

# Issues Affecting Tribal Communities



ISSUE BRIEF: BUREAU OF JUSTICE ASSISTANCE TRAINING & TECHNICAL ASSISTANCE PROGRAM FOR STATE ADMINISTERING AGENCIES

## Tribal-State Court Collaboration

Tribal and state courts interact across myriad issues, including child welfare, cross-jurisdictional enforcement of court orders and civil commitments, to name just a few. One of the key arenas of interaction with great potential for collaboration is the courts. This issue falls within the JAG priority area of “court programs.” Tribal and state courts can misunderstand, misinterpret and disagree about issues of great importance to both jurisdictions. Long histories of mistrust exist in some states that create a wedge that can be hard to mend, but a lack of coordination can create dire consequences for safety and justice in Indian country. Nowhere is this truer than in states subject to Public Law 280,<sup>1</sup> wherein the federal government transferred criminal jurisdiction to state authorities. These “PL 280” states have a crucial need for collaboration in both the courts and law enforcement.

### Practice Pointers

Beginning in the mid-1980s through the efforts of the Conference of Chief Justices, tribal-state court forums began to bridge some of these gaps by bringing judges and court personnel together to foster relationships, discuss areas of mutual concern, develop legislative initiatives and to find a common ground (see [www.WalkingOnCommonGround.org](http://www.WalkingOnCommonGround.org) for detailed background). Since then, several tribal-state, and sometimes federal, court forums have emerged. These forums vary somewhat in their make-up and focus, but most primarily involve tribal and state court judges, focus on issues of common concern, and meet regularly in the spirit of collaboration and mutual respect. Among the states with active forums are: Arizona, California, Idaho, Michigan, Minnesota, New Mexico, New York, North Dakota, Utah and Wisconsin.<sup>2</sup> Forums are

currently being revitalized or developed in Washington and Oregon. Some areas ripe for collaboration and focus include:

- *The Indian Child Welfare Act (ICWA):* Several forums have worked together to create trainings or materials to assist state courts with ICWA’s implementation. The Michigan forum played a key role in the development of its own state legislation on ICWA.
- *Recognition of Tribal Court Orders by State Courts:* Many forums have developed rules or protocols for recognition of orders coming out of tribal courts, including Arizona and New York.
- *Jurisdictional Uncertainties:* Members of tribal-state court forums are more apt to simply pick up the phone and call their colleagues in other jurisdictions for quick and easy resolution of jurisdiction questions that would otherwise persist through lengthy motions and expense going through more formal mechanisms.

Importantly, at their most basic level, forums also provide a crucial cross-cultural education component. Many state court judges lack basic knowledge of the caseload and day-to-day functions in tribal court. Conversely, tribal court judges may not understand the full range of state court cases and dockets. Forums such as those in New Mexico and California place a special emphasis on the importance of cross-cultural education.

### Priority Needs

The Tribal Law and Policy Institute held a working group meeting of tribal-state court forums in December of 2012 and convened a meeting of tribal-

state court forums from across the nation in 2016. The results of both meetings were unanimous – forums are in dire need of funding to operate. The development of relationships and, in the longer term, priority setting, requires in person meetings. These meetings require logistical, administrative and travel support. There is no current funding source for tribal-state court forums. Forums without the administrative support needed to hold the group together are likely to fail, and along with that, future collaboration is threatened.

### Recommendations

SAA's can make a huge and measurable impact in furthering tribal-state collaboration by providing funding for administrative support to keep communication ongoing and consistent, maintain peer to peer mentoring networks, schedule meetings, keep contact lists up to date, inform public of forum accomplishments, etc. Support for meeting expenses would make possible the most crucial element of collaborating – face-to-face networking and relationship building. This administrative function in many forums is housed in the state administrative office of the courts. Funding to state AOCs for this purpose, with explicit language on tribal participation, would be a major contribution to furthering tribal-state collaboration. Again, *there is no current funding source for these forums*. SAA funding to tribal-state court forums could make real, measurable positive change in this area.

## Alcohol and Substance Abuse in Indian Country

American Indian/Alaskan Native (AI/AN) substance abuse levels are higher than any other demographic group. AI/ANs are more likely than any other race to report substance dependence or abuse.<sup>3</sup> The Department of Health and Human Services, the Department of Interior, and the Department of Justice, identified “[a]lcoholism, addiction, and alcohol and substance abuse a[s] among the most severe public health and safety problems facing American Indian and Alaska Native individuals, families, and communities, resulting in devastating social, economic, physical, mental, and spiritual consequences.”<sup>4</sup> Concurrently, tribal justice systems operate within a unique web of jurisdictional and cultural complexity, compounding the ineffectiveness of incarceration as a tool against drug and alcohol abuse.<sup>5</sup>

### Practice Pointers

Where incarceration has proven grossly expensive and largely ineffective in curbing abuse (and its derived offenses), drug courts have successfully countered by ditching adversarial, punishment-oriented structures in exchange for integrated treatment and restorative justice.<sup>6</sup> Tribal Healing to Wellness Courts, the tribal iterations of the drug court model, have similarly thrived in Indian country, blending evidence-based programs with traditional notions of healing. With over eighty currently operational Wellness Courts across the country,<sup>7</sup> tribes are utilizing the drug court model to serve adults, juveniles, and parents with civil dependency cases.<sup>8</sup> Wellness Courts are aiding in the reintegration of lost community members as well as reinforcing the overall tribal justice system.<sup>9</sup> In addition, through Wellness Courts, tribes are working more with their county and municipal neighbors to serve Natives on and off the reservation.

### Priority Needs

Wellness Courts are in desperate need of funding. Unlike state, federal and local governments, tribes are less able to effectively levy taxes.<sup>10</sup> While some tribes have benefited from gaming, the majority of tribes have no gaming revenue stream.<sup>11</sup> Tribal justice systems are woefully underfunded.<sup>12</sup> When competing against base funding for tribal courts, law enforcement, and victim services, Wellness Courts are unfortunately often sacrificed. While the Bureau of Justice Assistance’s Drug Court funding is opened to tribes, only 7 tribes (out of 566) have been funded from FY 2012 to FY 2015.<sup>13</sup>

### Recommendations

Interest in Healing to Wellness Courts is growing. However, they require support. SAA's could be integral towards financially supplementing Wellness Court funding. Additionally, through SAA encouragement and prioritization, counties and municipalities can be incentivized to collaborate with tribes to serve Natives in the state system through myriad ways, such as memoranda of agreement. By recognizing Wellness Courts as assets in our communities, all of our resources can be maximized.

## Indigent Defense in Indian Country

For many years, there has been a jurisdictional gap in prosecuting and sentencing crime on reservations.<sup>14</sup> Two recent laws - the Tribal Law and Order Act of 2010 (TLOA)<sup>15</sup> and the Violence Against Women Reauthorization Act of 2013 (VAWA)<sup>16</sup> - provide an opportunity for tribes to begin to close this jurisdictional gap. The two laws amend the Indian Civil Rights Act (ICRA).<sup>17</sup> As a result, if a tribe chooses to act under either of these laws, the tribe must provide enhanced civil rights safeguards, along with numerous other statutory requirements now codified within ICRA.

For example, under TLOA tribes now have an option to sentence defendants beyond the maximum sentence of one year of imprisonment and/or a \$5,000 fine (as mandated by ICRA) if certain requirements are met. If those requirements are met, the tribe's court is able to exercise enhanced sentencing authority, meaning it may sentence a defendant to a maximum of three years and a \$15,000 fine for a single offense and may stack those sentences up to a cumulative total of nine years.

Also under VAWA's special domestic violence criminal jurisdiction (SDVCJ), tribes may now prosecute non-Indian defendants accused of certain acts of domestic violence where previously they could not. In order to exercise this jurisdiction, the non-Indian defendant must have specific ties to the tribe, such as residing or being employed in the Indian country of the participating tribe; or being the spouse, intimate partner, or dating partner of a tribal member, or of an Indian who resides in Indian country of the participating tribe.

There are many requirements under ICRA that tribes must meet to act under each of these new laws, such as clarified minimum standards for presiding judges, jury requirements and public notice requirements. However, key to each of these exercises of authority is the need for tribes to provide competent indigent

defense. Prior to TLOA, ICRA did not require that tribes afford indigent defendants competent counsel. Now however, if tribes elect to exercise either TLOA enhanced sentencing or VAWA SDVCJ, ICRA states that tribes must provide indigent defense attorneys that are "licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys". Similarly, "[attorneys] must provide the defendant with effective assistance of counsel at least equal to that guaranteed by the U.S. Constitution." This falls under the JAG priority area of "indigent defense".

### Practice Pointers

Tribes who have already implemented these laws have set up public defender offices funded by the tribe. Some tribes contract out the defense counsel positions and pay as defense counsel is needed. Other tribes have hired full time defense counsel. The tribes typically define 'indigence' according to federal guidelines.<sup>18</sup>

### Priority Needs

Similar to the other issues discussed in this paper, most tribes lack funding to provide many necessary services. The majority of tribal governments are dependent on economic development and on federal funding to finance their criminal justice system. These revenues have not always been consistent or reliable.

### Recommendations

With the assistance of SAA funding for indigent defense services, more tribes will be able to implement TLOA enhanced sentencing and/or VAWA 2013 SDVCJ. In turn, this will assist in addressing the jurisdictional gap that often allows many serious crimes in Indian Country to go unprosecuted. Providing indigent defense funding to tribes will in turn assist those defendants who need representation.

*The Tribal Law and Policy Institute (TLPI) is a 100% Native American owned and operated non-profit corporation organized to design and deliver culturally engaged education, research, training and technical assistance programs and publications which promote the enhancement of community justice in Indian country and the health, well-being, and culture of Native peoples [www.home.TLPI.org](http://www.home.TLPI.org). TLPI's vision is "to empower Native communities to create and control their own institutions for the benefit/welfare of all community members now and for future generations". TLPI's mission is "to enhance and strengthen tribal sovereignty and justice while honoring community values, protecting rights, and promoting well-being. TLPI has a 20-year history of working with Native communities on tribal justice issues including court development, violence against Native women issues, healing to wellness court training, tribal-state court collaboration, Indian child welfare issues, and tribal juvenile justice issues. See [www.home.TLPI.org](http://www.home.TLPI.org) for more information.*

<sup>1</sup> 18 USC 1152. Public Law 280 originally included: California, Minnesota, Oregon, Nebraska and Wisconsin. Alaska was added at statehood. Many tribes have returned jurisdiction to federal authorities through a process known as “retrocession.” Additionally, other states were allowed to “opt in” and still other states have state jurisdiction through other legislation. For a full listing of state jurisdiction in Indian country by state, see the jurisdiction section of [www.WalkingOnCommonGround.org](http://www.WalkingOnCommonGround.org)

<sup>2</sup> See forthcoming TLPI publication: “Tribal-State Court Forums: An Annotated Directory,” currently under review by the Bureau of Justice Assistance. Forthcoming at: [www.WalkingOnCommonGround.org](http://www.WalkingOnCommonGround.org).

<sup>3</sup> SAMHSA, Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings, NSDUH Series H-48, HHS Publication No. (SMA) 14-4863, (2014) 88 (reporting a rate of 14.9 percent among AI/AN for substance dependence or abuse, higher than any other racial category).

<sup>4</sup> Indian Alcohol and Substance Abuse MOA between DHHS, DOI, and DOJ, 76 Fed. Reg. 47,597 (Aug. 5, 2011).

<sup>5</sup> E.g., tribal sentencing authority is capped, regardless of the offense, to 3 years of imprisonment. 25 U.S.C. § 1302(a)(7).

<sup>6</sup> “Drug Courts: A Smart Approach to Criminal Justice,” Office of National Drug Control Policy, White House (May 2011).

<sup>7</sup> List of Tribal Wellness Courts, available at [www.wellnesscourts.org](http://www.wellnesscourts.org).

<sup>8</sup> Joseph T. Flies-Away, Carrie Garrow, Pat Sekaquaptewa, *Tribal Healing to Wellness Courts: The Key Components*, 2nd ed., The Tribal Law and Policy Institute (May 2014).

<sup>9</sup> See generally, Joseph T. Flies-Away and Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence*+ 2013 MICH. ST. L. REV. 403 (2013).

<sup>10</sup> E.g. Tribes are limited in their ability to tax property and many non-Indian activities. Additionally, states have concurrent taxing authority in many instances. Newton, Nell Jessup, Ed., *Cohen’s Handbook of Federal Indian Law*, § 8.04-8.05 (2012).

<sup>11</sup> Peter Katel, *American Indians: Are They Making Meaningful Progress at Last?* in ISSUES IN RACE, ETHNICITY, GENDER AND CLASS: SELECTIONS FROM CQ RESEARCHER, at 122 (Pine Forge Press 2010).

<sup>12</sup> INDIAN LAW AND ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 67-91 (2013).

<sup>13</sup> Bureau of Justice Assistance Grant Awards FY 2015 – FY 2012, available at <https://www.bja.gov/funding.aspx#3>.

<sup>14</sup> INDIAN LAW AND ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 1-5 (2013).

<sup>15</sup> Pub.L. 111–211

<sup>16</sup> 25 U.S.C. 1304 *et seq.*

<sup>17</sup> 25 U.S.C. 1301 *et seq.*

<sup>18</sup> Maureen White Eagle, Melissa Tatum, Chia Halpern Beetso, [Tribal Legal Code Resource: Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction Guide for Drafting or Revising Tribal Laws to Implement the Enhanced Sentencing Provisions of the Tribal Law and Order Act \(TLOA\) and the Special Jurisdiction Provisions of the Violence Against Women Reauthorization of 2013](#), The Tribal Law and Policy Institute (February 2015).

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