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Tribal and State Courts - A New Beginning

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TRIBAL AND STATE COURTS — A NEW BEGINNING

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I. HISTORY

The neglect and distant misunderstandings that have marked the relationship between tribal and state courts have been a long ignored and greatly underestimated source of confusion and frustration for those who seek justice in areas affected by the two court systems. Recently, however, several states and tribes have undertaken impressive initiatives to reexamine the dynamics of tribal and state court interaction. Those initiatives resulted from a chain of events begun nearly ten years ago at a meeting of the Conference of Chief Justices.[1]

On August 8, 1985, after considerable debate on the conference floor, the Conference of Chief Justices adopted by divided vote a resolution that, in essence, directed the president of the Conference to create a committee to study problems involving civil jurisdiction within Indian country.[2] Within a few months, the then president of the Conference of Chief Justices, Edward Hennessey of Massachusetts, appointed the committee that ultimately became known as the Committee on Jurisdiction Within Indian Country.[3] The need for such a committee was apparent when the United States Supreme Court in two divided opinions involving the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota vacated one opinion of the North Dakota Supreme Court and reversed a subsequent opinion of the same

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1. NATIONAL CENTER FOR STATE COURTS, HISTORY OF THE CONFERENCE OF CHIEF JUSTICES (1986 & 1993). The Conference of Chief Justices was founded in 1949 and consists of the chief judicial officers of the highest appellate courts in the 50 states, the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands. *Id.* at 14. The purpose of the Conference is to provide an opportunity and vehicle for consultation among these judicial officers concerning the "administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems." *Id.* (quoting ARTICLES OF INCORPORATION OF THE CONFERENCE OF CHIEF JUSTICES, art. 2.1).

2. H. Ted Rubin, *Tribal Courts and State Courts: Disputed Civil Jurisdiction Concerns and Steps Toward Resolution*, ST. CT. J. 9 (Spring 1990).

3. The Committee was originally chaired by Ralph J. Erickstad, one of the authors of this article, and then by James G. Exum, Jr., Chief Justice of the North Carolina Supreme Court. The Committee, now known as the Tribal, State, and Federal Relations Committee, is currently under the able leadership of Stanley G. Feldman, Chief Justice of the Arizona Supreme Court.

court.[4] Those cases involved the issue of whether a North Dakota court had subject matter jurisdiction over a civil action arising within the exterior boundaries of the Fort Berthold Indian Reservation. The Three Affiliated Tribes had sued Wold Engineering, a non-Indian defendant, for designing and constructing an allegedly defective water system.[5] The North Dakota Supreme Court had held that, under Public Law 280,[6] as amended by the Indian Civil Rights Act of 1968,[7] the state court did not have jurisdiction because the Indian Tribes had not voted to accept state court jurisdiction.[8] In reversing the North Dakota Supreme Court, the United States Supreme Court concluded that the North Dakota trial court had jurisdiction in this action by Indians against non-Indians because a North Dakota court had exercised jurisdiction over Indian people in another case *before* the amendments to Public Law 280, even though members of the Three Affiliated Tribes had not voted to accept jurisdiction *after* those amendments.[9] The novel analytic turn taken by the United States Supreme Court in reaching its result contributed to an uncertain understanding about when and under which circumstances state courts had jurisdiction in civil actions arising in Indian country.[10]

On August 5, 1987, a very thought-provoking and enlightening panel discussion on the issue of civil jurisdiction within Indian country was held at the Conference of Chief Justices, hosted by then Chief Justice George W. Wuest of South Dakota, at Rapid City, South Dakota. Shortly thereafter, the Committee on Civil Jurisdiction Within Indian Country, by resolution, urged the Conference of Chief Justices to request the National

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4. *See* Three Affiliated Tribes of the Fort Berthold Indian Reservation v. Wold Engineering, P.C., 321 N.W.2d 510 (N.D. 1982) [*Three Affiliated Tribes I*], *cert. granted*, 461 U.S. 904 (1983), *vacated and remanded*, 467 U.S. 138 (1984) [*Three Affiliated Tribes II*]; on remand *Three Affiliated Tribes*, 364 N.W.2d 98 (N.D. 1985) [*Three Affiliated Tribes III*], *cert. granted*, 474 U.S. 900 (1985); *judgment reversed and remanded*, 476 U.S. 877 (1986) [hereinafter *Three Affiliated Tribes IV*]; on remand *Three Affiliated Tribes*, 392 N.W.2d 87 (N.D. 1986) (per curiam) [*Three Affiliated Tribes V*].

5. *Three Affiliated Tribes I*, 321 N.W.2d 510, 511 (N.D. 1982).

6. 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162(a) (1984) (criminal jurisdiction); 28 U.S.C. § 1360(a) (1993) (civil jurisdiction)) (conferring extensive criminal and civil jurisdiction over Indian country and permitting other states to acquire similar jurisdiction at their option).

7. 25 U.S.C. §§ 1321(a), 1322(a), 1326 (1983). The Indian Civil Rights Act of 1968 responded to the criticism that Public Law 280 permitted states to assume jurisdiction in Indian country without the consent of the affected tribes. The Act amended Public Law 280 to require that the consent of the tribes must be obtained before a state could acquire criminal or civil jurisdiction. *See* 25 U.S.C. §§ 1321(a), 1322(a) (1983). That consent could be obtained only through a majority vote of adult tribal members at a special election. *See* 25 U.S.C. § 1326 (1983).

8. *Three Affiliated Tribes I*, 321 N.W.2d at 512.

9. *Three Affiliated Tribes IV*, 476 U.S. at 886-887.

10. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 148, 199 (1988) (noting the "unusual" application of the preemption doctrine and the "analytical difficulties" in the United States Supreme Court opinion reversing the lower court).

Center for State Courts to seek funding from the State Justice Institute[11] to engage in an in-depth study that might culminate in a national conference on tribal/state court relations.[12] The resolution was approved by the Conference and pursued by the National Center for State Courts, and in January, 1989, the National Center received its first grant to conduct phase 1 of the study.[13] The purpose of phase 1 was to identify the primary disputed jurisdiction case types through surveys and legal research.[14] Later that year, the State Justice Institute approved a second grant to the National Center to conduct phase 2, which was to undertake demonstration forums in three states to clarify the respective authority of the state and tribal court systems, seek out methods of resolving jurisdictional conflicts, and generally enhance the level of understanding between the two court systems.[15] Arizona, Oklahoma, and Washington were selected as the forum states to pursue these program objectives under the broadly titled "Tribal Courts and State Courts: The Prevention and Resolution of Jurisdictional Disputes Project."[16]

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11. *See* 59 Fed. Reg. 43,165 (1994). The State Justice Institute was established by Pub. L. 98–620 to improve the administration of justice in the state courts. *Id.* The Institute is charged with the responsibility to direct a national program of financial assistance to assure ready access to a fair and effective system of justice, foster cooperation with the federal judiciary, promote recognition of the importance of an independent judiciary, and encourage education for state judges and support personnel through national and state organizations. *Id.*

12. NATIONAL CENTER FOR STATE COURTS, BUILDING ON COMMON GROUND: A NATIONAL AGENDA TO REDUCE JURISDICTIONAL DISPUTES BETWEEN TRIBAL, STATE, AND FEDERAL COURTS 2 (1994) [hereinafter COMMON GROUND].

13. *See* Rubin, *supra* note 2, at 10 (discussing the first phase of the study).

14. *Id.* The first survey conducted by the National Center's jurisdiction project was a mail survey directed to tribal and state court officials, state attorneys general, and bar association executives in the 32 states with federally recognized Indian country. *Id.* at 10. The three most commonly cited areas of jurisdictional dispute cited in the surveys were: problems associated with adherence to requirements of the Indian Child Welfare Act, domestic relations (divorce, child custody, and support), and contract actions. *Id.* at 10-11. The survey also found that tribal courts generally recognize state court judgments, but tribal court officials expressed frustration with a perceived unwillingness by state courts to recognize tribal court judgments. *Id.* at 11. This perception was not shared by state trial court judges who indicated that, generally, state recognition is provided to tribal court orders and decrees. *Id.* at 9-10. The first survey was followed by a second survey consisting of telephone interviews with 65 tribal and state court officials and state executive agency representatives in seven states – Alaska, Arizona, North Dakota, Oklahoma, South Dakota, Washington, and Wisconsin. *Id.* at 10. Consistent with the results of the first survey, Indian Child Welfare Act and domestic relations issues were most often cited as the most problematic areas. *Id.* at 12. North Dakota responses indicated that the most common domestic relations problems resulted from the lack of recognition of tribal or state court judgments. *Id.* at 13.

15. *See* Rubin, *supra* note 2, at 9 (discussing the purposes for conducting the studies).

16. A 13-member Coordinating Council was appointed to oversee the entire project in conjunction with grants from the State Justice Institute and project development by the National Center for State Courts. Vernon R. Pearson, Justice (ret.), Supreme Court of Washington, served as chair and deserves special thanks for his far-sighted and diplomatic leadership. Special thanks should be extended also to H. Ted Rubin, former senior staff attorney of the Institute for Court Management of the National Center for State Courts, who served exceptionally well as project director and now serves as project consultant. Fred G. Miller, senior staff attorney, National Center for State Courts, succeeded H. Ted Rubin as project director. Other members of the Coordinating Council, to whom a debt of gratitude is owed, were:

A subsequent grant was made by the State Justice Institute to the National Center for the purpose of holding a national conference to discuss and analyze the lessons gained from the studies and forum projects conducted with funding from the first two grants.[17] The national conference, phase 3 of what had become a very ambitious project, was held in Seattle, Washington, during the summer of 1991 and was attended by nearly 250 people.[18] The participants represented twenty-two states and Canada and included state appellate and trial court judges; tribal court judges; state, tribal, and federal government officials; and members of other organizations interested in improving intergovernmental relationships.[19] The conference theme—"From Conflict to Common Ground"—underscored the importance of pursuing long-term efforts to overcome obstacles to understanding, and to attempt to achieve cooperative agreements that meet common needs without doing violence to the integrity of either tribal or state governments or courts.[20]

Because of the success of the Seattle conference, the Conference of Chief Justices was encouraged to adopt Resolution IX at its July, 1992, conference. The resolution urged the State Justice Institute and others to support a request from the National Center for State Courts to administer a second national conference. In responding to the resolution, the National Center requested funding to undertake a second, open-invitation conference modeled after the Seattle conference. This request was unsuccessful. However, the National Center also requested, and received, funding to administer a smaller, closed-invitation leadership conference to develop a national agenda to prevent or resolve civil and criminal disputes at tribal, state, and federal levels and to seek improvement of working relationships among the three judicial

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–James G. Exum, Jr., Chief Justice, Supreme Court of North Carolina
–Charles R. Cloud, Judge, Norfolk General District Court, Virginia
–Bruce S. Jenkins, Chief Judge, U.S. District Court, Salt Lake City, Utah
–Ralph W. Johnson, Professor, University of Washington School of Law
–Hilda A. Manuel, Division of Gaming, U.S. Department of the Interior, Washington, D.C.
–William L. McDonald, then Administrative Director of the Courts, Phoenix, Arizona; succeeded by David Byers, Administrative Director of the Courts, Phoenix, Arizona
–F. Browning Pipestem; Pipestem, Carter and Lamirand; Norman, Oklahoma
–Thomas F. Schulz, Judge (ret.), Superior Court, Ketchikan, Alaska
–Tom Tso, then Chief Justice of the Navajo Nation; succeeded by Robert Yazzie, Chief Justice of the Navajo Nation
–Jay V. White, Attorney, Seattle, Washington
–Jeanne S. Whiteing, Attorney, Boulder, Colorado
–Roger L. Wollman, Judge, U.S. Court of Appeals for the Eighth Circuit

17. COMMON GROUND, *supra* note 12, at 2.
18. *Id.*
19. *Id.*
20. *Id.*

systems.[21] The national leadership conference was held in Santa Fe, New Mexico in the fall of 1993 and resulted in the development of a bold agenda for national action.[22] The Conference of Chief Justices, continuing its support for this project, endorsed the general principles contained in the National Agenda with the adoption of Resolution XIII at its 1994 conference in Jackson Hole, Wyoming.

Following the close of the Seattle conference, the National Center for State Courts also applied to the State Justice Institute for funding to establish additional state forum projects.[23] That application was approved in part and North Dakota was one of several states that was requested to, and did, submit applications for funding through the National Center to establish a forum.[24] The selecting body viewed all applying states as worthy of receiving funding, but because of funding limitations could only select two—South Dakota and Michigan.[25] The North Dakota Supreme Court, thereafter, sought and received direct funding from the State Justice Institute to establish a forum project in North Dakota.[26] With the experiences of the previous forum projects to draw upon and with the shared goal of reducing conflict and achieving greater understanding, the North Dakota Tribal/State Court Forum was formed and began its work in January, 1993.

Two significant events preceded the initiation of North Dakota's Tribal/State Court Forum project. During the summer of 1991, a large North Dakota delegation consisting of state and tribal representatives attended the Seattle conference to evaluate the pilot forum projects in

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21. *Id.* at 2-3.

22. *See* COMMON GROUND, *supra* note 12, at 3. The National Agenda sets out four core recommendations, each of which is accompanied by several suggestions for implementation. The core recommendations are:

> I. Tribal, state, and federal courts should continue cooperative efforts to resolve jurisdictional disputes.
>
> II. Congress should provide resources to enhance and expand tribal court operations concomitant with their increased authority.
>
> III. Appropriate action should be taken to assure cross-recognition of judgments, final orders, laws, and public acts between tribal, state, and federal courts.
>
> IV. It should be a goal of all concerned for Indian tribes to have some jurisdiction, at their option and as their resources permit, over conduct in Indian country, whether by Indian tribal members, non-members, or non-Indians.

With respect to Recommendation II, it is important to acknowledge and welcome the enactment of the Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004-08 (codified at 25 U.S.C. Sections 3601-3631 (West Supp. 1994)). The Act, which contains numerous important provisions, is intended to improve administration and provide resources for tribes to operate tribal forums with adequate resources, training, funding, and guidance. It is also intended to aid tribal justice systems in achieving respect and "congressional support for recognition of tribal court judgments by state courts and authorities." 1993 U.S.C.C.A.N. (107 Stat.) 2426, 2453, 2457.

23. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 1 (Dec. 5, 1993).

24. *Id.*

25. *Id.*

26. *Id.*

Arizona, Oklahoma, and Washington.[27] Following the Seattle conference, the North Dakota Department of Transportation and the Supreme Court sponsored a gathering, widely regarded as a "first of its kind," of federal, state, and tribal officials to discuss issues related to traffic safety.[28] Discussion of jurisdictional issues in the areas of domestic relations and criminal law was also part of the conference.[29] In addition to these fledgling efforts to renew interest in tribal/state issues, all tribal court judges have been invited by the Chief Justice of the North Dakota Supreme Court to participate in the state Judicial Conference.[30] This semi-annual meeting brings together state court judges to discuss issues affecting the judiciary.[31] Furthermore, an invitation to participate in the annual Judicial Institute has been extended to tribal court judges.[32] The Judicial Institute is an intensive four-day judicial education seminar dedicated to a particular area of law.[33] The important work done by the Forum was facilitated by these early and continuing efforts to rekindle tribal/state court interest.

North Dakota's Tribal/State Court Forum was initially comprised of five state court judges and four tribal court judges.[34] Both authors of this article were involved in the Forum process.[35] The Forum was chaired by Donovan Foughty, then county judge for Ramsey County and now a state district judge. Andrew Morin, then chief tribal judge of the Devils Lake Sioux Tribe, served as vice-chair. Between January and October of 1993, the Forum met five times, once in Bismarck, and once

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27. *Id.*

28. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 2 (Dec. 5, 1993).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 2 (Dec. 5, 1993). The first three Judicial Institutes, beginning in 1991, were made possible by funding from the State Justice Institute. Credit is due David Tevelin, Executive Director, and Richard Van Duizend, Deputy Director, of the State Justice Institute for their support of these funding grants as well as grants for the Forum projects.

34. The initial composition of the North Dakota Tribal/State Court Forum was as follows:
- Donovan Foughty, Chair; County Court Judge
- Andrew Morin, Vice-Chair; Chief Tribal Judge, Devils Lake Sioux Tribe
- Bruce E. Bohlman, District Court Judge
- Richard Frederick, Chief Tribal Judge, Turtle Mountain Band of Chippewa
- Benny A. Graff, District Court Judge
- Michael Swallow, Chief Tribal Judge, Standing Rock Sioux Tribe
- Donavin L. Grenz, County Court Judge
- Anthony Hale, Chief Tribal Judge, Three Affiliated Tribes
- Everett Nels Olson, District Court Judge
- P. Diane Avery, Associate Judge, Three Affiliated Tribes. Judge Avery participated as an alternate member on behalf of Chief Judge Anthony Hale.

35. Ralph J. Erickstad was appointed by Chief Justice Gerald W. VandeWalle to participate as an ex officio member of the Forum while Jim Ganje served as Forum staff.

on each of the four reservations in North Dakota.[36] In addition to the Forum members, approximately 100 people participated in the process, including: members of the North Dakota Supreme Court; tribal and state court judges and personnel; tribal, state, county, and federal law enforcement officials; social and human services agencies representing tribal, state, and county interests; tribal education officials; state parole and probation officials; the Attorney General of the State of North Dakota; as well as representatives from the office of the United States Attorney.[37] These people participated in the meetings by giving testimony and making comments.[38]

II. FORUM ISSUES AND CONCERNS

The Forum, throughout its five meetings, identified and discussed issues and concerns, and made recommendations, in four major areas: the Indian Child Welfare Act (ICWA), including awareness of and effective enforcement of the Act's requirements; recognition of tribal and state court judgments and orders; criminal jurisdiction matters, with primary emphasis on methods of enforcement and prosecution; and education, broadly directed at increasing the knowledge base of state and tribal court judges and personnel about how the respective systems operate.[39] These issues and concerns are not unlike those encountered by other states that conducted forum projects.[40]

A. INDIAN CHILD WELFARE ACT ISSUES

The unquestioned importance of preserving traditional Native American culture underscores the critical need for effective understanding of the requirements of the Indian Child Welfare Act (ICWA)[41] and its practical implementation.[42] Testimony emphasized the benefits provided by practical ICWA training and education on a continuing periodic basis for all tribal and state court judges, as well as other court personnel routinely involved in ICWA-related matters.[43] Increasing awareness of proper notice requirements, clarifying

36. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 2-3 (Dec. 5, 1993).
37. *Id.* at 3.
38. *Id.*
39. *Id.* at 1-21.
40. *See, e.g.*, STATE AND TRIBAL COURT INTERACTION: BUILDING COOPERATION – AN ARIZONA PERSPECTIVE 9-12 (1991); REPORT, SOUTH DAKOTA TRIBAL-STATE FORUM 2-17 (December, 1992); REPORT, MICHIGAN INDIAN TRIBAL COURT/STATE TRIAL COURT FORUM 4-9 (1992).
41. 25 U.S.C. §§ 1901–1963 (1983).
42. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 8 (Dec. 5, 1993).
43. *Id.*

procedures for effective tribal intervention, and providing a working knowledge of the respective court systems were identified as issues that could be addressed in a concerted education effort.[44] Furthermore, the Forum concluded that guardians ad litem can play an important role in ICWA proceedings and should be used whenever possible in those proceedings.[45] Similarly, it was determined that encouragement should be given to the tribes "to cultivate lay tribal representatives to represent the tribe in ICWA proceedings and state courts should welcome the participation of these representatives."[46]

B. CRIMINAL JURISDICTION AND PROSECUTION

The matter of jurisdiction is of significant concern to tribes in North Dakota in the prosecution of non-Indians for misdemeanors or minor crimes committed within Indian country against Indians.[47] The increase in tribal gaming activity and consequent increase in illegal acts committed by non-Indians visiting gaming sites on the reservation has made the issue of jurisdiction a pressing one.[48] "It should be emphasized, however, that a host of other misdemeanor offenses such as simple assault, harassment, and alcohol-related traffic offenses threaten the safety and well-being of reservation residents."[49] As a result of strained resources, the federal government is not inclined to prosecute misdemeanor offenses, which often are lost in the void of jurisdictional restrictions.[50] In *State v. Kuntz*,[51] the North Dakota Supreme Court concluded that the state of North Dakota had no jurisdiction to prosecute offenses committed against Indians by non-Indians due to the exclusive jurisdiction of the federal government in this area.[52] Nevertheless, testimony received by the Forum indicated a belief, apparently shared at one time by the United States Attorney's Office, that the state enjoyed concurrent jurisdiction with the federal government to prosecute such offenses.[53] Following a period of confusion and jurisdictional uncertainty, the matter was clarified upon the issuance by the North Dakota Attorney General of a letter opinion indicating that, based on

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44. *Id.*
45. *Id.* at 9.
46. *Id.*
47. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 14 (Dec. 5, 1993).
48. *Id.*
49. *Id.*
50. *Id.*
51. 66 N.W.2d 531 (N.D. 1954).
52. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 15 (Dec. 5, 1993) (citing State v. Kuntz, 66 N.W.2d 531 (N.D. 1954)).
53. *Id.*

Kuntz, the state had no jurisdiction to prosecute those offenses.[54] "In light of the absence of tribal or state jurisdiction, the fear, and the reality, is that minor crimes and misdemeanors committed by non-Indians against Indians will not be prosecuted because the federal government has neither the time nor the resources to commit to the effort."[55]

During the Forum's several meetings, a number of possible solutions to this situation were discussed. One possible solution is to extend to Indian tribes jurisdiction over all offenses committed in Indian country, including those committed by non-Indians. Another possible solution is to confer on states concurrent jurisdiction to prosecute offenses committed by non-Indians against Indians in Indian country. These two solutions would likely require federal legislation. A third possible solution is to seek the appointment of a federal magistrate or a special assistant federal prosecutor to ensure that the federal system is accessible for prosecution of these offenses.[56] This is a matter that clearly requires effective, meaningful attention and it is the subject of on-going discussion.

C. EDUCATION

The lack of information between tribal and state courts is perhaps the single greatest obstacle to improving relations between tribal and state courts.[57] Often, state court judges are unfamiliar with both the operation of tribal courts and with historical and cultural imperatives that inform tribal court decisionmaking, while tribal court judges are often unaccustomed to state courts' day-to-day operation.[58]

> Tribal courts often labor under the burden of inadequate funding and a lack of adequately trained support personnel—the impact of which state court judges and court personnel can only dimly perceive. State court judges often lack an understanding of the unique history, jurisdictional underpinnings, cultural distinctions, and governmental systems that tribal courts serve. Tribal court judges in turn often mistrust the actions of state courts as attacks on both tribal sovereignty and the legitimacy of tribal courts.[59]

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54. Letter Opinion from Heidi Heitkamp, Attorney General, State of North Dakota, to Merle Boucher, State Representative (August 31, 1993).
55. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 16 (Dec. 5, 1993).
56. *Id.*
57. *Id.* at 18.
58. *Id.*
59. *Id.*

A lack of information and understanding may perpetuate misperceptions that can impede effective communication and relations between the two court systems.[60] The Forum concluded that it was imperative for tribal court judges and personnel to continue involvement in state educational programs for judicial and court personnel to assist in establishing a common understanding between the two systems.[61] Equally important, the Forum determined that programs concerning substantive Indian law issues should be included in the state Judicial Institute and Judicial Conference to "introduce a larger audience of state court judges to the complexities, both legal and cultural, of the issues involved."[62] The Forum also recommended that tribal and state court judges periodically visit each others' courts as an additional vehicle for engendering more productive communication and understanding between court systems.[63]

The Forum concluded as well that it was essential to continue efforts to increase the awareness and understanding of the operation of the respective court systems, and to continue the discussion of jurisdictional and other issues that confront both systems. The Forum, therefore, strongly recommended the establishment of a permanent committee on tribal and state court affairs within the North Dakota judicial system, which was subsequently created following the adoption of Administrative Rule 37[64] by the North Dakota Supreme Court.[65] One of the authors of this article, Ralph J. Erickstad, was appointed committee chair and Richard Frederick, chief tribal judge of the Turtle Mountain Band of Chippewa, was appointed vice-chair. The committee's charge is to serve as

> a vehicle for expanding tribal and state court judges' knowledge of the respective judicial systems; for identifying and discussing issues regarding court practices, procedures, and administration which are of common concern to members of tribal and state judicial systems; and for cultivating mutual respect for and cooperation between tribal and state judicial systems.[66]

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60. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 19 (Dec. 5, 1993).
61. *Id.*
62. *Id.*
63. *Id.*
64. *See infra* Appendix A.
65. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 20 (Dec. 5, 1993).
66. *See infra* Appendix A.

D. RECOGNITION OF JUDGMENTS

Issues concerning recognition of tribal and state court judgments were the source of considerable Forum discussion. The need for the assurance of predictability with respect to the recognition and enforcement of judgments by state and tribal courts is necessary to the confidence of litigants in the effectiveness and authority of both systems. Sporadic and arbitrary recognition is of no benefit over the long term for either court system.

Generally, recognition of foreign judgments is discussed within the context of two competing and dissimilar theories: (1) full faith and credit and (2) comity.[67] The full faith and credit doctrine is grounded in Article IV, Section 1, of the United States Constitution, which essentially provides that the various states must recognize certain legislative acts and judicial decisions of other states.[68] Federal law provides that the judicial proceedings of "any State, Territory, or Possession of the United States" must receive as much deference "in every court within the United States and its Territories and Possessions" as those proceedings are given in the jurisdiction that rendered them.[69] Although some courts have ruled that a tribe is a "territory" and, as such, the doctrine of full faith and credit is fully applicable, this debate is far from settled.[70] The Forum generally concluded that the comity doctrine, or a modified version of it, was the more appropriate avenue for achieving mutual recognition of tribal and state court judgments.[71] Comity, as opposed to the required recognition of full faith and credit, is premised upon the discretionary recognition of the judgment of a foreign court for the general purposes of encouraging good relations between the two sovereigns.[72] The North Dakota Supreme Court in *Fredericks v. Eide-Kirschmann Ford*[73] invoked the doctrine of comity to uphold enforcement of a judgment entered by the

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67. For an interesting discussion of the application of comity and full faith and credit doctrines in recognizing tribal court judgments, see Symposium, *Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy, and Practice*, 18 AM. INDIAN L. REV. 239 (1993); *see also supra* notes 4, 9 (providing collected articles and cases).

68. U.S. CONST. art IV, § 1.

69. 28 U.S.C. § 1738 (1988).

70. *See, e.g.*, Sheppard v. Sheppard, 655 P.2d 895, 901 (Idaho 1982) (stating that tribal court decrees are entitled to full faith and credit); Jim v. CIT Financial Services Corp., 533 P.2d 751, 752 (N.M. 1975) (finding that territory included Indian tribes); *In re* Buehle, 555 P.2d 1334, 1342 (Wash. 1976) (finding that the tribal court order was entitled to full faith and credit); *but see* Sengstock v. San Carlos Apache Tribe, 477 N.W.2d 310, 314 (Wis. Ct. App. 1991) (finding that judgments and orders of tribal courts are not entitled to full faith and credit because a tribe is not a state, territory, possession, or commonwealth); Lohnes v. Cloud, 254 N.W.2d 430, 433 (N.D. 1977) (finding that tribal court judgments are not judgments for purposes of the state unsatisfied judgment fund).

71. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 13 (Dec. 5, 1993).

72. BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

73. 462 N.W.2d 164 (N.D. 1990).

Fort Berthold Tribal Court.[74] In adopting the comity doctrine developed by the United States Supreme Court, the North Dakota Supreme Court stated that

> [w]e consider an 'Indian Nation' as equivalent to a 'foreign nation' to encourage reciprocal action by the Indian tribes in this state and, ultimately, to better relations between the tribes and the State of North Dakota.[75]

Following extended discussion, the Forum devised a rule for recognition that was premised on aspects of the comity doctrine but essentially provided for the presumptive recognition of tribal court orders and judgments unless an objection is raised by a party to the judgment. This approach ensures, in most instances, the recognition of orders and judgments of tribal courts, but imports the general principles of the comity doctrine as elements the objecting party must show to be absent before recognition is declined by a state court. The proposed rule included by reference certain procedures contained in North Dakota's Uniform Enforcement of Foreign Judgments Act.[76] The Forum emphasized that a party seeking recognition in state court of a tribal court order or judgment should not be required to initiate a separate action in state court to obtain that recognition.

The rule recommended by the Forum was submitted to the North Dakota Supreme Court for consideration, which subsequently referred the proposal to the Supreme Court's Court Services Administration Committee, a standing advisory committee. The Court Services Administration Committee, chaired since its inception by attorney William A. Strutz of Bismarck, is composed of judges, lawyers, court personnel, and state legislators. The Committee reviewed the rule and, after minor modifications, referred the rule back to the Supreme Court with a recommendation that the rule be adopted. Following a hearing in the fall of 1994, the Supreme Court ordered that the rule be adopted effective January 1, 1995. The recognition rule is set out at Rule 7.2 of the North Dakota Rules of Court (Appendix B).

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74. Fredericks v. Eide-Kirschmann Ford, 462 N.W.2d 164, 171 (N.D. 1990) (concluding that the district court erred in granting the motion for summary judgment, and reversing and remanding for entry of judgment enforcing tribal court judgment as a matter of comity).

75. Id. at 168.

76. *See* N.D. CENT. CODE §§ 28-20.1-01 to -08 (1993). As its name implies, the Uniform Enforcement of Foreign Judgments Act is intended to provide a uniform method of recognizing foreign, i.e. other states', judgments. *Id.* The Act establishes the method by which a foreign judgment may be filed; requires that notice of the filing of the judgment be provided to the judgment debtor; requires that a court stay enforcement if it is shown that an appeal from the foreign judgment is pending or will be taken; and requires a fee to be paid upon filing a foreign judgment. *Id.*

III. CONCLUSION

It was originally thought in 1985 by those who proposed the resolution creating the study committee of the Conference of Chief Justices that the solution to the myriad problems of jurisdiction would probably be through federal legislation or through joint efforts of the Judicial Conference of the United States and the Conference of Chief Justices. It is now perhaps more generally accepted that the solutions will more likely come through cooperative efforts between tribes and tribal courts on the one hand, and state government and state courts on the other hand, to find mutual grounds for agreement and through recognition of each others' court judgments.

Aviam Soifer, in his treatment of history, memory, and the judicial experience in Indian law, notes that "incorrect history and inadequate memory are in and of themselves devastatingly destructive for those who have endured the gravest wrongs in the past."[77] While the context is somewhat different, the importance of memory and history in the continuing evolution of tribal judicial systems must be appreciated, if not totally understood, by those in state and federal court systems who must respond to the exercise of judicial authority by tribal courts. Similarly, as tribal courts continue the exercise of judicial prerogatives,[78] tribal judges and court personnel must become more aware of the points at which tribal and state judicial power intersect.

Implementation of the forum concept began with the desire to investigate the factors that contribute to disputed jurisdiction and to bridge the gap of misunderstanding and lack of knowledge that exists between tribal and state court systems. The North Dakota Forum was intended to, and did, provide a unique vehicle to examine issues of concern that exist within the two court systems and to identify possible methods of addressing those concerns. And, perhaps most important, the Forum provided the opportunity for discussion of how the two systems work, how judges do what they do, and how state and tribal courts can more effectively address the mutual problems they face. In these respects, the Forum process represented a new beginning to an old journey toward achieving the goals of any judicial system—justice and the preservation of human dignity.

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77. Aviam Soifer, *Objects in Mirror Are Closer Than They Appear*, 28 GA. L. REV. 533, 534 (1994).

78. *See, e.g.*, A-1 Contractors v. Strate, No. 92-3359, 1994 WL 666051 (8th Cir., November 29, 1994) (affirming district court ruling that Three Affiliated Tribes Tribal Court properly exercised jurisdiction over cause of action between non-Indians which arose on the Fort Berthold Indian Reservation).

Daniel Webster, an eminent American orator and lawyer, is said to have once written that "[m]iracles do not cluster."[79] Neither, it seems, will grand accomplishments in improving tribal and state court relations happen all at once. Rather we must all recognize that this is an honorable and worthy undertaking that must proceed one step at a time.

79. Webster, when contemplating the radical significance and uniqueness of the United States Constitution, remarked: "Miracles do not cluster. Hold on to the Constitution of the United States and the Republic for which it stands – what has happened once in six thousand years may never happen again. Hold on to your Constitution, for if the American Constitution shall fail there will be anarchy throughout the world." Daniel Webster, *quoted in* MCDONALD, FOREWORD TO M.E. BRADFORD, ORIGINAL INTENTIONS – ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION xiii (Univ. of Georgia Press, 1993). The context is different, but the overture between tribal and state courts is unique, significant, and of enduring importance.

APPENDIX A

AR 37
Effective October 3, 1994

COMMITTEE ON TRIBAL AND STATE COURT
Administrative AFFAIRS Rule 37[80]

SECTION 1. POLICY AND PURPOSE

The North Dakota Judicial System encourages greater understanding and exchange of information between the tribal and state judicial systems in North Dakota. The Committee on Tribal and State Court Affairs is a vehicle for expanding tribal and state court judges' knowledge of the respective judicial systems; for identifying and discussing issues regarding court practices, procedures, and administration which are of common concern to members of tribal and state judicial systems; and for cultivating mutual respect for and cooperation between tribal and state judicial systems.

SECTION 2. CREATION

The Committee on Tribal and State Court Affairs is a standing committee of the North Dakota Supreme Court. The Chief Justice appoints the chair and vice-chair of the Committee.

SECTION 3. MEMBERSHIP—TERMS—ROTATION

A. The Committee on Tribal and State Court Affairs consists of seventeen members:

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80. Adopted on an emergency basis effective May 18, 1994; amended and readopted effective October 3, 1994.

1. Four state court judges appointed by the Chief Justice for three-year terms.

2. The Chief Tribal Judge, or designee, of each of the four tribal judicial systems in North Dakota.

3. Two representatives each, selected according to subsection B, of tribal and state court administrative support services, including clerks of court. Each representative is limited to one three-year term, but may be reappointed as provided in subsection B.

4. Three public members, who have an interest or expertise in the operation of tribal and state judicial systems, appointed by the Chief Justice for three-year terms.

5. The Chief Judge, or designee, of the United States District Court for the North Dakota District.

6. The Director, or designee, of the Northern Plains Tribal Judicial Training Institute.

B. At the Committee's first meeting, the judge members of the Committee shall forward to the Chief Justice two nominations for each tribal and state court administrative support services representative. The Chief Justice shall appoint two members for each representative category. Before expiration of the term of a tribal or state court administrative support services representative, or in the event of a vacancy during a term, the judge members of the Committee shall forward to the Chief Justice two nominations for each present or impending vacancy. If a suitable replacement cannot be identified, the serving member may be reappointed.

C. Each member who serves for a specified term serves until the member's successor is appointed.

D. Members of the Committee serve without compensation for their services, but are entitled to reimbursement at state rates for actual expenses.

SECTION 4. DUTIES OF THE COMMITTEE

A. The Committee shall:

1. Study the comparative operation, practices, and procedures of tribal and state judicial systems for purposes of identifying possible areas of mutually agreeable cooperative action;

2. Serve as a forum for discussion of areas of common concern shared by tribal and state judges and judicial system personnel;

3. Serve as a vehicle for establishing and maintaining a long-term, continuing relationship between tribal and state judicial systems; and

4. Review any other matters referred to it by the Supreme Court, a tribal court, or a tribal council.

B. The Committee may recommend to the Supreme Court, tribal courts, or tribal councils, potential agreements, informal inter-system working relationships, education initiatives, or proposed or revised statutes or rules to resolve conflicts and to remove barriers to understanding and cooperation between tribal and state judicial systems.

SECTION 5. MEETING LOCATIONS

The Committee, at the direction of the Chair, shall periodically meet on each of the four reservations in North Dakota and at other locations determined appropriate by the Chair.

SECTION 6. STAFFING

Staffing for the Committee will be provided through staff of the Office of State Court Administrator.

SECTION 7. EFFECTIVE DATE

This Rule is adopted effective immediately.

Dated this 3rd day of October, 1994.

Gerald W. VandeWalle, Chief Justice
Herbert L. Meschke, Justice
Beryl J. Levine, Justice
William A. Neumann, Justice
Dale V. Sandstrom, Justice

ATTEST:
Penny Miller
Clerk of the Supreme Court

APPENDIX B

RULE 7.2— RECOGNITION OF TRIBAL COURT ORDERS AND JUDGMENTS[81]

[Adopted effective January 1, 1995]

(a) Policy. Under Article VI, Section 3, of the North Dakota Constitution, the policy of the North Dakota Judicial System is that the Indian tribes in this state are considered the equivalent of foreign nations for the purposes of recognizing the orders and judgments of the tribal courts in this state. This policy and rule are to promote justice, to encourage better relations between the tribes of this state and the state of North Dakota, and to encourage reciprocal action by the tribes of this state. This policy and rule apply to courts of record of the state of North Dakota and courts in this state of the federally recognized Indian nations, tribes, or bands, including courts of Indian offenses.

(b) Recognition. The judicial orders and judgments of tribal courts within the state of North Dakota, unless objected to, are recognized and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments of any court of record in this state.

If recognition of a judgment is objected to by a party, the recognizing court must be satisfied, upon application and proof by the objecting party with respect to subsections 1 through 5, that the following conditions are present:

(1) The tribal court had personal and subject matter jurisdiction;

(2) The order or judgment was obtained without fraud, duress, or coercion;

(3) The order or judgment was obtained through a process that afforded fair notice and a fair hearing;

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81. NORTH DAKOTA TRIBAL/STATE COURT FORUM FINAL REPORT 11-13, 21-22 (March 25, 1994).

(4) The order or judgment does not contravene the public policy of the state of North Dakota; and

(5) The order or judgment is final under the laws and procedures of the rendering court.

(c) Procedures. Judgments filed for recognition under this rule are subject to the notice of filing, stay of enforcement, and fee provisions established under NDCC Sections 28-20.1-03, 28-20.1-04, and 28-20.1-05.

(d) Exception. This rule does not apply to those orders or judgments to which federal law requires that states grant full faith and credit recognition.