TRIBAL-STATE COLLABORATIONS

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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 discovers, Indian people hold right to occupancy

• Cherokee Nation v. Georgia, 30 U.S. 1 (1831)
  • “Guardian-ward”; “Domestic dependent nations”

  • 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
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
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.
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
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
Opportunities for Collaboration 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?
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
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.

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RESOURCES


