was established in 1978 and exercises general civil jurisdiction and is supervised by the White Earth Appellate Court.<sup>70</sup> The Mille Lacs Band operates a tribal court, and has since the early 1980s.<sup>71</sup> This court rides a circuit, has broad civil jurisdiction, and misdemeanor criminal jurisdiction over Indian offenders.<sup>72</sup> The “Fond du Lac [ ] court exercises general civil jurisdiction and serves as the [Band’s] conservation court.”<sup>73</sup> A Fond du Lac appellate court is in place, but judicial positions have yet to be filled.<sup>74</sup> Grand Portage Band operates a tribal court exercising general civil jurisdiction with the exception of family law matters.<sup>75</sup> There are four judges, and the three not assigned to the trial serve as the Court of Appeals.<sup>76</sup> Leech Lake’s court has general civil jurisdiction that includes jurisdiction over certain traffic matters, conservation cases, and child welfare proceedings.<sup>77</sup> The Red Lake Band, which is independent of the Bands of the Minnesota Chippewa Tribe, also has its own tribal court system.<sup>78</sup>

Tribes other than the Chippewa Bands in Minnesota also have tribal court systems in place. The Court of the Lower Sioux, created in 1993, has general civil jurisdiction and is supervised by its own Court of Appeals.<sup>79</sup> The Prairie Island Court began operating in 1994, and has broad civil jurisdiction.<sup>80</sup> The Shakopee Mdewakanton Sioux (Dakota) Community also operates a court to hear civil cases.<sup>81</sup> The Upper Sioux Indian Community Tribal Court was created in 1994, and is supervised

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67. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 560-61 (2005).

68. See Minnesota American Indian Bar Association, Tribal Courts, <http://www.maiba.org/tribalCourts.html> (last visited May 21, 2008).

69. See *id.*

70. See *id.*

71. *Id.*

72. See *id.*

73. See *id.*

74. See *id.*

75. See *id.*

76. See *id.*

77. See *id.*

78. See *id.*

79. See *id.*

80. See *id.*

81. See *id.*

by its own Court of Appeals.<sup>82</sup>

Almost all states that have crafted some form of tribal court/state court agreement on recognition of judgments and other judicial matters have done so through the formation of a tribal-state forum.<sup>83</sup> The forums typically consist of state, federal, and tribal court judges and lawyers. The objective of a forum is for individuals to come together in order to discuss and formulate cooperation between state and tribal courts. While federal law prohibits forums from altering jurisdictional distribution between the state and tribes, there is nothing prohibiting forums from developing structures for cooperation within the current jurisdictional allocation and the mutual recognition of judgments.<sup>84</sup> The forum is an extension of state and tribal judiciaries working to develop procedural guidelines, not a legislative body attempting to alter substantive law. The first meeting of Minnesota's Tribal-State Court Forum was held in July 1998, when working groups were created to explore issues such as Full Faith & Credit, Children's Law, and Judicial Exchange. After a decade in existence, Minnesota's Forum continues to be active.

### III. THE GENESIS OF JOINT TRIBAL-STATE JURISDICTION

The Leech Lake Reservation is located in rural north-central Minnesota, approximately 235 miles north of Minneapolis-St. Paul and 100 miles south of the Canadian border. The Reservation covers over 1050 square miles within its boundaries, and primarily consists of forests, lakes, and wetlands with small Indian and rural residential communities. The Reservation has a few towns and 15 Indian communities, or "villages," that are separated by distances of 20 to 80 miles. Adequate transportation for reservation residents is seriously lacking. The Reservation encompasses sections of four counties—Beltrami, Cass, Hubbard, and Itasca—and is divided among seven Minnesota school districts. Over half of the Reservation is located in Cass County, which is ranked sixth in the state for the number of persons who are 200% below the poverty level.<sup>85</sup> The Native American unemployment rate on the Res-

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82. *See id.*

83. *See, e.g.,* Leeds, *supra* note 52, at 359-60 (discussing need for cooperation and benefits of familiarity between tribal and state judges in Colorado); Jones, *supra* note 21, at 483-84 (discussing need for dialogue and use of forums); Tebben, *supra* note 54, at 182 (stating the forum essential to Wisconsin's adoption of protocols); Washburn & Thompson, *supra* note 57 (discussing Minnesota and Arizona approaches); Bureau of Justice Assistance, *Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America: Executive Summary*, at 7 (William Brunson ed., 2005), [http://www.law.und.nodak.edu/npilc/judicial/web\\_assets/pdf/ExecSum9-05.pdf](http://www.law.und.nodak.edu/npilc/judicial/web_assets/pdf/ExecSum9-05.pdf) (reporting a national meeting of state and tribal officials recognized need to bring federal, state and tribal judges together to implement judicial cooperation); *cf.* Cavanagh, *supra* note 50, at 712 (discussing Michigan's formation of a forum for state-tribal court relations).

84. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 67, at 142-43.

85. U.S. CENSUS BUREAU, AMERICAN FACTFINDER: MINNESOTA BY COUNTY: INCOME AND POVERTY IN 1999 (2000), <http://factfinder.census.gov> (select "Minnesota" from state pull-down menu, select "People" tab, select "Poverty" tab, select "2000" tab, select "Income and Poverty: For all

ervation continues to hover near 26%, with 70% employed but below the poverty level, reflecting that poverty continues to be a serious problem.<sup>86</sup>

As is the case throughout Indian Country, public safety and substance abuse are serious issues on the Leech Lake Reservation. Crime statistics from the Band's Police Department Dispatch bear witness to the stark reality of life on the Reservation, as records show a steady increase in the number of calls for service from 6379 in 2002 to 9417 in 2006.<sup>87</sup> In 2006, Leech Lake Police responded to 436 assaults/fights, 29 sexual assaults, 195 domestic calls, 105 drug complaints, 13 stabbings, and 95 shootings/gun calls.<sup>88</sup> Thankfully, the reservation had only one murder resulting from this activity in 2006, down from six murders in 2005.<sup>89</sup>

Statistics from the Leech Lake Band of Ojibwe Addictions and Dependency (A&D) Program show that of the 656 adults and juveniles who received Rule 25<sup>90</sup> chemical dependency assessments in 2006, 95% were referred to either an in-patient or out-patient substance abuse treatment program.<sup>91</sup> In addition, an alarmingly high percentage of Leech Lake Reservation residents suffer from co-occurring mental health issues.<sup>92</sup> According to the Minnesota Department of Public Safety, during 2004-2006, over 50% of the state's 540 alcohol-related fatalities and 1369 injuries occurred in just 15 of 87 counties and cost the state and communities an estimated \$350 million.<sup>93</sup>

From 2002 through 2004, more than 50% of Minnesota's alcohol-related traffic fatalities and serious injuries occurred in 13 of 87 counties.<sup>94</sup> The 306 deaths and 612 serious injuries from the alcohol-related

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Counties").

86. OFFICE OF TRIBAL SERVS., U.S. DEP'T OF THE INTERIOR, AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT 2003, <http://www.doi.gov/bia/laborforce/2003LaborForceReportFinalAll.pdf>.

87. See Leech Lake Band of Ojibwe Tribal Police Department Uniform Crime Reports, 2002-2006. The number of calls received was: 6379 in 2002; 7786 in 2003; 9247 in 2004; 9266 in 2005; and 9417 in 2006.

88. See *id.*

89. See *id.*

90. When a person is seeking chemical dependency treatment and needs public funding to pay for the treatment, they get a chemical use assessment. The assessor gathers information from the client and concerned others and applies criteria to determine whether the person needs treatment and what sort of treatment would be best. This assessment process and the decision criteria are governed by Rule 25. MINN. R. 9530.6600-.6655 (2007).

91. Leech Lake Data: General (on file with author).

92. See *id.*

93. See Minn. Office of Traffic Safety, Impaired Driving Facts, [http://www.dps.state.mn.us/OTS/crashdata/impaired\\_driving.asp](http://www.dps.state.mn.us/OTS/crashdata/impaired_driving.asp) (last visited May 21, 2008); Minn. Office of Traffic Safety, [http://www.dps.state.mn.us/ots/enforcement\\_programs/NightCAP/87\\_counties\\_list.xls](http://www.dps.state.mn.us/ots/enforcement_programs/NightCAP/87_counties_list.xls) ("Minnesota's Deadliest Impaired Driving Counties") (last visited May 21, 2008).

94. See Minn. Office of Traffic Safety, Impaired Driving Facts, [http://www.dps.state.mn.us/OTS/crashdata/impaired\\_driving.asp](http://www.dps.state.mn.us/OTS/crashdata/impaired_driving.asp) (last visited May 21, 2008); Minn. Office of Traffic Safety, [http://www.dps.state.mn.us/ots/enforcement\\_programs/NightCAP/87\\_counties\\_list.xls](http://www.dps.state.mn.us/ots/enforcement_programs/NightCAP/87_counties_list.xls) ("Minnesota's Deadliest Impaired Driving Counties") (last visited May 21, 2008).

crashes cost the state an estimated \$362 million.<sup>95</sup>

From January 1, 2000 through December 31, 2002, Cass County experienced 30 fatalities and 231 alcohol-related injuries.<sup>96</sup> Between 2001 and 2003, there were 26 alcohol related fatalities in Cass County; this represents one death for every 1044 people, compared with one death for every 19,244 people in Hennepin County, Minnesota during the same time period.<sup>97</sup> Cass County's population of 28,910 represents only a fraction of all other counties, but its 26 deaths were the fifth highest in the state.

In Minnesota, disproportionate minority contact is a serious issue facing the state judicial system. Indian children are vastly *over*-represented in the child protection and juvenile justice systems, and youth are gravely at-risk. According to statistics available from the State of Minnesota Department of Human Services, American Indians made up 11.5% of the total number of children in out-of-home placements in 2005.<sup>98</sup> In contrast, demographic data shows that the American Indian population in Minnesota according to the 2000 census was only 1.6%.<sup>99</sup> American Indian juveniles are even more vastly over-represented in the juvenile delinquency population in the state than in the child protection system. Statistics available from the Minnesota Department of Corrections show that American Indians comprise 22.4% of the juvenile inmate population incarcerated in Minnesota's juvenile correctional facilities.<sup>100</sup>

Both tribal and state court systems share the goals of improved outcomes for families, fewer children in out-of-home placement, and decreased incarceration and recidivism rates. Unfortunately, neither

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95. See Minn. Office of Traffic Safety, Impaired Driving Facts, [http://www.dps.state.mn.us/OTS/crashdata/impaired\\_driving.asp](http://www.dps.state.mn.us/OTS/crashdata/impaired_driving.asp) (last visited May 21, 2008); Minn. Office of Traffic Safety, [http://www.dps.state.mn.us/ots/enforcement\\_programs/NightCAP/87\\_counties\\_list.xls](http://www.dps.state.mn.us/ots/enforcement_programs/NightCAP/87_counties_list.xls) ("Minnesota's Deadliest Impaired Driving Counties") (last visited May 21, 2008).

96. See Minn. Office of Traffic Safety, Impaired Driving Facts, [http://www.dps.state.mn.us/OTS/crashdata/impaired\\_driving.asp](http://www.dps.state.mn.us/OTS/crashdata/impaired_driving.asp) (last visited May 21, 2008); Minn. Office of Traffic Safety, [http://www.dps.state.mn.us/ots/enforcement\\_programs/NightCAP/87\\_counties\\_list.xls](http://www.dps.state.mn.us/ots/enforcement_programs/NightCAP/87_counties_list.xls) ("Minnesota's Deadliest Impaired Driving Counties") (last visited May 21, 2008).

97. See Minn. Office of Traffic Safety, Impaired Driving Facts, [http://www.dps.state.mn.us/OTS/crashdata/impaired\\_driving.asp](http://www.dps.state.mn.us/OTS/crashdata/impaired_driving.asp) (last visited May 21, 2008); Minn. Office of Traffic Safety, [http://www.dps.state.mn.us/ots/enforcement\\_programs/NightCAP/87\\_counties\\_list.xls](http://www.dps.state.mn.us/ots/enforcement_programs/NightCAP/87_counties_list.xls) ("Minnesota's Deadliest Impaired Driving Counties") (last visited May 21, 2008); MINN. STATE DEMOGRAPHIC CENTER, 2006 POPULATION AND HOUSEHOLD ESTIMATES 3, <http://www.co.cass.mn.us/pdfs/population.pdf> (last visited May 21, 2008); HENNEPIN COUNTY RESEARCH, PLANNING, & DEV., HENNEPIN COUNTY 2006 POPULATION FACT SHEET: AGE, GENDER, AND RACIAL COMPOSITION, <http://www.co.hennepin.mn.us/images/HCInternet/YCG/Departments/Research,%20Planning,%20&%20Development/HC%202006%20population%20Fact%20Sheet.pdf> (last visited May 21, 2008).

98. MINN. DEP'T OF HEALTH AND HUMAN SERVS., MINNESOTA'S CHILDREN IN OUT-OF-HOME CARE REPORT FOR 2005 8, [http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16\\_136543.pdf](http://www.dhs.state.mn.us/main/groups/publications/documents/pub/dhs16_136543.pdf) (select "Attachment C").

99. *Id.*

100. MINN. DEP'T OF CORR., JUVENILE INMATE PROFILE AS OF 01/01/2008, <http://www.doc.state.mn.us/aboutdoc/stats/documents/JuvenileProfile01-01-08.pdf> (last visited May 21, 2008).

system can claim complete success in reaching these goals on its own. For example, state courts have historically placed the focus on the symptoms of the drug and alcohol epidemic, and these courts are often inadequately equipped to deal with the root causes. Rather than building on the strengths and capabilities of offenders and their families, the state court system has simply dealt with their deficiencies and preached virtue at them, rarely successful in dealing with the problems that undercut their chances of success. Minnesota Department of Corrections statistics affirm this, as 36% of offenders released in 2002 were reconvicted within three years of their release; of these, 25% were reincarcerated.<sup>101</sup> For property crimes, a staggering 49% were reconvicted within three years of their release, and 38% were reincarcerated.<sup>102</sup> Approximately 33% of person and other drug (non-methamphetamine) offenders were reconvicted within three years of release, with 22% being reincarcerated.<sup>103</sup> Statistics for juvenile recidivism are no better, due in large part to the fact that many offenders have significant mental health issues and are on psychiatric medications.<sup>104</sup> Twenty-six percent of juvenile offenders released from Minnesota's Redwing facility in 2001 or 2002 were reconvicted of a felony offense within a year of release, and 15% were reincarcerated.<sup>105</sup> Within three years of release, 53% had been reconvicted of a felony, with 38% being reincarcerated.<sup>106</sup> Significantly, reconviction and reincarceration rates were highest among juvenile offenders who were originally convicted of a drug or person offense.<sup>107</sup> In addition, although many juvenile offenders are receiving chemical dependency treatment while incarcerated, 47% of the offenders who entered treatment were reconvicted of a new felony within two years of release, and 32% were reincarcerated.<sup>108</sup> Within three years of release, the recidivism rate for offenders who entered chemical dependency treatment while incarcerated is even higher: 57% were reconvicted of a felony, and 43% were reincarcerated.<sup>109</sup>

Tribal systems are often no better equipped than the state courts to deal with justice issues stemming from substance abuse. For example, while the Leech Lake Band of Ojibwe has a Human Services Division with a Mental Health Program, an Addictions and Dependency Program, an Opioid Treatment Program, and a Family Services Program,

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101. MINN. DEP'T OF CORR., PERFORMANCE REPORT FOR FISCAL YEAR 2006 24-25 (Jan. 31, 2007), <http://www.doc.state.mn.us/publications/legislative-reports/documents/PerformanceReport200601-31-07.pdf>.

102. *See id.* at 28.

103. *See id.*

104. *See id.* at 29.

105. *See id.* at 30.

106. *See id.*

107. *See id.* at 31.

108. *See id.*

109. *See id.*

these programs are seriously under-staffed and under-funded and struggle to deal with the needs of the Reservation's population. Tribal members frequently must be sent outside of the community to receive inpatient substance abuse treatment. There is a lack of adequate aftercare services in the community, and many relapse after being returned to the same home environment without having had their mental health needs adequately addressed. In addition, there can be up to a six-week waiting list for Tribal chemical dependency assessments to be performed.

Clearly, "justice as usual" has not resulted in acceptable outcomes for those involved in the juvenile and adult justice systems in northern Minnesota. Over time, it has become clear that the solution to adequately addressing the needs of offenders and breaking the cycle of drug and alcohol dependence is inter-governmental and inter-agency collaboration. In response to the bleak situation in Cass County and on the Leech Lake Reservation, in 2006, the Leech Lake Tribal Court teamed up with the Cass County District Court to form a unique problem-solving court that is the first of its kind in the nation. Created under grants from the Minnesota State Court Administrator's Office and the Bureau of Justice Assistance, Tribal Courts Assistance Program, the Leech Lake-Cass County Wellness Court ("the Wellness Court") is a post-conviction, post-sentencing Driving While Impaired (DWI) Court founded on the ten principles of drug courts, and handles the cases of both tribal members and non-Indians. The mission of the Wellness Court is to enhance public safety by providing hope and opportunities for appropriate treatment with accountability, thereby improving the quality of life within families and in the community. The Leech Lake Tribal Court Chief Judge Wahwassuck and Cass County District Court Judge Smith are part of a multi-jurisdictional, multi-disciplinary core team made up of representatives from Tribal, County, State, and other agencies, and they preside together over hearings that alternate between the courts. The Leech Lake Tribal Court recently installed a state-of-the-art Interactive Videoconferencing (ITV) system for the courtroom, enabling Wellness Court sessions to run simultaneously in Cass Lake (in the tribal courtroom) and in Walker (in the district courtroom). Clients in the Wellness Court will have the option of appearing for the court hearings either in Cass Lake or Walker, whichever is most convenient.

The Wellness Court was made possible by a Joint Powers Agreement executed between the judges of the Leech Lake Tribal Court and the Cass County District Court. 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. Under the Joint Powers Agreement, the two court systems work collabora-

tively and creatively for better results for those involved in the adult and juvenile justice systems. The partnership between the two Court systems has resulted in elimination of some of the “us versus them” attitude that has historically prevailed, and tribal members have a more comfortable feeling when appearing in Cass County District Court. The agreement has also helped strengthen services to families that otherwise may go unaddressed because of lack of funding available to the Leech Lake Band. The Band is also able to have a hand in healing for Tribal members, as the Tribal Court is now involved in cases that historically were beyond its reach because the cases did not involve the Indian Child Welfare Act.<sup>110</sup>

The Joint Powers Agreement has opened the possibility for development of shared facilities and collaboration on other types of cases besides those handled by the Wellness Court. For example, part of the Leech Lake Tribal Court’s Strategic Plan calls for creation of a Regional Justice and Public Safety Center, with adequate facilities to host visiting judges from other tribal, federal, and state courts for hearings in cases pending in those jurisdictions.<sup>111</sup> In addition, the Tribal Court’s recently installed ITV system, which is on the same network as the Minnesota Judicial Branch, will make it possible for participants in State District Court cases to appear in Tribal Court and be hooked up live to the District Courts for some proceedings, thus significantly cutting down time and travel for these hearings. The Courts are also cooperating on community service arrangements so that Tribal Members can complete their hours on the Reservation, in their own communities. The Courts are beginning to collaborate on juvenile delinquency cases, and are developing a diversion program that will allow the Tribal Court to provide supervision in a culturally-appropriate manner. In addition, collaboration between the Leech Lake Tribal Court and the Minnesota Department of Corrections has made it possible for incarcerated parents to appear via ITV for hearings in child protection cases pending in Leech Lake Tribal Court.

Involvement in the Wellness Court has brought unprecedented recognition not only for the Leech Lake Tribal Court, but also for tribal sovereignty in general. On February 23, 2007, the official Leech Lake

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110. The Indian Child Welfare Act (ICWA)

is a federal law that seeks to keep American Indian children with American Indian families. Congress passed ICWA in 1978 in response to the alarmingly high number of Indian children being removed from their homes by both public and private agencies. The intent of Congress under ICWA was to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.” ICWA sets federal requirements that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe.

National Indian Child Welfare Association, [www.nicwa.org/Indian\\_Child\\_Welfare\\_Act/](http://www.nicwa.org/Indian_Child_Welfare_Act/) (last visited May 21, 2008) (citation omitted).

111. Strategic Plan, Leech Lake Tribal Court, 2007-2012 (on file with author).

Tribal Flag was permanently installed in the Cass County District Court to memorialize the Joint Powers Agreement between the Courts. The flag is displayed alongside the United States and Minnesota state flags in the courtroom of District Court Judge John P. Smith. This historic event opened with a pipe ceremony and was attended by two Minnesota State Legislators; a Minnesota State Senator; a Minnesota Supreme Court Judge; and the Minnesota State Court Administrator, to name but a few. Recognition of the legitimacy of tribal courts has further enhanced the relationship between the two governments as well. Cass County District Court Judge John P. Smith stated:

There was a time when I thought Tribal Courts were inferior to State or Federal Courts. I have come to understand that they are equal, parallel systems to ours. Having the Leech Lake flag in my courtroom will be a daily reminder of the sovereign status of the Leech Lake Band of Ojibwe.<sup>112</sup>

The success of the Leech Lake-Cass County Wellness Court has been closely watched by other jurisdictions, and the concept is catching on in northern Minnesota. For example, in June 2007, the Itasca County District Court in Grand Rapids, Minnesota went operational with its own Wellness Court after months of development that included input from the Leech Lake Band of Ojibwe. Not only were tribal staff invited to participate in the planning stages, but the Leech Lake Chief Judge now regularly takes the bench alongside Itasca County District Court Judge John Hawkinson to preside over Wellness Court hearings. On February 22, 2008, the judges of the Leech Lake Tribal Court and the three judges of the Itasca County District Court signed a Joint Powers Agreement similar to that executed with Cass County, and Leech Lake Tribal Flags were installed in all three Itasca County Courtrooms. Minnesota Supreme Court Chief Justice Russell Anderson and Associate Justice Lorie Gildea were active participants in the Itasca County Ceremony.

The Leech Lake Tribal Court-Cass County District Court Joint Powers Agreement has also set an example that is being followed elsewhere, even in non-judicial settings. For example, the Leech Lake Tribal Council and the Cass County Board of Commissions now regularly hold joint meetings; the Wellness Court contracts with the Band's Police Department for some supervision services; and other Tribal Courts in Minnesota are opening lines of communication with their State Court counterparts.

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112. John P. Smith, Cass County District Court Judge, Speech at Leech Lake/Cass County Tribal Flag Ceremony (Feb. 1, 2007); see also *The Leech Lake Band: A Diverse & Strong Community*, INITIATIVE Q., Summer 2007, at 13.

## IV. PRACTICAL SUGGESTIONS TO FOSTER JOINT JURISDICTION

As the Leech Lake-Cass County Wellness Court began to gain national attention, it became clear that other jurisdictions could benefit from similar partnerships. Although there was nearly universal interest in the benefits collaboration can provide, many jurisdictions—tribal and state—simply did not know how to begin. Others insisted that collaboration would never happen “where they come from.” Wishing to assist others with launching their own partnerships, Judge Wahwassuck and Judge Smith developed the Leech Lake-Cass County Cooperative Model, a simple three-step guide to opening the door for collaboration. To illustrate how separate systems can begin the process, development of the Wellness Court within the framework of the Leech Lake-Cass County Cooperative Model is described below.

In launching any new venture, efforts are often met with resistance and just getting started is often the hardest part. For this reason, Step One of the Leech Lake-Cass County Wellness Court Model is entitled *Getting Started—“A Million and One Excuses Why It Won’t Work” (or “You can’t pound square pegs into round holes”)*.<sup>113</sup> Those involved with various systems often become entrenched in their own way of doing things, thinking that their way is the best or only way. The idea of cooperation seems impossible, even if there might be benefits for both “sides.” Take, for example, the situation in which the Leech Lake Tribal Court and the Cass County District Court found themselves prior to 2006. On the one hand, mistrust of the “white man’s” judicial system was rampant among tribal members; on the other, the Tribal Court was not taken seriously by many in the dominant legal culture. How could the two systems possibly work together? And why would they even bother? The answer lies in a problem shared by both systems: staggeringly high numbers of people dying in alcohol-related crashes on the highways of Cass County.<sup>114</sup>

In 2006, the Minnesota Judicial Council, the administrative policy-making authority for the Minnesota Judicial Branch, made expansion of drug courts a top priority for the Minnesota Judicial Branch. As part of this initiative, the Cass County District Court, determined to address its impaired driving crisis, started its own DWI Court. But in order for this new approach to work, Cass County Judge John P. Smith was convinced that the Leech Lake Band of Ojibwe must be involved. In early 2006, Judge Smith and Cass County Probation Director Reno Wells traveled to the Leech Lake Reservation to meet with the Chairman of the Leech Lake Tribal Council and ask for the Band’s help. Judge Smith risked

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113. KOREY WAHWASSUCK & J.P. SMITH, THE LEECH LAKE-CASS COUNTY COOPERATIVE MODEL app. A (2007).

114. See Minnesota Department of Public Safety, *supra* note 93.

being rejected, because historically Tribal members have been mistrustful, even hostile, toward the state judicial system in Minnesota. But Judge Smith was willing to take that chance for the sake of meaningful, lasting change.

After Judge Smith took the first step by coming forward to ask for help, the Cass County District Court and the Leech Lake Tribal Court moved to Step Two in the cooperative model: *Opening Lines of Communication—“Finding Common Goals.”*<sup>115</sup> As the judges of the two jurisdictions began examining the problem of impaired driving and its devastating effects, a set of common goals emerged. Both wanted a decrease in the number of arrests for drunken driving, fewer fatalities, and decreased recidivism rates, to name but a few of the shared goals. Both systems were working toward the same goals, albeit in different ways, and previous efforts by both systems were not successful. It soon became very clear that, although the two systems operated differently, collaboration was the key to addressing this common problem.

When examined through the lens of common goals, working together seemed much less of an insurmountable challenge. The two jurisdictions were now ready to move to the final step, Step Three in the cooperative model: *Exploring Collaboration—“Finding Common Ground.”*<sup>116</sup> Based on their common objectives, the two jurisdictions found something on which they could work together collaboratively, and the Leech Lake-Cass County Wellness Court was formed—the first of many cooperative efforts between the two systems.

Further suggestions for fostering cooperation are listed below, and the Leech Lake-Cass County Cooperative Model can facilitate each of them. For the sake of convenience, these suggestions are listed as bulleted points, and examples of how the italicized items are being implemented in Minnesota are discussed in more detail below.

- *Tribal and state judges should meet together in person regularly to discuss issues of common concern, and should develop procedures to contact each other by telephone to answer questions or resolve problems.*
  - Bar Association Directories should include contact information for tribal courts.
  - Judicial governing bodies should include cooperation between state and tribal courts as part of their strategic plans for the state judiciary.
  - State legislatures should enact Full Faith and Credit Statutes providing for recognition of tribal court orders.
- *State Court Administrators’ offices should offer support to tribal*

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115. WAHWASSUCK & SMITH, *supra* note 113.

116. *Id.*

*courts to help their staff develop case management tools.*

- Create an online clearinghouse in each state for tribal court materials.
- Formulate a brief publication on basic Indian law issues to be distributed to judges and attorneys in each state. The publication should address tribal sovereignty, basic attributes of tribal courts, issues concerning suing a tribe, where to file claims, tribal court jurisdiction, contact information for tribal court clerks, and any other appropriate issues.<sup>117</sup>
- *Create intergovernmental agreements allowing for shared facilities, programs, and personnel by state and tribal court systems, including cross-appointment of judges and judicial staff or probation officers.*
  - Develop protocols covering such things as allowing tribal courts to petition the State Supreme Courts for a controlling statement of state law, and for state courts to certify questions of tribal law to tribal courts.
- *Develop a system for sending a federal or state magistrate judge to the reservations to hear motions and cases to alleviate the burden on Indians having to travel long distances for court appearances.*
  - Encourage and enable tribes to develop their courts to handle litigation to the fullest extent of their jurisdiction.
- *Assist tribal courts in applying for federal grants under the Indian Tribal Justice Technical and Legal Assistance Act of 2000.*<sup>118</sup>
  - Sponsor state and tribal judges to attend educational seminars on tribal law and state-tribal court cooperation.<sup>119</sup>

As discussed above, successful collaboration requires regular face-to-face meetings between tribal and state judges, especially at the district and county level, as these are the judges most likely to need coop-

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117. See, e.g., Christopher B. Chaney, *Tribal Courts- Justice on Utah's Reservations*, 11 UTAH B. J. 26 (1998); Stanley G. Feldman & David L. Withey, *Overlapping Justice: Addressing Jurisdictional Dilemmas Between State and Tribal Courts*, 56 OR. ST. B. BULL., July 1996, at 17; Gabriel S. Galanda, *Reservations of Right: A Practitioner's Guide to Indian Law in Montana*, 28 MONT. LAW., Jan. 2003, at 7; Gabriel S. Galanda, *Arizona Indian Law*, 39 ARIZ. ATT'Y, Jan. 2003, at 24; Gabe Galanda, *Legal Practice Tips: Indian Law Essentials*, 63 OR. ST. B. BULL., Oct. 2002, at 29; Gabriel S. Galanda, *Reservations of Right: A Practitioner's Guide to Indian Law in Nevada*, 10 NEV. LAW, Oct. 2002, at 23.

118. 25 U.S.C. §§ 3651-81 (2006); see, e.g., BUREAU OF JUSTICE ASSISTANCE, TRIBAL COURT ASSISTANCE PROGRAM: FACT SHEET 1 (Winter 2005), available at [http://www.law.und.nodak.edu/npile/judicial/web\\_assets/pdf/TCApprog.pdf](http://www.law.und.nodak.edu/npile/judicial/web_assets/pdf/TCApprog.pdf).

119. See, e.g., Bureau of Justice Assistance, *supra* note 83 (describing annual Pathways to Justice conferences, national meetings between state and tribal leaders).

eration between their judicial systems. In Minnesota, members of the State Court-Tribal Court Forum meet several times a year. These meetings allow the judges to get to know one another, discuss common concerns, and share ideas. Such communication has made it possible for other Tribal and State jurisdictions, even those that have historically been at odds with one another, to open lines of communication and explore collaboration.

While collaboration is often initiated at the judicial level, it must be implemented at the administrative level. Thus, for any cooperative effort to be successful, those who are “in the trenches” must be involved in the process and take ownership in it. Not surprisingly, Minnesota state court staff historically suffered from the same lack of understanding as state court judges of how Tribal Courts function. Although some Tribal Courts have sophisticated case management systems, others struggle with administration and case management challenges, often perpetuating the misconception that Tribal Court staff are at best untrained and at worst incompetent. To foster better communication and understanding, State Court Administrators from Minnesota’s Ninth Judicial District have opened their quarterly meetings to administrative staff from Tribal Courts in the district. At these meetings, administrators from both systems share ideas and discuss challenges, thus providing support to one another and ensuring that lines of communication remain open.

A dearth of available funding for judicial activities has created budget crises for both the state and tribal court systems in Minnesota. Many courts face such challenges, as there are too few judges and support staff to handle increasingly large caseloads, and inadequate and outdated court and jail facilities. As a result, jurisdictions in northern Minnesota are now seeking creative solutions to address this fiscal dilemma, and the systems now routinely support each other’s applications for grant funding. One example of facility cross-utilization is found in the Leech Lake Tribal Court’s Strategic Plan, which calls for the creation of a “first-of-its-kind, state-of-the-art Regional Justice and Public Safety Center, with [adequate] space to [house] visiting judges” from other tribal, federal, and state jurisdictions to hold hearings in cases pending in those jurisdictions.<sup>120</sup> This proposal will also foster collaboration between the Leech Lake Police Department and the Sheriffs’ Departments in surrounding counties. Due to a lack of adequate jail space, these counties are now forced to send their overflow prisoners to be held in other jurisdictions, resulting in additional cost to the counties and the inability for these inmates to maintain meaningful contact with

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120. Strategic Plan, *supra* note 111.

family and legal support because they are far from home. The Leech Lake Public Safety Center will have adequate space to house these overflow inmates, resulting not only in a cost savings to the counties, but also in a unique economic development opportunity for the Leech Lake Band. It is also anticipated that this collaboration will help achieve the mutual goal of decreased recidivism rates, as offenders will have stronger support systems, thus enhancing their chances of living a crime-free life upon release. The Band recently applied for federal funding to conduct a feasibility study and create a planning committee, and the plan was met with enthusiasm not only from surrounding jurisdictions, but also from the Minnesota Department of Corrections, which officially endorsed the Band's application by submitting a letter of support to the Department of Justice.

In addition to plans for shared judicial and public safety facilities, discussions have begun to create a Juvenile Probation Officer position, the cost of which would be split between the Leech Lake Band of Ojibwe and the Cass County Probation Department. Finally, the Joint Powers Agreement has helped alleviate judicial shortages, as illustrated by the fact that the Leech Lake-Cass County and Itasca County Wellness Court judges now have the ability to cover hearings for each other should a scheduling conflict arise.

Although judicial systems are institutions, they are run by individuals, and those individuals determine whether collaboration will be successful. And although it may seem obvious, some do not recognize that the first step toward collaboration can be as easy as picking up the phone and saying, "Hello, my name is Korey Wahwassuck and I'm Chief Judge of the Leech Lake Tribal Court." As with any relationship, building a partnership between jurisdictions requires trust and a willingness to openly communicate. Through communication, change becomes possible. Stereotypes can be broken and misconceptions corrected. For example, despite years of work by organizations such as the Minnesota American Indian Bar Association and the Minnesota Tribal Court-State Court Forum, there remains a widespread lack of understanding about Tribal Courts in Minnesota. Until recently many state court judges were unaware that almost all of the Tribal Court judges in Minnesota are licensed attorneys. This simple fact came as a surprise to many who were unfamiliar with the structure of Tribal Courts. Once judges in the state court system realized that they have something in common with their Tribal Court counterparts, perceptions of tribal justice shifted, and the possibility of collaboration did not seem so far-fetched.

## V. CONCLUSION

The foundation for the Leech Lake-Cass County Wellness Court

and the Joint Powers Agreement is a set of common goals and objectives shared by both jurisdictions. Successful cooperation is only made possible by a willingness to communicate and to stay focused on these mutual goals. By going through the steps in the Leech Lake-Cass County Cooperative Model, common goals are surprisingly easy to find; all it takes is mutual willingness to give it a try. Even systems that, at first glance, seem diametrically opposed to one another can find common ground by picking just one goal, one project, one idea on which they can work together.

To make this collaboration possible, however, someone must be willing to take the first step, to ask for assistance, to extend a helping hand. Once that threshold is crossed, a world of possibilities opens. Cass County District Court Judge John P. Smith took a first step, and the resulting collaboration has changed the face of justice forever. Henry Ford once said that obstacles are those frightful things you see when you take your eyes off your goal. While the task of creating joint jurisdiction may appear daunting at first, the model created by the Leech Lake Tribal Court and the District Courts of Cass County and Itasca County can be reproduced elsewhere.

While relationships between the Leech Lake Band of Ojibwe and surrounding counties have historically been strained, the joint work broke down cultural barriers and resulted in more effective administration of justice in northern Minnesota. The cooperative arrangement made possible by the Joint Powers Agreement allows the Band to have a hand in promoting healing while at the same time exercising its inherent sovereignty. As noted by the Pilot-Independent, Leech Lake Tribal Chairman George Goggleye, Jr., summed it up nicely at the Cass County Flag installation ceremony: “‘This is [a] historic day’ . . . [The Band] is exercising its tribal sovereignty ‘in ways unheard of. This is totally new,’ . . . [and] the significance ‘may not sink in until later, when we see how well people are working together.’”<sup>121</sup> Joint tribal-state jurisdiction is the new face of justice in northern Minnesota, where concurrent jurisdiction no longer has to result in an “either-or” choice between forums. Each jurisdiction, be it tribal or state, brings to the table tools unique to its system, and by exercising jurisdiction cooperatively the courts can leverage scarce resources and achieve better results for those willing to venture into this new frontier of jurisprudence.

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121. Gail DeBoer, *Leech Lake Tribal Flag to Go on Display in District Court*, THE PILOT-INDEPENDENT, Feb. 28, 2007.