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**DISPUTED JURISDICTION AND  
RECOGNITION OF JUDGMENTS  
BETWEEN TRIBAL AND STATE COURTS:  
A SURVEY OF SEVEN STATES**

**1990**

**Prepared by**  
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# Disputed Jurisdiction and Recognition of Judgments between

## Tribal and State Courts: A Survey of Seven States

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Carol Friesen\*

The National Center for State Courts conducted a series of telephone interviews in 1989 with tribal and state court representatives and officials in seven states in order to develop a fuller understanding of the disputes arising in each state over the civil jurisdiction of tribal and state courts. An earlier mail survey had developed a typology of those states--identifying the most common jurisdiction disputes by casetype and reported on practices of recognizing judgments by full faith and credit or comity. The telephone survey sought to provide a basis for comparison among the seven states, each of which had reported numerous or serious disputes in the prior study, in order to inform the selection of three states as pilot demonstration forums for the next project stage.

Survey participants were selected from a variety of organizations within each state, and an effort was made to achieve a balanced view by soliciting both tribal and state perspectives and including representatives from a range of officials that have dealings in both court systems. Seven to 12 participants were interviewed in each state. Responses were obtained from a total of 23 judges, 8 court administrators, 11

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<sup>1</sup> Institute for Court Management of the National Center for State Courts, Denver Colorado. This research was conducted under Grant no. 88-14L-B-037 from the State Justice Institute. The opinions and recommendations expressed are those of the author and do not necessarily reflect the views or policies of the grantor or grantee.

private attorneys, 5 social service agency representatives, 11 government officials, and 7 attorneys general. Table 1 below presents a state-by-state breakdown of participants.

Table 1

Distribution of Survey Participants  
Tribal or State Affiliation

	AK		AZ		ND		OK		SD		WA		WI		Totals	
	Tr	St	Tr	St	Tr	St	Tr	St	Tr	St	Tr	St	Tr	St	Tr	St
Judges	1	3	1	3		2	2	2	2	1	1	1	2	2	9	14
Ct. Admin.		1		2			1	1		1			1	1	2	6
Attorneys	1		1		2				2		3		1	1	10	1
Soc. Svc. Agcy. Rep.		1		1				1		1		1			0	5
Govt. Officials		1	2	1		3	1	2						1	3	8
Atty. Gen.		1		1		2		1		1		1			0	7
Totals:	2	7	4	8	2	7	4	7	4	4	4	3	4	5	24	41

The survey instrument was comprised of three parts: The first asked for detailed responses about specific areas of jurisdictional conflict; the second asked about practices of mutual recognition of orders and judgments (i.e., full faith and credit or comity); and the third elicited information and suggestions about how to resolve jurisdictional conflicts without unnecessary litigation. Table 2 below contains the results of the first section of the survey.

Table 2  
Number of Participants Mentioning Conflict within a Casetype

	AK	AZ	ND	OK	SD	WA	WI
Domestic Relations	5 *1 **1	8 **3	7 *4 **3	3 *1	6 *2 **4	6 *3 **3	4 *3 **2
ICWA	7 *5 **6	8 *3 **1	6	6 *1 **2	7 *4 **3	5 *3 **4	5 *2 **2
Economic & Com. Development	2	5 *3	4	1 *1 **1	5	4	3
Taxation	3 *1	8 *2 **2	5 *2 **1	8 *3 **5	3	3	4 **1
Tort Claims		6	5	1	4	2	3 **1
Installment Contracts		4 *2 **1	3 **1	1	2 *1	2	2 **1
Gambling		2	2	6 *1 **1	3		4
Natural Resources		2	1 *2	2	1	*1 **1	5
Water Regulation	1	3	1			3	
Hunting/ Fishing	5	3	4	4	5 **1	5	6
Haz. Waste		1				1	
Traffic		4	1	3	2 *1	5	4 **3
Disposition of Remains	2	4 **1	3	1	2		1
Religious Freedom		2	2	2			
Other:							
Probate/Estates		1		2			
Mental Health		4 *1					
Contract	1	1					
Small Claims							1
Worker's Comp.			1				1
Discrimination							1
Paternity			1				
Termination of Emp.			1				
Driver's License			1				
Total Participants	9	12	9	11	8	7	9

• Number of participants who said this area was "most difficult"

\*\* Number of participants who said this area was "most common"

The first column contains the number of participants who answered "yes" to the question: "Has there been a jurisdictional conflict in this casetype in the last three years?" while the second column indicates the number of participants who said a particular casetype was either the most difficult or most common of all. The two columns, when taken together, can provide a reasonably reliable basis for identifying the key conflict areas. Frequency of mention (column 1) does not alone provide a reliable basis for identifying the key areas of conflict for two reasons: First, a "yes" answer in this section can have six different meanings. It can mean "yes, I know of a jurisdictional dispute in this area; yes, I know of a case in this area (no jurisdictional dispute); yes, a lot of these cases come up and there may be some jurisdictional conflicts; yes, there is a controversy in this area; yes, we handle these cases; or yes, I know something about that topic."

As a rule, only the last two "yes" responses were excluded from the tally, since a more strictly circumscribed result would have excluded valuable information and key areas of concern. Further, a word of caution against equating frequency of cases with frequency of mention. Oftentimes, especially in the economic and commercial development, taxation, and disposition of Indian remains and artifacts cases, a number of respondents all mentioned the same significant case. A high number of mentions can also indicate a territorial conflict over police authority, which has no direct impact on the civil courts at the present time, as is the case for the hunting and fishing category in Wisconsin.

Domestic relations and Indian Child Welfare Act cases are the most often-mentioned in almost every state, and are quite frequently identified as "most common"

and "most difficult". There is an important distinction to be made between the two casetypes, which does not emerge from the data. Domestic relations cases frequently end in disputes over which court should have jurisdiction and whether one court will enforce the child support, custody, or domestic violence restraining order of the other. Under the Indian Child Welfare Act casetype on the other hand, participants seldom cite disputes over court jurisdiction. They often say that state courts are quite good about transferring cases when they are aware of the law, but they note other difficulties in administering the law, such as determining who is an Indian child.

The following profiles of each state are organized for the purpose of providing ready comparisons in five categories: Indian country and tribal courts, jurisdictional conflicts, recognition of judgments, legislation and formal agreements, and cooperation. The first section--Indian country and tribal courts--gives pertinent background information on the number of tribes, definitions of territory, laws, key decisions governing jurisdiction (e.g., PL280), and the development of tribal courts within the state. The second section--jurisdictional conflicts--selects the most significant casetypes in each state, according to criteria mentioned above, and elaborates on the most salient cases or problems. The third section--recognition of judgments--looks for (but seldom finds) consensus on what rules or rules of thumb judges apply when they honor or deny each other's orders and judgments. The fourth section is simply a list of legislation (pending or enacted) and formal agreements that help to define jurisdiction or resolve jurisdictional conflicts. The fifth section--cooperation--attempts to give an accurate impression of how well the lines of communication between the two systems work. With very few exceptions, the participants from both systems either mentioned their

contacts with the other court system or suggested that such relationships need to be cultivated. Naturally, degrees of cooperation are difficult to gauge, but participants often mention evidence of cooperation such as monthly informal meetings, first-name basis, formal and informal mutual education projects, and statewide joint conferences. The estimates of cooperation are based, as much as possible, on these tangibles.

## PROFILES OF THE STATES

### ALASKA

#### **A. Indian Country and Tribal Courts**

With the passage of the Alaska Native Claims Settlement Act, 44,000,000 acres of land were conveyed to natives and native groups (i.e., incorporated villages), based on aboriginal land claims. Section 19(a) of the act revokes various reserves set aside by legislation or executive order for native use or for administration of native affairs. Approximately two and a half million acres are subject to revocation, including all but the Metlakatla reservation. Metlakatla has the only tribal court now recognized by the state. It hears children in need of aid cases as well as delinquency proceedings and cases involving reservation ordinances. Sitka also has an active tribal court, which hears children in need of aid cases, but it is not officially recognized. Participants in the survey noted several "semi-active" tribal courts as well as efforts to create a tribal court system among consolidated villages, but the status and authority of these courts is still a matter of dispute.

#### **B. Jurisdictional Conflicts**

Table 3 below shows the number of participants who said a particular casetype was "most difficult" or "most common". Some participants mentioned several areas under each classification, so the number of areas cited will usually be



greater than the number of participants. These figures are not to be confused with the number of participants mentioning conflict within a casetype.

Table 3		
ALASKA		
	Most Difficult	Most Common
ISSUE AREA		
Domestic Relations	1	1
ICWA/Custody	5	6
Taxation	1	6
Total Number of Participants	9	

1. Indian Child Welfare Act: The vast majority of cases and case conflicts fall into this category. Because a number of tribal courts are not recognized, there is an ongoing dispute over whether the tribe must petition the Secretary of the Interior in order to take jurisdiction in an Indian Child Welfare Act case. The state of Alaska complies with the act and recognizes native process rights, but (except with regard to the one officially recognized tribal court in Metlakatla) without clearly acknowledging the jurisdiction of the tribal court. As one tribal judge pointed out, "They may not recognize us, but they notify us."

2. Hunting and Fishing Rights: Although there have been no court cases in this area, four of the participants anticipated that this would become a source of conflict. The issue of where the state can enforce its hunting and fishing regulations is liable to arise, since no one knows the exact boundaries of the Metlakatla reservation. The issue of what constitutes "subsistence" level hunting and fishing may arise both on the Metlakatla reservation and with respect to other native residents. Under the law, native hunting and fishing rights are limited to "subsistence" level, but since there is no clear definition of "subsistence", there will probably be litigation over this issue.

### **C. Recognition of Judgments**

Although the state does not officially recognize tribal courts other than the Metlakatla, some judges do recognize other tribal judgments. One state court judge said he gave the judgments comity and one tribal judge said that judgments were recognized "in many areas" [of the state]. Others said the issue rarely comes up, because there is a tacit understanding that one participant called "mutual avoidance, mutual respect." Other responses: "We're not that technical about it," and "I've never seen a written decision out of Metlakatla."

### **D. Legislation and Formal Agreements**

(1) There are written agreements between some tribes and villages and the Department of Health and Social Services concerning procedural (not jurisdictional) aspects of the Indian Child Welfare Act. One respondent said the agreements were

not being used.

(2) The governor is lobbying for a change in the Federal Indian Child Welfare Act that would give villages concurrent jurisdiction in those cases, thus circumventing the cumbersome reassumption process.

#### **E. Cooperation**

Although many participants noted that, at the local level, cooperation between the state courts, the Department of Health and Social Services, and the tribes or villages can be very good, there are no forums or other formal means of developing cooperation in place. One respondent pointed out that tribal judges are not invited to state judicial conferences. The conflict between native groups and the state over recognition of sovereignty may have an inhibiting effect. A three year negotiation between Metlakatla, Sitka, and the state government over Indian Child Welfare Act procedures recently ended in stalemate. The state's representatives wanted to forge a purely procedural agreement, but the tribes refused to negotiate procedures until the sovereignty question had been addressed.

## ARIZONA

### **A. Indian Country and Tribal Courts**

The Navajo reservation, with almost 14 million acres of tribal and allotted land, is the largest in the United States. The Navajo nation has a well-developed tribal legal system with its own bar, an extensive tribal code (including, among other areas, corporation, commercial, and tax), a recording system, and written rules of procedure and evidence. The court system has seven district judges, five children's court judges, the Peacemaker courts (a form of mediation), an intermediate appellate level with one circuit court judge, and a supreme court with one chief justice and two associate justices. A judiciary committee of the tribal council oversees the appointment of judges and the judges ascribe to the ABA code of conduct. Unlike many tribal court systems in the United States which were instituted by the Bureau of Indian Affairs under the Tribal Reorganization Act in the 1930s, the Navajo system is an amalgam of the tribe's historical forms of dispute resolution (akin to common law) and western structures of adjudication and record keeping.

There are 20 other tribes in Arizona, varying in population from 100 to 8,000. The largest among these are the White Mountain Apache (Ft. Apache reservation), the Hopi, the Pima and Maricopa tribes (Salt River and Gila River reservations), the Tohono O'odham, the Mojave and Chemehuevi tribes (Colorado River Reservation). The smaller tribes within the state also have well developed tribal court systems, usually under a regional intertribal court system. For instance, the seven tribes of the Colorado River area have one unified court system. Many tribal courts have less

foundation in tribal history than the Navajo courts, and therefore tend to be more "similar to the state courts." Their laws tend to be based on state statutes rather than tribal custom.

## B. Jurisdictional Conflicts

Table 4 below shows the number of participants who said a particular casetype was "most difficult" or "most common".

Table 4		
ARIZONA		
	Most Difficult	Most Common
ISSUE AREA		
Domestic Relations		3
ICWA/Custody	3	1
Economic and Commercial Dev.	3	
Taxation	2	2
Installment Contracts	2	1
Disposition of Indian Remains		1
Other:		
Mental Health	1	
Juvenile		1
Total Number of Participants	12	

1. Domestic Relations: Conflicts in this area are most apt to arise in a divorce when one of the parties is Indian and one is non-Indian or when one of the parties

lives off reservation. Jurisdiction rulings are usually based on a combination of the tribal membership and domicile of the two parties, and as the statements below suggest, both the tribe and state adhere to common principles and are willing to relinquish jurisdiction when those principles apply:

Superior Ct. Judge	Tribal Judge	Superior Ct. Judge
Where I ruled we had concurrent jurisdiction, even though no personal jurisdiction, the Court of Appeals reversed. It said we should defer to the tribal court in a case where the father was Indian, the mother non-Indian, and the children not eligible for enrollment.	In a case where the spouse was off-reservation and the other was on, our (Navajo) supreme court ruled that the tribal court had no jurisdiction over the absent spouse.	When one party in a divorce wants a modification of a Navajo divorce decree in state court to collect more child support, it's a conflict. If he is living on-reservation, I give the Navajo order full faith and credit. If he is living off-reservation, I will give the mother the higher child support under state law.

The problem of how to enforce a state court order for child support on-reservation came up frequently, with officials differing as to how the conflict can or should be handled.

County Attorney	Ct. of Appeals Judge
Our office is contacted to collect child support but we don't have jurisdiction to collect from Indians on-reservation. If the father is Indian with an Indian or non-Indian spouse living off-reservation, it's impossible.	How do you enforce a state court child support order on the reservation? My resolution was to get to know the family court judges on the reservation. We would talk about using the [Uniform Child Custody] Act to resolve the jurisdictional problem. We developed a mutual agreement to release jurisdiction.

2. Indian Child Welfare Act: Although jurisdictional issues tend to arise in this area,

there are no serious conflicts. State court judges think the law is clear, and if a case winds up in their court (usually because the attorneys or the parties were inattentive to the law), they will almost always readily transfer the case to tribal court and notify the tribal social service agency. There are clear, formal agreements between the state social service department and the Navajo and the tribes of Gila River.

3. Taxation: In a case that dragged on for many years, Peabody Coal disputed the tribe's right to levy a tax on the grounds that it was "dual taxation". The U.S. Supreme Court has ruled that such a tax is constitutional. If a business challenges a tribal tax, it must file in tribal court. Jurisdiction is fairly clear, but some fear that the issue of the tribe's right to tax will be subjected to continuing challenges.

4. Mental Health: The Attorney General of Arizona has determined that the state court cannot recognize tribal court orders for involuntary commitment to a state mental hospital. There are no tribal facilities for mental health care. If state and county court judges honored the attorney general's opinion, there would be no way to see that a tribal member who had been found to be a danger to himself or others could be committed. Judges seem to be resisting the policy or finding ways to circumvent it.

Cty. Ct. Clerk	Atty. Gen.	Ct. of App. Judge
We have taken the position that we will give comity to a tribal court judgment for commitment to state hospital. They are committed as citizens of the state and the BIA pays for the cost of commitment.	There is a mechanism whereby commitment can be litigated in the Maricopa County court. Will the court give full faith and credit to a tribal court order? Who has the obligation to pay, tribe or county? The issue is not resolved.	I entered an order to commit to the state hospital on the basis of the Navajo court order, giving it comity. There was great resistance to that procedure on the part of the state hospital.

#### **D. Recognition of Judgments**

The Arizona Supreme Court has ruled that tribal court decisions should be given comity, and the Navajo Supreme Court has ruled that comity should be given to state court judgments. Almost all of the state court judges interviewed said they gave full faith and credit to tribal court decisions, but thought that other judges in the state probably did not. One judge said that the tribes are less apt to give comity, because they fear their sovereignty might be threatened.

As Navajo Chief Justice Tom Tso pointed out, tribal courts have relatively little trouble getting the state courts to recognize their judgments. The greater problem arises when state governmental agencies or businesses fail to recognize tribal court orders.

#### **E. Legislation and Formal Agreements**

Arizona statutes provide for intergovernmental agreements between the state and the tribes, and there is an active intertribal council which works on negotiating



such agreements. The Department of Children, Youth and Families has two intergovernmental agreements for ICWA (one with the Navajo and one with the Gila River tribes) which outlines the specific responsibilities of each side.

#### **F. Cooperation**

In Arizona, the lines of communication between state and tribal court judges are open, and judges on both sides seem to make an effort to get to know each other and to understand each other's judicial systems and cultural values. Chief Justice Gordon has made a concerted effort to include the tribal courts in state judicial conferences, and to supply technical assistance and the services of visiting judges as needed. The Arizona State University Law School has sponsored a number of seminars on issues of tribal law. Participants have included many lawyers and judges from the state court system. As one judge remarked, "Because we've had such close contact, the Navajo leaders are personal friends. It's like a small town. If we have a problem, we pick up the phone, and usually we can find a way around it."

## NORTH DAKOTA

### **A. Indian Country and Tribal Courts**

North Dakota has four reservations within its territory: Ft. Berthold (the Three Affiliated Tribes), Turtle Mountain (Chippewa), Ft. Totten (Devil's Lake Sioux), and Standing Rock (Sioux). The Three Affiliated Tribes at Ft. Berthold have by far the most developed tribal court system, which has a district court, an intertribal court of appeals, and a law-trained judge and prosecutor.

### **B. Jurisdictional Conflicts**

Table 5 below shows the number of participants who said a particular casetype was "most difficult" or "most common".

Table 5		
NORTH DAKOTA		
	Most Difficult	Most Common
ISSUE AREA		
Domestic Relations/ Custody	4	3
Taxation	2	1
Installment Contracts		1
Water Rights	2	
Other:		
Zoning	1	1
Total Number of Participants	9	

1. Domestic Relations: Domestic Relations was the case type most often mentioned, and, according to four of the participants, the most difficult. The most common problems in this area stem from lack of recognition of both state and tribal court judgments. Typically, a district court judge will refuse to honor ex parte tribal court orders or any order for which he or she suspects that one of the parties was denied proper notice and opportunity to appear. Another common problem arises when an Indian parent moves back to the reservation and takes the children in violation of a state court order, since the state will not go onto tribal land to enforce a custody order. Nothing can be done in that case.

2. Installment Contracts/Economic Development: Although these two casetypes are dissimilar in substance, they have similar ramifications. Many of the respondents expressed a concern that businesses are reluctant to operate on a reservation or to sell goods to Indians who live on a reservation, because they lack venue for resolving disputes. One respondent mentioned a repossession case in which an Indian whose payments on a trailer were in default succeeded in asserting that the state court lacked jurisdiction over the matter. In another case where a tribe filed a claim against Wold Engineering in state court, it was held that Wold Engineering could not file a counterclaim in state court against the tribe. The overarching concern is that the perceived lack of venue will prevent much needed economic development on tribal lands.

3. Taxation: Two respondents cited this area as the "most difficult", and one said this casetype was the "most common". Unresolved taxation issues include workers' compensation and unemployment compensation assessments against the tribe, disputes arising from the construction of the Garrison Dam, and tobacco, alcohol and motor vehicle fuel taxes.

4. Hunting and Fishing Rights: As in many states, questions over where the state of North Dakota has the power to regulate remain unresolved. Jurisdiction is clearest on the Ft. Berthold reservation, which has its own hunting and fishing code, licenses and game wardens, and a cross-deputization agreement with the state. Jurisdiction varies from one reservation to another. One respondent said that jurisdiction is most problematic on the Ft. Totten reservation, because the Devil's Lake Sioux have no clear treaty rights to hunt and fish on tribal land.

### **C. Recognition of Judgments**

A North Dakota statute provides for reciprocal full faith and credit in the area of domestic relations for the Three Affiliated Tribes only. For other tribes and in other areas, state court judges said they generally give comity if they find that certain minimal standards of due process have been met. They generally do not give comity to ex parte orders.

Most of the respondents (two-thirds from both tribe and state, the rest did not know) said that tribes generally do not recognize state court decisions. One said that this creates problems especially for family law and installment contract cases.

#### **D. Legislation and Formal Agreements**

- (1) Statute providing full faith and credit to domestic relations judgments of the Ft. Berthold tribal court.
- (2) A compact providing for concurrent jurisdiction for liquor licensing.
- (3) An agreement to honor tribal court orders for involuntary commitment to a state hospital.

#### **E. Cooperation**

Instances of formal cooperation mentioned by the respondents include: a judicial planning commission, which includes members of tribal courts, and periodic meetings between the governor and tribal leaders (the last was held in September 1989)

In most states, at least two respondents mentioned that they have good working relationships or that there was some form of personal contact between judges in the two systems. Notably, there was no such mention in North Dakota. The geography may prevent contact, since district courts are located at a great distance from reservations. State court judges expressed concern that there was a lack of continuity in the tribal leadership, which also made it difficult for them to develop working relationships. Many expressed a general lack of faith in the tribal court system, because, they said, there is no separation of powers or respect for due process on the reservation. They believe judgments are apt to be capricious or

politically motivated. Four of the respondents, including one tribal attorney, suggested some type of reform in this area.

## OKLAHOMA

### **A. Indian Country and Tribal Courts**

In Oklahoma, the policy of allotment, once aimed at decimating the tribal land base has combined with the modern trend of recognizing allotted land as Indian country to create a "checkerboard jurisdiction" of relatively small plots of non-contiguous tribal land. Many of the participants lamented the inevitable confusions over jurisdiction, though one tribal judge commented, "State people will say it is a jurisdictional nightmare, but the truth is, at the local level, 90 percent of the time, we know what is Indian land and what isn't."

Most of the courts in Oklahoma are "CFR" courts or Courts of Indian Offenses established by federal statute and maintained by the Bureau of Indian Affairs. In the Littlechief case (1978), the state and federal courts determined that the State of Oklahoma had no jurisdiction over Indian country. To fill the jurisdictional void created by that decision, the tribes requested that the Courts of Indian Offenses be revived on a temporary basis, until the tribes were able to establish and maintain independent courts. Many of the tribes have already begun to form tribal court systems.

### **B. Jurisdictional Conflicts**

Table 6 below shows the number of participants who said a particular casetype was "most difficult" or "most common".

Table 6  
OKLAHOMA  
Most Difficult

Most Common

ISSUE AREA

Domestic Relations	1	
ICWA/Custody	1	2
Taxation	3	5
Gambling	1	1
Other:		
Election Disputes	1	
Sovereignty	1	
Housing Authority		1
Total Number of Participants	11	

1. Taxation: Conflicts over taxation center around the state's right to tax cigarette sales and the tribes' right to issue automobile license plates. Tribes have granted business licenses that do not bear the state tax stamp to smokeshops on allotted land. Do smokeshops located on allotted land have to pay state sales tax? The issues remain unresolved, creating a high volume of taxation cases some of which are handled in tribal court. One participant felt that the taxation issue was the most serious "because it affects the most people in the state, the whole structure of state government."

2. Indian Child Welfare Act: According to one tribal court judge, the volume of cases is very high (now 150 active cases in his district). The major problem with



these cases, as participant comments suggest, is that state district court judges have been reluctant to transfer cases in instances where the act applied. One tribal judge said the problem was serious, and that, in outlying areas where Indians have less visibility, the problem was worse. Three others (from a tribal court, the Indian Affairs Commission, and the attorney general's office) said the situation is improving, as they see the effects of a learning curve. Also, since the state supreme court issued an order to a district court to comply with the act, most district judges are now more willing to turn cases over.

Two participants, a tribal judge and a state social worker, noted that the tribes will often decline case transfer because they lack subpoena power and resources for investigation.

3. Gambling: Although there has been a good deal of litigation over the question of the state's right to tax and regulate bingo halls, the issue appears to have been resolved by a federal court decision that the state has no jurisdiction. A conflict over the tribes' authority to operate race tracks is imminent. To bring in more tourists, the state has recently allowed one track for horse racing, while "signing in blood" that it would not allow any more race tracks. The tribes may seize the opportunity created by this "exception" to its regulation of horse racing. The governor is now in the process of negotiating a compact with the tribes.

4. Hunting and Fishing Rights: The Cheyenne Arapaho challenged the enforceability of state hunting and fishing regulation on allotted land. The tenth circuit held that

tribal members were allowed to hunt and fish without a state license. Enforcement officials now must grapple with the difficulties created by the checkerboard jurisdiction.

### **C. Recognition of Judgments**

There was no consensus among the participants as to whether state courts recognize tribal court decisions. Three of the state court participants said either they did not know or the problem had never come up. Two (a trial court administrator and an Indian affairs commissioner) flatly said no, and three said the state courts did recognize tribal court decisions and enforce their judgments (two of them--a social service agent and a CFR court clerk--said the state court gave full faith and credit). Two officials (one state and one tribal) said that recognition was a "random" phenomenon, "some yes, some no". As one tribal judge pointed out, "It's the businesses, not the courts, that give us trouble." Only one participant from the attorney general's office noted a case in which a tribal court had not honored a state administrative procedure.

### **D. Legislation and Formal Agreements**

- (1) There is now a legislative committee working on tribal-state relationships. No compacts have yet come about, however.
- (2) The state legislature has directed the social service agency to form agreements with the tribes.

- (3) Oklahoma has a state ICWA which mandates cooperation with the tribes in implementing the requirements of the act.
- (4) A new statute (1989) provides that Oklahoma shall recognize all federally-recognized Indian tribes, provides for cooperation with the federally-recognized tribes, and authorizes the governor to enter into agreements with federally-recognized Indian governments.

#### **E. Cooperation**

Although the tribal courts in Oklahoma are still vying for recognition from state courts, there are signs that the two are entering an era of greater cooperation. The Oklahoma Supreme Court has twice co-sponsored a sovereignty symposium whose purposes include bringing the two sides together to discuss issues, and the recently formed Indian Law Section of the Oklahoma Bar Association is planning to sponsor seminars with the goal of increasing communication among legal practitioners in the state.

## SOUTH DAKOTA

### **A. Indian Country and Tribal Courts**

There are nine reservations in South Dakota, each of which has some form of tribal court. Seven of the tribal courts have their roots in tribal sovereign authority, while two tribes (the Yankton Sioux and the Flandreau Santee) have CFR courts. Except for the CFR courts, all of the tribal courts in South Dakota have some form of appellate level--four have their own courts of appeals, and three (the Crow Creek, Lower Brule, and Sisseton) participate in an intertribal court of appeals.

Some disputes over territorial jurisdiction arise in South Dakota. Five of the reservations--Sisseton, Rosebud, Pine Ridge, Yankton, and Lower Brule--have been diminished at some time. Consequently, some trust land lies outside the reservation boundaries. The highways are also a disputed territory, a factor in both traffic enforcement and commercial development cases. The state of South Dakota has claimed jurisdiction over both Indians and non-Indians on highways under Public Law 280 (even though it is not a 280 state). The state supreme court has ruled that the tribes and the state have concurrent jurisdiction on the highways, but there has been no clear ruling on who has jurisdiction over Indian or non-Indian persons on the highways.

### **B. Jurisdictional Conflicts**

Table 7 below shows the number of participants who said a particular casetype was "most difficult" or "most common".

Table 7		
SOUTH DAKOTA		
	Most Difficult	Most Common
ISSUE AREA		
Domestic Relations	2	4
ICWA/Custody	4	3
Installment Contracts		1
Hunting and Fishing		1
Decriminalized Traffic Offenses	1	
Other:		
Licensing	1	
Contracts	1	
<hr/>		
Total Number of Participants		8

1. Indian Child Welfare Act: There was a consensus among the participants that the state generally transfers cases very readily. In the two cited cases where transfer was denied, the state determined that the transfer was requested at too late a stage. In one of these cases, the child in question was not of Indian descent but had been adopted by an Indian father and enrolled in the tribe. The trial court did not recognize the enrollment. Ultimately, the state supreme court affirmed the denial of transfer, but only because it was "untimely". Notably, the supreme court said it would not "look behind the tribe's determination of membership."

Reports about cooperation between the state courts and social workers and their tribal counterparts are mixed:

Counsel for the Dept. of  
Social Services

If the tribes need to do any follow-up, we have run into problems working with people on reservations. There is no follow up by their department, i.e. home visits. We can't get any information out of them.

Social Service Executive

The biggest problem is lack of responsiveness from the tribes. If they're noticed, the state's attorneys often represent that tribes have been noticed and not responded. If we could get a formal response to notice, it would be a help.

Tribal Attorney, Sisseton

State and tribal social workers alternate on-call status. The tribal child protection program contracts with the state to provide services and is subject to state licensing. If a state worker takes a case, the case will be referred directly to the tribe.

One participant said that although the state is willing to transfer cases, the tribes are often reluctant to intervene because they lack the resources to handle a case.

2. Domestic Relations: Jurisdiction in this area does not appear to be well defined.

One tribal attorney said that although Indians prefer to take their case to tribal court where the judges are more sensitive to cultural differences, many file for divorce in state court because they worry that a tribal divorce will not be honored when they remarry and need a state marriage license. A circuit court judge said that legal aid lawyers will often seek a state court divorce for their clients; his policy is to grant the divorce without questioning jurisdiction, even though this antagonizes the Rosebud tribe, which refuses to enforce his decrees.

Several participants mentioned specific rulings: A federal court ruled in one case that the state law on AFDC does not apply on reservation. In another case, a state judge denied a motion that challenged state court jurisdiction, because, he said, the party's residence was on a part of the reservation that had been disestablished. The state supreme court is now hearing a case involving the issue

of who has jurisdiction where both parties are Indian and one lives off-reservation.

3. Economic and Commercial Development: Two questions have arisen concerning which court has jurisdiction over an allegedly Indian corporation operating on-reservation. In one case, the business was incorporated both as a tribal and as a state entity. In the other case, a state corporation originally owned by Indians had assigned stock holdings to a non-Indian.

Conflicts over business licensing have emerged: The Rosebud Sioux has required highway contractors operating on-reservation to purchase tribal licenses, by which they consent to tribal court jurisdiction. The controversy over who has jurisdiction on the highways comes into play (see background section).

Several participants mentioned that credit for tribal members and the tribal economy overall may be hampered when non-Indian businesses fear that the tribal courts do not give them an adequate venue for collecting debts, i.e., repossessing property and garnisheeing wages.

4. Hunting and Fishing Rights: The Cheyenne River Sioux are involved in a controversy (now pending in federal district court) over who has control of hunting and fishing along the Missouri River as it runs through the reservation and who controls access to lakes that border on reservation land. The state claims it has regulatory power over all the waters within South Dakota. There is also an ongoing conflict over who has enforcement authority over ceded land.

According to a representative from the attorney general's office, pre-season

negotiations over hunting and fishing enforcement agreements with the Cheyenne Sioux have broken down, and the tribe has said it will prosecute any non-Indian hunting on the reservation.

### **C. Recognition of Judgments**

Participants came to an easy consensus regarding state court recognition of tribal court orders simply because there is a clear state statute requiring state courts to give comity to tribal court orders if they meet specific criteria. (See "Legislation" section)

However, there was less agreement concerning tribal court recognition of state court judgments. Four of the participants (including two tribal attorneys and one tribal judge) said that tribal courts do not honor state court orders. One tribal judge said that his tribe has a comity statute that is the "mirror image" of the state statute. The rest did not know.

### **D. Legislation and Formal Agreements**

- (1) A state statute enacted in 1986 (section 1-1-25) reads as follows, "No order or judgment of a tribal court in the state of South Dakota may be recognized as a matter of comity in the state courts of South Dakota, except under the following terms and conditions..." To paraphrase, the conditions are that the tribal court has personal and subject matter jurisdiction, if the order or judgment was not fraudulently obtained, due notice and an opportunity for hearing were given, the order or



judgment conforms to the laws of the tribe and does not contravene the public policy of the state. When those conditions are met, comity may be given in child custody or domestic relations cases, or if the issuing tribal court gives comity to South Dakota courts, or in exceptional cases.

#### **E. Cooperation**

Participants report some good, informal working agreements between the tribal courts and social service agencies and periodic, ongoing negotiations with various state agencies, "but not between the two court systems." There is a great deal of mistrust and antagonism, especially on the state court side, because of a perceived lack of continuity and stability in the tribal court leadership, a lack of independence in the judiciary, and a failure to meet minimal standards of due process. State court judges fear that politically motivated tribal court decisions may be dictated by a tribal council and are suspicious of tribal court orders, often issued *ex parte* and without adequate notice or hearing.

On the tribal side, two tribal attorneys noted a strong bias in the community which precludes recognition of the efforts of the tribal courts. Also, as one noted, although she had heard "horror stories," concerns arising from lack of independence in the judiciary vary from one jurisdiction to another.

Participants mentioned only one formal mechanism of cooperation: a series of educational conferences on the Indian Child Welfare Act. Although one person said the conference "went pretty well," the other comments were more dispirited:

"Nobody got anywhere," and "Some good results have come of that, but it doesn't solve the problem. I don't know what they could do. I'm pessimistic."

## WASHINGTON

### **A. Indian Country and Tribal Courts**

In the state of Washington there are 26 federally-recognized tribes and ten non-recognized tribes. The largest of these (in descending order) are the Yakima, Colville, Lummi, and Quinault tribes, all of which are federally recognized. The Colville has a tribal court with full, general civil jurisdiction and one appellate level which rules on issues of law. The chief judge there described the system as "quasi-constitutional". It was established by the tribal council, but practices separation of powers. The Quinault has a full-time tribal court with one non-attorney judge. Many of the tribes belong to a Northwest Intertribal Court system, which has both trial and appellate level judges and a centralized administration.

Because Washington is a Public Law 280 state, the majority of tribes have concurrent jurisdiction over child welfare matters. However, ten of the tribes have exclusive jurisdiction. The Colvilles and Yakimas petitioned for and received retrogression of jurisdiction under the Indian Child Welfare Act and some of the smaller tribes gained federal recognition after the Indian Civil Rights Act had given them the power of consent over state jurisdiction.

### **B. Jurisdictional Conflicts**

Table 8 below shows the number of participants who said a particular casetype was "most difficult" or "most common".

Table 8  
WASHINGTON

	Most Difficult	Most Common
ISSUE AREA		
Domestic Relations	3	3
ICWA/Custody	3	4
Natural Resources	1	1
Total Number of Participants	7	

1. Domestic Relations: As one tribal attorney and one government official noted, in the case of a divorce involving an Indian and a non-Indian, "whoever files first decides the issue" of jurisdiction. An Indian party will generally try to get his or her case filed and thereby establish jurisdiction as quickly as possible in tribal court. Sometimes, if tribes do not have codes adequate to decide the case, the matter will be handled in state court.

A case involving two conflicting custody orders, one in state court and one in tribal court recently went through tribal, state, and the federal district court (in that order). The county claimed that the tribal court did not have jurisdiction because of Public Law 280. The federal court resolved the case without making a definitive ruling on jurisdiction, so the issue of jurisdiction in domestic relations cases remains unresolved.

2. Indian Child Welfare Act: Even those who cited the Indian Child Welfare Act as a conflict area insisted that there is "minimal conflict, because the procedures are so

well defined," and that it is "usually not a problem." The attorney for the Department of Social and Health Services highlighted the Washington approach to the ICWA process:

We separate jurisdiction and agency service issues. Tribal members have equal entitlement to social services. We still do full investigation even on exclusive jurisdiction tribes. Tribal social service is the petitioner even if we do the investigation. We do the same when the court requires out of home placement. If the tribal court has ordered something to be done, we will respond to the court's orders, as if the case were in state court.

Participants spoke more about problems of administering the law than they did about specific jurisdictional conflicts. Two noted that it is often difficult to determine who is an Indian child, and that the tribes often don't have the resources to make such a determination. One participant's comments dealt with specific problems in the act itself: There is a loophole which allows the state to interpret it as not applying to voluntary placements; and there is a conflict between the notice requirement and the clause which allows for confidentiality. As two of the participants pointed out, problems with implementing the act are usually due to lack of judge training in that area.

3. Hunting and Fishing Rights: The tribes generally have their own hunting and fishing regulations and enforcement officers, and violations usually go to tribal court. Enforcement agreements between tribes and state game wardens, which tend to circumvent conflicts, are evolving or already in place.

In many cases, if a tribal member violates the tribal code and there is no prosecution in the tribal court, the state will assert its right to prosecute the case. One district court judge said she knew of several such cases that had been filed in

state court and dismissed on jurisdictional grounds. What usually happens is that the state suspends its prosecution pending the outcome of the tribal court proceedings. An attorney who specializes in treaty rights said that, in his experience, the state has always dropped its case after the tribal court has made its ruling.

#### 4. Economic and Commercial Development

Most of the cases mentioned under this heading pertained to zoning for developments on reservation land. In one case, a sawmill challenged both the tribe's authority to zone and the tribal court's jurisdiction over the case. Two others addressed the question of whose zoning controls in areas that are only partially owned by the tribe. In another case, a developer challenged the tribal court's jurisdiction over a technical question concerning EPA approval.

### **C. Recognition of Judgments**

Over half of the participants (including two state and two tribal officials) said that state court judges sometimes honor tribal court judgments, i.e., that recognition varies from one jurisdiction to another. Two state officials said that state courts routinely honor tribal court judgments in the areas of domestic relations and Indian Child Welfare Act; one said that the state courts routinely give the tribal courts full faith and credit. Problems arise (according to one district court judge) when employers refuse to honor an order to garnishee wages or when the tribe cannot get help to enforce a pick up order of a child not located on reservation.

As to tribal court recognition of state court judgments, three participants said

that tribal courts honor state court judgments (one tribal judge said she gives comity), two said they do not, one said recognition varies from one court to another, and one said that the tribal court gives full faith and credit.

#### **D. Legislation and Formal Agreements**

- (1) The governor recently signed a "Centennial Accord" with the leaders of the tribes in which they recognize each other's sovereignty and agree to deal on a government-to-government basis to resolve disputes. Because of the accord, at least three issues that were once the subject of ongoing litigation are now resolved through legislation:
  - o The issue of the Quinault's right to license vehicles has been negotiated.
  - o There has been a cooperative rezoning of the Lummi reservation.
  - o A "Timber, Fish, and Wildlife" agreement resolved a tribe's claim against a logging company.
- (2) The Department of Social and Health Services has developed a uniform model agreement on how to handle Indian Child Welfare Act matters. An ICWA manual for caseworkers delineates legal and procedural guidelines for all contingencies (advanced stage, convenient forum, no tribal court, etc.) and addresses issues arising both for tribes that have concurrent jurisdiction in ICWA matters and those that have exclusive jurisdiction. Implementation of the model agreement will involve a massive training (using the manual) of caseworkers, police, judges, and

other community agencies.

- (3) The state's own ICWA policy defines "Indian child" more broadly than the federal act requires to include Canadian and non-recognized tribes.

## **E. Cooperation**

Washington's unique Centennial Accord makes it difficult to distinguish between the categories of "legislation" and "cooperation", because it inaugurates a legislative program that fosters working agreements, both formal and informal, all over the state. Ongoing negotiation over hunting and fishing rights, ICWA procedures, land use management, and resource use have brought about better working relationships.

Several other cooperative approaches are also worthy of mention. The Department of Social and Health Services has set up local ICWA committees in every region of the state that include Indian people from the community. The committees staff the cases with department workers, work on identification, case plans, and jurisdiction questions, and seek to ensure that case workers are culturally sensitive. Another notable development in the state is that tribal judges now attend the Annual Judicial Conference. Two of the judges interviewed (one district court and one tribal) expressed their satisfaction with this arrangement. One stated, "It has promoted more than any of the agreements. It has developed for me and for many of the judges I know a more professional working relationship."



## WISCONSIN

### **A. Indian Country and Tribal Courts**

There are eleven reservations in the state of Wisconsin, including those of the Winnebago, Potawatomi, Oneida, Stockbridge and Munsee, Menominee, and the six bands of Chippewa, all of which have autonomous governments and most of which have tribal courts. (The first four mentioned do not have tribal courts.) Of these, the Menominee Tribe has the largest and most integrated land base, while the Winnebago and Oneida tribes have the least territorial integrity.

Wisconsin is one of the original Public Law 280 states, but the largest tribe, the Menominee, has an anomalous status under that law. In the 1950s, the Menominee chose to be "terminated", and much of its land was converted to private ownership. In 1973, the Menominee resumed its tribal status as a non-280 tribe, but as a consequence of its one-time termination, much of the land within the reservation is owned by non-Indians. The boundaries of the Menominee reservation and Menominee County are coterminous.

### **B. Jurisdictional Conflicts**

Table 9 below shows the number of participants who said a particular casetype was "most difficult" or "most common".

Table 9		
WISCONSIN		
	Most Difficult	Most Common
ISSUE AREA		
Domestic Relations	3	2
ICWA/Custody	2	2
Taxation		1
Tort Claims		1
Installment Contracts		1
Decriminalized Traffic Offenses		3
Other:		
Law Enforcement Reciprocity	2	
<hr/>		
Total Number of Participants		9

1. Hunting, Fishing, and Natural Resources: This area was mentioned by the most participants as a source of jurisdictional conflict, yet none said it was the most common or the most difficult. The conflicts in this area are really more political than jurisdictional or administrative. The Chippewa Tribe has begun to reassert its longstanding treaty rights to hunt, fish, and harvest timber on off-reservation, privately-owned, state-regulated land. The 1983 Voigt decision had held the treaty rights valid. But since the tourism and logging industries are vital to the local economy, there is an inevitable resistance to the exercise of these rights, and the

governor is now attempting to negotiate agreements with the Chippewa. One court administrator said that although the controversy has not directly affected the courts, "the whole hunting/fishing/timber rights issues do a lot to undermine the cooperation between circuit and tribal courts. No one will flat out not cooperate for that specific reason [the treaty rights controversy], but it affects attitudes about assistance from law enforcement."

2. Indian Child Welfare Act: As in many states, jurisdictional conflicts are most apt to arise in this area when a judge, lawyer, or social service worker does not apply the law. One tribal judge thought that the law may not be carried out in many cases, because the process involves so many players, any one of whom can choose to ignore the requirements of the act. There was some disagreement between two participants as to who has jurisdiction over a child off-reservation:

Circuit Ct. Judge	Indian Advocate
If the child is off-reservation, it's a state court matter. They motion to move the question to tribal court. We always deny the motion. Our state courts have determined it belongs in Wisconsin court.	The [state] courts did not recognize ICWA off-reservation at first. In Milwaukee, they have finally worked out an agreement with the Oneida, who have no tribal court.

3. Decriminalized Traffic Offenses: This type of case was cited by the most participants (3) as occurring "most often". Apparently, this type of conflict is most predominant in Menominee County. The state supreme court has held that the tribe has jurisdiction over Indians in non-criminal matters on the reservation, and that the

state court has jurisdiction over non-members on the reservation. Menominees routinely write tickets to non-Indians although theoretically there is no jurisdiction. As long as no one objects, the tribe collects the fine. Some problems may arise over maintaining records on DWI offenses, but legislation is now pending (AB 453) that would allow for exchange of information on traffic violations. Conversely, it is not clear whether the county can stop an Indian on-reservation.

4. Domestic Relations: The ostensible conflict here is over mutual enforcement of child support and domestic violence restraining orders.

**Court Administrator**

Child support is a problem, with orders for Indians levied by the circuit court. Once the Indian moves back to the reservation, it's not even worth the time to try to enforce the order on the reservation.

**Tribal Judge**

Support is a sticky issue. The tribal court issues an order for child support, the father moves off-reservation, and we have a hard time reaching those people jurisdictionally. Only some state courts will enforce the tribal court's judgment.

**C. Recognition of Judgments**

The participants were in agreement about the specific guidelines for recognition. Current legislation gives Menominee decisions and judgments full faith and credit in the circuit court, and there is now a bill pending that would extend full faith and credit to all tribal courts. At present, the state courts are obliged to give comity in the area of family law, but, in practice, not all courts do. Two participants on the state side complained of problems with honoring judgments for small claims. A court administrator said, "Some judges have received a money judgment from tribal

court, docketed it in circuit court, and made some effort to enforce the judgment. Then the defendant says he has never received notice of the judgment."

#### **D. Legislation and Formal Agreements**

- (1) A bill that would give full faith and credit to tribal court judgments (AB 454) is now pending.
- (2) Other pending legislation includes: AB 451 , Relating to Enforcement of Tribal Domestic Abuse Temporary Restraining Orders and Injunctions; AB 452 Relating to Tribal Vital Records and Granting Rule Making Authority; AB 453 Relating to Demerit Points for Tribal Court Traffic Convictions.
- (3) A joint law enforcement arrangement between the Lac Du Flambeau band and the neighboring county.

#### **E. Cooperation**

Relationships between tribes and social service agencies appear to be very good in some areas. One social service representative said that his agency has established effective informal working relationships with the Public Law 280 tribal government and the tribal courts. For example, the Oneida Tribe has enacted a resolution requiring, as a condition of tribal employment, that people agree to have child support deducted from their paychecks.

While many of the participants noted good working relationships and regular

personal contact between judges in both systems, others said the level of cooperation varies from county to county.

## CONCLUSIONS

It is difficult to make secure generalizations about the jurisdiction disputes between tribes and states, because state law and state recognition policies and practices are not uniform across each state. Federal laws and treaties are also a significant variable, and can vary widely among tribes within a state. The extent and integrity of the tribal land base and the evolution of tribal governments and courts also have a direct effect on state policies and practices. North Dakota and Wisconsin, for instance, have full faith and credit laws that apply to the tribal courts of the Three Affiliated Tribes of Ft. Berthold Reservation and the Menominee Tribe (respectively), but not to any of the other tribal courts within the state's boundaries. Within the state of Washington, the tribes that still come under Public Law 280 will have concurrent jurisdiction over ICWA matters, while those that have petitioned for retrogression have exclusive jurisdiction.

Nevertheless some broad trends are discernible. For example, the CFR courts of Oklahoma, with the problem of checkerboard jurisdiction and a more "assimilated" population, will encounter different types of jurisdiction disputes than does the tribal court system of the Navajo Nation in Arizona. The affirmative legislation and model agreements initiated by the executive branch in Washington State facilitates cooperative child welfare procedures and creates a different tone for tribal-state relationships than does the "negative comity" statute of South Dakota. Finally, levels of cooperation between the actors in the tribal and state court systems seem to vary from state to state. The express purpose of this report is not to draw conclusions,

but to provide a framework for making meaningful distinctions among states and jurisdictions.