

# Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America

## DRAFT REPORT

*Editor's Note: This document is a draft report published for the purpose of soliciting comments from participants in the conferences. Text boxes, inserts, and pull quotes are used in this document to convey information that is helpful for the reader. They are intended to be read separate from the main narrative. For the convenience of the reader, the text is enclosed in a box or highlighted in blue.*

Alaska Gathering of Tribal Justice Leaders  
April 12-13, 2005  
Anchorage, Alaska  
National Gathering of Tribal Justice Leaders  
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Washington, D.C.

William Brunson, Editor  
National Judicial College

### Contributors

B.J. Jones, Executive Director, Tribal Judicial Institute  
Bill Kockenmeister, Chief Judge, Pyramid Lake Paiute Tribe  
Michelle Rivard Parks, Associate Deputy Director, Tribal Judicial Institute  
Carolyn Wilson, Program Attorney, National Tribal Judicial Center

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For any inquiry:

National Judicial College

Judicial College Building/358

Reno, NV 89557

Tel: 800-255-8343

Fax: 775-327-2161

E-mail: [pubs@judges.org](mailto:pubs@judges.org)

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## PREFACE

TEXT BOX: The Earth is the mother of all people, and all people should have equal rights upon it ... Let me be a free man, free to travel, free to stop, free to work, free to trade ... where I choose my own teachers, free to follow the religion of my fathers, free to think and talk and act for myself, and I will obey every law, or submit to the penalty.  
Heinmot Tooyalaket (Chief Joseph), Nez Perce

From the Bering Strait in Alaska to the Everglades of Florida, from the majestic pines of Maine to the deserts of the Southwest, Native communities have administered justice systems for their citizens and visitors for centuries. Five hundred and sixty-one American Indian and Native Alaska tribes now have unique government-to-government relationships with the United States government. This special trust relationship is the result of almost 600 Indian treaties between the federal government and Native American nations in which the federal government promised to support tribal self-government and promote law and order within tribal communities. These communities are diverse and encompass 55.7 million acres of land within the United States, including 35 American Indian tribes that border Mexico and Canada, making these tribes partners with the federal government in ensuring border security as well as protecting the safety of the citizens of those communities.

The justice systems that Native American nations administer are distinct. Some share many of the same characteristics of western-style justice systems, while others utilize traditional tribal values and customs to resolve disputes and restore losses in the community. In 1998 the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice (BJA), began an ambitious plan of assisting American Indian and Alaska Native tribes in the development and enhancement of tribal justice systems through a competitive grant program entitled Tribal Courts Assistance Program (TCAP). Since the program's inception in 1998, 294 American Indian and Alaska Native tribes have been awarded almost \$40 million for the purpose of planning, improving and enhancing tribal justice systems.

The TCAP program has been complemented by two other BJA funding initiatives: the Tribal Drug Court Program and the Indian Alcohol and Substance Abuse Demonstration Program. These grants have enabled tribes to enhance their governmental infrastructures to better serve the criminal justice needs of their communities. Tribes have hired probation officers, alcohol and drug counselors and other personnel. They have funded technology enhancements for tribal courts and law enforcement and have developed new justice systems. The improvements in the criminal justice services tribes are now able to offer have also benefited federal and state courts by relieving their burgeoning criminal dockets and providing treatment alternatives for American Indian and Alaska Native offenders in those courts.

In 2005, the BJA's efforts culminated in three national gatherings ("Gatherings") of tribal justice leaders: (1) the Alaska Gathering of Tribal Justice Leaders held in Anchorage, Alaska from April 11-13, 2005; (2) the National Gathering of Tribal Justice Leaders held in Washington, D.C. from May 22-24, 2005; and (3) "Walking on Common Ground: A National Gathering for Tribal-

State-Federal Courts” held in Green Bay, Wisconsin from July 26-29, 2005. These Gatherings, funded by BJA, afforded a unique opportunity to examine tribal perspectives on crime and justice in Indian communities. A separate Gathering was held for Alaska Native tribes and villages, because the social, geographic and political landscape of Alaska creates unique challenges and opportunities and also in recognition that the Gathering would offer a timely opportunity to address certain actions by the state of Alaska that will have strong repercussions for the future of Alaska Native justice systems: (1) the issuance of an opinion by the Alaska attorney general that revoked a 2002 opinion and declared that “state courts have exclusive jurisdiction over child custody proceedings under [the Indian Child Welfare Act]”<sup>1</sup>; and (2) the completion of the initial drafts from the Alaska Rural Justice and Law Enforcement Commission’s working groups.

The programs for each Gathering were structured to initiate and record a dialogue that will provide insight on critical needs of tribal justice systems, identify promising practices, and serve as guidance for developing justice policies. This Report is a summary of what was learned from listening to the tribal justice leaders at the Gatherings held in Anchorage, Alaska and Washington, D.C. Part 1 provides an executive summary. Part 2 summarizes guidelines for policy-makers that were gleaned from the commentary at the Gatherings. Part 3 contains the agendas and a complete list of key findings from each Gathering. The Appendix provides a bibliography and list of additional resources concerning the historical and legal background that provides the context for understanding the current status of tribal governments and their justice systems.

Although tribal governments have made great strides in developing and enhancing their tribal justice systems over the past decade, there are many further improvements that need to be made. A recent Bureau of Justice Statistics report reveals startling rates of victimization of Native persons both on and off reservations. American Indian and Alaska Native children continue to be removed from their families for neglect and abuse at disproportionate rates. Many federal detention facilities now hold more Native American juvenile offenders than any other race. Juvenile suicide rates remain significantly above the national average and the number of Native persons killed by drugs and alcohol is a tribal and national tragedy.

Many of the social ills endemic in Native communities received massive media attention following the shootings at Red Lake High School on the Red Lake Indian reservation in March 2005. Although this tragedy could have happened at any high school in the country, the Red Lake shootings created awareness among the non-Indian communities of the dire social conditions on many reservations. The Anishinabe people of Red Lake are recovering from that tragedy with the support of other tribal nations, the United States government, and concerned people all over the world. Perhaps, in this period of renewal, when many innovations are often tied to the past, tribal leaders will succeed in their efforts to improve tribal communities and to impart to their children the tribal values lost in many Native communities.

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<sup>1</sup> Jurisdiction of State and Tribal Courts in Child Protection Matters, 2004 Op. Att’y Gen. 3 (2004).

Over 200 American Indian and Alaska Native tribes participated in the Alaska and National Gatherings of Tribal Justice Leaders. While a daunting task, this Report attempts to honor and capture their thoughts, feelings and aspirations, so that the federal government can formulate policy that will assist tribal governments in developing and further enhancing their justice systems. Ultimately, the goal is to preserve happy, healthy and safe tribal communities.

B.J. Jones  
Executive Director  
Tribal Judicial Institute

## PART 1: Executive Summary

Textbox: From Many Voices, Common Ground

“While tribal courts seek to incorporate the best elements of their own customs into the courts’ procedures and decisions, the tribal courts have also sought to include useful aspects of the Anglo-American tradition....”

Sandra Day O’Connor, Lessons from the Third Sovereign: Indian Tribal Courts, 33 TULSA L.J. 1, 5 (1997)

These Gatherings have taught us what our ancestors already knew, that to be treated with respect we must learn to respect others, even though different. Despite our differences, tribal, state and federal courts share the mission of delivering justice. Justice comes in different forms depending on one’s values and culture. Therefore, we must strive to learn from each other and respect the sovereignty and culture of different justice systems. Only in this manner can we achieve peace and harmony for the people we serve. As judges, we do walk on common ground.

Eugene White-Fish, President, National American Indian Court Judges Association (*Chief Judge, Forest County Potawatomi Tribal Court*)

In April, May, and July 2005, American Indian and Alaska Native tribal leaders from throughout the United States conveyed their nations’ concerns, needs and aspirations at three historic “Gatherings” funded by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice (BJA). The Gatherings were dedicated to giving tribal leaders a significant voice in the formation of public policy essential to the health and safety of American Indian communities. Collectively entitled “Pathways to Justice,” the concept of the Gatherings was to ensure a full opportunity for tribal leaders to speak and be heard, and to generate a record of the dialogue that would provide insight on critical needs of tribal justice systems. The Gatherings were also designed to give tribal leaders an opportunity to identify promising practices and to serve as a platform for providing input into funding strategies by federal and state policy- and decision-makers. This Report contains the record from the Alaska and National Gatherings, including key findings and policy guidance from each Gathering.

### **Background**

Native communities have administered justice systems for their people and visitors for centuries. In the past, these diverse justice systems were able to function alone, unencumbered by the outside world and free to exercise justice in accordance with the customs of individual Tribes. Today, however, this is no longer feasible. There are 561 American Indian and Alaska Native tribes that have unique government-to-government relationships with the United States. These communities are diverse in culture and location, encompassing 55.7 million acres of land. They are essential partners with the federal and state governments in concerns ranging from border security to drug trafficking to the increase in violent crime. Some Native justice systems share many of the characteristics of western-style justice systems, while others utilize traditional tribal values and customs to resolve disputes and restore losses in the communities they serve. Regardless of the nature of the justice system, tribal leaders recognize that their relationships

with the modern world are critical to the health and safety of Native communities and society in general.

TEXT BOX: History of Tribal Court Development

To fully comprehend tribal approaches to justice systems, it is helpful to be familiar with the history of these systems. Many tribal justice systems evolved from courts established on reservations by the Bureau of Indian Affairs, which were intended to assimilate American Indian people into the predominant Anglo-American legal system. As a result, early tribal courts mirrored the justice systems of federal and state governments.

The precursors to modern tribal justice systems were the Courts of Indian Offenses established by the Bureau of Indian Affairs in 1883. These courts were also known as Code of Federal Regulation Courts or “C.F.R. courts.” The C.F.R. courts were not “tribal” courts; they were agents of assimilation. They followed laws and regulations designed to assimilate the Native people into the religious and jurisprudential mainstream of American society.<sup>2</sup>

Only with the enactment of the Indian Reorganization Act of 1934,<sup>3</sup> and the subsequent promulgation of a revised Code of Indian Offenses for Indian tribes, which expressly recognized for the first time the right of tribes to supplant the Code of Federal Regulations (C.F.R.) by the adoption of their own codes of laws,<sup>4</sup> did tribes receive the federal government’s imprimatur to create and operate their own court systems. Not surprisingly, because tribes needed to receive permission from the Department of the Interior to supplant the C.F.R. with their own codes, many tribes adopted most of the C.F.R. law and order provisions to appease the Department. As a result, the constitutional and statutory provisions contained in modern-day tribal codes often resemble the laws contained in the original Code of Indian Offenses.<sup>5</sup>

There are 15 C.F.R. courts operating in Indian Country.<sup>6</sup> Most of those courts serve tribes in Oklahoma.

All who work with programs, policies or funding for Native American justice systems must recognize that these systems, though distinct from locale to locale, impact greatly on the overall administration of justice. Problems that can be addressed by Native justice systems will relieve

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<sup>2</sup> In the first challenge to the authority of the Bureau of Indian Affairs to create and maintain court systems for Indians, the federal district court, in upholding that authority, clearly intimated the function of these courts as “mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian.” *U.S. v. Clapox*, 35 F. 575, 577 (D.C. Or. 1888). The same court described an Indian reservation as an institution “in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.” *Id.*

<sup>3</sup> Act of June 18, 1934, c. 546, 48 Stat. 984 (codified as 25 U.S.C. §§ 461 *et seq.*) (Supp. 2004).

<sup>4</sup> See 3 Fed. Reg. 952-59 (1938) (codified at 25 C.F.R. § 11 (Supp. 2005) (giving both substantive and procedural Indian law)).

<sup>5</sup> For example, until recently, many tribal codes required a stipulation from a non-Indian party before the tribal court could exercise civil jurisdiction. See 25 C.F.R. § 11.103.

<sup>6</sup> 25 C.F.R. § 11.100.



the burden on state and federal courts, and give Native communities a genuine sense of controlling their own territories. Working together, tribal, federal and state judiciaries will generate dialogues, agreements and alternatives that benefit all.

Problems that have migrated from the larger community to tribal communities have been difficult to eradicate. Tribal communities are devising means of addressing these problems, and not unlike non-Indian communities, some strategies are successful, some are not. Substance abuse, domestic violence and criminal victimization in Native communities are not merely Indian problems – they are American problems. Native people have a deep understanding of the devastation caused by these problems, and a vision for ways of resolving them. They need support and guidance, in terms of models, technical assistance and funding, from the larger community.

TEXT BOX: The Impact of Public Law 280 on Tribal Court Development

In 1953, Congress, concerned about the apparent void in criminal misdemeanor jurisdiction on some Indian reservations, enacted Public Law 83-280.<sup>7</sup> The states to which Public Law 280 applies have criminal and civil jurisdiction over most actions that arise in Indian Country within the territorial boundaries of the state. California, Minnesota (with the exception of the Red Lake Indian reservation), Nebraska, Oregon (with the exception of the Warm Springs reservation) and Wisconsin (with the exception of the Menominee reservation) were the five states that were required to take jurisdiction pursuant to the provisions of Public Law 280. Other states were given the option of accepting jurisdiction by amending any constitutional limitations on jurisdiction and by affirmatively accepting jurisdiction through legislative enactment.<sup>8</sup>

Public Law 280 has proved to be an impediment to tribal court development as well as adding to the level of jurisdictional ambiguity that exists in Indian Country. Because one of the objectives of Public Law 280 was to defray federal costs for tribal law enforcement by turning those functions over to state and county governments, the principal funding source of tribal courts, the Bureau of Indian Affairs and the tribes, believed that it was no longer necessary to fund tribal courts.<sup>9</sup> Likewise, the leadership of many tribes perceived that Public Law 280 stripped tribal courts of jurisdictional authority and consequently did not adopt tribal codes or fund their court systems.

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<sup>7</sup> Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. 1162 (1994), 25 U.S.C. 1321-1326 (1994), 28 U.S.C. 1360 (1994)).

<sup>8</sup> See 25 U.S.C. 1321-22 (1994). This section of Public Law 280 was amended by passage of the Indian Civil Rights Act, which now requires an affirmative vote by the tribal electorate before states can assume any further jurisdiction. See 25 U.S.C. 1326 (1994). Before that amendment, however, ten states accepted some form of jurisdiction over Indian country. See Felix Cohen, *Handbook of Federal Indian Law* 28 (1982).

<sup>9</sup> See *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976) (“The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.”) (citing Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A.L.Rev. 535, 541-542 (1975)).

Nevertheless, many Public Law 280 states found that tribal court development remained integral to the overall scheme of maintaining justice in Indian Country because jurisdictional authority over trust and restricted Indian property was expressly excluded,<sup>10</sup> and limited to criminal offenses under state law.<sup>11</sup> Additionally, laws passed after Public Law 280, such as the Indian Child Welfare Act, permit all Indian tribal courts, including those in Public Law 280 states, to exercise substantial jurisdiction both inside and outside Indian Country.<sup>12</sup>

Despite extensive judicial review of the scope and application of Public Law 280, the statute continues to create tension between state and tribal governments, particularly as tribes begin developing their own justice systems. This is especially evident in Alaska and California. The concerns range from apprehension that the emergence of a new forum for adjudication will create jurisdictional conflicts to speculation that tribes develop their own courts to evade review of tribal contracts and business activities by state and federal courts.<sup>13</sup> Regardless of whether these concerns are legitimate or spurious, they indicate that the historical and future legacy of Public Law 280 is the repression of tribal court development.

Thus, the challenge of the 21<sup>st</sup> century, not only for Native Americans but also for the country as a whole, is to maintain the cultural integrity valued by each individual tribe while simultaneously creating justice systems that resolve disputes in ways that are respected and accepted by other systems of justice. Justice means ensuring the protection and security of all Americans, Native and non-Native alike.

## ***The “Gatherings”***

### **The Tribal Courts Assistance Program**

In 1998, with congressional funding and support, the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice (BJA) began an ambitious plan of assisting tribes in the development and enhancement of tribal justice systems through a competitive grant program entitled the Tribal Courts Assistance Program (TCAP). Since the program’s inception 294 American Indian and Alaska Native tribes have been awarded upwards of \$40 million for the purpose of planning, implementing and enhancing tribal justice systems. These grants have not only benefited the tribes that received them, but have also benefited federal and state judiciaries by relieving their burgeoning criminal dockets, and by providing treatment alternatives for American Indian and Alaska Native offenders in those courts. However, in spite

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<sup>10</sup>See 25 U.S.C. § 1321(b) (1994) (“Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States ....”).

<sup>11</sup>See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (holding that criminal jurisdiction conferred by Public law 280 did not authorize enforcement of a state statute regulating bingo, because the statute was a “regulatory” in nature, rather than “prohibitive”).

<sup>12</sup>Indian Child Welfare Act of 1978, as amended, Pub. L. 95-608, 92 Stat. 3609 (codified as 25 U.S.C. §§ 1901, *et seq.*).

<sup>13</sup>See, e.g., Pat Doyle, *Judge Challenges Tribal Sovereignty*, STAR TRIB. (Minneapolis), Feb. 19, 1996, at 1A.

of the great strides that tribal governments have made in developing and enhancing their tribal justice systems over the past decade, much remains to be done.

**CALLOUT: Delivery of TCAP Technical Assistance and Training**

In order to streamline the delivery of services and to facilitate collaboration among a variety of public and private agencies, the Tribal Judicial Institute at the University of North Dakota School of Law was designated the lead agency in delivering technical assistance to tribal communities via the Bureau of Justice Assistance (BJA) Tribal Courts Assistance Program (TCAP). TCAP technical assistance providers have designed and presented numerous national and regional programs support justice initiatives for the benefit of Native and non-Native people involved in tribal justice systems. Providers have included: Alaska Native Justice Center; Fox Valley Technical College; National Institute for Trial Advocacy; National Tribal Judicial Center at the National Judicial College; National Tribal Justice Resource Center; Native American Alliance Foundation; Oklahoma City University Law School; and Tribal Law and Policy Institute.

This past year, the Institute and its partners delivered over 40 national and regional training programs. Personnel representing 129 tribal entities attended educational programs presented by TCAP technical assistance providers. The Institute and its partners also conducted on-site needs assessments in Alaska and California, provided regional orientation sessions to aid grant recipients in complying with federal financial and programmatic guidelines, and helped enhance the capacities of tribal information systems in the Northern Plains and Southwest.

**CALLOUT: Sisseton-Wahpeton Oyate**

This Tribe has a membership of approximately 10,000 and is located in northeastern South Dakota. It has used its BJA grants to enhance its justice system by developing a Treatment Court (a drug court that has graduated 70 tribal members, over half of whom were referred by adjoining state courts for felony drug or alcohol convictions), a Youth Probation and Home Monitoring Department that closely monitors 100 youthful offenders on intensive probation, a youth re-entry program in conjunction with the State of South Dakota that stresses cultural attachment and educational opportunities for young people facing potential out-of-home placements, and a treatment program that works closely with the court system to deliver culturally-appropriate alcohol and drug treatment. Without BJA funding, these effective programs would not be possible because of limited tribal resources.

In 2005, a historic undertaking to assess and evaluate the progress achieved by the federal government's tribal justice initiative was implemented through a series of meetings entitled "Pathways to Justice." The meetings were "Gatherings" of tribal justice leaders and state and federal decision-makers. The first, "Alaska Gathering of Tribal Justice Leaders" was held in Anchorage, Alaska from April 11-13, 2005. The second, "National Gathering of Tribal Justice Leaders" was held in Washington, D.C., from May 22-24, 2005. The third, "Walking on Common Ground: A National Gathering for Tribal-State-Federal Courts," was held in Green Bay, Wisconsin from July 26-29, 2005. Each Gathering was intended to develop a series of specific recommendations for tribal, state and federal policy-makers for developing and supporting critical tribal justice policies and priorities.

**CALLOUT: Hopi Tribal Court**

The Hopi Tribal Court, a 2004 TCAP grant recipient, has made significant progress in hiring, retaining, and training personnel, including a new Program Director for the Youth Wellness Court and a Juvenile Probation Officer. Proceeds from the TCAP grant have also been used to purchase and install electronic court recording and case management systems. The grant also allows staff to travel to regional and national venues so they may participate in training crucial to the development and continued growth of tribal justice systems.

**CALLOUT: Alaska Native Village of Tuntuliak**

The Alaska Native Village of Tuntuliak is a traditional Yupik Eskimo Village that is utilizing its BJA grant to strengthen its relationship with the Alaska state courts and child welfare workers to enhance the lives of the Yupik children. The unique legal status of the Alaska Native tribes as sovereign entities without territorial jurisdiction necessitates that the tribes coordinate their justice initiatives with state programs and services. The Village intends to augment state resources by providing culturally-relevant diversion programs and sentencing alternatives for juveniles. The efforts of the Alaska Native Village of Tuntuliak to reduce underage drinking by re-enforcing traditional tribal values and sense of social responsibility exemplifies the type of approach that many of the Alaska Native tribes are developing with their TCAP grants.

**CALLOUT: Tulalip Tribe of Washington**

In 2001, the State of Washington retroceded its criminal and civil jurisdiction over the reservation lands of the Tulalip Tribe necessitating the expansion of the tribe's judicial system. Prior to 2001, the Tulalip Tribe of Washington administered a conservation court that averaged up to 40 hunting and fishing violations per year. Now the court averages 423 civil and criminal cases per year, a ten-fold increase. The tribe used its TCAP grant to establish a case management system and hire additional staff. The increased capacity of the tribal judicial system has lessened the burden on state courts in the areas in which the tribe has already assumed jurisdiction. The tribe projects further expansion of its jurisdiction to include juvenile and serious criminal activity in the next phase of its development.

**CALLOUT: Chickasaw Nation**

The Chickasaw Nation has made enormous strides in developing its tribal courts and training its judges, peacemakers and court personnel with assistance of TCAP funding. When the Chickasaw Nation District Court was re-established in 2001, the caseload has grown from one case to over 1,400 most of which were transferred from the C.F.R. court that formerly served the Nation's citizens. TCAP funding supported the implementation of several enhancements to the Nation's Justice System, including improved case management technology, establishment of a peacemaking court, and creating court advocate service to assist pro se litigants. The current caseload managed by the District Court is 523 cases with 374 new cases filed in 2004. The Chickasaw Nation has made full use of BJA-sponsored training for its trial and appellate judges, peacemakers, and court personnel. In 2005, most of the court staff, the District Court Judge and Supreme Court Judge Barbara Smith taught a session on Case Management for "Practical Approaches to Family Issues in Tribal Court," a TCAP course developed and presented by the National Tribal Judicial Center at the National Judicial College. The Nation has truly become a

partner with the BJA and the Tribal Courts Working Group through its participation in TCAP training programs.

This Report covers the first two of the three Gatherings. Representatives of more than 200 American Indian and Alaska Native tribes attended the first two Gatherings. A report for the third Gathering, which was attended by more than 300 tribal, state and federal judges and representatives, will be published independent of this Report. The third Gathering implemented one of the strongest recommendations of the first two: to bring together state and federal judges with tribal judges to address specific ways of envisioning and implementing judicial cooperation across jurisdictional lines. The objective of the third Gathering was to recognize and develop workable solutions that will foster respect and comity, mitigate intergovernmental conflicts, and reduce or forestall unnecessary, duplicative, and divisive litigation.

#### **CALLOUT: Southern California Tribal Chairman's Association**

The Southern California Tribal Chairmen's Association (the "Association") is a consortium of 18 federally recognized Indian Tribes that have agreed to develop an inter-tribal court to serve the needs of the member tribes. The small populations and close proximity of the member tribes made an inter-tribal judicial system the most cost-effective means for protecting the safety and welfare of their respective tribal communities. To ensure acceptance of the inter-tribal court among the members of the tribes represented by the consortium, significant community involvement in the planning stages of the court was required. The TCAP grant award enabled the Association to garner the necessary support to establish the inter-tribal court system.

### **The "Gathering" Process**

The challenge of the "Gatherings" was to ensure that all participants would have a chance to express their concerns. They were given the opportunity to report the needs and challenges facing their tribal judicial systems, to voice the matters of importance to their tribal members, to explore solutions to common problems, and to urge federal and state decision-makers to support tribal efforts.

To achieve this goal, a task force of organizers, including all of the TCAP technical assistance providers (listed in the Appendix as "Tribal Courts Working Group"), identified topics designed to generate discussion relating to the needs and challenges confronting justice systems in Indian Country. Experts discussed the topics in plenary sessions and then, working with facilitators and recorders, the participants were divided into small groups. The small group dynamic gave all participants a chance to speak and to be heard. As one tribal leader emphasized, "We are here for the past and future generations of leaders, and we carry that obligation with great commitment." The resulting discussions were inspiring because of the candid, vigorous, powerful, sophisticated Native voices who shared their successes and failures. This Report compiles that information into findings, guidelines and recommendations.

### **History**

It is important to say what this Report is *not* about. It is not about the historical trauma caused to Native American communities by the western assault on tribal cultures, although history is an important backdrop to any perspective on the mental, emotional and social lives of Native

American people and their relationships with the wider American community. There are, however, historical factors that directly undercut the effectiveness of tribal courts that must be considered. For example, tribal justice is complicated by artificial boundaries, both legal and geographical. There is a widely held belief, supported by factual history, that the development of tribal justice systems has been impeded by decades of misguided and destructive federal and state policies toward tribal governments, seeking to limit the ability of tribes to address complaints and crimes arising in their sovereign territories. In addition to the hodge-podge of statutes limiting tribes, federal Indian policy also created a checkerboard of Indian land areas. This checkerboard makes it impossible for tribal leaders to police tribal territories without the cooperation of the surrounding communities. The Report references additional information pertinent to the history of tribal efforts to control their own territories in the Appendix.

### ***Policy Guidelines and Key Findings***

The Report includes two sections reflecting the detailed work of the Gatherings: “Policy Guidelines” and “Key Findings.” Both contain significant information about the state, and the state of mind, of contemporary Native America. The “Policy Guidelines” focus on actions that tribal leaders urge state and federal decision-makers to take if the positive momentum achieved by the TCAP and other funding sources is to have a lasting impact. Most require critical funding for specific projects at a time when Native justice systems have the most potential to contribute meaningfully to the administration of justice throughout the United States.

In the section entitled “Key Findings,” the Report sets forth summations from each of the discussions facilitated at both the Alaska and the National Gatherings. This section summarizes success stories, genuine grievances, and solutions, candidly shared by all participants, although the Report cannot truly demonstrate the extent and passion of the discussions. Nonetheless, read with other resources set out in the Report, these sections provide a rich and detailed perspective and background from which to understand some of the commonly identified needs of tribal communities.

### **Policy Guidelines**

The Gatherings produced many visions, ideas, and models for strengthening tribal justice systems. Although the focus was identifying challenges and opportunities for advancing justice in Indian Country, the commentary offers some insight on how the integration of social norms, traditional dispute resolution practices, and core values is influencing the evolution of modern tribal justice systems. Regardless of the type of justice system – western or traditional or a blend of each – participants agreed that justice systems must be perceived as fairly and competently serving the needs of the communities and respected by non-Native systems.

**TEXT BOX: Policy Guidelines**

*The key findings from the Alaska and National Gatherings indicate that effective governmental policies for tribal justice systems will:*

1. Strengthen tribal self-governance
2. Address the needs and expectations of the community
3. Promote community wellness and secure a better future for the next generation
4. Involve the tribal community in planning, implementation and evaluation
5. Facilitate collaboration and cooperation within tribal governments
6. Design cost-effective and sustainable solutions
7. Require qualified, culturally-competent staff and professional services
8. Enhance the capacity to respond to a tribal community's evolving needs and expectations
9. Facilitate collaboration and cooperation between tribal, federal, and state governments

Altogether, the Report sets forth nine Policy Guidelines with recommendations. A theme among the recommendations is that federal policy makers must change funding and grant-making processes to recognize the uniqueness of Native communities. Many specific suggestions were made as to how to use the public's money more efficiently and effectively, ranging from the timing and duration of grants to the essential flexibility that must be a part of grant programs if there is to be continued growth in the efficiency and effectiveness of tribal justice systems and culture of American Indians and Alaska Natives.

The Report's Policy Guidelines section discusses in detail each of the nine guidelines, with accompanying commentary and specific recommendations. These nine guidelines represent an effort to fix priorities, and the recommendations advocate for the immediate attention of state and federal officials. No recommendations are provided for specific tribes, because the cultural, social and governmental diversity of the tribes precludes anything more specific than the broad directives set forth in the Policy Guidelines.

## **Key Findings**

### **Alaska Gathering Findings**

A separate gathering of tribal justice leaders in Alaska was planned because Alaska Native governments and justice systems, and their relationships with state and federal policy-makers, present unique challenges and opportunities. To ensure a meaningful dialogue and analysis, the Gathering provided a rare opportunity for Alaska Native people to speak directly with policy-makers. The Report's Key Findings demonstrate the wisdom of a distinct Alaska Gathering. Although the issues discussed paralleled the National Gathering topics, the Alaska Native tribes expressed an unyielding determination to protect traditional justice systems, which dominated the discussion of all topics. To make a positive contribution to the health and safety of Alaska Natives, Alaska policy-makers must respect this focus and determination. At the same time, Alaska Native tribal representatives recognized that such a focus carries with it a number of responsibilities including: (1) educating Native people as well as the non-Natives about their justice systems; (2) collaborating with other tribes, villages, and state and federal governments in implementing their justice systems; and (3) sharing their successful programs with one another



and with local, state and federal government and justice officials who make decisions that impact greatly on their Native communities.

The Alaska Gathering key findings summarized in this Report are organized around the main issues discussed:

- Tribal justice, including the nature of justice systems, the role of restorative justice, and the limitations on jurisdiction
- Intergovernmental relations, with emphasis on relations with Alaska, with other states, and the means of information sharing between them
- Public safety, with emphasis on the challenges faced by tribal villages in remote areas
- Alcohol and substance abuse, including the utilization of wellness court models to address social issues raised by addiction
- Children and families, with emphasis on the need for tribal foster-care placement options
- Juvenile justice, including the emergence of tribal youth courts and diversion programs

### **The National Gathering Findings**

The National Gathering involved tribal justice leaders from every corner of the lower forty-eight states and Alaska. It generated a wide-ranging exchange that reflected ongoing creative tension as tribes decide whether and how to integrate traditional and western-style justice systems to address the health of their communities. The program purposefully focused on a multitude of issues and in each category the discussion produced strong calls to action.

The National Gathering key findings set forth in this Report are organized around those issues:

- Tribal justice, including subtopics of courts, jurisdiction and juvenile justice, development of tribal justice systems
- Community wellness, including key findings on substance abuse, domestic violence, sexual assault and elder abuse, neglect and abuse of children, and youth diversion programs
- Administration of justice, with findings on alternative courts and problem-solving courts, corrections and probation, sharing justice information, and developing cooperative agreements

### ***Pathways to the Future***

The Report of the Alaska and National Gatherings tells the story of an intense process designed to encourage heartfelt, creative, hard-nosed thinking and sharing focused on problems and issues impacting people living in tribal communities throughout the country.

While the process generated expressions of many different critical needs and challenges, in many different voices, in many different ways, from diverse directions, five strong central themes emerged. These themes point the way to the next steps essential to the efficient and effective use of resources to ensure the health and safety of American Indian and Alaska Native people that is so important to the country as a whole.

*Central Themes – Next Steps on the Pathways to Justice*

- 1) Tribal, federal and state governments must create a comprehensive approach to justice issues in Indian Country that requires sharing of information, recognizes and enforces one another's orders, and efficiently uses their combined pool of resources.*
- 2) To create such a comprehensive approach, tribal, federal and state government leaders and justice officials must gather face-to-face in their communities throughout the country in a respectful spirit of collaboration, communication and comity.*
- 3) Because education is the key to understanding between communities and peoples, a strategy must be devised and implemented to provide opportunities for Native and non-Native peoples to gather together, to share information and to gain cultural and professional competence.*
- 4) Tribes and the non-Indian community must work together to devise communication channels that will permit sharing of success stories and replication of models that can be adapted for broader use.*
- 5) A plan must be created to bring to the tribes modern technology critically needed to gather and report data essential to allow for credible needs assessments and to help formulate tribal justice strategies.*

The commitment of tribal, federal and state government and judicial officials expressed at the Gatherings to achieve a partnership is a dramatic beginning. If this beginning is to culminate in success, the commitment must be translated to action. Together, actively, they must follow the Pathway to Justice, every step of the way.

## PART 2: POLICY GUIDELINES

### **Strengthen tribal self-governance**

*Through support of tribal justice initiatives, the federal government and tribes can strengthen tribal self-governance by developing justice systems that are independent, self-reliant, accountable, and fair.*

#### TEXT BOX: Recommendations

1. The federal government should explore easing restrictions on the criminal jurisdiction of tribes to include the authority to regulate and prosecute the manufacture and distribution of controlled substances within their territorial boundaries.
2. When federal law extends or delegates civil or criminal jurisdiction in Indian Country to a state, the state should be required to negotiate cooperative agreements with the tribes with regard to law enforcement.

For Alaska Native Villages and Tribes:

3. The federal government should clarify the jurisdiction of Alaska Native villages and tribes.

The authority to address crime and victimization is necessary for effective self-governance. The development of federal legislation and case law in the area of criminal and civil jurisdiction in Indian Country has created a complex and often perplexing foundation for the development of justice strategies. Unlike state courts that have general jurisdiction over criminal and civil matters within the confines of their territorial jurisdiction, federal law places restrictions on the exercise of criminal and civil jurisdiction by tribal governments. Tribes may not exercise criminal jurisdiction over non-Indians.<sup>14</sup> The criminal penalties tribes may impose are limited to one year in jail and a \$5,000 fine.<sup>15</sup> Further, federal statutes and case law create unclear delineations of the territorial boundaries over which the tribes may exercise regulatory and adjudicatory jurisdiction (see textbox: “What Is ‘Indian Country?’”).

Legal scholars have also suggested that two federal statutes – Public Law 280<sup>16</sup> and the Major Crimes Act<sup>17</sup> – may indirectly contribute to failures in the criminal systems in Indian Country. Professor Carole Goldberg-Ambrose makes a compelling case that Public Law 280, which gives certain states civil and criminal jurisdiction over Indian lands and reservations, directly and indirectly creates a state of lawlessness in Indian Country.<sup>18</sup> She notes that Public Law 280, which was intended to address perceived lawlessness in Indian Country, actually contributes to lawlessness in two ways: 1) by creating “legal vacuums” or jurisdictional gaps that arise when no governmental entity has the authority, institutional capacity, or willingness to address issues

<sup>14</sup> *Oliphant v. Suquamish Indian Tribe, et al*, 435 U.S. 191, 212 (1978).

<sup>15</sup> 25 U.S.C. § 1302(7) (Supp. 1986).

<sup>16</sup> Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, as amended by the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 78 (codified as amended at 18 U.S.C. 1162 (1994), 25 U.S.C. §§ 1321-1326 (1994), 28 U.S.C. § 1360 (1994)).

<sup>17</sup> 18 U.S.C. § 1153(b) (2000).

<sup>18</sup> Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 U.C.L.A. L.R. 1405, 1418 (1997).

of crime; and 2) by permitting abuses of authority by states that are unconstrained by accountability to the tribal populace.<sup>19</sup>

The adverse impact of the Major Crimes Act on justice in Indian Country is the subject of a recent article by Professor Kevin Washburn. He states that “[i]n federalizing local crimes that have no national impact, the federal criminal justice system in Indian country creates a host of practical problems that calls into question whether the system is consistent with many basic principles of American criminal justice.”<sup>20</sup> He notes that the distance between the community where the offense occurred and the prosecuting forum compromises the normative principle of trial by a “jury of one’s peers” and may represent a *de facto* denial of the First Amendment guarantee of public access to the courts.<sup>21</sup> In addition, he offers several examples of how the prosecution may be hindered by practical problems associated with investigating crimes and assembling evidence and witnesses for trial. In a forthcoming law review article on this topic Professor Washburn recommends that “the federal criminal justice system on Indian reservations should be reconceived to give life to existing federal constitutional norms or repealed in favor of an approach more consistent with constitutional values and modern federal policy.”<sup>22</sup>

The subject of jurisdiction arose in various contexts in the National Gathering. The recommendations of the justice leaders at the Gathering regarding jurisdictional issues focus on requests for clarification and expansion of criminal jurisdiction. In particular the justice leaders suggest that Public Law 280 should be repealed and jurisdiction clarified by federal legislation. The tribal leaders also note that federal law prohibiting criminal prosecution of non-Indians impedes the ability to effectively respond to domestic violence and the trafficking of controlled substances in Indian Country. Further, the tribal leaders at both the Alaska and National Gatherings reported that conflict with states over jurisdictional issues hampers efforts to build collaborative partnerships between state and tribal governments.

## **Crime and Victimization in Indian Country**

The incidence of crime and victimization in Indian Country has not been accurately determined by studies or surveys. However, a recent statistical profile compiled by the Bureau of Justice Statistics demonstrates that American Indians suffer a high incidence of victimization by of non-Indians. The average victimization rate for American Indians over 12 years of age during that period was found to be 101 victims of violent crime per 1,000 persons – 2.5 times greater than the total population.<sup>23</sup> American Indian victims are more likely to report that the offender was

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<sup>19</sup> *Id.* at 1419-36.

<sup>20</sup> Kevin K. Washburn, *The Federal Criminal Justice System in Indian Country and the Legacy of Colonialism*, 52 *FED. LAW.* 40 (Apr. 2005). A law review article on the subject matter covered in his essay will be published as *American Indians, Crime and the Law*, 104 *Michigan Law Review* (forthcoming Feb. 2006).

<sup>21</sup> *Id.*

<sup>22</sup> Kevin K. Washburn, *American Indians, Crime and the Law*, 104 *Michigan Law Review* (forthcoming Feb. 2006).

<sup>23</sup> Steven J. Perry, *A BJS STATISTICAL PROFILE 1992-2002: AMERICAN INDIANS AND CRIME 4* (Bureau of Justice Statistics 2004). The source is the National Crime Victimization Survey; the report provides estimates for rape/sexual assault, robbery, aggravated assault, and simple assault.

non-Indian and was under the influence of alcohol or drugs.<sup>24</sup> American Indians are also more likely to be murdered by a non-Indian.<sup>25</sup>

The statistics on criminal victimization of American Indians demonstrate a dire state of affairs. Tribal leaders seek assistance from the federal government to escape the jurisdictional conundrum created by federal statutes and case law, so that they may address this serious problem. As tribal leaders develop justice systems, it is an opportune time for the federal government to revisit its laws and affirm its policy of self-governance by enabling those justice systems to respond effectively to the crises in their tribal communities.

**TEXT BOX: The Plight of Alaska Native Tribes: Landless Sovereigns**

Alaska Native tribes face a unique challenge in developing and administering tribal justice systems, because, in effect, they have no territorial jurisdiction over their tribal lands.

In 1971, the Alaska Native Claims Settlement Act (“ANCSA”) set the stage for the unique jurisdictional status of the Alaska Native tribes.<sup>26</sup> ANCSA transferred all but one reservation in Alaska to state-chartered, regional corporations and created years of debate over the legal status of Alaska Native village governments; specifically, the state questioned the status of these governments as tribes and the designation of tribal lands managed by the regional, tribal-owned corporations as “Indian Country” as defined by 18 U.S. § 1151(b). The U.S. Department of the Interior ended the debate regarding the status of the Alaska Native tribes through the publication of a notice in 1993, which included 226 Alaska Native villages and tribes among the federally recognized tribal entities. However, the question of the territorial jurisdiction of Alaska Native tribal governments was not clearly resolved until 1998 when the U.S. Supreme Court issued its opinion in the case of *Alaska v. Native Village of Venetie Tribal Government* (“Venetie”).<sup>27</sup> In *Venetie*, the court held that ANCSA lands could not be defined as “Indian Country” because they were set-aside for private, state-chartered Native corporations. In determining that these lands did not meet the federal definition of “Indian Country,” the court ultimately determined that ANCSA had extinguished most of “Indian Country” in Alaska.<sup>28</sup>

*Venetie* eliminated all tribal territorial jurisdiction within Alaska, except for one reservation. Consequently, Alaska Native tribal governments must address daunting social, economic, and health issues with very little legal authority over their members. In addition, the State of Alaska continues to challenge this narrow base of authority. Most recently the Office of the Alaska Attorney General has reasserted the opinion that tribes do not exist in Alaska.<sup>29</sup> Despite such opposition, tribal governments continue to function and assert the rights of sovereign governments including that of establishing tribal justice systems that provide both unique and culturally appropriate approaches to dispute resolution.

<sup>24</sup> *Id.* at 9-10. American Indian victims reported the offender was White or Black in 66 percent of the incidents and under the influence of alcohol or drugs in 71 percent.

<sup>25</sup> *Id.* at 23.

<sup>26</sup> Pub. L. 92-203, 85 Stat. 688, as amended (codified as 43 U.S.C. §§ 1601 *et seq.* (Supp. 2004)).

<sup>27</sup> 522 U.S. 520 (1998).

<sup>28</sup> *Id.* at 527-532.

<sup>29</sup> Jurisdiction of State and Tribal Courts in Child Protection Matters, 2004 Op. Att’y Gen. 3 (2004).

## **Address the needs and expectations of the community**

*Effective tribal responses to justice issues in Indian Country must address the needs and expectations of individual tribal communities. The diversity in population, geographic conditions, and culture of American Indians requires flexibility in program management.*

TEXT BOX: Recommendations – The federal government should:

1. Send program managers visit tribal communities to better understand the issues that concern tribal leaders.
2. Support educational efforts that assist federal and state policy-makers in understanding that diverse cultures, customs and traditions prohibit one-size-fits-all approaches to addressing justice issues in Indian Country.
3. Support the development of resources that will assist tribes in identifying appropriate tribal justice system models based on their specific needs.
4. Subsidize the exhibition and showcasing of successful courts and promising practices at conferences and events that tribal justice leaders are likely to attend.
5. Sponsor education programs that fully explore the issues that tribal leaders face in integrating culture and tradition in their tribal justice systems. The educational goal should encompass the needs of tribes that have a variety of cultures represented within the boundaries of their reservations.
6. Support development of a program that provides (a) a survey of potential justice systems models, (b) self-assessment tools to evaluate community needs, cost-effectiveness, and resource capacity to implement different justice models, and (c) an inventory of resources for planning and implementation. Deliver the program through on-site technical assistance or a distance-learning course.
7. Offer flexibility in program design and structure to allow grant applicants to establish programs that reflect the strengths of their communities. Examples of strengths may include institutional capacity, community involvement, community resources, and culture.
8. Develop of civil and criminal model codes with commentary that gives tribes criteria for selecting provisions that address their specific needs.
9. Support the study of culturally based programs to identify promising practices with an understanding of the diversity of cultures within Indian Country and within individual tribal communities.
10. Extend program grant periods to account for the time that it takes for culturally based programs to establish rapport and trust with the community.

For Alaska Native tribes and villages:

11. Develop funding opportunities for village-based justice initiatives either through specific solicitations or by creating an Alaska Native category under which Alaska Native tribes may apply for grants. Qualifications and selection criteria should afford these tribes latitude in the structure, composition, and goals of their justice systems. Tribes should have an option of implementing village-based initiatives, as long as these plans result in cost-effective and sustainable programs. Timeframes for planning should be increased to give tribal officials the opportunity to fully assess the needs of their community and develop competency in justice planning.

12. Provide technical assistance and education specifically for Alaska Native justice systems by providers that have experience and expertise in developing and enhancing tribal justice systems in Alaska.

Contemporary tribal courts are emerging as an amalgamation of the American legal system's adversarial process blended with processes influenced by tribal communities' traditional values, customs, and practices. The integration of traditional or customary law may be reflected in subtle revisions to evidence codes that allow for the introduction of customary law evidence. Alternatively, tribal courts may exhibit a striking contrast to the American legal system with wholly different structures, procedures, and overall objectives. Some tribal justice systems may even challenge widely held notions of justice and fair play. Tribal leaders are developing justice systems after considering their communities' needs and expectations and the legal and resource limitations of their tribes. Federal grant programs and technical assistance services can leverage resources by assisting tribal leaders and administrators in making these important choices.

**TEXT BOX: Contemporary Tribal Justice Systems**

Source: Ada Pecos-Melton, NATIONAL VICTIM ASSISTANCE ACADEMY TEXTBOOK (Section 4: Tribal Justice); available at [http://www.nvaa.org/assist/chapter3\\_4.html](http://www.nvaa.org/assist/chapter3_4.html).

The composition, structure, and processes of contemporary tribal justice systems are diverse and representative of distinct differences in culture, social norms, and practical realities of American Indian tribes:

- Family forums. Elders or community leaders usually facilitate family forums such as family gatherings and talking circles. Problems typically involve interpersonal transactions such as family problems, marital conflicts, juvenile misconduct, violent or abusive behavior, parental misconduct, or property disputes. Customary laws, sanctions, and practices are used to resolve the problem(s). ... Although family forums are the least official, they are the most inclusive and actively engage participants in discussing problems and fashioning solutions.
- Community forums. Community forums require more formal protocols than family forums, but draw upon the families' willingness to discuss the issues, events, or accusations with tribal community members or tribal officials who may or may not be a part of their family. ... These types of forums are the most community-based in that they reach outside the immediate family, to relatives, friends, and other concerned citizens, in discussing problems, reaching solutions, and ensuring offender compliance as well as victim assistance, protection, and safety.
- Traditional courts. Although traditional courts incorporate some modern judicial practices regarding criminal and juvenile matters, the process for handling cases is similar to the community forum. ... These proceedings are presided over by the heads of tribal government, such as the governor, lieutenant governors, or other appointed tribal officials, and are guided by customary laws and sanctions. ... While there is more native-based formality in traditional courts, they continue to rely on immediate family, other relatives, and friends in exploring problems and developing appropriate solutions.

- Courts of Indian Offenses. Also referred to as CFR (Code of Federal Regulations) Courts, Courts of Indian Offenses are federal courts. These courts have limited jurisdiction pursuant to Title 25, the Code of Federal Regulations. ...
- Tribal courts. Tribal courts are judicial forums based on the Anglo-American legal model using written codes, rules, procedures, and guidelines. These courts handle criminal, civil, traffic, domestic relations, and juvenile matters. ... Several tribal courts use peacemaking principles to process cases, particularly in cases that involve youth.

Recent innovations include the addition of problem-solving courts, typically referred to as “wellness courts.” Tribal leaders at the National Gathering reported success with using this type of forum to manage cases involving drug and alcohol abuse, particularly with juveniles.

The laws applied and the procedures used in tribal justice forums vary based on the constitutions, laws, and customs of the tribes, except that the Indian Civil Rights Act (“ICRA”) requires tribal governments to provide certain minimum protections of individual rights.<sup>30</sup> The ICRA ensures certain basic rights for individuals when working or dealing with tribal governments and court systems. However, some Indian law scholars have suggested that the ICRA may be responsible for some of the inherent ambiguities that exist in modern tribal justice systems. Some provisions force tribes to base their judicial systems on Anglo-American notions of due process that reinforce principles inconsistent with Native values and traditional dispute resolution methods.<sup>31</sup> By compelling tribes to offer jury trials and secure the rights of the accused to remain silent and confront witnesses, the ICRA indirectly coerces tribes to follow the criminal processes of state and federal courts.<sup>32</sup> While more latitude may be available in civil actions, many tribes make their traditional courts or peace-making processes alternative forums to which all parties must consent.

**TEXT BOX: Indian Civil Rights (25 U.S.C. § 1302)**

Federal law protects individuals from the following actions by tribal governments:

- Infringement of free exercise of religion, speech, press, and assembly; and right to petition for a redress of grievances
- Unreasonable search and seizures
- Double jeopardy
- Self-incrimination in criminal proceedings

<sup>30</sup> Indian Civil Rights Act of 1968, Pub. L. 90-284, Title II, 82 Stat. 77 (codified as 25 U.S.C. §§ 1301, *et seq.* (Supp. 1990)).

<sup>31</sup> See Kirke Kickingbird, “*In Our Image..., After Our Likeness:*” *The Drive for the Assimilation of Indian Court Systems*, 13 AM. CRIM. L. REV. 675, 694-95 (1976).

<sup>32</sup> See *Granite Valley Hotel Ltd. Partnership v. Jackpot Junction Bingo & Casino*, 559 N.W.2d 135, 144 (Minn. Ct. App. 1997). A contemporary example of this coercion arose on the Red Lake Indian reservation where the Tribal Council, in the face of continuing jury nullification in drug cases, enacted an ordinance permitting tribal judges to overturn both jury convictions and acquittals and impose the opposite verdict should they believe that the jury verdicts were the result of passion or prejudice. See *id.* at 145 (Randall, J. concurring). In the face of a federal action seeking a writ of habeas corpus, the tribal court backed down and allowed the defendant to plead to a lesser offense. *Id.*



- Takings of property without just compensation
- Denial of the following rights: speedy and public trial; information about the nature and cause of the accusation; confrontation of witnesses against the defendant; compulsory process for obtaining witnesses in the defendant's favor; and counsel's assistance (at defendant's own expense)
- Imposition of excessive bail, excessive fines, and cruel and unusual punishments
- Denial of equal protection of the law or deprivation of liberty or property without due process of law
- Bill of attainder or *ex post facto* law
- Denial of right to a jury trial by a minimum of six persons when subject to penalty of incarceration

ICRA also limits criminal punishments to a maximum of one year of incarceration and \$5,000 per offense.

## Challenges and Opportunities for Emerging Tribal Justice Systems

**CALLOUT:** It's like when someone is feeding pigeons. The pigeons all go to the new person who starts feeding them ... There needs to be more thought put into how the money can be used. Let the process be driven from the tribe back to the federal government.

When tribal governments endeavor to develop or enhance their tribal justice systems, they are undertaking a task that will require knowledge of complicated and often perplexing rules of law, and a thorough understanding of their tribe's resources and cultural integrity. Tribal justice leaders recognize that there is no "one-size-fits-all" solution to justice in Indian Country. The leaders expressed concern that federal programs often constrain tribes to utilize "model programs" and that funding periods for grants do not provide adequate time to accomplish their goals. Specifically, the tribal leaders raised several issues that suggest longer periods of time are required for planning and implementation phases:

- Tribal leaders tend to proceed cautiously in matters that implicate sovereign immunity.
- Innovations may threaten the balance of power and the communities' struggles with separation of powers issues.
- The integration of cultural norms and traditional practices may represent a practical problem (*e.g.*, identifying and applying cultural values, educating communities to develop trust in the systems, etc.).

**CALLOUT:** The Tribal Court has the duty of incorporating centuries of customs and traditions within the framework of the new Constitution. As in this case, it is not an easy task. Applying the Tribal Code of Laws to a traditional and religious conflict results in tension and conflict between the Tribal Code of Laws and traditional customs and traditions. Because of these dilemmas, Anglo-American concepts of fairness and civil rights are sometimes inappropriate, in their raw form, to Indian communities. These concepts can be applied only in conjunction with the unique cultural, social, and political attributes of the Indian heritage. *In the Matter of Sacred*

*Arrows*, 3 Okla. Trib. 332, 337-8 (Cheyenne-Arapaho Dist. 1993) (Tribal court abstained from matter involving rightful possession of sacred objects.).

The most intriguing series of key findings were those related to questions concerning the need for culturally specific program strategies in youth diversion programs. Although the integration of culture was lauded in most discussion groups and acknowledged as a necessary consideration in planning all facets of tribal justice systems, the participants in the youth diversion discussion group at the National Gathering noted several problems with requiring programs to be culturally specific. Specifically, the leaders raised the following issues:

- Some tribes have difficulty identifying tribal customs, traditions, and values because of lost histories, mixed cultures, diverse religions, etc.
- The mix of cultures when multiple tribes reside within the same reservation may cause conflict in the design and implementation of a single tribal justice system.
- Tribal traditional values and norms may not conform to contemporary expectations and social norms (*e.g.*, traditional practices may not conform to modern notions of due process or equal protection).
- Religious intolerance exists within tribal communities between traditionalists and Christians and other people of other faiths.

These issues should be given due consideration in drafting solicitations for grant programs to avoid interfering with the acculturation of tribal communities or creating unnecessary impediments to the development of effective tribal justice systems.

## **Promote community wellness and secure a better future for the next generation**

*Tribal justice leaders support a holistic approach to addressing the serious social problems that affect the wellness of their communities. In many instances, they focus their efforts on youth because youth are the most amenable to prevention and intervention strategies, and their well-being ultimately foretells the tribe's future.*

TEXT BOX: Recommendations – The federal government should:

1. Disseminate innovative ideas, promising practices and success stories (*e.g.*, family-based treatment facilities, tribal youth programs, culturally relevant treatment options, etc.) in a medium that is readily accessible by tribal communities.
2. Sponsor the development of a model protocol for collecting and measuring data on drug and alcohol abuse to allow tribes to make valid needs assessments. The protocol should include basic instruction on the types of data that need to be collected, recommended methods for collection, and useful frameworks for reporting the data.
3. Support the provision of technical assistance on cost-effective, culturally-relevant screening and assessment tools for addiction to alcohol and illicit drugs, youth gang participation, and domestic violence.
4. Subsidize studies of drug usage that single out specific drugs, so that tribal justice leaders and federal policy advisors can ascertain trends by type of drug used.

For Alaska tribes and villages:

5. Alaska should enforce local option laws and standards and protocols for conducting searches should be added to these laws.
6. The federal and state governments should collaborate with tribal governments to expand tribal youth diversion programs.

Restorative justice principles play a significant role in emerging and developing tribal justice systems. Wellness courts, tribal youth programs, traditional peacemaking, and other restorative justice strategies are providing tribal communities with glimmers of hope in what might otherwise represent a bleak landscape marred by generations of alcohol abuse and addiction. Some of the tribal justice leaders perceive that large segments of their population are trapped in a cycle of addiction, child neglect and abuse, domestic violence, and delinquency. In areas where there is a high prevalence of alcoholism or addiction, this may well be the case.<sup>33</sup> Studies have demonstrated relationships exist between child abuse or neglect and parental involvement with alcohol,<sup>34</sup> and between child abuse or neglect and subsequent delinquency in adolescence.<sup>35</sup> The

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<sup>33</sup> See Fred Beauvais, *American Indians and Alcohol*, 22 SPOTLIGHT ON SPECIAL POPULATIONS 253-4 (1998) (“The level of alcohol use among American Indian adults is difficult to estimate. Drinking practices vary greatly from tribe to tribe ... from a low of 30 percent to a high of 84 percent.”); available at <http://www.niaaa.nih.gov/publications/arh22-4/253.pdf>.

<sup>34</sup> Philip A. May, *The Epidemiology of Alcohol Abuse Among American Indians*, 20 THE HIS PRIMARY CARE PROVIDER 37-56 (March 1995) (reprinted from 18 AMERICAN INDIAN CULTURE AND RESEARCH JOURNAL 121-143 (1994); citing Lujan, C.C., et al., *Profile of Abused and Neglected Indian Children in the Southwest*, 13 CHILD ABUSE AND NEGLECT 449-61 (1989)); available at <http://www.ihs.gov/publicinfo/publications/healthprovider/issues/ihspromar2.asp>.

tribal leaders perceive that a holistic approach premised on a desire to make things right would address the problem.

Tribal justice leaders believe that significant benefits can be derived from a restorative justice approach in criminal and civil matters. For example, the leaders recognize that using a restorative justice approach provides an opportunity to address familial and social issues that are often the cause of aberrant behavior (particularly in youth). Likewise, they believe that sentencing individuals in conformance with restorative justice goals results in outcomes that benefit the community as a whole. They identify the specific goals of sentencing as traditional skill development, reintegration of the offender into the community, and reaffirmation of the offender's sense of accountability to the tribe. Because spirituality is deeply rooted in many native healing practices, tribal processes often integrate cultural activities and rituals at critical stages.

Although the perceptions of the tribal leaders appear to be validated by the findings of various studies, there remains a dire need to develop a greater understanding of the justice issues facing Indian Country based on statistically valid data relevant to tribal communities. Much of the information reported with regard to crime in Indian Country is derived from national surveys or studies of individual tribal communities. A more accurate assessment of the factors that contribute to crime in Indian Country and the incidence of crime in tribal communities would facilitate more effective responses to existing and emerging justice issues.

### **Juvenile Delinquency and Gang Activity in Indian Country**

When asked to identify the most problematic juvenile justice issues, the tribal leaders identified truancy, dropping out of school, curfew violations, teen sex, alcohol consumption, substance abuse, vandalism, and theft. Only a few tribal leaders mentioned gang activity. The leaders noted that, in the case of serious offenses, juveniles are prosecuted in federal district court under the Major Crimes Act. If convicted, they are confined in federal detention facilities.

The tribal justice leaders at the Alaska and National Gatherings perceived that parenting failures are the principal cause of juvenile delinquency. The failures cited by the tribal leaders include: (1) engaging in drinking parties with children present; (2) failing to express concern when children drop out of school; and (3) exposing children to domestic violence. According to the National Survey on Drug Use and Health, Native American youth ages 12-17 have the highest rates of cigarette use, binge drinking, and illicit drug use compared to their peers of other races.<sup>36</sup> Further, a larger percentage of Native American youth failed to perceive any risk in engaging in those behaviors and reported that their parents "do not strongly disapprove" of regular use of

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<sup>35</sup> Richard Wiebush, Raelene Freitag, and Christopher Baird, *Preventing Delinquency through Improved Child Protection Services*, OJJDP JUVENILE JUSTICE BULLETIN (July 2001); available at <http://www.ncjrs.org/pdffiles1/ojjdp/187759.pdf>.

<sup>36</sup> National Survey on Drug Use and Health, *Risk and Protective Factors for Substance Use among American Indian or Alaska Native Youths*, THE NSDUH REPORT (Office of Applied Science, Substance Abuse and Mental Health Services Administration (SAMHSA) 2004); available at <http://www.oas.samhsa.gov/2k4/AmIndianYouthRF/AmIndianYouthRF.htm>.

cigarettes, marijuana, or other drugs.<sup>37</sup> Although American Indian youth are less likely to be arrested for violent crimes (except murder), they are almost twice as likely as their peers to be arrested for alcohol-related offenses.<sup>38</sup> A study by the Office of Juvenile Justice and Delinquency Prevention indicates that American Indian youth are “placed in correctional facilities at twice the expected rate,” and certain states report even greater disparity in confinement of American Indian youth compared to all other races.<sup>39</sup>

A multitude of factors may contribute to truancy in addition to those noted above (*i.e.*, high rates of underage drinking, substance abuse, arrests, and incarceration). Educational attainment varies widely among tribal communities.<sup>40</sup> In some communities, less than 60 percent of adults over the age of 25 have high school or general equivalency diplomas. Historically, the drop out rate for Native Americans has been twice the national average.<sup>41</sup> Other contributing factors may be the high rates of neglect, abuse, and exposure to domestic violence.

The incidence of gang infiltration in Indian Country varies. Like delinquency, the emergence of the problem may originate from dysfunction in familial or community relationships. The commentary of the tribal justice leaders is consistent with the findings reported in the Office of Juvenile Justice and Delinquency Prevention Bulletin entitled *Youth Gangs in Indian Country*.<sup>42</sup> In the study, which was modeled on the 2001 National Youth Gang Center (NYGC) survey, 23 percent of the responding tribes reported active gang activity within their tribal communities.<sup>43</sup> The anecdotal reports at the Gathering and the study findings indicate that tribal communities with large populations are more likely to experience gang activity.<sup>44</sup> The OJJDP study reported that field studies on the Navajo reservation identified a variety of factors that contribute to a weakening of social control through parental, extended family, and tribal relationships.<sup>45</sup> The respondent tribes also reported that the overwhelming majority of gang members were juveniles.<sup>46</sup> Additionally, the commentary of the tribal justice leaders and the OJJDP report

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<sup>37</sup> *Id.*

<sup>38</sup> Steven W. Perry, A BJS STATISTICAL PROFILE: 1992-2002, AMERICAN INDIANS AND CRIME 17 (Bureau of Justice Statistics 2004). Arrest rate for alcohol-related offenses for American Indian youth is 681 per 100,000 persons compared to 362 for youth of all races.

<sup>39</sup> Heidi M. Hsia, George S. Bridges, and Rosalie McHale, DISPROPORTIONATE MINORITY CONFINEMENT 2002 UPDATE 3 (Office of Juvenile Justice and Delinquency Prevention 2004) (citing 1997 Census of Juveniles in Residential Placement (CJRP) regarding American Indian youth ages 10 to 17).

<sup>40</sup> 2000 U.S. CENSUS DATA. Nationally 70.9 percent of Native Americans and Alaska Natives receive high school or general equivalency diplomas.

<sup>41</sup> See U.S. Commission on Civil Rights, BROKEN PROMISES: EVALUATING THE NATIVE AMERICAN HEALTH CARE SYSTEM (1994) (citing, U.S. Department of Education, Indian Nations at Risk Task Force, PLANS FOR DROPOUT PREVENTION AND SPECIAL SCHOOL SUPPORT SERVICES FOR AMERICAN INDIAN AND ALASKA NATIVE STUDENTS (1992)).

<sup>42</sup> Aline K. Major, Arien Egley, Jr., James C. Howell, Barbara Mendenhall, and Troy Armstrong, *Youth Gangs in Indian Country*, OJJDP JUVENILE JUSTICE BULLETIN (March 2004); available at [http://www.ncjrs.org/html/ojjdp/jbul2004\\_3\\_1/contents.html](http://www.ncjrs.org/html/ojjdp/jbul2004_3_1/contents.html).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* The average population of the tribal communities reporting gang activity was 4,500 versus an average population of 400 for communities reporting no gang activity.

<sup>45</sup> *Id.* (see text box: “Factors Associated with the Onset of Gang Activity”).

<sup>46</sup> *Id.* “[N]early 75 percent of all reported gang members in Indian country were juveniles (younger than 18 years old).”

suggest that juveniles re-entering the tribal communities from prisons and detention facilities and proximity to metropolitan areas with gang activity contribute to the incidence of gang activity in tribal communities.<sup>47</sup>

**TEXT BOX: Factors Associated with the Onset of Gang Activity**

Source: Aline K. Major, Arien Egley, Jr., James C. Howell, Barbara Mendenhall, and Troy Armstrong, "Youth Gangs in Indian Country", OJJDP Juvenile Justice Bulletin (March 2004).

Frequency with which families move off and onto the reservation

Poverty, substance abuse, and family dysfunction

The development of cluster housing instead of traditional single-family housing

A tenuous connection to Native American culture and traditional kinship ties among cousins

Based on findings that the incidence and severity of gang activity in Indian Country was "relatively low" and comparable to problems in areas of the United States with smaller populations, the OJJDP recommends "considering programs that have successfully targeted delinquent activity and gang involvement in the general population."<sup>48</sup> Specifically, the OJJDP recommends "incorporating a range of strategies to prevent, control, and reduce youth crime in Indian country", with a focus on community-specific prevention programs.<sup>49</sup>

## **Alcohol and Substance Abuse Trends**

Heavy consumption of alcohol continues to be a serious health threat to Native American populations. American Indians and Alaska Natives admitted to public treatment centers in 2002 overwhelmingly reported alcohol as their primary substance of abuse.<sup>50</sup> Arrest rates for drunkenness and alcohol-related offenses for American Indians and Alaska Natives were double the national rate.<sup>51</sup> Eleven percent of the inmates in Indian Country jails on June 30, 2003 were being held for alcohol-related offenses.<sup>52</sup> However, the statistical data suggests that illicit drug use is increasing among American Indians. For instance, from 1994 to 2002, admissions of American Indians and Alaska Natives to public treatment centers for dependency on illicit drugs increased from 23.6 percent to 37.1 percent.<sup>53</sup> Further, the National Household Survey on Drug Abuse reported that American Indians and Alaska Natives ages 12-17 were more likely to report use of "any illicit drug" in the past month (22.1 percent) than American Indians and Alaska Natives over the age of 12 (10.9 percent).

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Drug and Alcohol Services Information System, SUBSTANCE ABUSE TREATMENT ADMISSIONS AMONG AMERICAN INDIANS AND ALASKA NATIVES: 2002 (Office of Applied Sciences SAMHSA 2005); available at <http://oas.samhsa.gov/2k5/IndianTX/IndianTX.htm>.

<sup>51</sup> Steven W. Perry, A BJS STATISTICAL PROFILE at 17.

<sup>52</sup> Todd D. Minton, *Jails in Indian Country, 2003*, BUREAU OF JUSTICE STATISTICS BULLETIN (U.S. Department of Justice 2005); available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jic02.pdf>.

<sup>53</sup> Drug and Alcohol Services Information System, SUBSTANCE ABUSE TREATMENT ADMISSIONS AMONG AMERICAN INDIANS AND ALASKA NATIVES: 2002 (Office of Applied Sciences SAMHSA 2005); available at <http://oas.samhsa.gov/2k5/IndianTX/IndianTX.pdf>.

The increase in admissions for dependency on illicit drugs may be related to the increased number of wellness courts operating in Indian Country. However, the commentary of the tribal justice leaders suggests that incidence of methamphetamine and illegal prescription drug usage and trafficking in Indian Country is increasing at alarming rates in some tribal communities. Of the ten examples tribal justice leaders cited as evidence that alcohol and drug use were growing concerns in their community, three were specifically related to methamphetamine usage and trafficking:

- Babies born addicted to methamphetamine
- Alcohol use in youth starting as young as eight years of age
- Young grandparents addicted to methamphetamine
- Juveniles experimenting with methamphetamine
- Increased use of marijuana in environments where alcohol use is no longer socially acceptable
- Random drug testing creating a class of unemployable people
- Marijuana smuggled into the U.S. from Canada
- Increased high school dropout rates
- Gang infiltration
- Increased criminal court dockets (*e.g.*, domestic violence)

One leader reported that, “My area is called the ‘meth capitol.’” Another believes that 100 percent of the tribe’s child dependency docket involves methamphetamine usage. Unfortunately, there is insufficient timely and relevant data to which tribes might refer to prepare to meet the unique challenges posed by the increased prevalence of illicit drug use and trafficking in their communities.

### **Promising Practices Highlighted**

One tribal leader reported that when his tribe finally made inroads to reduce the incidence of alcohol abuse, a new “drug of choice” emerged – marijuana. Nonetheless, the most extensive list of successful programs generated in the discussion groups were initiatives related to wellness courts, tribal youth programs, and treatment programs.

#### **TEXT BOX: Potential Promising Practices Identified by Tribal Justice Leaders**

- Participation in cultural activities (*e.g.*, sweat lodges, culture camps) and traditional skill building (*e.g.*, fishing, horse husbandry, language development)
- Social pressure from peers, mentors, spiritual leaders and members of the community
- Public information and outreach at schools and community events through organized campaigns such as Community Mobilization Against Drugs (CMAD)
- Enhancements to tribal justice systems such as wellness courts and circles of healing
- Exploration of sentencing strategies such as increased use of mandatory screening or drug tests, and banishment
- Youth-specific programming such as Boys and Girls Clubs and tribal youth programs
- Utilization of culturally relevant treatment options such as therapeutic story-telling
- Ensuring that children attend school

Alaska Native justice leaders identified the following programs as Potential Promising Practices:

- McLaughlin Youth Facility (BJA funded program)
- Drum Dancers (Juneau)
- Youth Employment Services (CITC)
- Youth Opportunity Program

Potential obstacles to implementing or sustaining successful tribal youth programs that the tribal leaders identified were that:

- Many offenses committed by tribal youth occur outside the jurisdiction of the tribe, *i.e.*, the conduct occurs outside the tribe's territorial jurisdiction or is defined as a federal crime under the Major Crimes Act.
- Federal and state justice officials refuse to refer offenders to tribal-operated programs.
- Too often the success of the program is vulnerable because it relies heavily on the leadership of one or two key participants.
- Leadership may be centralized among certain clans or families creating apparent conflicts of interest because the judges or court personnel are related to persons that participate in diversion programs.
- Juveniles are resistant to indoctrination in tribal culture.
- Tribes are not routinely performing criminal background checks on staff and volunteers in youth programs.
- Some tribal leaders report that parents utilize youth programs as daycare, so the parents can drink alcohol.

**TEXT BOX: Alaska Native Youth: Diverting a Crisis?**

A grossly disproportionate number of cases involving Alaska Native youth are referred to the criminal justice system. In Fairbanks, while Native youth comprise only 6.9 percent of the population, 32.9 percent of the cases referred to the criminal justice system involved Native youth.<sup>54</sup> In Anchorage, Native youth comprise 7.3 percent of the population, but account for 18 percent of the juvenile referrals to the criminal justice system.<sup>55</sup>

Alaska Native justice leaders report that tribes often do not learn of juvenile offenses until the state is involved, because much of the criminal activity that tribal youth perpetrate happens off tribal lands and the offenses are prosecuted in state or federal courts. When tribes have the

<sup>54</sup> Alaska Judicial Committee to the U.S. Commission on Civil Rights, *RACISM'S FRONTIER* 38 (2001).

<sup>55</sup> Cracium Research Group, *2004 ASSESSMENT STUDY DISPROPORTIONATE MINORITY CONTACT WITH THE ALASKA JUVENILE JUSTICE SYSTEM* (Nov. 1, 2004) (funded by the State of Alaska, Department of Health and Social Services, Division of Juvenile Justice).



opportunity to treat juvenile offenders, they implement programs that reinforce cultural values, traditions and history (e.g., spirit camps, culture camps, traditional knowledge and skill building, language development programs, etc.). Some tribes and non-profit organizations are also successfully collaborating with Alaska juvenile courts on diversion programs and youth courts. Tribal youth in Anchorage may be referred to the Alaska Native Justice Center (ANJC) Tribal Youth Diversion Effort (TYDE) Program. This three-tier program provides culturally-relevant life-skills training and tutoring to tribal youth who commit minor offenses (I), violent offenses (II) or alcohol abuse (III). Offenders are referred to the program following an assessment by ANJC and the juvenile court judge. The program has demonstrated significant impact on recidivism. Recidivism among TYDE I graduates is less than 30 percent. Before the inception of the program, recidivism for tribal youth involved in the juvenile court system was 73 percent.<sup>56</sup>

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<sup>56</sup> Alaska Native Justice Center (July 21, 2005).

## ***Involve the tribal community in planning, implementation and evaluation***

*Effective tribal responses to justice issues in Indian Country must involve the tribal community at all stages of development. Tribal community participation in development is essential to promote community acceptance and participation in the justice process.*

TEXT BOX: Recommendations – The federal government should:

1. Collect and disseminate promising practices for involving tribal communities in planning, implementing and evaluating tribal justice programs.
2. Sponsor tribal public information campaigns to create awareness about the detrimental impact of child abuse and neglect, domestic violence and elder abuse on tribal communities – to promote the confrontation of the issues within tribal communities.

For Alaska Native tribes:

3. Sponsor the development of educational programs and materials to support community action planning of Alaska Native justice initiatives.

Tribal justice leaders are supportive of community involvement in the planning and design of their courts. Tribal justice systems are often established with volunteers from the community who act as judges, mediators, mentors, or peer advisors. Early involvement of the community often yields more participation in the program or process being implemented. In their commentary, the tribal leaders noted they face a challenge that is unique to tribal communities: tribal courts can be too westernized and fail to reflect the traditions and customs of their communities. Community members may not utilize an emerging tribal justice system until trust is established, because they have more confidence in the effectiveness of a traditional justice system than a western-style court.

In other instances, the attainment of justice goals including deterrence, prevention, incapacitation and rehabilitation requires that communities not only accept, but support, justice initiatives. For example, successful implementation of wellness court models is enhanced when the community provides a supportive environment for the continuing sobriety of the program graduates. One leader suggested that the temporary nature of the support system provided by the wellness court fails to address the vulnerability of offenders to social pressures following graduation.

**CALLOUT:** “We gave him a certificate, gifts, recognition ... for being in the program for a year. Afterwards, all the safety was gone. When they got out they didn’t feel a part of the community. They felt isolated.”

Likewise, to effectively develop and implement strategies to combat domestic violence and abuse within Indian families, these problems must be recognized by the tribal community. One tribal justice leader referred to the historical tribal justice response to domestic abuse in Indian Country as “a Code of Silence”; however, he noted that public information campaigns in tribal communities are increasing awareness of the problem and indicated that tribal justice systems are

beginning to respond. Elder abuse is another problem area that might benefit from some initial groundwork in the community.

Although no reliable statistical data exists on the prevalence of elder abuse in Indian Country, the tribal justice leaders recognized it as an issue and noted that elder abuse is generally reported in the context of a guardianship proceeding. This is consistent with the findings of the National Indian Council on Aging which reported that results from a survey of adult protective service workers showed a strong perception that financial exploitation is the most common form of elder abuse.<sup>57</sup> One tribal leader described the situation as a “dogfight over having the elder [to] get their check.” The tribal leaders suggest that elders are reluctant to report exploitation and abuse because they are: (1) embarrassed that the existence of the problem is an indication of the breakdown in their immediate families; and (2) concerned that the tribal community will ostracize individual family members. Thus, this problem is unlikely to get the attention it deserves without further study using statistically valid research methods.

**TEXT BOX: Clearing the Pathway to Justice in Alaska Native Tribal Communities**  
Throughout the discussions at the Alaska Gathering, leaders stated that tribes should be able to develop justice systems that reflect the values, needs, and expectations of their respective communities. The comments of the tribal leaders indicate that common practices in western-style justice systems were often inconsistent with Native values and expectations related to justice:

- One leader referred to due process protections in adversarial systems as “hoops” that need to be met.
- Another indicated that deferred sentencing is inconsistent with personal accountability.
- No contact orders are inconsistent with the values of the tribal community and often ineffective due to the size of the community.
- Written rules of law are not the cultural norm in Alaska Native justice systems. Whether or not tribes have written ordinances, their justice systems appear to recognize and incorporate principles of customary law.

Some tribal communities reported that their ordinances do not necessarily address some offenses, so they may rely on “traditional laws.”

- Tribal justice systems may employ elders to act as advisors or mentors whose role is to provide traditional knowledge.
- Many tribal communities utilize stories to pass on morals, values and the importance of family.
- Tribal leaders reported that the customary law among Alaska Native communities is not uniform.

Because the Alaska Native tribal communities are often small and participation in the planning and development process of the court is often the subject of community meetings, Alaska Native justice leaders would likely benefit from technical assistance in planning and presenting programs to initiate new tribal justice programs.

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<sup>57</sup> National Council on Aging, PREVENTING AND RESPONDING TO ABUSE OF ELDERS IN INDIAN COUNTRY 4 (June 2004); available at <http://www.elderabusecenter.org/pdf/whatnew/abuseindian040707.pdf>. Two-thirds of the 30 respondents reported that financial exploitation of elders “occurs often.”

## ***Facilitate collaboration and cooperation within tribal governments***

*To fully accomplish the tribal community's justice goals, tribal leaders must work together in a productive partnership built on mutual respect, trust, and effective communication.*

TEXT BOX: Recommendations – The federal government should:

1. Support tribal justice initiatives that evaluate tribal policies and operating procedures.
2. Sponsor management training for tribal court judges and other justice officials.

Human resources can represent a tribe's greatest strength or severest weakness. Tribal justice leaders report successes and failures in their programs related to cooperation between different branches of government. One leader reported that her tribe held a tribal summit on alcohol and substance abuse from which information was collected to create a tribal resource guide. The guide serves as the basis of the tribe's alcohol and substance abuse policies. Conversely, another leader reported that strained relations within his tribal government impeded sharing of information between law enforcement, the court and other agencies.

More than one leader cited "tribal politics" as an obstacle in one or more areas of the justice system. This issue is indicative of a failure in leadership that is potentially remedied through management training that includes instruction on separation of powers, assessment tools for evaluating internal processes and communications, and leadership skills.

TEXT BOX: Key Findings on Separation of Powers

Tribes report that the doctrine of separation of powers is not uniformly applied in Indian Country. For example:

1. Some tribes vest judicial authority in the tribal council or other legislative body.
2. Some tribes have formal separation of powers between the branches of government.
3. Others have a blended system in which the authority is shared.

Greater opportunities to examine the issues of separation of power in Indian Country may create opportunities for identifying successful strategies for preserving judicial independence in the administration of justice.

## **Design cost-effective and sustainable solutions**

*Utilizing volunteers, leveraging individual tribe's strengths and using sound management principles will ensure the sustainability of tribal justice systems outside of federal funding. The federal government can assist tribes by enhancing existing technical assistance programs and resources to meet this need.*

TEXT BOX: Recommendations – The federal government should:

1. Continue to provide funding and technical assistance for the development of tribal justice systems.
2. Coordinate grant notifications issued by various government entities so that all tribes have equal access to available funding resources (*e.g.*, coordinate grant solicitation notices, create a website for grant notifications, provide sufficient government staff to respond to inquiries, etc.).
3. Support the development of a technical assistance program that furnishes information about locating, writing and managing grants for tribal justice systems. The technical assistance program should have a practical, easy-to-use publication that can be distributed to tribes that are not able to attend the program.
4. Facilitate program evaluation and compliance by revising existing grant reporting forms to simplify the collection of information and data relevant to performance measures and program activities (*e.g.*, number of meetings and attendees, publications, etc.). Potential improvements may include utilizing checklists and directed questions that require less narration and fill-in-the-blanks (with sample answers) and that solicit information that will assist the federal government and the tribes in identifying trends.
5. Support technical assistance efforts that enable tribal communities to assess and capitalize on their strengths and plan for succession as the community evolves.
6. Enhance the Bureau of Justice Assistance's tribal grantee website to include information that is useful to the tribes on grant implementation and develop strategies for increasing awareness about the site.

Many tribes, particularly in Alaska, initiate their justice systems by utilizing highly-dedicated teams of volunteers. The positive impact is that the volunteers are motivated by a genuine desire to serve those within the community who need assistance. The volunteers are also knowledgeable about the specific problems that offenders face in that particular community. The drawback is that the volunteers are often novices in the development and administration of federal grants, and they tend to have short tenures.

Tribal justice leaders perceived that the larger tribes with grant development departments have an unfair advantage in accessing federal funds. The tribal leaders recommended that the federal government should initiate program enhancements to facilitate the grant development process. The federal government could further enhance the program for the benefit of both the tribes and the government policy-makers by developing a reporting system that facilitates the collection of data while also instilling good management practices. For instance, the grantees should be collecting and reporting data that will ultimately assist them and the government in assessing cost-effectiveness and forecasting future needs.

Finally, awareness of the tribal grantee website was not widespread. Tribal justice leaders at both Gatherings recommended that the Bureau of Justice Assistance create a website for tribal grantees. This issue may be easily remedied by an electronic message board. Further, the site should include content that is useful to the tribes throughout the grant funding period.

## **Require qualified, culturally-competent staff and professional services**

*For staff and professional services to function competently, they must be able to assess the nature of the problem, identify solutions, and apply those solutions to the justice issues that confront the community. This requires an ability to weigh the technical requirements against the cultural influences.*

TEXT BOX: Recommendations – The federal government should:

1. Continue to support tribal initiatives that allow tribes to develop their own laws and justice systems which honor tribal customs, traditions and values in addressing domestic violence, sexual assault, and elder abuse.
2. Continue to support programs that assist tribes in obtaining culturally competent and qualified mental health professionals, probation officers, law enforcement officers, judges and other justice leaders, and court personnel.
3. Support the development of legal institutes in which non-lawyer tribal judges and non-lawyer tribal advocates can be educated in comprehensive programs similar to the first year of law school.
4. Ensure that tribal probation officers are able to participate in training made available to federal probation officers.
5. Provide opportunities for tribal law enforcement to receive uniform training and certification, offered, perhaps, under the auspices of the Bureau of Indian Affairs.

In discussing the challenges tribal justice leaders face in the management of their justice systems, the leaders often cited lack of qualified personnel. Some judges reported that progress on justice initiatives is impeded by the lack of personnel to complete administrative functions of the court (e.g., court administrators, clerks, administrative assistants, financial professionals, etc.). Nor is there a centralized department that drafts grant applications and oversees compliance. Other judges reported that staff members and candidates for employment are not adequately trained to address emerging justice issues. For example:

- Cultural competence is an essential qualification because the trend in modern tribal justice systems and supportive services is to develop culturally-relevant programs.
- Restorative justice models require that justice personnel have specific knowledge and expertise to effectively participate in interdisciplinary approaches to criminal and civil matters.
- Training must be on-going to keep up with advancements in technology, science and justice reform.

As most tribal courts operate on modest budgets with miniscule staffs, developing and presenting training programs that deliver educational goals cost-effectively with minimal time commitments would be most beneficial to the tribes.

TEXT BOX: Training, Technology, and Competency Guidelines Required

- Lack of adequately trained judges
- Lack of technology hardware and software
- Inconsistency in decisions (*i.e.*, not utilizing *stare decisis* partly because of unwritten opinions)
- Lack of standards and qualifications for judges



## **Enhance the capacity to respond to a tribal community's evolving needs and expectations**

*For tribal justice systems to be successful, they must have access to detention facilities, treatment centers, foster care placement alternatives and other services that allow for a full range of options for addressing justice-related issues.*

TEXT BOX: Recommendations – The federal government should:

### Tribal Foster Care Placement

1. Allocate funding for tribal foster care proportionate to the needs of tribal communities.
2. Support the assessment of how tribes can most effectively participate in the protection of neglected and abused Indian children and the assessment of the most efficient method for allocating funds to the tribes for that purpose. For example, it may be more efficient for the tribes to negotiate for funds to support child welfare services through 638 contracting.

### Improve Access to Health and Detention Facilities

3. Develop standards and guidelines for ensuring that appropriate health services and detention facilities are available in tribal communities.
4. Develop short- and long-term plans for remedying any inadequacies identified, including the construction of new facilities when necessary.
5. Assist tribal communities in identifying and negotiating with state and local governments to provide suitable detention facilities for tribal offenders.
6. Permit usage of self-governance funds for incarcerating tribal offenders in state and local facilities.

### Upgrade Technology

7. Assist tribes in attaining the minimum resources (*e.g.*, forensic evidence collection and storage facilities, detention centers, crisis centers, victim support services, etc.) necessary to deal effectively with domestic violence and sexual assault in tribal communities.
8. Continue to support the acquisition of information technology systems and the upgrading of existing systems to meet minimum standards required to share information between federal and state databases.

### For Alaska:

9. Ensure that all villages have viable police protection; federal and state funding should be redirected to increase the number of VPSOs.
10. Redirect funding to enhance the training and compensation of VPSOs, and certify VPSOs to carry weapons.
11. Ensure that Alaska develops protocols that clearly delineate the scope of authority of state troopers and VPSOs.

The lack of accessible foster homes and alternative placements for children in need of care, detention facilities for adults and juveniles, and treatment alternatives for mental health issues pose significant impediments to the cost-effective administration of justice in remote, rural areas. Some tribal leaders reported that members of their communities have to travel up to eight hours to obtain mental health services; in other communities, the services are only available periodically on a weekly or monthly basis. In contrast, tribes near metropolitan areas reported

having greater access to services and enhanced opportunities for economic development to support tribal justice programming; however, some of those tribes reported serious problems with drug trafficking and gang infiltration. Further, while the sheer number of tribes in Alaska and California suggest that regional consortiums would be the most cost-efficient strategy for tribes in those states to administer justice, the needs of tribal communities in remote, poverty-stricken areas could be neglected within an inter-tribal justice system.

## **Foster Care and Alternative Placements**

Under the Indian Child Welfare Act of 1978, as amended, 25 U.S.C. §§ 1901, *et seq.* (“ICWA”), tribes have exclusive jurisdiction over certain permanent and temporary custody matters involving Indian children. However, the federal statutory scheme that provides financial assistance (Title IVe of the Foster Care and Adoption Assistance Program) does not provide for direct assistance to tribal governments that assume jurisdiction under ICWA. Some tribes are able to access funds indirectly through agreements with states; however, these agreements generally only cover foster care payments and do not reimburse tribes for personnel, training, or other administrative costs associated with administering foster care placements, adoptions or transitional services. Further, tribes do not have equal access to the funds because they are administered by each state. One tribal leader referred to Title IVe funds as the “\$200 million secret,” while another complained that his state set unreasonable standards for the tribe to demonstrate the capacity to administer the funds. Thus, under one federal law, the tribes have the power to protect their interests relative to Indian children who are members or eligible for membership, while another law denies them access to an entitlement program that would enable them to provide the full range of services their children need.

Tribal leaders reported that an inadequate number of tribal foster homes exist for the placement of Native American children. This situation is especially dire for children requiring therapeutic foster care placements. Until tribes have access to the full array of funds available to support tribal adoptions, foster care, and transitional programs, the problem will likely persist.

## **Detention Facilities**

Most of the tribal leaders reported that the effectiveness of their justice systems, whether adversarial or traditional, is hampered by the inability to incarcerate offenders who do not respond to other sanctions. Of the six tribes that participated in this discussion group, four reported that they have detention facilities in their communities. The other two contract with state or local governments for detention services. However, the leaders stated that some detention facilities are as far as eight hours away from the tribal communities that they serve.

Resources and funding are the primary issues facing tribal communities with regard to detention facilities and correctional services. Tribal capacity to provide detention facilities is dependent on self-governance funding, and the tribal leaders reported the following issues:

- The BIA restricts use of its funding to BIA facilities only even though state or county facilities may be better suited to meet the needs of the tribes.

- Relocating tribal offenders outside of their communities in detention facilities prevents tribal members from being able to effectively administer therapeutic treatment.

The tribal leaders stated that their detention facilities are deteriorating and have been condemned, or should be condemned. Tribes that have constructed new detention facilities reported having difficulties with gaining BIA approval for opening the facilities. A Bureau of Justice Statistics Bulletin on *Jails in Indian Country, 2003* indicated a potential need for new facilities to curb overcrowding.<sup>58</sup> As of June 30, 2003, there were only 70 detention facilities in Indian Country with an overall capacity of 2,222 inmates at any given time.<sup>59</sup> Viewed as a whole, there does not appear to be a significant overcrowding in Indian Country jails. Capacity problems are apparent, however, when the populations of the largest jails are considered. At the time the study was conducted, the ten largest jails held 43 percent of the total inmates incarcerated in Indian Country, and seven of those facilities were significantly over their inmate capacity.<sup>60</sup> Seven of the facilities were under court order or consent decree to limit the number of inmates.<sup>61</sup> Only one facility was completed during the interim between the 2002 and 2003 studies. At the present time, the federal government is not funding new facilities.

Despite the widespread acceptance of problem-solving courts throughout Indian Country, the detention facilities do not appear to offer programs that would further restorative justice goals. Tribal leaders report that minimal rehabilitative services are offered in their detention facilities. The Navajo Nation appears to have the most extensive services offered which include education, life skills training and transitional behavioral health services. If tribes are expected to make significant inroads in addressing crime in Indian Country, access to affordable and appropriate detention facilities is a basic need. Further, in order to fully appreciate the benefits of therapeutic justice systems, tribes must have accessible treatment and supportive services as viable alternatives to detention.

### **Health Services/Forensic Supplies and Equipment**

The U.S. Commission on Civil Rights identified several structural barriers that limit access to health care by American Indian populations.<sup>62</sup> The Commission reported that health delivery programs administered by Indian Health Services (“IHS”) included a direct deliver system through only 63 hospitals, health centers and health stations.<sup>63</sup> In addition, 285 tribes contract with IHS to provide medical services under self-governance contracts or compacts.<sup>64</sup>

Within the context of tribal justice systems, the tribal leaders report that the health care system is inadequate to meet the following needs:

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<sup>58</sup> Todd D. Minton, *Jails in Indian Country, 2003*.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* Sixteen of the 70 jails were operating above 150% of capacity.

<sup>61</sup> *Id.*

<sup>62</sup> U.S. Commission on Civil Rights, *BROKEN PROMISES* 47. The Commission’s findings identified the following barriers: management or oversight issues; geographic location of facilities; outdated and aging facilities; extended wait times; retention and recruitment of qualified providers; and misdiagnosis or late diagnosis of diseases.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 54.

- Rehabilitation and crisis centers in close proximity to tribal communities
- Reliable and cost-effective monitoring and testing of offenders
- Collection and storage of forensic evidence in sexual assault cases
- Provision of a variety of treatment options

Four of ten tribal justice leaders reported that they have effective data management systems for collecting and measuring substance abuse in their tribal communities. The capacity of the remaining tribes varied significantly. Specifically, the leaders described the following problems:

- Lack of technical knowledge to perform collection and measurement activities
- Lack of infrastructure (*e.g.*, no information technology equipment and personnel)
- Lack of an effective method for retrieving data in functional reports from information databases that they have created

To the extent that tribes are unable to overcome the barriers identified above, they are stymied in their efforts to manage one of the greatest needs in tribal justice: alcohol and substance abuse offenses.

**TEXT BOX: Alaska Village Public Safety Officers**

Public safety in rural village poses unique problems. The Alaska Department of Public Safety, through the Alaska State Troopers and the Division of Wildlife protection, provides service to 272 rural communities throughout the state. Sixty-four percent of those communities are accessible only by airplane, boat or snowmobile.<sup>65</sup> For rural villages, 334 troopers are assigned to 42 trooper posts.<sup>66</sup>

Some of the rural villages are served by village public safety officers (VPSOs) who handle lower level crimes under the supervision of state troopers. In 2002, there were 84 VPSOs assigned to 76 remote villages.<sup>67</sup> VPSOs receive less training than state troopers and are not permitted to intervene in major criminal cases. Turnover of VPSOs is a significant problem.

VPSOs are on call 24 hours a day, seven days a week. VPSOs are not permitted to carry firearms. While 76 villages have VPSOs, 73 villages have no police protection at all.<sup>68</sup> VPSOs are funded through a combination of state funding and federal funding under the Community Policing Services (COPS) program. Between 2000 and 2004, funding was shifted from VPSOs and tribal police officers to state troopers. Alaska eliminated 19.5 VPSO positions (from 84 to

<sup>65</sup> Alaska Advisory Committee to the U.S. Commission on Civil Rights, *RACISM'S FRONTIER: THE UNTOLD STORY OF DISCRIMINATION AND DIVISION IN ALASKA* 39 (2001).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

64.5), and the COPS program reduced its grants for VPSOs from an average of 41 to 16 officers.<sup>69</sup>

Police protection for off-road communities is of particular concern. State troopers are unable to promptly respond to domestic violence, child abuse, sexual assaults, and other serious crimes in these communities. Response time by state troopers to off-road villages often takes several hours, and sometimes days.

Inadequate police protection in rural villages results in a lack of crime deterrence, a lack of punishment for less serious crimes, and a failure to respond to serious crimes in a timely manner.

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<sup>69</sup> Justin Roberts, VILLAGE JUSTICE: A HISTORY OF RURAL PUBLIC SAFETY SERVICES IN ALASKA 20 (Alaska Federation of Natives 2004).

## **Facilitate collaboration and cooperation between tribal, federal, and state governments**

*A comprehensive approach to justice issues in Indian Country requires that tribal, federal and state governments share information, recognize and enforce one another's orders, and efficiently use limited resources.*

TEXT BOX: Recommendations – The federal government should:

1. Support public awareness campaigns to educate tribal communities that promoting safety in Indian Country requires intergovernmental cooperation.
  2. Support recurring local and regional conferences between states and tribes to facilitate cooperation in resolving jurisdictional disputes.
  3. Support the development and implementation of multi-jurisdictional programs for the prosecution and rehabilitation of serious juvenile offenders.
  4. Ensure that states give full faith and credit to all tribal court decisions through federal legislation or other means with the ultimate goal of tribal-state cooperation regarding jurisdictional issues.
  5. Support the study of intergovernmental recognition of protective orders following the enactment of the Violence Against Women Act to determine if the states and tribes are in compliance with the full faith and credit provision of the Act and identify best practices for intergovernmental cooperation.
  6. Determine the current status of the prosecution of cases in Indian Country (*e.g.*, the number of crimes committed compared to the number of cases prosecuted in all jurisdictions) to ascertain the best course of action for resolving those cases. The tribes and states should cooperate in the study to ensure that the data accurately reflects the nature of the problem.
  7. Study the incidence of non-prosecution of crimes against Native Americans by the U.S. Attorney's Offices to ascertain the implications for tribal communities.
  8. Support gang and crime-related information and intelligence sharing with tribal law enforcement via federally supported programs, agencies and organizations with tribal law enforcement.
  9. Assist tribes in participating in the Department of Justice's national sex offender registry.
  10. Sponsor the development of model cooperative agreements. They should include: (1) commentary from respected Indian law scholars that cooperative agreements will not adversely impact sovereignty; and (2) suggestions for modifications based on the tribe's particular needs (*e.g.*, geographical characteristics, PL 280 status, available services and resources, etc.).
  11. Continue to support the acquisition of information technology systems and the upgrading of existing systems to meet minimum standards required to share information with federal and state databases.
  12. Support the coordination of regional intergovernmental summits on information sharing.
- For Alaska Native Tribes and Villages:
13. Establish formal policy recognizing a government-to-government relationship with tribes and enact appropriate legislation to provide for recognition of tribal orders, whether they are from a tribal court or another body designated by the tribe to issue orders.

14. Hold a tribal-state relations forum for tribes and states to develop action plans to initiate formal government-to-government relations and draft agreements with tribes to establish local control.

Tribal leaders recognize that cooperation between the states and tribes in coordinating and resolving jurisdictional issues is necessary for the effective administration of justice. A principal concern of tribal leaders in executing cooperative agreements is that tribal sovereignty not be diminished. When the federal government requires the states and tribes to recognize judgments and findings (*e.g.*, Uniform Child Custody Jurisdiction Enforcement Act), tribal leaders report success in dealing with jurisdictional issues in those matters. Tribal leaders identified federal legislation mandating reciprocal full faith and credit as a possible solution for ensuring the enforcement of orders and judgments, and some suggest that the use of formal and informal agreements is sufficient.

Tribal justice leaders recognize that legitimate reasons exist for intergovernmental sharing of information on criminal convictions, particularly with regard to the following offenses: sex offenses, domestic violence, child abuse, and driving under the influence or driving while impaired. However, most tribal leaders report that the legislative or executive branches of their governments were opposed to formal, uniform reporting of data regarding criminal offenders to the states. The most frequently cited reasons for not cooperating are:

- Infringement on privacy rights of tribal members, especially with regard to fingerprints
- Inaccessible data due to access fees or because of software incompatibility
- Adverse economic impact on tribal members (*e.g.*, increased insurance rates, ability to obtain employment or education, etc.)
- Jurisdictional issues and conflicts
- Lack of cooperative, intergovernmental relations with states
- Internal political pressures on the tribal councils

Regional intertribal cooperation in sharing criminal information appears to be more common than cooperation between tribes and states. Some tribal leaders report that their law enforcement offices collect information from other jurisdictions by the following means:

- Informal contact with state agencies and law enforcement
- Formal requests to federal or state agencies
- Utilization of federal and state criminal databases (*e.g.*, National Crime Information Center)

**TEXT BOX: Alaska Attorney General Revokes Recognition of Tribal Jurisdiction**  
*Cooperation, collaboration, and communication among tribal, state and federal governments are key components to the effective administration of justice for Native Alaskans.*

A formidable barrier to intergovernmental relations exists as a result of a lack of clarity in the jurisdiction of the tribes and inconsistency in recognizing the sovereign status of Alaska Native tribes. Alaska Native justice leaders feel the same sense of duty to protect and promote the welfare of their people; however, they remain vulnerable to the unilateral actions of the federal and state governments.

The commentary from these tribal justice leaders on the subject of intergovernmental relations and information sharing was hopeful yet decidedly guarded. They referred to a formal opinion issued by the Alaska Attorney General as the underlying cause for their skepticism regarding the status of their relationship with the state of Alaska. In his opinion issued October 1, 2004, the attorney general revoked a 2002 opinion and declared that “state courts have exclusive jurisdiction over child custody proceedings under [the Indian Child Welfare Act]” unless the tribes had successfully petitioned the BIA to reassume jurisdiction or a state court had transferred jurisdiction to the tribe.<sup>70</sup> Because many Alaska Native communities are building their tribal justice systems on the basis of original and transfer jurisdiction over child custody cases under the Indian Child Welfare Act, this decision was a devastating blow. The commentary of the tribal justice leaders cannot be fully appreciated without reference to the attorney general’s opinion and an understanding of its impact on one of the most important tribal justice issues in Alaska: how to protect Alaska Native children.

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<sup>70</sup> Jurisdiction of State and Tribal Courts in Child Protection Matters, 2004 Op. Att’y Gen. 3 (2004).



## **Conclusion**

### **TEXT BOX: Guiding Principles on the Pathway to Justice**

Out of the Indian approach to life there came a great freedom, an intense and absorbing respect for life, enriching faith in a Supreme Power, and principles of truth, honesty, generosity, equity, and brotherhood as a guide to mundane relations.

Luther Standing Bear, Oglala Sioux (1868-1937)

The nine policy guidelines presented in this Report were inspired by the commentary of the tribal justice leaders that attended the Gatherings. Although the recommendations contained in this Report are primarily addressed to the federal government, the policy guidelines apply generally to tribal, federal and state policies. Recognizing that tribal, state, and federal governments must work together to improve the social and economic conditions of modern tribal communities, the policy guidelines suggest ways in which that can be done effectively and respectfully. Read another way, the policy guidelines, recommendations, and key findings in this Report hopefully clear away much of the misconceptions, biases, and fears that potentially impede development of smart and effective strategies for meeting the diverse needs of tribal justice systems.

The five central themes emerging from the recommendations made in this report suggest a road map for navigating the pathways to justice in Indian Country that is not as complicated as it appears from our history. In an era when the concept of therapeutic justice is taking hold, the traditional tribal values and principles that once bewildered federal and state policy makers now resonate with popular notions of justice. Barriers that have historically contributed to isolation of tribal populations from the greater society are crumbling. Populations in tribal communities no longer consist only of tribal members and Indian people, significant numbers of non-Indians now live within the boundaries of tribal reservations. Tribes are engaging in economic development through on- and off-reservation business enterprises that often involve partnerships with non-Indians and contribute to the economy of the surrounding communities. As people migrate to and from reservations, so too do the many social ills that affect tribes and the general society. Thus, we are in a time of unprecedented opportunity for tribes, states, and federal officials to work together on justice initiatives to improve justice in Indian Country. It is important for us to continue to seek opportunities locally, regionally, and nationally to build and repair relationships, enhance communication, and share insights and information. The Gatherings demonstrate that such efforts can be undertaken successfully.

### **TEXT BOX**

#### **Five Central Themes of the Gathering Recommendations**

- 1) Tribal, federal and state governments must create a comprehensive approach to justice issues in Indian Country that requires sharing of information, recognizes and enforces one another's orders, and efficiently uses their combined pool of resources.
- 2) To create such a comprehensive approach, tribal, federal and state government leaders and justice officials must gather face-to-face in their communities throughout the country in a respectful spirit of collaboration, communication and comity.

- 3) Because education is the key to understanding between communities and peoples, a strategy must be devised and implemented to provide opportunities for Native and non-Native peoples to gather together, to share information and to gain cultural and professional competence.
- 4) Tribes and the non-Indian community must work together to devise communication channels that will permit sharing of success stories and replication of models that can be adapted for broader use; and
- 5) A plan must be created to bring to the tribes modern technology critically needed to gather and report data essential to allow for credible needs assessments and to help formulate tribal justice strategies.

## **PART 3: KEY FINDINGS**

TEXT BOX: Editor's Note: The key findings summarize the comments collected at the Gatherings, which often took the form of stories and anecdotes. They are not a transcript of the event or an exhaustive discussion of all matters covered in the discussion groups. Rather, the findings should be utilized to understand some of the commonly identified needs of tribal communities and read in conjunction with other resources.

## ***Alaska Gathering of Tribal Justice Leaders***

April 12-14, 2005 – Anchorage, Alaska

A separate gathering of tribal justice leaders was deemed necessary to develop a meaningful analysis of the challenges and opportunities for advancing justice in Alaska Native communities. The objective of the forum was “the recognition and development of workable solutions that will foster respect and comity, mitigate intersystem conflicts, and reduce or forestall unnecessary, duplicative, and divisive litigation.” This objective was to be achieved through the exchange of insights, experience, and information shared by tribal leaders in a series of discussion groups that followed presentations in four primary topic areas, including: 1) tribal courts and alternative justice systems; 2) alcohol and substance abuse; 3) children and family; and 4) juvenile justice.

Success required participation of state and local agencies, federal agencies and the many private institutions that serve the interests of justice in Alaska. Most importantly, success required the willingness of tribal justice leaders to share their thoughts, opinions, beliefs, practices and stories regarding the need for tribal justice and the many obstacles facing their communities. The Tribal Judicial Institute, the Alaska Native Justice Center, and the Bureau of Justice Assistance (Office of Justice Programs, U.S. Department of Justice) extended invitations to tribal leaders requesting that they participate in the forum and “discuss the criminal justice challenges that are facing their courts and communities.” Over 200 individuals registered for the conference representing 61 Alaska Native communities, eight state and local agencies, three federal agencies, and 29 private institutions. A list of participating tribes, government agencies and private institutions is included in the Appendix. Sixty-four tribal justice leaders received scholarships or direct financial assistance that enabled them to attend.

### **The Process**

Conference planners assigned attendees to five discussion groups that were comprised of 30 to 40 participants each. These groups were staffed with individuals who served as hosts, facilitators, and recorders. Interpreters were available to the groups that required them. To foster trust and confidence, the participants remained in the same discussion groups throughout the conference.

The Tribal Judicial Institute conducted a one-day orientation session to advise hosts, facilitators, and recorders of their respective roles in the discussion groups, to review the agenda and primary topic areas, and to provide instruction on how information should be collected. The hosts ensured that the participants were comfortable and able to fully participate in the discussion. The facilitator’s role was to lead the discussions. The reporters took notes that summarized the participants’ comments; they did not develop transcripts of the proceedings.

The discussion groups convened following presentations in each of the four primary topic areas. The Gathering agenda served as a guide for facilitating discussion among the participants. Facilitators could freely conduct the discussion groups to suit the individual dynamics of the groups. Some groups broke into smaller segments of 10 to 15 members and held brief “report back” sessions to capture the most salient points. Because the facilitators, presenters, and

listeners were aware that the discussion groups were intended primarily to solicit comments from tribal leaders, the recorders noted primarily the comments of those leaders.

At the Gathering's conclusion, tribal leaders could also submit written comments on forms provided by the Tribal Judicial Institute. The section entitled "Tribal Justice Response" summarizes both the recorders' notes and participants' written comments.

INSERT:

### **Alaska Gathering of Tribal Justice Leaders Agenda**

Monday, April 11, 2005

6:30-8:30 p.m.

Welcome Orientation and Registration for Facilitators, Listeners and Presenters

Crow's Nest - Captain Cook Hotel

Tuesday, April 12, 2005

7:30 - 8:15 a.m.

Registration

8:15 - 9:00 a.m.

Traditional Opening

Lamp Lighting Ceremony - Cindy Pennington and Lucille Fedosia Davis

Prayer and Welcome - Alberta Stephan, Denaina Athabascan Elder, Traditional Bearer of Eklutna Village

Welcome and Introductions

Denise Morris, President/CEO, Alaska Native Justice Center

Honorable Mark Begich, Mayor of Anchorage

Michelle Parks, Associate Deputy Director, Tribal Judicial Institute

9:00 - 9:30 a.m.

Working Together for a Safer and Healthier Tomorrow - Bureau of Justice Assistance

Domingo Herraiz, Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice

9:30 - 10:45 a.m.

Opening Plenary Session - The Administration of Justice in Alaska

The opening session will provide attendees with information on current initiatives that are underway to improve the administration of justice in Alaska. Presenters will provide their impressions from federal, state and tribal perspectives.

Moderator: A. Elizabeth Griffith, Associate Deputy Director, Bureau of Justice Assistance, Office of Justice, U.S. Department of Justice

Presenters: Tim Burgess, U.S. Attorney for Alaska; Ingrid Cumberlandidge, Tribal Court Judge, Eastern Aleutian Tribes; Delores Cadiente, Tlingit-Haida Indian Tribes, Alaska Representative to National Congress of American Indians

Traditional Dance: Headstart Dancers

10:45 - 11:00 a.m.

Break

11:00 - 12:00 p.m.

First Primary Topic - Tribal Courts and Alternative Justice Systems

Tribal courts are of importance when discussing justice in Alaska. Whether courts are based upon a traditional model or whether they are more adversarial in nature, tribal courts are unique, in part because they often utilize custom and tradition in administering justice. While the use of custom and tradition in tribal court development is an important aspect of tribal justice, the very application of customs and traditions has often made it difficult for tribes to gain recognition from state and federal court systems. There remain several issues that compound the problems tribal courts face as they attempt to develop in a manner that meets the community needs while gaining recognition from courts in outside jurisdictions. Tribal leaders will be given an opportunity to comment on these issues and to provide federal and state leaders with a better understanding of the current issues facing tribal courts as well as meaningful input on potential solutions to these problems.

Moderator: Michelle Parks, Tribal Judicial Institute

Presenters: Thomas Heffelfinger, Chairman of Attorney General Advisory Committee's Native American Issues Subcommittee; Honorable Mike Jackson, Magistrate, Organized Village of Kake; Ethan Schutt, General Counsel, Tanana Chiefs Conference

12:00 - 1:00 p.m.

Lunch

1:00 - 3:00 p.m.

Discussion Groups Breakout

Each discussion group will discuss the following issues as they relate to tribal courts and alternative justice systems:

1. Restorative Justice Initiatives in Tribal Court and Alternative Justice Systems. Restorative justice provides a holistic approach to the administration of justice. Restorative justice focuses on administering justice in a manner that restores communities and individuals thereby enabling communities and individuals to continue to live together in harmony. Restorative justice efforts can be initiated through law enforcement and tribal courts regardless of the structure of the tribal justice system. Discussion will be had on restorative justice and the role that it plays in the development and enhancement of law enforcement, tribal courts and alternative justice systems in Alaska.
2. Tribal Court and State Court Jurisdiction. Tribal courts often find themselves in conflict with neighboring state courts with respect to the exercise of jurisdiction. Discussion will focus on tribal courts, tribal court jurisdiction and the impact that the exercise of tribal court jurisdiction has on state jurisdiction. The focus will be on the cooperation of tribal and state jurisdictions and how such cooperation can enhance the justice system in Alaska. Exploration and discussion will be had on the use of principles of comity and mutual respect between tribal and state jurisdictions.

3. Tribal, State and Federal Communication. Communication is key to the effective administration of justice in Alaska. This topic shall focus on the resources that are available to and can be used by tribal, state and federal justice systems to share information thereby enhancing the administration of justice. Discussion will be had on the role that collaborative efforts, technology and other forms of communication play with respect to the effective administration of tribal justice.

#### Group Comment Overview

3:00 - 3:15 p.m.

Break

3:15 - 4:15 p.m.

Second Primary Topic - Alcohol and Substance Abuse

Statistics make it impossible to ignore the role that alcohol and substance abuse have played in tribal justice. Alcohol and substance abuse are leading contributing factors to many crimes that occur within rural communities. Alcohol and substance abuse have had a devastating impact on individuals, families and communities. Controlling the illegal importation of alcohol and controlled substances is a key aspect to addressing these issues in rural Alaska. Further, the impact of mental health has had a significant impact in many communities and remains an issue that tribal justice systems need to address. In order for tribes and villages to effectively administer justice, tribal courts must be equipped with the knowledge, resources and services to address such issues.

Moderator: Dr. Tony Fabelo, Associate, JFA Institute, Washington, DC

Presenters: Darlene Wright, Alaska Native Brotherhood Camp II; Ben Diedrickson, Sitka Tribe; Luke Titus, Minto Culture Camp

4:15 - 6:00 p.m.

Discussion Groups Breakout

Each discussion group will discuss the following issues as they relate to alcohol and substance abuse:

1. Restorative Justice Initiatives Relating to Alcohol, Substance Abuse and Mental Health.

Restorative justice is a holistic approach to the administration of justice. Restorative justice focuses on administering justice in a manner that heals communities and individuals thereby enabling the community and individuals to continue to live together in harmony. Restorative justice measures are especially viable when addressing alcohol and substance abuse issues as well as mental health issues as they provide a culturally relevant means to address these issues. Discussion will be had regarding the feasibility and effectiveness of restorative justice measures through tribal courts and alternative justice systems as they relate to alcohol, substance abuse and mental health.

2. Culturally Relevant Treatment Programs and Village-Based Services. Culturally-relevant and village-based services are especially important when addressing alcohol and substance abuse issues and mental health issues in rural and tribal settings. Oftentimes, tribal courts require treatment and services for alcohol and substance abuse or mental health conditions and providing village-based and culturally relevant services enhances the likelihood for success in overcoming

such issues. Discussion will be had on the need for tribal courts to have access to such treatment programs and why such programs are necessary to the effective administration of tribal justice.

3. Enforcing and Preventing the Illegal Importation of Alcohol and Controlled Substances. In rural Alaska the illegal importation of alcohol and controlled substances has been identified as a contributing factor to alcohol and substance abuse in tribal communities. Discussion will be had on the effects that illegal importation of alcohol and controlled substances have had and continue to have within Alaska Native communities. More specifically, discussion will focus on various methods that tribes feel will be successful in the enforcement and prevention of illegal importation of alcohol and controlled substances.

4. Tribal, State and Federal Communication. Communication is key to the effective administration of justice in Alaska. This topic shall focus on the resources that are available to and can be used by tribal, state and federal justice systems to share information thereby enhancing the administration of justice. Discussion will be had on the role that collaborative efforts, technology and other forms of communication play with respect to the effective administration of tribal justice, effective response to mental health issues and the reduction of alcohol and substance abuse in tribal communities.

#### Group Comment Overview

Wednesday, April 13, 2005

8:30 - 9:00 a.m.

Opening Prayer - Wilson Justin, Native Athabascan

Opening Comments and Review of Previous Day

Overview of Today's Agenda

9:00 - 10:00 a.m.

Third Primary Topic - Children and Family

Tribal justice often finds its focus on issues pertaining to children and families. Tribal justice systems play a large role in addressing cases involving child custody, the abuse and neglect of children, domestic abuse, sexual assault and other cases related to children and families. Tribal courts and alternative justice systems must be equipped with the necessary resources to fulfill their role in addressing the issues facing children and families.

Moderator: Denise Morris, President/CEO, Alaska Native Justice Center

Presenters: Katherine Gottlieb, President/CEO Southcentral Foundation; Lisa Doulchak, Traditional Healer; Eleanor David, Alaska Native Women's Coalition

10:00 - 10:15 a.m.

Break

10:15 a.m. - 12:15 p.m.

Discussion Group Breakout

Each discussion group will discuss the following issues as they relate to child and family justice:

1. Restorative Justice Efforts with Respect to Children and Families. Restorative justice is a more holistic approach to the administration of justice. Restorative justice focuses on administering justice in a manner that restores the community and individuals involved thereby



enabling the community and individuals to continue to live together in harmony. Restorative justice issues are especially relevant when addressing the issues facing children and families. Discussion will be had on the feasibility and effectiveness of restorative justice measures through tribal courts as they relate to such issues as child neglect and abuse, domestic violence and sexual assault.

2. Foster Care and Child Placement. Foster care and child placements are issues that are addressed within both tribal and state justice systems. The applicability of such federal laws as the Indian Child Welfare Act and local tribal laws applicable to child placements are especially important in the development and enhancement of tribal court and tribal justice systems. Discussion will be had on the current state of the foster care systems and the need to provide for child placements in villages. Discussion will also be had on the role that tribal courts play in the placement of children.

3. Village-Based Services for Children and Families Suffering from Neglect, Abuse and Domestic Violence. Many times the issues facing children and families in rural and tribal communities stem from or centers upon neglect, abuse and domestic violence. As tribal courts and tribal justice systems are developed and enhanced, it is imperative that they be equipped with local support services to address such issues. Discussion will be had on the need for and types of village-based services that will assist tribes to address the needs of children and victims of neglect, abuse and domestic violence.

4. Tribal, State and Federal Communication. Communication is key to the effective administration of justice in Alaska. In the area of children and families, there is a great amount of overlapping jurisdiction and responsibility between tribal, state and federal agencies. Cooperation is imperative in effectively addressing these issues. Discussion will be had on the need for both formal and informal cooperative efforts between tribal, state, and federal agencies as well as the need for recognition of tribal courts and tribal justice systems from neighboring state agencies and courts with respect to issues facing children and families. This topic shall focus on the resources that are available to and can be used by tribal, state and federal justice systems to share information thereby enhancing the administration of justice. Discussion will be had on the role that collaborative efforts, technology and other forms of communication play with respect to the effective administration of tribal justice.

#### Group Comment Overview

12:15 - 1:30 p.m.

Lunch

1:30 – 2:30 p.m.

Fourth Primary Topic – Juvenile Justice

In recent years tribal courts have been overwrought with juvenile delinquency and status offenses. The focus of many juvenile justice programs has been on rehabilitation and prevention. This topic will focus on the needs of tribal courts and tribal justice systems to effectively deal with juvenile delinquency and status offenses.

Moderator: Michelle Rivard Parks, Associate Deputy Director, Tribal Judicial Institute

Presenters: Tom Gamble, Sitka Tribal Council Member; Shirley Tuzroyluke; Tom Begich, Cook Inlet Tribal Council

2:30 - 2:45 p.m.

Break

2:45 – 4:45 p.m.

Discussion Groups Breakout

Each discussion group will discuss the following issues as they relate to juvenile justice:

1. Restorative Justice Initiatives as they relate to juvenile justice. Restorative justice is a more holistic approach to the administration of justice. Restorative justice focuses on administering justice in a manner that restores the community and individuals involved thereby enabling the community and individuals to continue to live together in harmony. Discussion will focus on current initiatives that are working positively to reduce juvenile delinquency and status offenses in tribal communities as well as address the issues from a prevention standpoint. Discussion will further be had on how federal and state agencies become involved in and support such initiatives.
2. Youth Courts and Youth Initiatives. Youth courts and youth diversion programs have become increasingly effective in addressing juvenile justice in tribal and rural communities. These initiatives focus on gaining an understanding of the problems facing the child and the underlying causes of their actions so that a rehabilitative approach can be taken to prevent future incidents of delinquency and status offenses. Discussion will be had on various types of youth programs that are having a positive effect in reducing juvenile offenses within tribal communities. Discussion will further focus upon how federal and state agencies can assist in cooperating with and supporting such initiatives.
3. Tribal, State and Federal Relations. In order to effectively address the juvenile delinquency and status offenses within tribal communities, it is imperative that tribal, state and federal justice systems work together in a manner that best serves the children. Discussion will be had on ways in which tribal, state and federal courts and agencies can work collaboratively to alleviate some of the juvenile justice issues within tribal communities.
4. Tribal, State and Federal Communication. Oftentimes there will be cases where a child is involved in tribal, state and federal justice systems either concurrently or consecutively. In order to address the needs of the child, it is imperative that the tribal, state and federal courts and support service agencies work together to share information to ensure that no child falls through the cracks of a system and to further ensure that the needs of the child are being met and not duplicated. Discussion will be had on the role that effective communication and collaboration between tribal, state and federal agencies play in improving the administration of tribal justice with respect to juveniles.

4:45 – 5:00 p.m.

Break

5:00 p.m. – 6:00 p.m.

Closing Plenary Session – Closing Impressions.

The closing plenary session shall provide officials from the federal, state and tribal governments with an opportunity to provide their closing impressions from the Gathering.

Presenters: Robert Brown, Bureau of Justice Assistance; Julie Kitka, Alaska Federation of Natives; Frank H. Murkowski, Governor, State of Alaska

The Extinguishing of the Lamp  
Honor Song: Buzz Daney

6:00 p.m.  
Adjourn

## Summary of Key Findings

The key findings of the Alaska Gathering of Tribal Justice Leaders are organized in six topic areas: (1) tribal justice; (2) intergovernmental relations; (3) public safety; (4) alcohol and substance abuse; (5) children and family; and (6) juvenile justice. This method was used to structure the key findings to eliminate redundancy while providing a fair representation of the discussions.

## Tribal Justice

### Nature of Justice Systems

1. Alaska Native justice leaders differ on whether tribal courts or other governmental bodies other than tribal councils are necessary to uphold the rule of law.
  - a. Customs and traditions operate as a method of social control in some communities; therefore, a western model tribal court is not necessary or desired.
  - b. Some tribal communities want to establish the rule of law for maintaining peace and promoting wellness and therefore encourage the development of formalized tribal courts.
2. Tribes should be able to develop justice systems that reflect the values, needs, and expectations of their communities. Common practices in western adversarial systems were often inconsistent with Native values and expectations related to justice. For example:
  - a. Due process protections in adversarial systems may be viewed as “hoops” that need to be met
  - b. Deferred sentencing may be viewed as inconsistent with personal accountability
  - c. No contact orders are inconsistent with the values of some tribal communities and can be ineffective due to a community’s small size
3. Written rules of law are not the cultural norm in Alaska Native justice systems. Whether or not tribes have written ordinances, their justice systems appear to recognize and incorporate principles of customary law.
  - a. Ordinances do not necessarily address some offenses, so some tribal communities may rely on “traditional laws.”

- b. Tribal justice systems may employ elders to act as advisors or mentors, whose role is to provide traditional knowledge.
  - c. Many tribal communities utilize stories to pass on morals, values and the importance of family.
- 4. Customary law among Alaska Native communities is not uniform.
- 5. The structure, composition and decision-making processes of the tribal justice systems in Alaska are diverse.
  - a. The governmental structure may be unified where all powers to uphold and enforce the law are vested in the tribal council.
  - b. Judges may be appointed or elected to hear cases alone or as a panel.
  - c. The process may incorporate all interested parties in the decision making process utilizing facilitated mediation, peacemaking or sentencing circles.
- 6. Tribal justice proceedings may be held in informal settings; some communities do not have facilities for social programs.
- 7. Inequities in funding diminish some tribal communities' capacity to develop effective justice systems. Two areas of particular concern are:
  - a. Lack of law enforcement (village public safety officers vs. state troopers)
  - b. Lack of funding to pay foster care parents
- 8. While some Alaska Native tribes receive technical assistance from non-profit organizations, many require additional resources to develop and enhance their justice systems. Potential solutions include the development of:
  - a. A website with tribal court information that is relevant to the needs of Alaska Native villages
  - b. An intertribal communications network to provide mutual assistance in the court development process
  - c. Introductory educational programs (*e.g.*, mock hearing training) for tribes initiating new justice systems
  - d. Documentation of traditional knowledge so tribes can preserve their capacity to heal their communities

#### Role of Restorative Justice

1. Restorative justice principles play a prominent role in the development of justice

initiatives in Alaska Native tribal communities.

- a. Many communities established justice systems modeled on restorative justice principles.
  - b. The tribes employ an array of justice processes: sentencing circles, peacemaking, and facilitated mediation.
  - c. Elders often participate in the proceedings as advisors and mentors.
2. The foundational principles of restorative justice are perceived as consistent with tribal concepts of justice as healing.
- a. The community's well-being is intertwined with the well-being of the individuals in the village.
  - b. Sentencing individuals in conformance with restorative justice goals will benefit the community as a whole. Some of the perceived benefits are: 1) creating opportunities for traditional skill development; 2) reintegrating the offender into the community; and 3) reaffirming the offender's sense of accountability to the community.
  - c. Using a restorative justice approach also provides an opportunity to address familial or social issues that caused the aberrant behavior.
  - d. Spirituality is deeply rooted in some Native traditions and connected to tribal communities' expectations that the goal of a justice system is restorative in nature. The Alaska Native tribal communities may incorporate prayer and other spiritual practices into their justice proceedings.
3. Some tribes have experimented with tribal youth courts that are operated in a circle format, which are coordinated through the schools. They are considered courts, not diversionary programs, and can improve school-tribal communication.
4. Perhaps other states should establish circles and restorative justice practices in the school disciplinary process.

#### Limitations on Jurisdiction

1. Tribes should have primary jurisdictional authority over their members.
2. Jurisdiction is perceived as an inherent power of the tribe.
3. Alaska Native tribal justice leaders correlate the exercise of jurisdictional authority with community strength and the ability to solve social ills affecting their communities.
  - a. The inability to exercise jurisdiction over their communities is demoralizing to the tribes and the tribal members.

- b. The inception of many of their social ills followed the loss of their jurisdictional authority.
  - c. The Alaska attorney general's recent opinion harmed morale in some communities.
4. In some cases, tribal justice systems should be village-based to be effective.
    - a. Some studies have demonstrated that the best solution is for villages to assume responsibility for justice.
    - b. Consolidating and regionalizing services is unattractive to some because the services will be further removed from the villages and the people that require them.
    - c. In some cases, funding and education should be provided at the village level.
  5. Tribes recognize that they must be prepared to accept the responsibility of taking on additional cases and services for their justice systems to operate correctly.

## **Intergovernmental Relations Key Findings**

### Relations with Alaska

1. Many communities are skeptical about future relations between Alaska Native tribes and the state of Alaska resulting from the Alaska attorney general's opinion.
  - a. Alaska's executive, legislative and judicial branches appear to be inconsistent regarding the recognition of tribal status.
  - b. The inconsistency in cooperation may be related to Alaska's justice priorities. For example, in cases involving youth, state officials are more likely to be cooperative with tribal justice initiatives.
  - c. Conversely, the inconsistency may be related to departmental policies. For example, state troopers are more likely to appear at tribal court proceedings than state probation officers.
2. State judicial systems are inadequate to achieve most fundamental justice goals because it can take up to a year for a case to be transferred to a state superior court.
3. State and tribal courts have made progress in developing cooperative relationships to achieve justice goals, although some believe that the attorney general's opinion eliminated that progress. Examples of progress include:
  - a. State probation officers attend juvenile proceedings in some tribal communities.
  - b. One local superior court refers juveniles to organizations that conduct circle sentencing.

- c. Tribes in or near urban areas have successfully implemented drug and youth courts. They receive referrals not only from village law enforcement but also from schools and state courts.
4. Better tribal-state relations are needed; however, several barriers to productive partnerships exist including:
  - a. Territorial boundaries often do not exist.
  - b. State courts do not recognize tribal court orders.
  - c. State courts do not refer offenders to culturally-relevant tribal services.
  - d. Many state leaders have misconceptions regarding tribal court development and its impact on non-tribal communities.
  - e. Information is not shared.
5. Inequity, no reciprocity of recognition, and condescension are other barriers to effective tribal-state partnerships.
6. Development of cultural competency among state officials could improve tribal-state relations. The state could employ Native Alaskans in capacities other than tribal “liaisons.”

#### Relations with Other States

1. Some states in the “lower 48” have refused to recognize the orders and decisions of tribal councils and councils of elders that function as courts.
2. Some tribal leaders share memoranda of agreement with other villages, and the villages work cooperatively to address youth problems. In some cases, tribes have intervened in child dependency cases on behalf of other tribes.
3. Some tribal communities have entered into memoranda of agreement with municipal and tribal governments; some involve monthly meetings.

#### Information Sharing

1. Some of the state and federal forms (*e.g.*, the parental consent form) are difficult to use because tribal justice system personnel do not know how to use them or the forms do not fit within the context of the justice system being used.
2. It would be helpful if the state reported statistical data to tribes regarding the number of offenses committed by tribal youth, the number of cases transferred to tribes, and the number of cases referred to non-profit organizations.
3. An information network or clearinghouse would assist in the exchange of information, and could advise state court judges of treatment options available in tribal communities.

4. To ensure an understanding of the complexity of the problems confronted by some Alaska Native communities, state and federal officials would benefit from living in the villages temporarily.

### **Public Safety Key Findings**

1. Some communities have no law enforcement whatsoever.
2. There are insufficient village public safety officers (VPSOs) in some villages for crime prevention.
3. In some communities, funding VPSOs is much more cost-effective than funding state troopers.
4. VPSOs, often the only viable law enforcement personnel capable of protecting the personal safety of residents of rural communities, are not adequately compensated, armed, certified, or trained.
5. There should be consistency in the authority of VPSOs and state troopers.
6. The state is unable to offer adequate law enforcement coverage in outlying areas. It can take two to four days for a state trooper to respond to a request for assistance. Ironically, fish and game officials respond more quickly than state troopers who are charged with protecting people.

### **Alcohol and Substance Abuse Key Findings**

1. By teaching traditional knowledge and values to youth, both youth and adults will be better able to make good choices and avoid poor behavior, especially with regard to drug and alcohol use.
2. Alaska Native communities employ a variety of village-based programs for alcohol and substance abuse prevention and treatment (*e.g.*, dance groups, drug courts, wellness committees, boys and girls clubs, youth work programs, dry communities, AFN Wellness Program, etc.).
3. Alaska Native communities utilize cultural immersion as a means to prevent and combat alcohol and substance abuse among youth (*e.g.*, subsistence activities, traditional skill building, language development, saunas, etc.).
4. Organizations serving Alaska Native communities have also developed cultural immersion programs to prevent and combat alcohol and substance abuse among youth (*e.g.*, Native Youth Olympics, archaeological digs, culture camps, spirit camps, immersion schools, language development camps, etc.).
5. Tribes need culturally relevant brochures and fact sheets on alcohol and drugs for distribution to youth.



6. Public schools can assist some tribal communities by providing preventative education programs on alcohol, drugs, and violence.
7. Prevention education should occur earlier than high school.
8. Youth programs should be a priority.
9. Wellness program funding has assisted some tribal communities in developing a system in which young people can resolve their own problems.
10. Wellness program funding has also been used to develop a strategic plan for alternative activities for youth.
11. The consequences of violating local option laws, which provide a method for a community to control and impose certain limits on the availability of alcohol, are not severe enough to change behavior.
12. Standards and protocols for conducting searches are often not included in local option laws.
13. Local option laws regulating the sale, possession, or consumption of alcohol in villages are not adequately enforced.
14. Failure to enforce laws creates a public safety risk in the villages; bootlegging is prevalent in “dry” villages.
15. Fourth Amendment protections hinder the maintenance of some “dry” villages because the concern is with community, not individual, rights.
16. Therapeutic courts are necessary to promote wellness in some tribal communities.

## **Children and Families Key Findings**

### **Tribal Involvement with Abused and Neglected Children**

1. Tribal communities often are not allowed to take care of children who have been abused or neglected.
2. In some communities, the child’s identity is closely intertwined with the clan.
3. The well-being of the community is intertwined with the well-being of the individuals in the village.
4. Native culture does not ordinarily terminate parental rights, endeavoring to protect children but not isolate them from their families.
5. The state often fails or neglects to notify tribes about reports of neglect or abuse of children.

6. Tribal leaders are reluctant to support efforts to consolidate and regionalize services because the services will be further removed from the villages and the people that require them.
7. Child in need of aid cases are handled more quickly in tribal courts than in state courts.
8. In tribal court dependency proceedings, due process ensures that all participants are treated fairly.

#### Foster Care

1. Tribes desire input on assessment and evaluation of tribal foster care homes.
2. Foster parents often need specialized training to address the needs of abused and neglected children.
3. Group homes are needed in which the entire family can stay while the parents are undergoing treatment.
4. Local training is needed for foster care parents in villages.
5. Culturally relevant standards and criteria for licensing Native foster care homes are needed.
6. More housing is needed for foster care homes in Native communities.
7. Therapeutic foster care homes in villages are necessary.

#### Role of the State

1. Some tribes have successfully collaborated with the state in administering child protective services (e.g., Office of Children Services workers make efforts to place children with tribal families, and troopers participate in court proceedings).
2. State officials involved in protective services (e.g., social workers, troopers, foster parents, and teachers, etc.) need cultural competency training.
3. No consistency exists among the states for recognizing tribal court orders in child abuse and neglect cases.

#### **Juvenile Justice Key Findings**

1. The following juvenile justice issues are problematic: truancy, dropping out of high school, curfew violations, teen sex, alcohol and substance abuse, vandalism, and theft.
2. The root cause of aberrant behavior is attributed to dysfunctional families, racism, transitioning from traditional to modern culture, poor educational systems, and improper parenting.
3. Developing traditional knowledge and skills is an effective preventative strategy because

it reinforces respect for the tribal community.

4. In some communities, tribes do not learn of juvenile offenses until the state is involved because the criminal activity occurs outside the village and is prosecuted in state court.
5. Before tribal courts were established, many tribal communities utilized schools, churches, and community gatherings to deal with social problems.
6. When some tribes have the opportunity to treat juvenile offenders, they implement programs that reinforce cultural values, traditions, and history (*e.g.*, spirit camps, culture camps, traditional knowledge and skill building, language development programs, etc.).
7. Because many of the communities are small, deterrence works well because the word about ramifications for poor behavior spreads quickly.
8. Some tribal leaders support the development and enhancement of youth courts.
9. Some tribes and non-profits are successfully collaborating on youth courts, which provide alternative justice systems for some juvenile offenses.
10. In some communities, state courts are beginning to refer Native youth to tribal youth courts.
11. Village-based services need to be available, but funding is a problem.
12. Tribal leaders identified the following programs as promising practices: McLaughlin Youth Facility (BJA funded program); Drum Dancers (Juneau); Youth Employment Services (CITC); and Youth Opportunity Program.

### ***National Gathering of Tribal Justice Leaders***

May 22-24, 2005 – Washington, D.C.

The goal of the National Gathering was to bring together a group of tribal justice leaders who could fairly represent the wide diversity of needs of American Indian tribes. To achieve that objective, the director of the Bureau of Justice Assistance, Domingo Herraiz, and the executive director of the Tribal Judicial Institute (TJI) at the University of North Dakota, School of Law, Hon. B.J. Jones, invited the chief judge and tribal chairman/president of each federally-recognized tribe in the lower 48 states to attend the National Gathering. Announcements regarding the event were also placed on the webpage of the National Tribal Judicial Resource Center (NTJRC). The National Congress of American Indians (NCAI) and the National American Indian Court Judges Association (NAICJA) also sent letters of endorsements to their members. The Tribal Judicial Institute also offered scholarships, funded by the BJA, to defray the costs associated with attendance.

## **The Process**

The National Gathering of Tribal Justice Leaders utilized a similar process as the Alaska Gathering. Three substantive areas were covered in the two-day conference: (1) tribal justice; (2) community wellness; and (3) the administration of justice in Indian Country. A plenary session on each substantive area was held to evoke commentary and discussion of pertinent issues in the discussion groups that followed. The discussion group topics were identified before the conference, and the attendees participated in the topics they chose. Two or three discussion groups were convened for each topic, depending on the interest in the topic. Eight to 12 tribal justice leaders were in each discussion group. As with the Alaska Gathering, the agenda was the principal guide for facilitating participant discussion. However, the facilitators could use the provided sample discussion questions at their discretion. Each group had a recorder who took notes of the tribal justice leaders' commentary.

Tribal leaders also could submit written comments at the Gathering's conclusion. The Tribal Justice Institute provided forms for this purpose. When appropriate, these comments were incorporated in the key findings.

INSERT:

### **National Gathering of Tribal Justice Leaders Agenda**

The summary of the key findings of the tribal justice leaders' commentary follows the structure of the agenda with minor variations to avoid redundancy.

Sunday, May 22, 2005

6:30 p.m. – 8:30 p.m.

Registration

7:00 p.m.

Orientation for the National Gathering of Tribal Justice Leaders Conference Agenda and Format. Welcome from Bureau of Justice Assistance and Tribal Judicial Institute. Performance by Native America's People Dancers

Monday, May 23, 2005

7:30 – 8:00 a.m.

Registration

8:00 – 8:35 a.m.

Opening - Welcome and Introductions

Opening Drum Group: Native America's People Dancers

Presenters: Gene Thin Elk, Cultural Advisor, University of South Dakota; Honorable B.J. Jones, Director, Tribal Judicial Institute, University of North Dakota School of Law; Chief Judge, Sisseton-Wahpeton Oyate; Domingo S. Herraiz, Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice

8:35 – 9:35 a.m.

Plenary Session – State of Indian Country

An overview of the criminal justice issues facing Indian Country's tribal courts and some of the programs the Justice Department has developed to transfer resources to Indian tribes to respond to these issues.

Moderator: Honorable B.J. Jones, Executive Director, Tribal Judicial Institute, University of North Dakota School of Law and Chief Judge, Sisseton-Wahpeton Oyate

Presenters: Tex Hall, President, National Congress of American Indians; Honorable Eugene White-Fish, President, National American Indian Court Judges Association and Chief Judge, Forest County Potawatomi Community; A. Elizabeth Griffith, Associate Deputy Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice; Denise Morris, President, Alaska Native Justice Center; and Wilson Justin, Health Director/Vice-President, Mt. Sanford Tribal Consortium

9:35 – 9:45 a.m.

Break

9:45 a.m. – 10:45 a.m.

First Primary Topic – Tribal Justice

The development of tribal justice systems has greatly enhanced the ability of tribal communities to develop local approaches to combat an escalating crime problem in Indian Country. This session will focus on how federal and state governments can enhance these systems in the areas of jurisdiction, juvenile justice issues, and sharing of resources.

Moderator: Honorable Karrie Azure-Elliott, Deputy Director, Tribal Judicial Institute and Appellate Court Justice, Turtle Mountain Band of Chippewa Indians

Presenters: Thomas Heffelfinger, U.S. Attorney for the District of Minnesota and Chairman of the Attorney General Advisory Committee's Native American Issues Subcommittee; Vincent Knight, Executive Director, National Tribal Justice Resource Center

10:45 a.m. – 12:45 p.m.

Discussion Groups by Topic

Breakout One – Courts. Tribal nations have developed a variety of justice systems to resolve disputes in Indian Country, some of which are based upon western systems and others more consistent with traditional dispute resolution techniques. How these courts can be enhanced and supported will be the focus of this session.

Facilitators: Bill Thorne, Elbridge Coochise

Recorders: Rebecca Murdock, Jason Loos, Michelle Rivard Parks

Breakout Two – Jurisdiction. Determining who has the authority to arrest suspects and prosecute offenders in Indian Country is often confusing. This session will focus on the ability to prosecute crimes in Indian Country and how federal agencies can assist in the expansion of this jurisdiction.

Facilitators: Kevin Washburn, Vincent Knight, Philip Propes

Recorders: Debra Flute, Carrie Garrow, Dave Raasch

Breakout Three – Juvenile Justice. Juvenile delinquency, gang activity, and status offenses are serious problems in Indian Country, and most tribes lack the resources to confront these issues.

Much of the federal money directed towards these issues goes to state governments with set-asides for tribal governments. Helping tribes confront the problems of the youth will be the focus of this session.

Facilitators: Ray Perales, Amy Lovell, Connie Bear King

Recorders: Carolyn Wilson, Steve Moore, Tahira Hashmi

Recorders: Kelly Stoner, Karen Eri, Devin Rieckmann

Breakout Four – Development of Tribal Justice. Although tribal justice systems vary within Indian Country, the planning, implementation, or enhancement of a tribal justice system encompasses topical areas such as code development and court procedures. This session will focus on the necessary components to the development of these varied tribal justice systems.

Facilitators: Matthew Fletcher, Stacy Leeds, Rick Robinson

Recorders: Kelly Stoner, Karen Eri, Devin Rieckmann

12:45 – 1:45 p.m.

Luncheon Speaker: Acting Assistant Attorney General Tracy Henke, Office of Justice Programs

1:45 – 2:45 p.m.

Second Primary Topic – Community Wellness

Justice cannot be achieved in Indian country without addressing the socio-economic and human wellness issues that contribute to crime and victimization in Indian Country. Incidences of violence against women, substance abuse, and the maltreatment of children are alarmingly high in Indian Country and affect quality of life in Indian communities. Tribal leaders will be able to express their concerns and offer possible solutions to these problems in Indian Country.

Moderator: Gene Thin Elk, Cultural Advisor, University of South Dakota

Presenters: Terry Cross, Executive Director, National Indian Child Welfare Association; Honorable H. Chico Gallegos, Associate Director, Native American Alliance Foundation and Judge, Pueblo of Zia Tribal Court

2:45 – 3:00 p.m.

Break

3:00 – 5:00 p.m.

Discussion Groups by Topic

Breakout One – Substance Abuse. Seventy-one percent of violent crime committed in Indian Country is committed by an offender under the influence of drugs or alcohol, compared to 51% nationwide. The pernicious problem of substance abuse is perhaps the most daunting task facing tribal justice leaders and this session will give tribal leaders the opportunity to explore options and examine successes.

Facilitators: Bill Thorne, Ray Perales

Recorders: Michelle Rivard Parks, Rebecca Murdock, Jason Loos

Breakout Two – Domestic Violence, Sexual Abuse and Elder Abuse. Even though women are considered sacred in many tribal communities, levels of violence against them in tribal communities remain alarmingly high. Many tribal communities have examined domestic

violence in an historical context as a byproduct of the colonization of Indian communities. An additional problem is the extent to which these crimes are committed by non-Indians against tribal members. This session will allow leaders to discuss how to respond to domestic violence in the tribal communities. Elders are the sacred conveyors of culture for native people, but unfortunately there is exploitation of the elderly in some tribal communities. This session will examine how the elder members of native communities can be better protected.

Facilitators: Amy Lovell, Stacy Leeds, Elbridge Coochise

Recorders: Debra Flute, Carrie Garrow, Dave Raasch

Breakout Three – Neglect and Abuse of Children, Indian Child Welfare Act. The removal rates for native children from their homes remain as high as they were prior to the passage of the Indian Child Welfare Act. The plight of these children removed from their homes will be the subject of this session.

Facilitators: Connie Bear King, Vincent Knight, Matthew Fletcher

Recorders: Karen Eri, Devin Rieckmann

Breakout Four – Youth Diversion Programs. A recent BJS report on crime in Indian Country pointed out the significant problem with juvenile delinquency and youth gang activity in Indian Country. Many tribal communities have discovered that helping youth rediscover their culture is the most effective way of dealing with the issues of delinquent behavior. This session will highlight these programs and allow tribal leaders to discuss these issues.

Facilitators: Rick Robinson, Kevin Washburn, Philip Propes

Recorders: Carolyn Wilson, Steve Moore, Tahira Hashmi

May 24, 2005

8:00 – 8:15 a.m.

Opening Comments

Presenters: Gene Thin Elk, Cultural Advisor, University of South Dakota; Honorable B.J. Jones, Director, Tribal Judicial Institute, University of North Dakota School of Law and Chief Judge, Sisseton-Wahpeton Oyate

8:15 – 8:30 a.m.

Comments from the Office of Tribal Justice

Presenter: Tracy Toulou, Director, Office of Tribal Justice, U.S. Department of Justice

8:30 – 9:30 a.m.

Third Primary Topic – Administration of Justice

Indian tribes strive to handle their own law enforcement matters within their communities, but are strapped for resources to build jails and juvenile detention facilities. Many tribes have turned to alternative sanctions and traditional methods to resolve disputes. This topic will allow tribal leaders to express their concerns and wishes for correctional methods for Indian Country.

Moderator: Michael Costigan, Director, Office of Police Corps and Law Enforcement Education.

Presenters: Christopher Chaney, Associate Solicitor Division of Indian Affairs; Honorable Theresa Pouley, Chief Judge, Lummi Indian Nation

9:30 – 9:45 a.m.

Break

9:45 – 11:45 a.m.

Discussion Groups by Topic

Breakout One – Alternative Courts/Problem-Solving Courts. Tribes have many times been in the forefront of developing alternative courts to resolve disputes and this session will explore those positive developments.

Facilitators: Elbridge Coochise, Vincent Knight

Recorders: Michelle Rivard Parks, Rebecca Murdock, Jason Loos

Breakout Two – Corrections (Detention Facilities)/Probation. A recent report on correctional facilities in Indian Country paints a sad picture of the state of penology in Indian Country. With no monies for new facilities, this session will allow tribal leaders to offer their opinions on what is needed in Indian Country to allow tribes to operate appropriate correctional facilities.

Facilitators: Bill Thorne, Ray Perales, Amy Lovell

Recorders: Debra Flute, Carrie Garrow, Dave Raasch

Breakout Three – Sharing Justice Information in Indian Country. This session will involve the discussion of the advantages and challenges of sharing justice information with other tribes, as well as surrounding local, state, and federal justice agencies. The focus will be on the political, managerial, and implementation challenges faced by tribal agencies, and the requirements for dealing with these challenges.

Facilitators: Philip Propes, Connie Bear King, Stacy Leeds

Recorders: Carolyn Wilson, Steve Moore, Devin Rieckmann

Breakout Four – Law Enforcement, Development of Cooperative Agreements. There has been much positive development in the area of tribal-state agreements in the areas of arrest, incarceration, extradition and other law enforcement areas. This session will discuss these developments.

Facilitators: Kevin Washburn, Matthew Fletcher, Rick Robinson

Recorders: Karen Eri, Tahira Hashmi

11:45 a.m. – 1:00 p.m.

Luncheon Speaker Attorney General Alberto Gonzales, U.S. Department Of Justice

1:00 – 2:15 p.m.

Final Comments by Tribal Leaders

2:15 – 3:15 p.m.

Listening Panel – Summary Report-Back of Tribal Leaders' Comments

Moderator Michelle Rivard Parks, Associate Deputy Director, Tribal Justice Institute

3:15 – 4:00 p.m.

Closing Plenary Session



Presenters: Domingo S. Herraiz, Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice; Gene Thin Elk, Cultural Advisor, University of South Dakota; Honorable B.J. Jones, Director, Tribal Judicial Institute and Chief Judge, Sisseton-Wahpeton Oyate

4:00 p.m.  
Adjourn

## **Tribal Justice**

The first plenary session was entitled “Tribal Justice.” United States Attorney Thomas Heffelfinger, U.S. attorney and chairman of the Attorney General’s Advisory Committee on Native American Issues, and the Honorable Vincent Knight, executive director of the National Tribal Justice Resource Center, introduced the topic with presentations on the role that tribal justice systems play in upholding justice in Indian Country and the responsibility of the federal government to support tribal leaders in their efforts to provide safety for their citizens.

The discussion groups were divided among following topics: (1) courts, (2) jurisdiction, (3) juvenile justice, and (4) development of tribal justice systems. The agenda includes the names of the facilitators and recorders for the sessions.

## **Courts Key Findings**

### TEXT BOX: Discussion Questions

- What types of tribal courts do you currently utilize?
- What is your estimated caseload?
- How do you fund your tribal court?
- What do you feel would assist you in enhancing the services that your court currently provides?
- What are the current needs of your tribal court?
- How do feel that the federal government could assist you in meeting your unmet needs?

1. The trust responsibilities of the federal government in relation to tribal justice systems are to provide funding, technical assistance and clarification of jurisdictional issues.
2. The issues of most importance to the communities include drug and alcohol abuse, domestic violence and environmental quality.
3. Caseloads range from 1 case to over 50,000 cases annually, depending on the size of the tribe. Other factors that appear to effect caseloads are:
  - a. Jurisdictional limitations (e.g., regulatory jurisdiction, adjudicatory jurisdiction, Public Law 280, etc.)
  - b. Population size

- c. Tribal land base (whether or not the tribe has contiguous, checkerboard or no land base)
  - d. Proximity to urban areas or international borders
  - e. Perception of court competency
  - f. Tribal norms and values (i.e., complacency regarding criminal behavior)
4. Tribal justice leaders are supportive of community involvement in the design and implementation of their courts.
5. Tribal justice systems are often established with volunteers from the community who act as judges, mediators, mentors, or peer advisors.
6. Tribal justice leaders report the following successes:
  - a. Establishing formal agreements with states to ensure full faith and credit in the enforcement of tribal court orders
  - b. Indexing and compiling court opinions in reporters
  - c. Establishing traditional courts
  - d. Enacting codes of conduct for judicial officers
  - e. Exercising greater judicial independence (i.e., separation of powers)
  - f. Improving public perception of the court within the tribal community
  - g. Working with the state legislature to obtain recognition of mental health commitment orders
7. At least one tribe has entered into a formal agreement with the state court to prosecute non-Natives in the tribal court. This tribe also entered into a memorandum of understanding with the state to provide court interpreter services.
8. Tribal justice leaders report the following challenges in improving court performance:
  - a. Lack of adequate detention facilities
  - b. Lack of technology hardware and software
  - c. Lack of adequately trained judges
  - d. Lack of standards and qualifications for judges

- e. Inconsistency in decisions (*i.e.*, not utilizing *stare decisis* partly because of unwritten opinions)
- f. Outdated codes and statutes
- g. Religious fanaticism

**CALLOUT:** “Vast areas are problems for enforcement [because they] create opportunities for planes and [people on] horseback to drop off drugs and make it difficult to provide adequate law enforcement services to the tribal members.”

9. Tribal courts are not a high priority for some tribes.
10. Some tribes report difficulty in locating resources to fund tribal court development.
11. Attorneys who appear in tribal courts often do not have adequate knowledge of tribal laws to effectively represent their clients in court. Perhaps an oversight committee could be used to regulate attorneys and advocates practicing before the courts.
12. A lack of qualified personnel (*e.g.*, court administrators, clerks, administrative assistants, financial professionals, etc.) impedes the development of many tribal court systems.
13. Some small tribes indicate a lack of infrastructure hinders the effectiveness of their tribal courts.
14. Due to insufficient qualified personnel and a lack of centralized grant management control, many tribes report having problems in administering federal grants.
15. The Bureau of Justice Assistance (BJA) is perceived as an excellent resource for funding tribal court development, and the BJA’s website is helpful for accessing information about resources.
16. Tribal leaders would like to have site visits from federal program managers so that the managers can understand the issues that individual tribes are confronting.

## **Jurisdiction Key Findings**

TEXT BOX: Discussion Questions

- What kind of court do you currently have?
- What jurisdiction does your tribal court currently exercise?
- How does lack of jurisdiction over non-Indians or non-members affect the ability of your court system to administer justice?
- What do you see as your biggest obstacle in exercising jurisdiction?

1. Tribal leaders recognize that cooperation between the states and tribes in coordinating and resolving jurisdictional issues is necessary for the effective administration of justice.

2. When non-Indians commit crimes on reservations, state officials often are not quick to prosecute.
3. In some communities bordering Canada, Canadian officials are more cooperative on jurisdictional issues than U.S. officials.
4. When the federal government requires states and tribes to recognize judgments and findings (e.g., under the Uniform Child Custody Jurisdiction Enforcement Act), tribal leaders report success in dealing with jurisdictional issues in those matters.
5. Federal legislation mandating reciprocal full faith and credit is a possible solution for ensuring the enforcement of orders and judgments, and some suggest the use of formal and informal agreements is sufficient.
6. States are unwilling to negotiate cooperative agreements for the enforcement of judgments and orders in some cases.
7. Recurring local and regional conferences between tribal and state justice leaders are effective strategies for facilitating cooperation.
8. Some tribes have had difficulty in persuading the U.S. attorney to review serious crimes in Indian Country, and U.S. attorney's offices often assign less experienced attorneys to those crimes.
9. Cross-deputization agreements between tribal and state law enforcement are working effectively in some communities.

## **Juvenile Justice Key Findings**

### **TEXT BOX: Discussion Questions**

- What kind of resources do you have to deal with juvenile offenders?
- Are you able to access the same funding as neighboring communities and states?
- If you exercise criminal jurisdiction where do you detain juveniles?
- Do you have service providers in your community for mental health, or alcohol and substance abuse?
- Describe any programs you currently have that are working well to address juvenile justice issues?
- What are your concerns surrounding educational issues and juveniles (i.e., behavior, truancy, etc.)?
- What do you feel needs to be done to improve upon juvenile justice issues?

1. Tribal justice systems do not have jurisdiction over the most serious juvenile offenders who are prosecuted in federal district courts.

2. In some cases, federal district court judges, prosecutors, and public defenders have less insight on the rehabilitation of tribal youthful offenders who must be prosecuted in federal court; however, tribal justice leaders acknowledge that they are unable to monitor the cases because the proceedings are not of public record.
3. Parenting failures are the principal cause of juvenile delinquency. Tribal leaders provided the following examples:
  - a. Drinking parties often include children.
  - b. Parents do not express concern about children dropping out of school.
  - c. Parents expose children to domestic violence.
4. Programs or practices that are restorative and holistic in their approach are the most successful. For example:
  - a. Facilities that address the youth’s mental, physical, and cultural needs.
  - b. Comprehensive services offered to the entire family to address the issues in the home environment to which the youth will be released (used by the Navajo).
  - c. Treatment processes that address home environment issues

TEXT BOX: Tribal leaders report success with the following programs:

- 1) Juvenile wellness courts
- 2) Teen courts
- 3) Dress codes (to curb gang activity)
- 4) “World of Difference” program (Southern Poverty Law Center)

5. One judge uses a “walking path”; if the offender does not show remorse after offering a plea, he walks with the offender in the company of a law enforcement officer. The discussions held on the “walking path” are not reflected in the record.
6. Some tribes are utilizing prevention, intervention, and diversion programs similar to state model programs; however, the effectiveness of the prevention programs is uncertain. Some tribal leaders report success with diversion programs, particularly teen courts.
7. Gang activity, distribution and sale of controlled substances by non-Indians, and truancy are the principal challenges in administering juvenile justice in tribal communities. Nevertheless, some tribes report that there is no discernable gang activity in their communities.
8. The incidence of gang activity is generally related to outside influences on youth (*e.g.*, youth raised off-reservation, re-entering from juvenile detention facilities, proximity to urban areas where gang activity is prevalent, etc.).

9. At least one tribe shares information with a state task force on gangs; the task force, likewise, shares information with the tribe regarding gang activity statewide.
10. Lack of resources is a challenge within tribal communities for addressing issues related to mental and physical health of tribal youth.
  - a. Some tribes note that access to critical services is limited to specific timeframes (*e.g.*, once a week or once a month).
  - b. Delivery of services may be further restricted because providers do not have adequate administrative staff.
  - c. Insufficient capacity is also an indication of a lack of resources available to tribal communities; some behavioral health facilities have two to three week-long waiting lists.
  - d. The nearest facility may be two to three hours away.
11. On-reservation detention facilities are necessary to effectively administer juvenile justice for many communities.
  - a. There may not be a responsible adult in whose care the offender can be released, and defiant youths may not respond to other methods of deterring delinquent behavior.
  - b. Youth may be subjected to “culture shock” when committed to off-reservation facilities.
12. The tribal community’s acculturation level affects whether the role of culture is used in intervention or diversion programs; likewise, the community’s size affects the level of community involvement in the intervention. For example, in one Alaska Native tribal village, aberrant behavior is addressed at community meetings.
13. The effectiveness of wellness courts could be enhanced by increased community participation (*e.g.*, elders, mentors, tribal council members, etc.). In some cases, the temporary nature of the support system constructed under the wellness court does not address the vulnerability of offenders to social pressures following graduation.

**CALLOUT:** “We gave him a certificate, gifts, recognition ... for being in the program for a year. Afterwards, all the safety was gone. When they got out they didn’t feel a part of the community. They felt isolated.”

14. Some smaller tribes involve the community in the planning and development of prevention programs through regular community meetings.
15. Several barriers exist to accessing funds allocated to states with tribal set-asides. For instance:

- a. One leader referred to the funds as “the \$200 million secret.”
  - b. Another leader indicated that the states’ requirements for demonstrating capacity to deliver services are arbitrary and unattainable.
16. Methamphetamine usage is increasing in many communities.
- a. One judge reports that every child neglect case on his docket involves methamphetamine.
  - b. Another leader estimates that half the parents in the tribal community use methamphetamine.
17. Increased methamphetamine usage has resulted in the following problems:
- a. Medical staff members at behavioral health facilities are unfamiliar with the effects and treatment of methamphetamine addiction.
  - b. Non-Indians living with tribal families on reservations are engaged in the distribution and sale of drugs.
  - c. Children are being used as agents in drug transactions because they are not prosecuted.
18. In many communities, comprehensive public education is necessary to focus attention on the underlying causes of status crimes (*e.g.*, education about the effects of lack of parental control/involvement, lack of cultural identity, alcohol and drug abuse, gang activity, etc.).

## Development of Tribal Justice Systems Key Findings

### TEXT BOX: Discussion Questions

- How long has your court system been operational?
- Did the community have input into the development of your court system?
- Is your court a traditional court system or more western model in nature?
- What process did you follow in developing your court system?
- What funds did you use to develop your court system?
- Do you have a tribal code?
- How did you get your tribal code developed?
- Do you feel people using your court system understand your tribal codes?
- What do you feel is most needed to enhance your current court system?
- What can the federal government do to support you in meeting your unmet needs?

- 1. People within tribal justice systems often do not have an adequate understanding of tribal law.

2. The doctrine of separation of powers is not uniformly applied in Indian Country. For example:
  - a. Some tribes vest judicial authority in tribal councils or other legislative bodies.
  - b. Some tribes have formal separation of powers between the branches of government.
  - c. Others have a blended system in which authority is shared.
3. Politics is often a barrier to an effective separation of powers.
4. Tribal courts are too “westernized” in some communities, signifying that they do not reflect the traditions and customs of the communities in which they are used.
5. Tribal justice systems are often established with volunteers from the community who act as judges, mediators, mentors, or peer advisors.
6. Some tribal leaders experience difficulty in integrating tribal customs, traditions, and values into their justice systems because the persons who hold that knowledge and experience, or the resources that provide that information, are not readily available or known.
7. Populations on reservations may represent several different tribes, and the mix of cultures may cause conflict in the design and implementation of a single tribal justice system.
8. Model tribal codes are often “one-size-fits-all” and do not necessarily suit the needs of the individual tribes.
9. The longevity of tribal court grants is too short for many grantees.
10. The nature of the grant process often does not allow for community ownership of legislation because there is insufficient time within the funding period to garner widespread support of the initiatives.
11. Community members often will not utilize the emerging tribal justice system until they have established trust in that system, especially if it resembles a western adversarial system.
12. A choice of law provision is an important component in many tribal codes, but some tribal leaders question the ramifications of following the laws of other jurisdictions.

## **Community Wellness**

The second plenary session was entitled “Community Wellness.” The cultural adviser for the Gathering, Gene Thin Elk, from the Sicangu Lakota nation of South Dakota, led the plenary session. The two principal speakers were Terry Cross, director of the National Indian Child Welfare Association, and the Honorable Chico Gallegos, associate director of the Native American Alliance Foundation and a tribal judge for the Pueblo of Zia. Mr. Cross delivered a message on the plight of Indian children in state and tribal foster care systems and noted that the efforts of tribal governments to enhance their justice systems to include tribal foster care were



hampered by the inability to access funds. Judge Gallegos presented a model for wellness for Indian Country. His remarks included information on how many communities utilize tribal wellness courts to address substance abuse and domestic violence problems in Indian Country.

The discussion groups were divided among the following topics: (1) substance abuse; (2) domestic violence, sexual abuse, and elder abuse; (3) neglect and abuse of Indian children; and (4) youth diversion programs. The agenda indicates the names of the facilitators and recorders for each session.

## Substance Abuse Key Findings

### TEXT BOX: Discussion Questions

- Do you see substance abuse as a problem in your community?
- What effect has substance abuse had on your justice system?
- What do you see as your biggest obstacle in addressing substance abuse?
- What are some current initiatives you are using that you feel are successfully addressing substance abuse?
- What are your thoughts of healing to wellness courts and their impact on substance abuse?
- What are your current unmet needs in the area of substance abuse?
- What can the federal government do to assist you in meeting your unmet needs?

1. Tribal courts, law enforcement, Indian Health Services, and other organizations are collaborating in most communities to develop comprehensive, coordinated responses to substance abuse in Indian Country.
2. The most abused substances in tribal communities are alcohol, methamphetamines, prescription drugs, painkillers, and marijuana, depending on the community.

**CALLOUT:** “My area is called the ‘meth capitol.’ . . . The little children are playing in hazardous material and don’t even know it. . . . No children have died from it yet, but we have many adults who have died.”

3. Many tribal justice leaders are not aware of statistics specific to methamphetamine usage; however, their perception is that it is a problem of growing concern in tribal communities.
4. The usage of methamphetamines, Ecstasy, formaldehyde, OxyContin, and cocaine are increasing, particularly among young adults, in many communities.
5. Challenges tribal leaders face in eradicating drug and alcohol abuse in tribal communities include:
  - a. Counselors are not Native nor tribal members, so they may lack cultural competence; and

- b. No rehabilitation centers are in close proximity to tribal communities (particularly those that treat substance abuse and mental health disorders).
6. The following are needed to effectively combat drug and alcohol abuse:
- a. Professional treatment providers and counselors
  - b. Capability to reliably and cost effectively monitor and test offenders
  - c. Probation officers and personnel to monitor alcohol and drug usage
  - d. Means for sharing information between courts and agencies (e.g., information technology equipment and personnel)
  - e. Family-based treatment facilities (i.e., where the entire family is treated at one time)
7. The following indicators suggest drug and alcohol problems within tribal communities:
- a. Babies born addicted to methamphetamine
  - b. Alcohol use starting as early as eight years of age
  - c. Young grandparents addicted to methamphetamine
  - d. Juveniles experimenting with methamphetamine
  - e. Increased use of marijuana in environments where alcohol use is no longer socially acceptable
  - f. Random drug testing creating a class of unemployable people
  - g. Marijuana smuggled into the U.S. from Canada
  - h. Increased dropouts from high schools
  - i. Gang infiltration
  - j. Increase in criminal assault and domestic violence cases

**CALLOUT:** “My community has done a lot of drug prevention, including the closing of bars – it is no longer cool to drink. Marijuana is the ‘drug of choice.’ Kids tell me that it’s ‘better than drinking.’”

8. Tribal justice leaders use the following strategies to prevent and reduce substance abuse in tribal communities:
- a. Participation in cultural activities (e.g., sweat lodges, culture camps)

- b. Public information and outreach at schools and community events through organized campaigns such as Community Mobilization Against Drugs (CMAD)
  - c. Enhancements to tribal justice systems such as wellness courts and circles of healing
  - d. Exploration of sentencing strategies such as increased use of mandatory screening or drug tests, and banishment
  - e. Youth-specific programming such as Boys and Girls Clubs and tribal youth programs
  - f. Utilization of culturally-relevant treatment options such as therapeutic storytelling
  - g. Ensuring that children attend school
9. One tribal leader participated in an intragovernmental summit on alcohol and substance abuse, and the information gleaned from the summit was used to create a resource guide. The guide serves as the basis of the tribe’s alcohol and substance abuse policies.

**CALLOUT:** “I went to a third grade class and when I asked how many kids have seen alcohol or substance abuse in their homes or with someone they love, all of the kids raised their hands.”

10. Funding for law enforcement should not take precedence over the funding for tribal justice systems.
11. Drug and wellness courts are making positive inroads in the reduction of substance abuse in some communities in Indian Country.
12. Four of ten tribal justice leaders report that they have effective data management systems for collecting and measuring substance abuse in their tribal communities. The capacity of the remaining tribes varies significantly:
- a. No technical knowledge to perform collection and measurement activities;
  - b. No infrastructure (e.g., no information technology equipment and personnel); or
  - c. An ability to create information databases with no effective method for retrieving the data in functional reports.

**Domestic Violence, Sexual Assault and Elder Abuse Key Findings**

TEXT BOX: Discussion Questions:

- Do you see domestic violence as a significant problem in your community?
- Do you see sexual assault as a significant problem in your community?

- Recent reports indicate that most perpetrators of domestic violence against Native women are non-Indian? Do you agree with this?
- What factors do you feel contribute to domestic violence/sexual assault?
- What services do you currently have available for victims and perpetrators?
- How does your community currently address domestic violence/sexual assault? Is there a code?
- What do you feel could be done to improve upon the response to incidents of domestic violence/sexual assault?
- What do you feel the federal government could do to assist you in addressing problems of domestic abuse/sexual assault?
- Do you feel that elder abuse is a significant problem in your community?
- How do you currently address elder abuse?
- What do you feel could be done to improve the response to elder abuse?
- What do you feel the federal government could do to assist you in responding to incidents of elder abuse?

## DOMESTIC VIOLENCE KEY FINDINGS

1. In some communities, there are insufficient trained professionals in the criminal justice system (*e.g.*, law enforcement, child protection professionals, domestic violence advocates, etc.) who understand the dynamics of domestic violence and appropriate interventions.
2. Alcohol and drug abuse and domestic violence are endemic in some tribal communities and contribute to a self-perpetuating cycle of violence.
3. Some Indian tribes have a code of silence when it comes to domestic violence issues, and education is often used to help the communities recognize and confront the issues.
4. A tribal court may be better equipped to deal with domestic violence and abuse offenses because the judge will be more likely to have essential knowledge of the offender's background and history.
5. In some communities, the solution to domestic violence is community-wide education regarding traditional values and language (*i.e.*, educating the offender alone will not eradicate the problem).

### TEXT BOX: Factors that contribute to domestic violence:

- Alcohol abuse
- Oppressed environment
- Family rearing and generational dysfunction of families
- Indians returning to the reservations from urban areas for economic and/or other reasons.
- Drug use
- Possible lingering acceptance of domestic violence offenses and sexual abuse.

6. Many tribes are utilizing banishment to control domestic violence in Indian Country through a variety of methods: some through legislative action for a specified period of time; some through a civil process and some through a graduated sentencing in criminal offenses (*e.g.*, 1<sup>st</sup> offense – 1 year; 2<sup>nd</sup> offense – two to five years; etc.).
7. In at least one community, banishment has created a backlog of cases because of requests for jury trials, which creates an undue burden on the court's and tribal community's resources.
8. At least one community uses two kinds of banishment: one from the territory and one from tribal services; revocation of tribal membership is a potential banishment alternative in some communities.
9. Some communities are still having difficulty with intergovernmental recognition of protective orders 11 years after the enactment of the Violence Against Women Act.
10. Tribal community members must seek a state order and a tribal court order for adequate protection in domestic violence cases in some communities.
11. At least one tribal justice leader believes that removing a child from a home in a domestic violence case defeats the purpose of resolving the problem because it separates the family members.

## SEXUAL ASSAULT KEY FINDINGS

1. There are intrinsic difficulties in managing sexual assault cases. For example:
  - a. The nearest rape crisis center is two hours away;
  - b. There is a lack of trained law enforcement and emergency personnel to collect forensic evidence; and
  - c. There is no holding place for evidence on the reservation.
2. Elders may discourage the reporting of incest because their own childhood experiences in boarding schools may have included victimization.
3. The U.S. attorney's office can take one to five years to prosecute rape cases that occur on reservations.
4. Tribal leaders perceive that they have no influence over the U.S. attorney's prosecutorial discretion.
5. Tribal leaders perceive that the U.S. attorney's office assumes that investigations conducted by tribal law enforcement are flawed. Similarly, tribal leaders perceive that

the U.S. attorney's office is unwilling to risk resources to prosecute crimes in Indian Country unless there is a high probability of conviction.

## ELDER ABUSE KEY FINDINGS

1. The issue of elder abuse often arises in the context of a guardianship case.
2. Economic exploitation is the primary form of elder abuse.

**CALLOUT:** "It's like the elders are a check. [There's a] dogfight over having the elder [to] get [the] check."

3. Elders may be reluctant to report exploitation and abuse because of:
  - a. Embarrassment that the existence of the problem is an indication of the breakdown in their immediate families.
  - b. Concern that the tribal community will ostracize individual family members.
4. Elders will often recant allegations of abuse and exploitation when interviewed by adult services.

## Neglect and Abuse of Children Key Findings

### TEXT BOX: Discussion Questions

- Do you exercise jurisdiction over neglect or abuse cases in your community?
- What is your primary funding source for placements of children?
- Does your tribe have an Indian Child Welfare Act (ICWA) office or ICWA coordinator? How is the ICWA program funded?
- Do you experience problems in receiving notices regarding child abuse or neglect cases?
- What are the primary problems with state compliance with ICWA in your communities?
- What do you feel would assist tribes in improving the tribal response in ICWA cases?
- What could the federal government do to assist in improved response to ICWA cases?

1. The incidence of child abuse and neglect appears to be increasing; however, one leader attributed the apparent increase to false reports of child abuse and molestation.
2. An inadequate number of tribal foster homes exist for the placement of Native American children. This situation is especially dire for children requiring therapeutic foster care placements.
3. Tribes and states apply widely divergent standards in making claims of neglect and abuse of children. For example:
  - a. Referrals made to state departments of social services are often rejected for inadequate substantiation.

- b. State workers may evaluate tribal homes as unsuitable for foster homes based on standards and mores that differ from the tribal community.
  - c. State agencies find some tribal homes to be unsuitable as foster homes even though they conform to norms and common lifestyle choices within that community.
4. Some believe that tribes should provide alternative placements to foster care; Children often run away from their foster care homes in some communities and then they are charged with status offenses.
5. States are inconsistent in notifying tribes of child custody proceedings under the ICWA. The leaders attribute failures in the process to lack of knowledge, apprehension about the tribe's response to the notification, and institutional apathy.
6. The following serve as sources of funding for child protective services for foster care placements:
  - a. Self-governance (638 contracting)
  - b. Federal grant programs
  - c. Title IV(b) funds
  - d. Tribal funds

**CALLOUT:** "It's shocking that the tribes cannot directly access IV-E funding [for foster care]. ... The effect is that the tribes do not have the resources to do the dependency and neglect cases."

7. If tribal children were educated about appropriate parenting skills before they became parents, it would result in healthier families.

### **Youth Diversion Programs Key Findings**

TEXT BOX: Discussion Questions

- Do you currently have youth diversion programs in your community?
- What kind of diversion programs do you have in your community?
- Do you feel your programs are being effective in preventing or stopping delinquent behavior?
- Do you feel that many young people are detached from their culture?
- How can the community address the disconnectedness from culture within the youth?
- Do you feel that culture is important in addressing the behavior of young offenders?
- Do you feel youth should be more involved in the justice system through such things as youth courts/ teen courts?
- What do you feel would assist tribes in establishing youth diversion programs?

1. Tribal leaders use the following programs for juveniles at risk:
  - a. Indigenous court (peacemaking process or circles composed of peers and/or mentors)
  - b. Drug elimination program (mentor program)
  - c. Boys and Girls Clubs
  - d. Supervision by elder (in place of probation officer)
  - e. Cultural immersion programs (community meetings)
  - f. Elder panels
2. Some tribal youth programs and juvenile wellness courts mandate participation in cultural activities; at least one community uses an advisory committee to meet with tribal youth and advise them about suitable cultural activities.
3. Large segments of some tribal communities, including youth, are detached from their cultures.
4. The diversity in the acculturation of the population represents a challenge for developing effective social programs; some tribes report that their members originate from several distinct tribal populations with divergent cultural practices, languages, and spiritual beliefs.
5. Most tribal leaders acknowledge that spirituality is a component in the successful administration of their courts; the extent to which it is incorporated may depend on expectations and social norms within the tribal community.
6. One tribal leader reports that within her community there is a contingent of community members who oppose strict imposition of traditional values and norms; other leaders suggest that some recognition of traditional values and norms is necessary to restore wellness in their communities.
7. In some tribes, Christianity and traditional spiritual beliefs are followed in tandem; in other tribes, there may be a rift in the community based on religious intolerance.
8. Cultural activities of the tribe are diverse and do not always require participation in rituals or overtly spiritual practices, e.g., one tribe is examining the use of “horse therapy” as a cultural activity for youthful offenders because the tribe recognizes a strong connection with horses.



CALLOUT: “One kid accused me – the judge – of coercing him to practice a religion that he did not want to practice. [The] key is to make a finding that the kid has selected a particular activity under his own free will.”

9. The tribal community’s commitment is necessary for attainment of justice goals including deterrence, prevention and rehabilitation.
10. Many tribal youth programs utilize an approach similar to a wellness court model with coordinated social and mental health services.
11. Law enforcement, social workers, and health professionals must be culturally competent to adequately serve the needs of their populations.

CALLOUT: “The fish run every year; the grants may come and go. The program is more important than the funding.”

12. Tribal youth programs often suffer from some of the following problems:
  - a. Too often the success of the program is vulnerable because it relies heavily on the leadership of one or two key participants.
  - b. Leadership may be centralized among certain clans or families creating apparent conflicts of interest because the judges or court personnel are related to persons that participate in diversion programs.
  - c. Juveniles are resistant to indoctrination in tribal culture.
  - d. Tribes are not routinely performing criminal background checks on staff and volunteers in youth programs.
  - e. Parents utilize youth programs as daycare, so they can drink alcohol.

13. Some youth programs utilize peer relationships for intervention and prevention.

14. It is important to involve children as much as possible in healthy activities to prevent criminal behavior (e.g., fishing, baseball, softball, canoe trips, shopping, etc.).

15. For tribal youth programs to be successful, the program staff members need to build rapport and trust with the youth.

CALLOUT: “It’s like when someone is feeding pigeons. The pigeons all go to the new person who starts feeding them. . . . There needs to be more thought put into how the money can be used. Let the process be driven from the tribe back to the federal government.”

16. The grant solicitation process is flawed for some communities because the program objectives are too specific, *i.e.*, the solicitation for wellness courts or tribal youth

programs only funds projects that are similar in structure and operation to a specific program model.

17. Federal funding has two primary problems:

- a. Limitations on program design are too excessive (see above).
- b. While the funding may require cultural competency in programming, funds are not available to reacquire or enhance cultural competency through community programs.

18. Needs assessment is based on problem identification rather than demonstration of community strengths.

### **Administration of Justice**

The third plenary session was entitled “Administration of Justice.” Chris Chaney, associate solicitor for the Division of Indian Affairs, and the Honorable Theresa Pouley, chief judge for the Lummi Indian Nation, spoke about law enforcement and corrections issues in Indian Country. Both speakers addressed the daunting task that tribes face in trying to administer law enforcement and corrections departments with very limited funding. Judge Pouley presented information on the historical development of the concept of “corrections” in Indian Country from the *Crow Dog* case to the contemporary wellness court model.

The discussion groups were divided among following topics: (1) problem-solving and alternative courts; (2) corrections and probation services; (3) sharing justice information in Indian Country; and (4) law enforcement and cooperative agreements between tribal and state/county law enforcement agencies. The agenda indicates the facilitators and recorders for each of the sessions.

### **Alternative Courts/Problem-Solving Courts Key Findings**

TEXT BOX: Discussion Questions

- Is your court based upon a western model or traditional model?
- Do you currently use alternative courts such as elders’ panels, talking circles, etc.?
- What are some of the issues that your alternative/traditional courts address?
- What types of remedies, punishments or alternative sanctions does your traditional/alternative court impose?
- Do you feel that the alternative/traditional model court that you use is effective in administering justice?
- What is the biggest obstacle that your traditional/alternative court faces?
- Are the alternative courts being recognized by neighboring communities/states?
- Is funding an issue for your alternative court?

1. Tribal leaders have concerns about referring to divisions of their justice systems as “alternative courts.”

2. The tribes utilize a variety of dispute resolution systems:
  - a. Western-style courts
  - b. Peacemaking processes
  - c. Wellness courts
  - d. Elder panels
  - e. Teen courts
  - f. Sentencing circles
3. Depending upon the community, tribal justice systems have jurisdiction over a full range of cases. For example:
  - a. Civil and criminal
  - b. Domestic relations
  - c. Domestic violence
  - d. Child abuse and neglect
  - e. Juvenile delinquency and status offenses, etc.
4. Tribal justice systems use a variety of alternative sanctions and incentives such as (a) imposing fines, (b) mandating community service, (c) removing privileges and licenses (*e.g.*, hunting, commercial, vehicle, use of tribal facilities, etc.), (d) requiring participation in cultural activities, (e) ordering restitution, (f) directing elder counseling, (g) ordering cognitive behavioral therapy, and (h) establishing incentives (*e.g.*, gifts, public acknowledgments, reunions, parties, etc.).
5. In at least one community, the tribal members were not using the peacemaking court because it was utilizing western-style mediation.
6. Providing incentives is not the solution for some tribal justice leaders; rather, offenders should be reintegrated within the tribal community through education about customs, traditions and values.
7. Some tribes permit parties in litigation, including criminal offenders, to “opt out” of the court system to an alternative justice system, *e.g.*, peacemaking. The option to transfer the case is generally limited to specific points in the proceeding.
8. Many tribal leaders have more confidence in the effectiveness of traditional justice systems than western-style courts.

9. The effectiveness of tribal justice systems, whether adversarial or traditional, is hampered by the inability to incarcerate offenders who do not respond to other sanctions in most communities.
10. States and local governments have an interest in tribal justice systems in many states and in some cases, have held multi-jurisdictional meetings. Other tribes report having either no relationship or an uncooperative relationship with state or local governments.
11. In certain types of cases (*e.g.*, child custody, protective orders, etc.), tribal orders are not acknowledged or enforced in many communities.
12. Some tribes have benefited from Bureau of Justice Assistance support through the Tribal Courts Assistance Program.
13. Tribal leaders request the following of the Bureau of Justice Assistance:
  - a. Extend grant periods
  - b. Provide technical assistance on conducting needs assessments
  - c. Provide training to qualify them to become tribal judges
  - d. Visit tribal communities
  - e. Develop a specialized website for Bureau of Justice Assistance grantees
  - f. Sponsor regional trainings
14. Alternative sentences often promote a sense of healing which is consistent with culture and traditions.
15. Through an agreement with the state, the state withholds the drivers' licenses of tribal juvenile offenders in at least one community.

### **Corrections/Probation Key Findings**

TEXT BOX: Discussion Questions

- Do you currently have a detention facility?
- Do you contract with another facility for use of their space? Who operates your detention facility?
- On a typical day how many people are incarcerated in your detention facility?
- What are the rehabilitative services offered in your detention facilities?
- What are some of the alternatives to detention that your tribe uses?
- Do you have probation services?
- Who administers your probation services?
- How are your probation services funded?
- What is the average caseload for a probation officer?

1. Resources and funding are the primary issues facing tribal communities with regard to detention facilities and correctional services.
2. Tribal leaders are not receiving adequate information from their own probation services to sentence appropriately.
3. Tribal leaders lack the resources to train probation officers appropriately, and there is limited access to culturally relevant training.
4. Of the six tribes that participated in this discussion group, four reported that they have detention facilities in their communities. The other two contracted with state or local governments for detention services.
5. Tribal capacity to provide detention facilities is dependent on self-governance funding, and two issues raise concern:
  - a. The BIA restricts use of its funding to BIA facilities only, even though state or county facilities may be better suited to meet the needs of the tribes.
  - b. Relocating tribal offenders outside of the community in detention facilities prevents tribal members from being able to effectively administer therapeutic treatment.
6. Many detention facilities are deteriorating or have been condemned or should be condemned. Tribes that have constructed new detention facilities have experienced difficulty in gaining BIA approval for opening the facilities.
7. Detention facilities are as far as eight hours away from the tribal communities that they serve.
8. Minimal rehabilitative services are offered in most tribal detention facilities. The Navajo Nation appears to have the most extensive services offered, which include education, life skills training, and transitional behavioral health services.
9. Federal probation officers may experience a lack of cooperation from individuals in the tribal community due to a perception that cooperation with an outside agency represents disloyalty to their own tribes.
10. Tribal leaders derive funding for probation services primarily from self-governance funds. Tribal leaders receive additional funding from the following federal sources: (a) tribal youth programs; (b) wellness court programs; and (c) domestic violence prevention programs.
11. Tribal leaders do not always receive notification when a sexual offender is returned to their communities.

12. The state refers Indian offenders to the tribe's treatment program in at least one community.

## Sharing Justice Information Key Findings

### TEXT BOX: Discussion Questions

- Do you share information regarding tribal convictions with state or federal jurisdictions?
- How is such information shared?
- Do you feel information should be shared?
- Why do you feel sharing information is or is not important?
- Does your court have a case management information system? What type of case management system do you use?
- Does your court and local law enforcement share information?
- How do you ensure that your orders that are entitled to full faith and credit are honored in other jurisdictions?
- Do you report DUI convictions to the states?
- Does your community have access to electronic lists available through law enforcement?
- Does your tribe coordinate with federal officials regarding anti-terrorism efforts?

1. Legitimate reasons exist for intergovernmental sharing of information on criminal convictions, particularly with regard to the following offenses: sex offenses, domestic violence, child abuse, and driving under the influence or driving while impaired.
2. Specific examples of failures in information sharing include:
  - a. One tribal member who had as many as 20 D.U.I. convictions
  - b. An employment reference check for a youth counselor revealed that he had been convicted in another tribe's court of a sex offense
  - c. Two drug traffickers moved to a different reservation after being banished from a reservation
  - d. State-convicted juvenile and adult offenders are often released into tribal communities without adequate notice or supervision
3. The legislative or executive branches of most tribal governments are opposed to formal, uniform reporting of data regarding criminal offenders to the states. The most frequently cited reasons for not cooperating are:
  - a. Infringement on privacy rights of tribal members
  - b. Data inaccessible due to access fees or software incompatibility
  - c. Adverse economic impact on tribal members (*e.g.*, increased insurance rates, inability to obtain employment or education, etc.)

- d. Jurisdictional issues or conflicts
  - e. Lack of cooperative, intergovernmental relations with states
  - f. Internal political pressures on tribal councils
4. Strained relations within the tribal government also impede the sharing of information between tribal law enforcement, the court and other agencies.
  5. Some tribal leaders fear that the sharing of information exacerbates the problem of racial profiling.
  6. Tribal actions often have repercussions throughout Indian Country; accordingly, tribal justice leaders tend to proceed cautiously in forging intergovernmental relationships.
  7. Only one tribal justice leader reports having mandatory, uniform reporting of crimes and offender data to the state; however, that tribal leader notes that the tribe does not have the economic resources to pay the access fee to use the database.
  8. Tribal leaders express concerns about sharing statistical data with the states because funds awarded to the states based on tribal statistics may not be used to protect the safety and welfare of tribal communities.
  9. Some tribal leaders from gaming tribes are purchasing information technology systems that are compatible with state systems for the purpose of sharing justice data; however, these systems may not be cost-effective for most tribes.
  10. Tribes that have cross-deputization and/or child welfare-related agreements with local law enforcement or the state tend to report more cooperation in sharing information.
  11. Reciprocity in the recognition and enforcement of orders impacts the decision of tribal leaders on whether to share information with other tribes and states.
  12. Some tribal justice leaders believe that the separation of powers permits the tribal justice system to engage in the exchange of information with the state without tribal council authorization.
  13. Regional intertribal cooperation in sharing criminal information appears to be more common than cooperation between tribes and states.
  14. Tribal law enforcement offices collect information from other jurisdictions by the following means:
    - a. Informal contact with state agencies and law enforcement
    - b. Formal requests to federal or state agencies

- c. Utilization of federal and state criminal databases (e.g., National Crime Information Center)
15. At least one tribe does not register sex offenders on the NCIC system because the offenses over which the tribe has jurisdiction are misdemeanors.
  16. Tribal leaders from courts with active criminal dockets report that they use electronic case management systems.
  17. Tribes share justice statistics with the Bureau of Indian Affairs through a response to the bureau's annual questionnaire.
  18. The efficiency of the collection and sharing of information within tribal governments is dependent on the tribe's information technology capacity; some tribes have only recently attained the capacity to collect data electronically, and at least one community still records some information on manual typewriters.

### **Law Enforcement/Development of Cooperative Agreements Key Findings**

TEXT BOX: Discussion Questions:

- Do you currently have cooperative agreements?
- In what types of situations have you entered a cooperative agreement (i.e., detention, fish and wildlife, gaming, etc.)?
- With whom have you entered into cooperative agreements?
- Do you feel that cooperative agreements have been or are helpful?
- Does your tribe currently receive any pass through money from the state government for any tribal programs?
- Would you prefer direct funding from the federal government or pass through money from the state for the funding of tribal programs?
- Do you have a jurisdictional sharing agreement with the state?

1. Some tribes have had cooperative agreements with state law enforcement for up to ten years.
2. All of the police officers in one tribe are cross-deputized with the state officers, so the tribal officers can execute warrants and arrests in both jurisdictions.
3. There is no uniformity in the ability of tribes to enter into cross-jurisdictional cooperative agreements; they are dependent on the state or local executive branch's willingness to support them.
4. One of the key issues in developing cooperative agreements is liability. Tribes often have to agree to limited waivers of sovereignty for the purpose of the agreement.
5. States won't allow cross-deputization because of:



- a. Concerns about liability
  - b. Inadequate training for tribal law enforcement officers
  - c. Lack of trust
6. Law enforcement is a key component of tribal sovereignty.
  7. A principal concern of tribal leaders in executing cooperative agreements is that tribal sovereignty not be diminished.

## **APPENDIX**

### **ACKNOWLEDGEMENTS**

The list of people who deserve credit for the publication of this report is too large for individual attribution. Nevertheless, to honor the tribes that participated, the report lists the individuals who attended each Gathering in this Appendix. The attendees included tribal leaders, representatives of state, local and federal agencies, and representatives of non-profit organizations that provide services to tribal justice systems. Their contributions were essential to the success of the Gatherings and to the development of this report.

Thanks also go to the presenters, cultural advisors, hosts, and facilitators who inspired the discussions and to the recorders who captured the remarks of the justice leaders for the purpose of creating this report. Devin Reickmann and Kari Bauer of Fox Valley Technical College Center for Criminal Innovation and Debra Flute of the Tribal Judicial Institute at the University of North Dakota deserve praise for their work at registration and as discussion group recorders. Part 3 includes a list of the presenters, cultural advisors, hosts, facilitators, and recorders, and the Appendix contains a separate list by role.

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The Honorable B.J. Jones, executive director of the Tribal Judicial Institute (TJI) at the University of North Dakota, and his staff, Deputy Director Karrie Azure-Elliot, and Associate Deputy Director Michelle Rivard Parks warrant appreciation for the planning and organization of the first two Gatherings. Denise Morris, executive director of the Alaska Native Justice Center, and her staff deserve recognition for their assistance with the logistics of the Alaska Gathering.

Finally, a special thank you is extended to all of the members of the Tribal Court Assistance Program Technical Assistance Providers (or the TCAP Coalition) and the Hon. Eugene White-Fish, President of the National American Indian Court Judges Association, who participated in the planning and presentation of the Gatherings. They were instrumental in all phases of this

project from the initial planning session to assisting with the production of this publication. A list of the individuals who participated in planning of the Gatherings is included in this Appendix and identified as the “Tribal Courts Working Group.”

## **Alaska Gathering Attendees**

*Editor’s Note: The names, titles, and agency/ tribal affiliations are listed as they appear on the registration forms.*

Adriene Active, Project Director, Inupiat/Jemez Pueblo  
Guy Adams, Board of Director, Maniilaq Association  
Cynthia Ahwinona, Senior Advisor, Senator Young’s Office  
Max Alex, Rules Keeper, Native Village of Eklutna  
David T. Alexie, Council Member, Tuluksak Native Community  
Lynn Allingham, General Counsel, Self-Governance Coordinator, Aleutian Pribilof Islands Association  
Annie Andrew, Tribal Judge, Organized Village of Kwethluk  
John Andrew, Tribal Judge, Native Village of Kongiganak  
Noah M. Andrew, Tribal Court, Justice/Council Member Tuluksak Native Community  
Winnie Atwood, Tribal Judge, Nenana  
Roxanne Auge, Local Government Specialist, Rural Justice Commission  
Emily Arnick, Administrative Assistant, Lesnoi Village  
Karrie Azure-Elliott, Deputy Director, Tribal Judicial Institute  
Virginia Baim, Domestic Violence and Child Abuse, Alaska Rural Justice Committee  
John Bajowski, Division of Behavioral Health, State of Alaska  
Percy Ballot, Board of Director, Maniilaq Association  
Billy Bartman, Council Member, Manokotak Village Council  
Evelyn Beeter, Cultural Director, Mt. Sanford Tribal Consortium  
Mark Begich, Mayor, City of Anchorage  
Tom Begich, CW Research  
Verna Bennett, Council Member, Ouzinkie Tribal Council  
Gifford Berry, Tribal Police Chief, Tuluksak Native Community  
Sally Billy, Tribal Court Administrator, Napakiak Tribal Court  
John Bioff, Staff Attorney, Kawerak, Inc.  
Karen Bitzer, Public Advocate, Alaska Native Justice Center  
Edgar Blatchford, Commissioner, Rural Justice Commission  
Dawn Blakenship, NVE ICWA Coordinator, Native Village of Eklutna  
Donna Boston, Council Member, Cheesh-Na  
Bruce Botelho, Mayor of Juneau  
Dan Branch, Assistant Attorney General, Alaska Department of Law  
Delka Bright, Lead Grant Program Specialist, USDOJ COPS Office  
Robert Brown, Senior Policy Advisor, Bureau of Justice Assistance  
Maureen Brown  
Myrna Brown, Administrative Assistant, Tlingit and Haida Indian Tribes of Alaska  
Tim Burgess, U.S. Attorney, State of Alaska  
Maxim Buterin, Jr., Vice President, Native Village of St. Paul  
Dolores Cadiente, Chief Judge, Tlingit and Haida Indian Tribes of Alaska

Phil Carella, NPSO LI, Alaska Native Justice Center  
 Roderick Carlson, President, Chignik Bay Tribal Council  
 David Case, Borough Attorney, Northwest Arctic  
 Zechariah Chaliak, Tribal Judge, Native Village of Nunapitchuk  
 Zita Chikigak, Tribal Court Planner, Alakanuk Tribal Council  
 Irene Chilligan, Rules Keeper, Native Village of Eklutna  
 Morgan Christen, Judge, Rasmuson Foundation  
 Natalia Clark  
 Maria Coleman, Rules Keeper, Native Village of Eklutna  
 Liz Connel, Senior Advisor, Senator Stevens' Office  
 Rob Corbisier, Special Assistant to Attorney General, State of Alaska  
 Michael Costigan, Director, Office of the Police Corps  
 Ingrid Cumberlandidge, Chief Tribal Judge, Qagan Tayagungin Tribe  
 Gilbert "Buz" Daney, Southcentral Foundation  
 Carol Daniel, General Counsel, Alaska Federation of Natives  
 Carolyn David, Tribal Council Member, Mentasta  
 Eleanor David, Co-Director, Alaska Native Women's Coalition  
 Agnes David, Tribal Judge, Native Village of Kongiganak  
 Agnes Denny, ICWA Worker, Cheesh-Na  
 Michelle Dewitt, Executive Director, Tundra Women's Coalition  
 Ben Didrickson, Tribal Judge, Sitka Tribe of Alaska  
 Susanne Dipietro  
 Elizabeth Dillon, Tribal Court Judge, Organized Village of Kwethluk  
 Lisa Dolchak, Traditional Healer, Southcentral Foundation  
 Ross Domnick  
 Gina Douville, Tribal Justice Director, Association of Village Council Presidents  
 Jay Dull, President, Umkumiute Tribal Council  
 Chariton Epchook, ICWA Coordinator, Organized Village of Kwethluk  
 Karen Eri, Tribal Programs Specialist, Fox Valley Technical College  
 Priscilla Evans, ICWA Coordinator, Nanwalek IRA Council  
 Antonio Fabelo, Senior Associate, JFA Institute  
 Cheryl Facine, Legal Advocate, Alaska Native Justice Center  
 Ben Flynn, Vice President, Chefornek Traditional Council  
 Fabian Frank, Tribal Administrator, Arctic Village Council  
 Kimberley Franke, Tribal Judge, Kenaitze Indian Tribe  
 Robert Fulton, Chief Tribal Judge, Karluk IRA Tribal Council  
 Margaret Galovin, Self-Governance Special Projects Assistant, Aleutian Pribilof Islands  
 Association  
 Tom Gamble, Tribal Councilman, Sitka Tribe of Alaska  
 Joseph Garoutte Sr., Legal Advocate, Native Village of Kotzebue  
 Michelle Geary, ICWA Coordinator, Native Village of Buckland  
 Clement George, Tribal Council Member, Umkumiute Tribal Council  
 Renee Giger, Training and Technical Assistance Coordinator, Bureau of Justice Assistance  
 Michael Gloko, President, Manokotak Village Council  
 Katherine Gottlieb, President, Southcentral Foundation

Wilson Green, Adolescent Counselor  
A. Elizabeth Griffith, Associate Deputy Director, Bureau of Justice Assistance  
Peter Gump, Council Member, Native Village of Hooper Bay  
Catherine Harpak, Acting Tribal Administrator, Asa'carsarmiut Tribal Council  
Andy Harrington, Executive Director, Alaska Legal Services  
Ed Harrington, Captain, Alaska State Troopers  
Thomas Heffelfinger, U.S. Attorney, District of Minnesota  
Shauna Hegna, Deputy Director, Rural Cap  
Kenneth Henry, Tribal Court Administrator, Nunakauyarmiut Tribe  
Domingo Herraiz, Director, Bureau of Justice Assistance  
Michael Heyward, Native Probation Support Officer, Alaska Native Justice Center  
Edgar Hoelscher, Tribal Chief/Judge, Native Village of Hooper Bay  
Sue Hollingsworth, Tribal Court Facilitator, Tanana Chiefs Conference  
George Hooper Sr., Tribal Court Judge, Native Village of Tununak  
Susanna Horn, IRA President, Native Village of St. Michael  
Henry Hunter, Tribal Judge  
Kevin Illingsworth, Assistant Professor, UAF Tribal Management Program  
Ira Isaac, Tribal Judge, Native Village of Mekoryuk  
Martha Jackson, Social Services Coordinator, Organized Village of Kwethluk  
Mike Jackson, Keeper of the Circle, Organized Village of Kake  
Valerie Jeffries, Administrator, Native Tribe of Kanatak  
Jeff Jesse, CEO, Alaska Mental Health Trust  
Gillam Joe, Vice President, Cheesh-Na  
Eva John, Tribal Court Clerk, Mentasta  
Robert John, Tribal Council Member, Mentasta  
Mary Ann Johnson, Village Administrator, Portage Creek Village Council  
Shannon Johnson-Nanlook, ICWA Representative, Traditional Council of Togiak  
Mary Jones, Tribal Court Director, Chevak Traditional Council  
Wilson Justin, Vice President, Mt. Sanford Tribal Consortium  
Sebastian Kasayuli, Vice President, Scammon Bay  
Harriet Kaufman, Contract Administrator, Native Village of Tyanek  
Carla Sims Kayotuk, Native Village of Kaktovik  
Martin Kelly, Tribal Administrator, Pilot Station Traditional Council  
Xavier Keyes, Tribal Court Planner, Algaaciq Tribal Government  
Hultman Kiokun, Executive Director, Native Village of Mekoryuk  
Rich Koutchak, Tribal Court Administrator, Native Village of Barrow  
Ed Krueger, Associate Dean, Fox Valley Technical College  
Patrick Lake, Associate Tribal Judge, Native Village of Hooper Bay  
Alexander Larson, Tribal Court Administrator, Akiachak Native Community  
Chris Larson, Tribal Chief, Napaskiak Tribal Council  
Nastasia Larson, Napaskiak Tribal Council  
Richard Larson, Tribal Council Member, Napaskiak Tribal Council  
Lindsay Lamar, Administrative Assistant, Alaska Native Justice Center  
Sharon Lindley, Project Manager, Association of Village Council Presidents  
Linda Long, Secretary, Pitkas Point Village Council

Nina Lopez, Alaska Native Justice Center  
Paul Lyle Sr., Asst. Attorney General, State of Alaska  
Shirley Martin-Elachik, Tribal Judge/Vice President, Native Village of St. Michael  
Joe Masters, Deputy Director, Alaska State Troopers  
Ignatius Matthias, ICWA Coordinator, Nightmute Traditional Council  
Pete Mellick, President/Tribal Administrator, Native Village of Sleetmute  
Minnie Michael, Tribal Judge, Organized Village of Kwethluk  
Lloyd Miller, Attorney, Sonosky Chambers Sachse Miller and Munson, LLP.  
Mary Ann Mills, Tribal Judge, Kenaitze Indian Tribe  
Denise Morris, President, Alaska Native Justice Center  
Rebecca Murdock, Tribal Programs Manager, Fox Valley Technical College  
Frederick Murray, Native Village of Elim President  
Laurie Myers, Administrative Assistant, Alaska Native Justice Center  
Robert Nick, Tribal Judge, Native Village of Nunapitchuk  
Lillian Olin, Tribal Court Judge, Louden Tribal Council  
Eric Olson, Tribal Chief Judge, Native Village of Hooper Bay  
Jonathan Paul, Tribal Court Planner, Kipnuk  
Rebecca Paul, Tribal Court Justice Committee Member, Napaskiak Tribal Council  
Hazel Faye Pebley, Executive Director, Native Village of Barrow  
Michael Pederson, Director of Social Services, Arctic Slope Native Association, Ltd.  
Jenny Pelkola, Tribal Court Judge, Louden Tribal Council  
James Pence, President, Cheesh-Na  
Cindy Pennington, Executive Director, Alaska Native Justice Center  
Ray Perales, Director of Training, Native American Alliance Foundation  
Mary Pete, Tribal Court Judge, Stebbins Community Association  
Bobby Peter, Tuluksak Native Community Member, Tuluksak Native Community  
Darlene Peters, ICWA Coordinator, Asa'carsarmiut Tribal Council  
Vivian Peters, Tribal Court Planner, Pilot Station Traditional Council  
Evelyn Peterson, ICWA Coordinator, Asa'carsarmiut Tribal Council  
Helen Peterson, Tribal Court Clerk, Algaaciq Tribal Government  
Wayne Phillip, Tribal Court Planner, Native Village of Kongiganak  
Vera Phillip, Native Village of Alakanuk  
John Phillip, Sr., Tribal Judge, Native Village of Kongiganak  
Marjorie Post, Tribal Court Clerk, Native Village of Tununak  
Dave Raasch, Consultant, Fox Valley Technical College  
Gloria Reamey, Council Member, Native Tribe of Kanatak  
John Reft, Tribal Council Vice-Chair, Shoonaq Tribe of Kodiak  
Alicia Reft, President, Karluk IRA Tribal Council  
Lisa Reiger, Board Member, Alaska Native Justice Center  
Michelle Rivard Parks, Associate Deputy Director, Tribal Judicial Institute  
Ida Roehl, Wellness Project Manager, Bristol Bay Native Association  
Maria Rubio, Executive Director, Western Community Policing Institute  
Faith Rukovishnikof, Tribal Court Clerk/Administrator, Native Village of St. Paul  
March Runner, Coordinator of Tribal Government Services, Bristol Bay Native Association  
Karen Sam, Tribal Court Clerk, Native Village of Kwinhagak

Rachel Sanford, Tribal Council Member, Mentasta  
Bing Santamour, Orutsararmiut, Native Council  
Ethan Schutt, General Counsel, Tanana Chiefs Conference  
Morgan Simon, President, Scammon Bay  
Elaine Sinyon, Tribal Administrator, Cheesh-Na  
Rebecca Skinner, Tribal Court Administrator, Shoonaq Tribe of Kodiak  
Richard Slats, Tribal Court Administrator, Orutsararmiut Native Council  
Grace Smith, Family Programs Coordinator, Aleutian Pribilof Islands Association  
George Smith, Scammon Bay  
Katherine J. Smith, Technician, Circle Peacemaking, Organized Village of Kake  
Judith Smith, Lead Grant Program Specialist, USDOJ COPS Office  
Susan Soule, Consultant  
Sadie Spargur, President, Native Tribe of Kanatak  
Alberta Stephan, Rules Keeper, Native Village of Eklutna  
Moses Strauss, Tribal Judge, Native Village of Kongiganak  
Nelda Swan, Board of Directors, Maniilaq Association  
Melissa Taylor, Program Director, Kawerak, Inc.  
Katie Tepas, Program Coordinator, Alaska State Troopers  
Ariana Tikiun, Tribal Clerk, Manokotak Village Council  
Annie Tikluk, Wellness Counselor, Native Village of Kaktovik  
Luke Titus, Reverend, Athabascan  
Lola Tobuk, Legal Advocate, Alaska Native Justice Center  
Moses Toyukak, Council Member, Manokotak Village Council  
Casandra Trentran, Health Director, Native Village of Tyonek  
Ignatius Tulik, Tribal Court Facilitator, Nightmute Traditional Council  
Tony Umugak, Tribal Court Judge, Chevak Traditional Council  
Diwakar Vadapalli, Tribal Court Planner, Native Village of Sleetmute  
Laura Vargas, Program Manager, Western Community Policing Institute  
Tony Vaska, Kalskag Traditional  
Susie Walter, Council Secretary, Native Village of Tununak  
Jerry Wassillie, Tribal Judge, Native Village of Nunapitchuk  
Raymond Watson, Chief Judge, Orutsararmiut Native Council  
Russ Webb, Program Officer, Alaska Mental Health Trust  
Penny Westing, ICWA Case Manager, Chickaloon Native Village  
Marcella White, ICWA Worker, Nunakauyarmiut Tribe  
Mike Williams, Alcohol and Substance Abuse Working Group  
Sarah Williams, Program Coordinator, Department of Corrections  
Deborah Wing, Program Operations, Director Alaska Native Justice Center  
Cathy Wold, Tribal Justice Specialist, Association of Village Council Presidents  
Ladonna Wolf, Tribal Council Member, Mentasta  
Lisa Wolf, Tribal Council Member, Mentasta  
Lotha Wolf, Tribal Judge, Mentasta  
Darlene Wright, Program Development Consultant, Spirit Village Justice Camp  
Richard M. Zacharof, President, Native Village of St. Paul  
Mike Zacharof, Senior Judge, Native Village of St. Paul

## **National Gathering Attendees**

*Editor's Note: The names, titles, and agency/ tribal affiliations are listed as they appear on the registration forms.*

Richard Ackley, Associate Judge, Bad River Band of Lake Superior Chippewa  
Lynn Alamilla, Paralegal, Lac Vieux Desert Band of Lake Superior Chippewa Indians  
Emmett Archuleta, 1st Warchief, Picuris Pueblo  
Manuel Archuleta, Lt. Governor, Picuris Pueblo  
Roxanne Auge, Local Government Specialist, State of Alaska Department of Commerce  
Steven Aycock, Chief Judge, Colville Confederated Tribes  
Alissa Azure, Tribal Member, Turtle Mountain Band of Chippewa Indians  
Karrie Azure-Elliott, Associate Justice, Turtle Mountain Band of Chippewa Indians  
Raj Basi, Tribal Attorney, Suquamish Tribe  
Connie Bear King, Tribal Member, Standing Rock Sioux  
Ken Bellmard, Tribal Attorney, Miami Tribe of Oklahoma  
Richard Blake, Chief Judge, Hoopa Valley Tribe  
Dale W. Brien, Program Director, Turtle Mountain Band of Chippewa Indians  
Kevin Briscoe, Youth Court Judge, Mississippi Band of Choctaw Indians  
Robert W. Buffalo, Chief Judge, Red Cliff Band of Lake Superior Chippewa  
Doloresa Cadiente, Chief Judge, Central Council of Tlingit and Haida Indian Tribes of Alaska  
Vera Calabaza, Juvenile Probation Officer, Acoma Pueblo  
Leona Canyon, Facility Administrator, Navajo Nation  
Dione C. Carroll, Esq, General Counsel, Miccosukee Tribe of Indians of Florida  
William D. Cavanaugh, Judge, Spirit Lake Sioux Tribe  
Chris Chaney, Tribal Member, Seneca-Cayuga Tribe of Oklahoma  
Benedict Chavez, 2nd Lt. Governor, Pueblo of Acoma  
Mark A. Colbert, Supreme Court Justice, Chickasaw Nation  
El Marie Conklin, District Judge, Three Affiliated Tribes  
Elbridge Coochise, Tribal Member, Hopi Tribe  
Steven Cook, Judge, St. Regis Mohawk Tribe  
Don Owen Costello, Chief Judge, Coquille Indian Tribe/Confederated Tribes of Coos  
Evelyn Crawford, Public Defender, Sisseton Wahpeton Oyate  
Terry Cross, Tribal Member, Seneca  
Thomas Dalton, Judge, Central Council of Tlingit and Haida Indian Tribes of Alaska  
Edward Delgado, Legislative Analyst, Oneida Tribe of Indians of Wisconsin  
Ray Deperry, Chairman, Red Cliff Band of Lake Superior Chippewa  
Velva Stiffarm Doore, Tribal Council Member, Gros-Venture  
Denise Dowdell, Tribal Court Judge, Narragansett Indian Tribe  
Roman J. Duran, Associate Judge, Jicarilla Apache Nation  
Cheryl Feazle, Deputy Court Clerk, Kaw Nation  
Anita Fineday, Associate Judge, Leech Lake and White Earth  
Matthew Fletcher, Tribal Member, Little Traverse Bay Band of Odawa Indians  
Debra Flute, Tribal Member, Sisseton Wahpeton Oyate  
Meredith Frailey, Tribal Council Member, Cherokee Nation  
Harold "Gus" Frank, Chairman, Forest County Potawatomi Community  
Kimberley Franke, Tribal Judge, Kenaitze Tribal Court

Clarence Frederick, Judicial Committee Chair, Turtle Mountain Band of Chippewa Indians  
Jenny Fyten, Tribal Attorney, Three Affiliated Tribes  
H. Chico Gallegos, Judge, Pueblo of Zia, Jicarilla Apache Nation  
Jodee Gamst, Director, Children and Family Services, Prairie Island Indian Community  
Lauren German, Judicial Committee Vice Chair, Sisseton Wahpeton Oyate  
Marcia L. Green, Policy Advisor to the Chairman, Seminole Tribe of Florida  
Joyce Greenwood, Indian Child Welfare Act Liaison, Ponca Tribe  
Delores Greyeyes, Director, Department of Corrections, Navajo Nation  
Fred Guardipee, Councilman, Blackfeet Tribe  
Doreen Hagen, President of Tribal Council, Prairie Island Indian Community  
Nathan Hale, Tribal Secretary, Three Affiliated Tribes  
Tex Hall, Chairman, Three Affiliated Tribes  
Mabel Henderson, Program Supervisor, Navajo Nation  
Dennis Hendricks  
Levon B. Henry, Executive Director Legal Services, Navajo  
Beverly Iron Shield, Indian Child Welfare Act Director, Standing Rock Sioux  
Isaac Jack, Tribal Member, Nisqually Tribe  
Lisa Jaeger, Tribal Government Specialist, Tanana Chiefs Conference  
Marie James, Tribal Prosecutor, Yavapai Apache  
B.J. Jones, Judge, Sisseton Wahpeton Oyate, Prairie Island, Three Affiliated Tribes, Standing  
Rock, Leech Lake, Mille Lacs Band of Ojibwe, Flandreau Santee Sioux  
Andrew Jones, Youth Court Diversion Coordinator, Mississippi Band of Choctaw Indians  
Wilson Justin, Acting President, Mt. Sanford Tribal Consortium  
Marie Kalama, Court Administrator, Nisqually  
Kristina Kalka, Associate Judge, Yavapai Apache  
Dan Kamkoff, Court Director, Lummi Indian Nation  
Marilyn Kary, Court Administrator, Standing Rock Sioux  
Vincent Knight, Tribal Member, Ponca Tribe of Oklahoma  
Walter Lamar, Tribal Member, Blackfeet Tribe  
Larry Lamabull, Social Services, Nisqually Tribe  
Callie Lankford, Social Services Manager, Miami Tribe of Oklahoma  
Gary LaRance, Chief Judge, Hopi Tribe  
April Larocque, Tribal Member, Turtle Mountain Band of Chippewa Indians  
Barbara Lazore, Tribal Chief, St. Regis Mohawk Tribe  
Stacy Leeds, Supreme Court Justice, Cherokee Nation  
Guy Lewis, Attorney, Miccosukee Tribe of Indians of Florida  
Amy Lovell, Tribal Judge, Pueblo of Zia  
Philip Lujan, Chief District Judge, Potawatomi Tribe, Kaw Tribe, Iowa Tribe, Seminole, Kiowa,  
Comanche, Wichita, Caddo, Delaware, Oklahoma Apache  
Douglas Luna, Judge, Central Council of Tlingit and Haida Indian Tribes of Alaska  
Hope MacDonald, Council Delegate, Navajo Nation  
Bonnie Makil, Judge, Pima-Maricopa  
Homer Mandoka, Council Member, Nottawaseppi Huron Band of Potawatomi  
Madonna Marcellais, Chief Judge, Turtle Mountain Band of Chippewa Indians  
Harry Martin, Chief Justice, Eastern Band of Cherokee Indians



Waylon Martinez, 2nd Warchief, Picuris Pueblo  
 Kerry McReynolds-Burns, J.D., Tribal Member, Choctaw Nation  
 Richard Mermejo, Governor, Picuris Pueblo  
 Robert Miller, Judge, Stockbridge-Munsee Mohican Nation  
 Mary Ann Mills, Tribal Judge, Kenaitze Tribal Court  
 Mark Montano, Vice Chair, Red Cliff Band of Lake Superior Chippewa  
 Diana R. Muniz, Interim Chief Judge, Jicarilla Apache Nation  
 Amy Oldfield, Icwa Director, Kaw Nation  
 Tim Pauls, Youth Court Counselor, Mississippi Band of Choctaw Indians  
 Lucy Peden, Court Administrator, Sac and Fox Nation of Missouri  
 Ray Perales, Tribal Member, Fort Peck Assiniboine & Sioux Tribes  
 Craig James Poitra, Tribal Liaison, Turtle Mountain Band of Chippewa Indians  
 Mark Pouley, Chief Judge, Swinomish Indian Tribal Community  
 Theresa Pouley, Chief Judge, Lummi Tribal Court  
 Arlen Quetawki, Governor, Pueblo of Zuni  
 Dave Raasch, Chief Judge, Stockbridge-Munsee Mohican Nation  
 Rick Rabenort, Chief of Police, Prairie Island Indian Community  
 Sandra Rachal, Tribal Chairwoman, Sokaogon Chippewa Tribe  
 Alicia Reft, President, Karluk IRA Tribal Council  
 Michelle Rivard Parks, General Counsel, Spirit Lake Nation  
 Melanie Rivas, Tribal Judge, San Juan Pueblo  
 Gwen Roberts, Judicial Committee Chair, Sisseton Wahpeton Oyate  
 Fred Roberts, Tribal Council Member, Gwich'in  
 Regina Rosario, Program Supervisor, Eastern Band of Cherokee Indians  
 Faith Rukovishnikoff, Tribal Courts Clerk, Tribal Government of St. Paul  
 Roger Shirley, Chief Prosecutor, Navajo Nation  
 Vicki Sieber-Benson, Court Coordinator, Confederated Tribes of Coos, Lower Umpqua and  
 Siuslaw Indians  
 Ralph Simon, Judge, Taos Pueblo  
 Vickie Simmons, Program Development Specialist, Moapa Band of Paiutes  
 Nancy Smit, Social Worker, Nottawaseppi Huron Band of Potawatomi  
 Barbara A. Smith, Supreme Court Justice, Chickasaw Nation  
 Nizhoni Smith, Tribal Member, Navajo Nation  
 Mary Beth Solomon, Tribal Judge, Gwich'in  
 Harry Sombrero, Captain, Navajo Nation  
 Igor Sopronenko, Videographer  
 Raphella Spute, Court Clerk, Moapa Band of Paiutes  
 John St. Clair, Chief Judge, Eastern Shoshone  
 Sharr Steet-Lah, Assistant Court Administrator, Nisqually  
 Leo Stewart, Vice-Chair Board of Trustees, Confederated Umatilla Tribes  
 Donel Takes The Gun, District Representative, Standing Rock Sioux  
 Darla Thiele, Juvenile Intake Officer, Spirit Lake Sioux Tribe  
 Gene Thin Elk, Tribal Member, Rosebud Sioux Tribe  
 Evelyn Thomas, Tribal Council President, Native Village of Crooked Creek  
 Winnifred Thomas, Deputy Chief Judicial Officer, Oneida Appeals Commission

George Tomer, Tribal Member, Penobscot Nation  
Diwakar Vadapalli, Community Planner/Court Planner, Sleetmute Traditional Council  
Fred Vallo, Councilman, Pueblo of Acoma  
Raenell Vaughn, Chief Justice, Mississippi Band of Choctaw Indians  
Kimberly M. Vele, Judge, Stockbridge-Munsee Mohican Nation  
Monique Vondall, Associate Justice, Turtle Mountain Band of Chippewa Indians  
Star Wallowing Bull, Tribal Member, White Earth  
David R. Ward, Chief of Police, Miccosukee Tribe of Indians of Florida  
Shawn Webb, Native American Legal Research Center, Oklahoma City University School of Law  
James Wells, Police Officer, Prairie Island Indian Community  
Marcus Wells, Tribal Member, Three Affiliated Tribes  
Frank Whitecalfe, Tribal Member, Three Affiliated Tribes  
Eugene White-Fish, Chief Judge, Forest County Potawatomi Community  
William Whitehead, Executive Board Member, Fort Peck Assiniboine & Sioux Tribes  
Selwyn Whiteskunk, Chairman, Ute Mountain Ute Indian Tribe  
Carolyn Wilson, Tribal Member, Delaware Tribe of Indians  
Mary Wynne, Tribal Member, Rosebud Sioux Tribe  
M. Richard Zacharof, President, Tribal Government of St. Paul  
Edouardo Zendejas, Attorney, Ponca Tribe of Nebraska

### **Presenters/Cultural Advisors**

Tim Burgess, U.S. Attorney for Alaska  
Delores Cadiente, Tlingit-Haida Indian Tribes, Alaska Representative to National Congress of American Indians  
Christopher Chaney, Associate Solicitor, Division of Indian Affairs  
Terry Cross, Executive Director, National Indian Child Welfare Association  
Ingrid Cumberlandidge, Tribal Court Judge, Eastern Aleutian Tribes  
Eleanor David, Alaska Native Women's Coalition  
Ben Diedrickson, Sitka Tribe, Sitka Alaska  
Lisa Doulichak, Traditional Healer  
H. Chico Gallegos, Associate Director, Native American Alliance Foundation and Judge, Pueblo of Zia  
Katherine Gottlieb, President/CEO, Southcentral Foundation  
A. Elizabeth Griffith, Associate Deputy Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice  
Tex Hall, President, National Congress of American Indians  
Thomas Heffelfinger, U.S. Attorney for the District of Minnesota and Chairman of Attorney General Advisory Committee's Native American Issues Subcommittee  
Domingo S. Herraiz, Director, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice  
B.J. Jones, Executive Director, Tribal Judicial Institute, University of North Dakota School of Law  
Wilson Justin, Health Director/Vice-President, Mt. Sanford Tribal Consortium

Julie Kitka, Alaska Federation of Natives Governor, State of Alaska  
Vincent Knight, Executive Director, National Tribal Justice Resource Center  
Denise Morris, President, Alaska Native Justice Center  
Theresa Pouley, Chief Judge, Lummi Indian Nation  
Gene Thin Elk, Cultural Advisor, Chief Judge Sisseton-Wahpeton Oyate, Luke Titus-Minto  
Culture Camp  
Tracy Toulou, Director, Office of Tribal Justice, U.S. Department of Justice  
Eugene White-Fish, President, National American Indian Court Judges Association and Chief  
Judge, Forest County Potawatomi Community  
Darlene Wright, Alaska Native Brotherhood Camp II

### **Facilitators/Hosts**

Connie Bear King, Consultant, Standing Rock Sioux Tribe  
Elbridge Coochise, Consultant, Hopi Tribe  
Matthew Fletcher, Director, Northern Plains Indian Law Center  
Stacy Leeds, Associate Professor, University of Kansas Law School  
Amy Lovell, Technical Assistance Program Manager, Native American Alliance Foundation  
Ray Perales, Director of Training, Native American Alliance Foundation  
Philip Propes, Assistant Director, Criminal Justice Institute  
Rick Robinson, Chief Professional Officer, Northern Cheyenne Boys and Girls Club  
Kevin Washburn, Associate Professor, University of Minnesota Law School  
William Thorne, Appellate Judge, Utah Court of Appeals

### **Recorders**

Karen Bitzer, Public Advocate, Alaska Native Justice Center  
Karen Eri, Tribal Programs Specialist, Fox Valley Technical College  
Debra Flute, Tribal Justice Assistant, Tribal Judicial Institute  
Carrie Garrow  
Tahira Hashmi, Staff Attorney, Tribal Judicial Institute  
Jason Loos, Legal Intern, Tribal Judicial Institute  
Steve Moore, Staff Attorney, Native American Rights Fund  
Rebecca Murdock, Tribal Programs Manager, Fox Valley Technical College  
Dave Raasch, Consultant, Fox Valley Technical College  
Devin Rieckmann, Technical Assistance, Fox Valley Technical College  
Michelle Rivard Parks, Associate Deputy Director, Tribal Judicial Institute  
Kelly Stoner, Director, Native American Legal Resource Center  
Carolyn Wilson, Program Attorney, National Tribal Judicial Center

### ***Tribal Courts Working Group***

Robert H. Brown, Jr., Sr. Policy Advisor  
Bureau of Justice Assistance  
Office of Justice Programs  
U.S. Department of Justice  
810 Seventh Street NW, Fourth Floor

Washington, DC 20531  
Phone (202) 616-6500  
Fax (202) 305-1367  
[www.ojp.usdoj.gov/BJA](http://www.ojp.usdoj.gov/BJA)

B.J. Jones, Executive Director  
Karrie Azure-Elliott, Deputy Director  
Michelle Rivard Parks, Associate Deputy Director  
Tribal Judicial Institute  
University of North Dakota School of Law  
PO Box 9003  
Grand Forks, ND 58202-9003  
Phone (701) 777-6306  
Fax (701) 777-2217  
[www.law.und.nodak.edu/NPILC/nptjti.html](http://www.law.und.nodak.edu/NPILC/nptjti.html)

Vincent Knight, Executive Director  
National Tribal Justice Resource Center  
4410 Arapahoe Ave, Suite 135  
Boulder, CO 80303  
Phone (303)245-0786  
Fax (303) 245-0785  
[www.tribalresourcecenter.org](http://www.tribalresourcecenter.org)

Ray Perales, Director of Training  
Amy Lovell, Program Manager for Training and Technical Assistance  
Native American Alliance Foundation  
5820 Fourth St., N.W.  
Albuquerque, NM 87107  
Phone (800) 516-9340  
Fax (505) 345-0176  
[www.native-alliance.org](http://www.native-alliance.org)

Jerry Gardner, Executive Director  
Tribal Law and Policy Institute  
8235 Santa Monica Blvd., Ste. 211  
West Hollywood, CA 90046  
Phone (323) 650-5467  
Fax (323) 650-8149  
[www.tribal-institute.org/lists.tlpi.htm](http://www.tribal-institute.org/lists.tlpi.htm)

Kelly Stoner, Director  
Shawn Webb, Staff Attorney  
Native American Legal Resource Center  
Oklahoma City University Law School

2501 N. Blackwelder  
Oklahoma City, OK 73106  
Phone (405) 226-2050  
[www.okcu.edu/Law/academiccenters/academiccenters\\_nativeamerican.html](http://www.okcu.edu/Law/academiccenters/academiccenters_nativeamerican.html)

Denise Morris, President  
Karen Bitzer, Public Advocate  
Alaska Native Justice Center  
121 West Fireweed Lane, Suite 240  
Anchorage, AK 99503  
Phone (907) 278-1154  
Fax (907) 278-1121  
[www.ciri.com/about\\_ciri/anjc.net](http://www.ciri.com/about_ciri/anjc.net)

Carolyn Wilson, Program Attorney  
National Tribal Judicial Center  
Judicial College Building/358  
Reno, NV 89557  
Phone (800)255-8343  
Fax (775) 784-4234  
[www.judges.org/specprogs/ntjc](http://www.judges.org/specprogs/ntjc)

Mark Caldwell, Program Director for Specialty Programs  
Jo Ann Harris, Board Member  
National Institute for Trial Advocacy  
363 Centennial Parkway, Suite 110  
Louisville, CO 80027  
Phone (877) 648-2632  
Fax (720) 890-7069  
[www.nita.org](http://www.nita.org)

Edward J. Krueger, Associate Dean  
Rebecca Murdock, Tribal Programs Manager  
Karen Zeller-Eri, Tribal Court Specialist  
Criminal Justice Center for Innovation  
Fox Valley Technical College  
2320 Industrial Drive  
Neenah, WI 54956  
Phone (888) 370-1752  
Fax (920) 996-7192  
[www.fvtc.edu/cjci](http://www.fvtc.edu/cjci)

BACK COVER

## Tribes in Attendance

The Alaska and National Gatherings could not have occurred without the participation of representatives from the following tribes:

Akiachak Native Community  
Algaaciq Native Village  
Apache Tribe of Oklahoma  
Arctic Village  
Asa'carsarmiut Tribe  
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana  
Bad River Band of the Lake Superior Tribe of Chippewa Indians  
Blackfeet Tribe  
Caddo Nation of Oklahoma  
Central Council of Tlingit and Haida Indian Tribes of Alaska  
Cheesh-Na Tribe  
Cherokee Nation, Oklahoma  
Chevak Native Village  
Chickaloon Native Village  
Chickasaw Nation, Oklahoma  
Choctaw Nation of Oklahoma  
Comanche Nation, Oklahoma  
Confederated Tribes of the Colville Reservation, Washington  
Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon  
Confederated Tribes of the Umatilla Reservation, Oregon  
Coquille Tribe of Oregon  
Delaware Tribe of Indians  
Eastern Band of Cherokee Indians of North Carolina  
Flandreau Santee Sioux Tribe of South Dakota  
Forest County Potawatomi Community, Wisconsin  
Fort Belknap Indian Community, Montana  
Galena Village (*aka* Loudon Village)  
Hoopa Valley Tribe, California  
Hopi Tribe of Arizona  
Huron Potawatomi, Inc., Michigan  
Iowa Tribe of Oklahoma  
Jicarilla Apache Nation, New Mexico  
Kaktovik Village  
Kaw Nation, Oklahoma  
Kenaitze Indian Tribe  
Kenaitze Indian Tribe  
Kiowa Indian Tribe of Oklahoma  
Lac Vieux Desert Band of Lake Superior Chippewa Indians, Michigan  
Leech Lake Band of Minnesota Chippewa Tribe, Minnesota  
Lesnoi Village  
Little Traverse Bay Band of Odawa Indians, Michigan

Lummi Tribe, Washington  
Manokotak Village Council  
Mentasta Traditional Council  
Mentasta Traditional Council  
Miami Tribe of Oklahoma  
Miccosukee Tribe of Indians of Florida  
Mille Lacs Band of Minnesota Chippewa Tribe, Minnesota  
Mississippi Band of Choctaw Indians, Mississippi  
Moapa Band of Paiute Indians  
Narragansett Indian Tribe of Rhode Island  
Native Tribe of Kanatak  
Native Village of Alakanuk  
Native Village of Barrow Inupiat Traditional Government  
Native Village of Buckland  
Native Village of Chignik Lagoon  
Native Village of Eklutna  
Native Village of Elim  
Native Village of Hooper Bay  
Native Village of Karluk  
Native Village of Kipnuk  
Native Village of Kongiganak  
Native Village of Kotzebue  
Native Village of Kwinhagak  
Native Village of Mekoryuk  
Native Village of Nanwalek  
Native Village of Napakiak  
Native Village of Napaskiak  
Native Village of Nightmute  
Native Village of Nunapitchuk  
Native Village of Ouzinkie  
Native Village of Pitka's Point  
Native Village of Saint Michael  
Native Village of Scammon Bay  
Native Village of Tununak  
Native Village of Tyonek  
Navajo Nation, Arizona, New Mexico & Utah  
Nenana Native Association  
Nisqually Indian Tribe  
Nunakauyarmiut Tribe  
Oneida Tribe of Indians of Wisconsin  
Organized Village of Kake  
Organized Village of Kwethluk  
Orutsaramiut Native Council  
Penobscot Tribe of Maine  
Pilot Station Traditional Village

Ponca Tribe of Nebraska  
Ponca Tribe of Oklahoma  
Portage Creek Village  
Prairie Island Indian Community  
Pribilof Islands Aleut Communities of St. Paul & St. George Islands  
Pueblo of Acoma  
Pueblo of Picuris, New Mexico  
Pueblo of San Juan  
Pueblo of Taos  
Pueblo of Zia  
Qagan Tayagungin Tribe of Sand Point Village  
Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin  
Rosebud Sioux Tribe  
Sac & Fox Nation of Missouri in Kansas and Nebraska  
Salt River Pima-Maricopa Indian Community  
Seminole Tribe of Florida  
Seneca Nation of New York  
Seneca-Cayuga Tribe of Oklahoma  
Shoonaq' Tribe of Kodiak  
Shoshone Tribe of the Wind River Reservation, Wyoming  
Sisseton-Wahpeton Oyate  
Sitka Tribe of Alaska  
Sokaogon Chippewa Community  
Spirit Lake Tribe  
St. Regis Band of Mohawk Indians of New York  
Standing Rock Sioux Tribe  
Stockbridge-Munsee Community  
Suquamish Indian Tribe  
Swinomish Indians  
Three Affiliated Tribes of the Fort Berthold Reservation  
Traditional Village of Togiak  
Tuluksak Native Community  
Turtle Mountain Band of Chippewa Indians  
Umkumiute Native Village  
Ute Mountain Tribe  
Village of Chefornak  
Village of Kalskag  
Village of Sleetmute  
White Earth Band of Minnesota Chippewa Tribe, Minnesota  
Wichita and Affiliated Tribes, Oklahoma  
Yavapai-Apache Nation