2009 Town and Village Justice Continuing Judicial Education Program

NEW YORK STATE JUDICIAL INSTITUTE

INDIAN LAW IN THE TOWN AND VILLAGE COURTS

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TABLE OF CONTENTS

INDIAN LAW FOR LOCAL COURTS

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"Indian" is from the Spanish "En Dio" or "in with God." "American Indian" is a term preferred by at least one Indian activist, Russell Means.

"Federal Indian Law is the balance that is attempted to be struck by American Courts, with American Guilt on one side, and American Greed on the other." Lance Morgan, CEO Ho-Chunk, Inc. Only those 'in with god' would be able to recognize such an occurrence.

1. Who is an Indian (and why do we need to care)?

Since one of the first steps a Court needs to do is to determine whether you have jurisdiction to hear the matter, understanding who is an Indian and what is Indian Country is of importance.

See 26 West's NY Digest 4th, Indians ¶ 1. At one time, *People v. Boots,* 106 Misc.2d 522 (Franklin County Ct. 1980), was the only cite; it still is in the main volume.

Tribal customs and practices determine who is a member of the tribe (*Boots,* 106 Misc.2d at 522; *Matter of Patterson v. Council of Seneca Nation*, 245 NY 433 [1927]). This can become vitally important in, say, matters of descent in Surrogate's Court (*see*, *e.g.*, 20 West's NY Digest 3d, Indians ¶ 18; *Bennett v. Fink Const. Co.*, 47 Misc.2d 283 [Sup Ct, Erie County 1965]).

18 USC § 1153 (Chapter 53 deals with Indians) does not separately define "Indian" but deals extensively with crimes committed in "Indian Country," as that term is defined in 18 USC § 1151). Definitions of "Indian" and "Indian Country" can vary depending on the Chapter of federal law you're dealing with. *See* William C. Canby, American Indian Law in a Nutshell (5th ed. 2009).

The determination of Tribal membership is within the sole authority of the Tribal Nation (Exclusive Jurisdiction); it is not shared or dependent upon any other sovereign (state or federal government). *See* Felix Cohen, Handbook of Federal

Indian Law (Nell J. Newton et. al. eds. 2005), at 176 [hereinafter Handbook], *citing Delaware Indians v. Cherokee Nation*, 193 US 127 (1904).

A group of Indians can become a Tribal Nation. As such, there may be a formal and "recognized" relationship between the Tribal Nation and the Federal and/or State Government, which gives rise to the term, "Federally Recognized Tribe" (usually history/treaties/continued existence will support the finding of federal recognition).

State-recognized tribes are often heritage groups, remnant descendants of Tribes, and/or Indian Tribes that may at one point have had federal recognition but lost it due to U.S. Termination policies. Only about 20 states have state-recognized tribes.

In New York State, there are seven (7) federally recognized Tribal Nations: The St. Regis Mohawk Tribe (hereinafter SRMT), Oneida Indian Nation, Onondaga, Cayuga, Seneca Nation of Indians, Tonawanda Band of Seneca, and Tuscarora.

New York State recognizes the preceding federally recognized Tribal Nations, as well as the Shinnecock Tribe and the Poospatuck (Unkechauge) Indian Nation. (*See* McKinney's Consolidated Laws of NY, Book 25, Indian Law, Articles 9-10).

With federal recognition, Tribal Nations are recognized as having availability to benefits and funding that are not available to state-recognized tribal governments. Federally recognized Tribal Nations possess certain powers/authority/jurisdiction, which is strongest when 'on reservation' and involves its own members, and weakens as it moves farther from that base in Indian Country.

Indian Country is broadly defined as: All lands within a reservation, under federal jurisdiction, including all Indian allotments and Indian titles that have not been extinguished. 18 USC § 1151.

The history on land is still being written, as there are mechanisms whereby land can come back to Tribal Nation. Some methods of land returning to Indian Nations include: The land into trust process (the Oneidas have been successful

in using this method), land claims settlements, excess property, and lawsuit/legislative settlement.

In general, Tribal jurisdiction is regarded as part of the "inherent sovereign power" tribes retained to regulate the people and affairs in their territory, as independent nations. Specifically, this refers to the power & authority codified by tribal governments that tribal courts have over criminal, civil and administrative matters. As a part of this Tribal sovereignty many Indian Nations issue their own license plates, which are recognized by the State. For example, Oklahoma recognizes 29 Tribal Nation license plates including the plates of the Seneca Cayuga Nation of Oklahoma. Wisconsin recognizes four Tribal License plates including the ones issued by the Oneida Nation of Wisconsin.

2. Criminal Jurisdiction

In 1948, the federal government enacted 25 USC § 232:

> "The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: *Provided*, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights."

The court in *Boots* indicates that the federal government granted federal criminal jurisdiction to New York. (*See also People v. Edwards*, 78 AD2d 582 (4th Dept 1980), *affd* 64 NY2d 658 (1984). Federal prosecutions indicate the feds believe otherwise *(see e.g. United States v. Cook*, 922 F2d 1026 (2d Cir 1991) *cert denied sub nom. Tarbell v. United States*, 500 US 941 (1991); *see also United States v. Miller*, 26 F Supp 2d 415 (NDNY 1998), *affd on other grounds* 7 Fed Appx 59 (2d Cir 2001), *cert denied* 534 US 874 (2001)). For a list of cases that have decided whether the federal government fully or partially delegated criminal jurisdiction to New York, *see* Porter, The Jurisdictional Relationship Between the

Iroquois and New York State: An Analysis of 25 USC §§232, 233, 27 Harv J on Legis 497, 529 (Summer 1990).

Bottom line -- you have jurisdiction over crimes committed by Indians anywhere within your Town or Village under the current state of the law. This is not necessarily the case in other states. (*See* Major Crimes Act - 18 USC § 1152).

It is possible that the State may return jurisdiction to the Federal Government, as was done in Red Lake, Minnesota. The emerging trend is for States and Tribal Nations to work cooperatively to address criminal matters. (*See* Appendix A: Leech Lake Ojibwe and Cass County "Joint Powers Agreement").

Tribal Nations still have criminal jurisdiction over their members and may (if they choose to) impose sentences of up to one year in jail for crimes commonly known as misdemeanors. *See* Handbook at § 9.02[1][d]. How these offences are defined (and thus punished) is left up to the Tribal Nations.

Where Criminal Jurisdiction Has Been Conferred by 25 USC § 232

Chart taken from http://www.usdoj.gov

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Unless otherwise expressly provided, there is concurrent federal and state jurisdiction exclusive of tribal jurisdiction.
Indian	Non-Indian	Unless otherwise expressly provided, state has concurrent jurisdiction with federal and tribal courts.
Indian	Indian	State has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, federal and tribal jurisdiction. There is no state regulatory jurisdiction.

In general, Indian country criminal jurisdiction is largely determined by looking at three factors: 1) the status of the perpetrator (Indian or non-Indian), 2) the status of the victim (Indian or non-Indian), and 3) the type of crime involved.

3. Tribal Police

Tribal police are usually—but not always—deputized by the local sheriff or have a cooperative agreement with the State to enforce State law. (*See, State v. Schmuck*, 121 Wash.2d 373, 850 P.2d 1332, [Wash. 1993, en banc], *cert denied* 510 US 931 (1993)) Without that, and without any legislation establishing them as CPL "police officers," what authority do they have? The Indian Law Enforcement Reform statute (25 USC § 2801 *et seq.*) doesn't give tribal police independent authority to enforce <u>all</u> tribal laws against non-Indians. There is an absolute dearth of research material on this topic. There is case law (*Schmuck, supra,* has a good analysis) and a federal statute (25 USC § 2801 et seq.).

New York State passed legislation that gave SRMT Police full police powers on the reservation (over Natives and Non-Natives). Indian Law § 114. It must also be noted further that a 'core issue' of what may be deemed civil (and still in the jurisdiction of the SRMT) and what is deemed criminal may still be defined by the SRMT!

Although the law confines the exercise of police powers to 'the reservation,' a Tribal Police officer "may follow a person for whom he or she has the authority to arrest on the reservation in continuous close pursuit, commencing on the reservation, in and through any county of the state, and may arrest such person in any county in which the officer apprehends him or her." Indian Law § 114(b)(iv)(8).

4. Tribal Vehicle and Traffic

Unless created by statute or expressly retained by treaty, tribal courts do not have criminal jurisdiction over non-Indians (*People v. Boots*, 106 Misc.2d 522, *supra*; *Oliphant v. Suquamish Indian Tribe*, 435 US 191 (1978). In addition, such case law is used to support the position that Tribes may not issue to or adjudicate tribal law traffic tickets for non-Indians on state or federal (public) highways (*Strate v. A-1 Contr.*, 520 US 438, 456 (1997) citing *State v. Schmuck*, 121 Wash.2d at 390, 850 P.2d at 1341). The Supreme Court expressed "no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Strate*, 520 US at 442. Tribal Police certainly have the right to stop and detain dangerous or incompetent drivers. *Id* at 458.

The Washington Supreme Court in *Schmuck* did not directly hold that tribal vehicle & traffic (V&T) law cannot be applied to non-Indians. That tribes' law, based probably on *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 [9th Cir 1991], *cert denied* 503 US 997 (1992), only sought to apply to Indians in any event.

Some western Tribal Nations have enacted V&T codes and applied them to non-Indians, on information and belief. These are probably promulgated under the authority of *Montana v. United States*, 450 US 544 (1981), *reh denied* 452 US 911 (1981), which holds that tribes may exercise civil authority over non-Indians in matters threatening or directly affecting the political integrity, economic security or health and welfare of the tribe or when there are consensual, contractual relations. Even that may not be enough, however. *Strate*, 520 US at 457-58.

Arizona, with its many reservations and large Indian population, is home to many tribal V&T codes. Tribal police in Arizona have peace officer status provided they attend the required training and become certified. Most if not all their reserves have tribal V&T codes which they apply to non-Indians on a debt basis only, *i.e.* if you don't pay the fine they report it as a bad debt (source: BIA regional Law Enforcement Office in Phoenix). Some of the western tribes have shied away from the issue as all are aware it is far from settled law.

Strate, *Montana* and *Schmuck* could still produce a future holding that only certain particular, safety-related provisions of tribal law may be applied to non-Indians, or that tribes have full jurisdiction over traffic infractions on tribal roads (*Strate,* 520 US at 457-58). Only time and much higher courts will tell. For an excellent analysis of post-*Strate* cases, *see Strate v. A-1 Contractors: A Perspective*, 75 ND L Rev 1 (1999).

The St. Regis Mohawk Tribe (SRMT) has a Vehicle and Traffic code, and Justices of the Traffic Court division of the Tribal Courts System have been adjudicating violations of the code against all alleged violators since 2000. The Saint Regis Mohawk Police are certified police officers and may write state tickets or tribal tickets. Tribal tickets at this time do not have the consequence, like State tickets, of adding points to one's license, impacting insurance rates, or affecting one's credit. Agreements with a state department of motor vehicles are possible but are not in place currently. However, the Tribal Courts System maintains a database of unpaid tickets, which the Tribal Police may search, and if there are unpaid Tribal Tickets the officer has the option of writing a State ticket rather than another Tribal ticket that may go unpaid, among other changes which may be applied.

5. State Law Enforcement

Through 25 USC § 232, New York State has official jurisdiction over offenses committed on reservations (*see also People v. Boots*, 106 Misc.2d 522*, supra*; 1982 NY Op Atty Gen (Inf) 91 (concluding that a sheriff may provide routine road patrol within Indian reservations for the purpose of enforcing the State's criminal law)). Some federal courts have held the state cannot enforce traffic laws against tribal members on reservations (*see Confederated Tribes of Colville Reservation v. Washington*, *supra*). However, courts cannot order officers to go on reservations where their presence would likely facilitate unrest (*St. Regis Mohawk Dev. Corp. v. Nemier*, 166 AD2d 861 (3d Dept 1990)), and there is an argument that because judgment enforcement is civil/regulatory, deputies don't have that authority on the reservations (25 USC § 233).

The Franklin County Sheriff, upon information and belief, will NOT send officers into the St. Regis Mohawk Indian Reservation (SRMIR). Although one may see many 'other' police agencies on the reserve, the SRMT Police are the 'lead agency' on the reserve.

Since the inception of Franklin County's 911 System, it has received only an estimated 10 calls from the SRMIR, while the number of calls to the SRMT Police in 2008 was over 3,500. In January 2009, the SRMT Police received over 300 calls, which they responded to! As such, this goes to show that the people of the SRMIR predominantly call the SRMT Police—rather than 911—to respond to their emergencies.

Issues which occurred near Buffalo, NY/Seneca Nation illustrate that other police forces may simply not be welcomed! The Seneca Nation has their own Police Force (SNI Marshall), the Oneida Indian Nation has their own police, and the Onondaga Nation has an agreement with the Onondaga County Sheriff.

Finally, in an interesting twist, the statistics for the SRMT Police are NOT included in the New York Division of Criminal Justice Services database; in fact, the SRMT Police are not even counted or recognized as being a police force by the database—even in light of the above-referenced laws, the work the SRMT Police do, and the working agreements they have with neighboring police agencies.

6. Tribal Courts

Until 1954 there was a provision in New York's Indian Law (§ 5-a) that directed the Governor to appoint a Justice of the Peace for each reservation. However, this provision was never used.

Since 1990, where Tribal Courts exist they have at least minor criminal jurisdiction over all Indians, not just tribal members. There are several federal statutes limiting Tribal Criminal jurisdiction: The Major Crimes Act (18 USC § 1153) (which creates federal court jurisdiction for certain offenses committed by Indians in Indian country; most of these are felonies carrying a maximum penalty

of more than one year imprisonment); The Indian Country Crimes Act, AKA the General Crimes Act (18 USC § 1152); and, a section of the Indian Civil Rights Act (25 USC § 1302[7]), which limits tribal court criminal jurisdiction to offenses that carry a maximum penalty of no more than one year imprisonment (misdemeanors).

18 USC § 1152 provides some measure of double jeopardy protection for Indians "convicted" in Indian country by an Indian tribunal of a violation of tribal law. But for this provision the doctrine of "separate sovereigns" would apply and one could conceivably be prosecuted in both an Indian and state or federal court for charges arising out of the same facts (and maybe in all three) *(see US v. Wheeler*, 435 US 313 (1978)).

The Double has happened! In *Hill v. Eppolito*, 5 AD3d 854, 772 NYS 2d 634 (3d Dept 2004), defendant Clinton Hill, a member of the Oneida Indian Nation, was charged in Oneida City Court with the crime of harassment in the second degree. The charge arose out of an altercation between Hill and another Oneida Indian that took place on Indian Nation property. While that charge was pending, a criminal complaint was filed against defendant Hill in the Nation Tribal Court charging him with assault, harassment and disorderly conduct arising out of the same transaction giving rise to the City Court charge.

The Appellate Division, Third Department, concluded that double jeopardy barred prosecution in State Court as the Oneida Tribal Court had already decided the matter! A key factor was that the elements of the crime defined under the Oneida Law and the State Law were similar.

Tribal jurisdiction is concurrent with State jurisdiction and litigants must exhaust Tribal Court remedies before invoking the State's jurisdiction (*Bowen v. Doyle*, 880 F Supp 99 (WDNY 1995), *affd* 230 F3d 525 (2d Cir 2000)).

Civil Jurisdiction (or "now you need to care")

This topic and the relevance of Indian status make criminal jurisdiction look like a simple small claims trial.

25 USC § 233 – New York State courts have jurisdiction at least as to claims and events since 9/13/52 (*see also* N.Y. Indian Law § 5). Exceptions are set forth below (*see also* Porter, The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 USC §§232, 233, 27 Harv J on Legis 497, *supra*).

Federal courts have a policy that where the tribal court claims jurisdiction, a litigant usually must first exhaust tribal remedies (*see* 25 USC § 1301 and annotations thereunder; *see also El Paso Natural Gas Co v. Neztsosie*, *et al*, 526 US 473 (1999)). New York courts may be required to abstain from ruling, depending on the issues (*see* Porter, The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 USC §§232, 233, 27 Harv J on Legis 497, *supra*; 25 USC § 233; and West's NY Digest 4th, *supra* at §32[7]; also see older cases in McKinney's citing NY Indian Law § 5); *but see*, *Montour v. White* (212 AD2d 891 [3d Dept 1995). Caution: in *Montour* there probably was no tribal court available.

Exhausting Tribal Exhaustion

Even a jurisdictional stretch is for the tribal court to determine first, unless its assertion is clearly and patently beyond any conceivable tribal jurisdiction. *Basil Cook Enterprises v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir 1997); *Strate v. A-1 Contr.*, 520 US 438, *supra*; *see also Chiefs Ransom, Smoke and Thompson v. Bruce Babbitt, et al.*, 69 F.Supp.2d 141 (DC Dist Ct, 1999), and defendants—native and non-native—must exhaust tribal court remedies before challenging tribal court's jurisdiction in federal or state court. *See Strate v. A-1 Contr.*, *supra*; *National Farmer's Union Ins. Companies v. Crow Tribe*, 471 US 845 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 US 9, *supra*.

The Supreme Court has stated that as a matter of federal policy and comity, matters within the tribe's jurisdiction "presumptively" lie in tribal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 US 9, 18 (1987).

Tribal exhaustion requirements provide Tribal Courts with an opportunity to "explain to the parties the precise basis for accepting [or rejecting] jurisdiction." *National Farmer's Union Ins. Companies v. Crow Tribe*, *supra* at 857. It is also a policy that supports tribal self-government.

In general, the Tribal exhaustion rule applies even when an action that is filed in state or federal court precedes the filing of a tribal court action. *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F2d 803 (7th Cir 1991); *but see*, *Drumm v. Brown*, 245 Conn. 657, 716 A.2d 50 (Conn. 1998) (the federal exhaustion doctrine applies to state courts but is not required in the absence of a pending tribal court action).

Sovereign Immunity

Tribes and their subsidiary agencies and corporations possess sovereign immunity from suit unless they have expressly and unequivocally waived it. *Ransom v. St. Regis Mohawk Educ. and Community Fund, Inc.*, 86 NY2d 553 (1995). It must be a recognized tribe or the doctrine does not apply. Presumably this would include Reorganized Tribes as well.

As a recap to this point consider the following case:

In *John Doe v. Oneida Indian Nation d/b/a Turning Stone Casino and Turning Stone Resort Hotel*, 278 AD2d 564 (3d Dept 2000), *lv denied* 96 NY2d 716 (2001), the guest of a hotel that was owned and operated by an Indian tribe brought action against the tribe, seeking damages for mental pain and distress arising out of an incident in which the guest's leg was pierced by a hypodermic needle projecting from his mattress at hotel.

The trial court granted the tribe's motion to dismiss for lack of subject matter jurisdiction. The Supreme Court, Appellate Division, held that the tribe's sovereign immunity barred the guest's action, even though the hotel was located on land separate from the reservation! The court wrote:

> "Defendant owns and operates the Turning Stone Casino and Resort Hotel (hereinafter Hotel). During the early morning hours of February

> 7, 1998, plaintiff's leg was pierced by a hypodermic needle projecting from his mattress at the Hotel. Although plaintiff's injury did not require hospitalization, since the incident plaintiff has continuously undergone HIV testing which has been negative. Initially, plaintiff sought compensation through the Indian Nation Peacemaker Court, ultimately rejecting a settlement offer. Although his case is apparently still pending in the tribal court system, plaintiff commenced this action seeking $20 million for mental pain and distress. Supreme Court granted defendant's motion to dismiss the complaint pursuant to CPLR § 3211(a)(2), holding that defendant possesses sovereign immunity and, thus, the court lacked subject matter jurisdiction to entertain the action. The Plaintiff then appealed.
>
> "We affirm. It is fundamental that Indian tribes possess sovereign immunity from suit in state and Federal courts."

278 AD2d at 564.

Full Faith and Credit

Federal and State laws require that full faith and credit be given to Tribal orders concerning the following: Orders of Protection, Tribal Custody & Visitation Orders, and Tribal Child Support Orders.

In addition, under the Indian Child Welfare Act (ICWA), the Federal government, States and other Tribal Nations must give "full faith and credit" to the decisions made by a tribal court. 25 U.S.C. § 1911(d). The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings.

Originally, protection orders were only good within the jurisdiction that issued the order. However, because a person needing protection may live in one jurisdiction, work in another, and travel throughout, the problem was remedied by statute to protect the person pursuant to the Full Faith and Credit Clause of the Constitution. US Const. art IV, §1.

18 USC § 2265 (the Crimes and Criminal Procedure Act):

(a) Full Faith and Credit. Any protection order issued that is consistent with subsection (b) of this section by the court of one State, **Indian tribe**, or territory (the issuing State, **Indian tribe**, or territory) shall be accorded full faith and credit by the court of another State, **Indian tribe**, or territory (the enforcing State, **Indian tribe**, or territory) and enforced by the court and law enforcement personnel of the other State, **Indian tribal** government or Territory as if it were the order of the enforcing State or tribe.

(b) Protection Order. A protection order issued by a State, **tribal**, or territorial court is consistent with this subsection if—

(1) such court has jurisdiction over the parties and matter under the law of such State, **Indian tribe**, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex-parte orders, notice and opportunity to be heard must be provided within the time required by State, **tribal**, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

. . . .

(e) Tribal Court Jurisdiction. For purposes of this section, a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from **Indian lands**, and other appropriate mechanisms, in matters arising within the authority of the **tribe**.

[emphases added]

New York State's full faith and credit enabling legislation includes the following: NY Criminal Procedure Law § 530.11, 530.12 (Recognizing Tribal Orders of Protection); NY Penal Law § 215.51 (Criminal contempt in the first degree is committed when not recognizing an Order of Protection, including Tribal Orders); NY Penal Law § 215.52 (Aggravated criminal contempt when a person is in violation of a duly served Order of Protection, including Tribal Orders); NY Judiciary Law § 751 (citing CPL § 530.12) (Carried over to county courts, for it may be used as a contempt provision to enforce an Order of Protection). In addition, the topic "Full Faith and Credit of Tribal Court Orders" appears in: NY

Social Domestic Relations law § 240(3-c)(a) (Custody and Child Support; Orders of Protection).

Uniform Child Custody Jurisdiction Enforcement Act (1997) [UCCJEA]

The UCCJEA is not a federal law! Rather it is a recommended statute issued by the National Conference of Commissioners on Uniform State Laws (NCCUSL). For the lawyers, remember the Uniform Commercial Code? This is the same principle.

The changes came about (and the need for uniformity) because of the Parental Kidnapping Preservation Act (PKPA), 28 USC §1738A, which is a Federal law. The PKPA did not require full faith and credit with Tribal Nations and states. Interestingly, a *key provision of the PKPA is for States to enforce and not modify custody orders.* The Full Faith and Credit provision came about because of recommendations of the NCCUSL!

The states seeking uniformity adopted the recommendations contained in the UCCJEA. New York's enabling language is Domestic Relations Law § 75-c:

> § 75-c. Application to Indian tribes. 1. A child custody preceding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 USC § 1901 *et seq.* **is not subject** to this article to the extent that it is governed by the Indian Child Welfare Act.
>
> 2. A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying this title and title two of this article.
>
> 3. A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this article must be recognized and enforced under title three of this article.

[emphases added]

7. Domestic Relations and Family Law

Child Support

In 1996, a change to the federal Social Security Act permitted direct federal funding to Tribes to perform the work of Child Support Enforcement. Prior to 1996, the money went to the states to act on behalf of the tribes. (*See* 42 USC 655(f) (Section 455(f) of the Social Security Act). There is funding available, as well as software, from the federal government to undertake the development and implementation of a Tribal Child Support Enforcement Unit. There is also funding for the continuous administration of the program.

Under federal and state law, full faith and credit of Tribal Child Support orders is well established. 28 USC § 1738B(a) provides: "The appropriate authorities of each State shall enforce according to its terms a child support order made consistently with this section by a court of another State; and shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i). 28 USC § 1738B(b) defines "State" as a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in 18 USC § 1151).

The same holds true for the NY Family Court Act. In the definitions section, Indian Tribes are treated as states with full faith and credit of their orders. Section 580-101 of the Family Court Act defines "State" as:

> "a State of the United States, the District of Columbia, and Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States. The term includes: (i) an Indian tribe***;*** and (ii) a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under this article, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act."

Marriage & Divorce

The State laws are clear as mud when it comes to recognition of Indian Nation Marriages. New York Domestic Relation Law is specific on the components of a marriage license, who can officiate a marriage (DRL § 11), how a marriage is to be solemnized (DRL § 12), and how records of such marriages are to be kept on file by the Department of Health (DRL § 20). It is the filing with the Department of Health that assists couples in getting their marriages recognized. Interestingly, the Domestic Relations Law makes no mention of Tribal Court marriages or recognition of such marriages.

The problem stems from state and federal polices that were paternalistic and sought to assimilate Indians. New York State laws, such as NYS Indian Law § 3 (Marriage and Divorce) was enacted in 1849; and, in 1950, the federal government enacted 25 USC 233 (giving New York courts concurrent jurisdiction in civil actions). The current policy is one of Indian Nation self-determination; however, these laws have not been updated to reflect the policy change, thus adding to the confusion of the status of the law of Indian tribes not specifically mentioned in the statute.

The Seneca Peacemaker Courts are specifically mentioned in *Indian Law § 3 Marriage and Divorce*:

> The laws of the State relating to the capacity to contract marriage, the solemnization of marriage, the annulment of the marriage contract, and divorce, are applicable to Indians; and subject to the jurisdiction of the peacemakers' courts of the Seneca nation to grant divorces, the same courts shall have jurisdiction of actions arising thereunder. But Indians ***who have heretofore*** contract marriage according to the Indian custom or usage, and shall cohabit as husband and wife ***shall be deemed lawfully married***. Indian marriages may be **solemnized by peacemakers within their jurisdiction with the same force and effect as by a justice of the peace**.

[emphases added]

What about the other Iroquois Nations? One has to look to the historic context to see that Indian Law § 3 was enacted in 1849, at a time when only the Seneca Peacemaker Courts existed. The Peacemaker Courts were established in 1845—five years prior to the State statute—and other tribal courts were not

mentioned in the statute because they simply did not exist at that time. In addition, the Seneca Peacemaker Courts have jurisdiction to grant divorces, including a limited divorce or separation as well as a total divorce. *See People v. John*, 181 Misc. 921 (Erie County Ct. 1943).

It seems logical to imply that if Seneca Courts' marriages and divorces are recognized, then those of the Courts of other Tribal Nations should be as well. However, it remains as clear as mud.

8. Hunting and Fishing

Native American Reservations are off-limits to DEC rules (*Menominee Tribe v. United States*, 391 US 404 (1968)), and off-reserve land may be wide open too depending first on applicable treaty rights and then reasonable preservation measures for a given fishery. *See United States v. Winans*, 198 US 371 (1905); *Antoine v. Washington*, 420 US 194 (1975); s*ee also* 25 USC § 233 ("That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights").

The Haudenosaunee (AKA Iroquois Confederacy) argument is that they have an aboriginal recognized right, since time immemorial, to hunt and fish within Haudenosaunee customary aboriginal gathering, hunting, and fishing territory. This is a right that is recognized by treaties with the State of New York and Federal government and in law.

The Haudenosaunee, composed of federal- and state-recognized nations, as well as non-recognized nations (where an elective tribal government and traditional Confederacy government exists parallel to each other), issue their own membership cards, known as the Haudenosaunee "Red Card." (*See* Appendix D.) These cards are used by the membership for hunting, fishing, and gathering on and off the reservation. There is an unofficial acceptance of "Red Cards" by the DEC. The elective Tribal governments, such as the Saint Regis Mohawk Tribe,

distribute to enrolled tribal membership free NYSDEC hunting and fishing licenses, which are good throughout New York State. (*See* Appendix B). However, many Iroquois prefer to use the "Red Card" for political/spiritual reasons.

Under case law, the state is only allowed to impair an off-reservation treaty right to hunt and fish when: 1) It represents a reasonable and necessary conservation measure, and 2) It does not discriminate against the Native Nation treaty right-holders. *Tulee v. Washington*, 315 US 681, 683-684 [1942]; *Puyallup Tribe v. Department of Game of Wash.*, 391 US 392, [1968]; *see also Department of Game of Wash. v. Puyallup Tribe*, 414 US 44 [1973].

In *People v. Patterson*, 5 NY3d 91 [2005], a state environmental conservation officer found defendant Neil Patterson, a member of the Tuscarora Indian Nation (one of the Six Nations of the Haudenosaunee Confederacy) ice fishing in Wilson-Tuscarora State Park without an identifying tag on his ice fishing tip-up. The park, located in Niagara County, is near the shore of Lake Ontario, outside the Tuscarora reservation, on former Seneca lands. The officer issued defendant a citation for violating a State regulation, which provides that all "tip-ups must be marked with the name and address of the operator while ... in the water." 6 NYCRR § 10.4(a)(7).

The Court held that the Treaty of Canandaigua did not vest members of the Tuscarora Indian Nation with off-reservation fishing rights on former Seneca lands demarcated by the Treaty. *Patterson*, 5 NY3d 91, *supra*.

Patterson is not definitive of off-reservation hunting and fishing rights for the Indians of New York State. The Haudenosaunee continue to meet with NYS leadership to formalize the collective right to hunt, fish, and gather within their customary territory. The history, as the present status, is like a schizophrenic pendulum swinging to the beat of whatever the political scheme is of the decade. (See Appendix C for historical information, How We Got Here!)

9. Cutting Edge on Resolving Jurisdictional Issues

New York State, Federal, Tribal, Indian Nation Forum

Tribal Court/State Court Forums came about in 1989 under the Prevention and Resolution of Jurisdictional Disputes Project, which was sponsored by the Conference of Chief Justices. The Conference of Chief Justices recommended the creation of an ongoing colloquium composed of state, tribal and federal members to work together on strategies to find mutually acceptable and practical solutions to conflicts between the two court systems in the hope of reducing conflicts and strengthening relationships between tribal and state courts.

These projects have been addressing intersystem disputes that arise from the Indian Child Welfare Act, domestic relations matters, contracts, torts, taxation, economic development, hunting and fishing, highway traffic, criminal, and other substantive areas, with attention focused on full-faith and credit and comity conflicts. These problems can be resolved through informed agreements, informal intersystem working relationships, education, and the development of new legislation or the revision of statutes.

Some forums, like the New York State, Federal, Tribal, Indian Nation Forum (NYS Forum), which was established in 2003, have chosen not to address certain topics for political reasons, (*e.g.*, taxation, gaming, and land disputes). The NYS Forum's Mission Statement is to:

1. Develop educational programs for Judges and Tribal Chiefs and Indian Communities
2. Exchange information between/among Tribes and Nations and agencies
3. Coordinate the integration of ICW A training for child care professionals, attorneys, judges, and law guardians
4. Develop mechanism for promoting resolution of jurisdictional conflicts and development of possible inter-jurisdictional recognition of judgments

5. Foster better cooperation and understanding between/among justice systems
6. Enhance proper ICW A enforcement

The NYS Forum meets bi-annually, usually in April and October. Its website can be found at: http://www.nyfedstatetribalcourtsforum.org/

Cass County/Leech Lake Agreement

As an outgrowth of the Forums, some States (and counties) and Tribal Nations have begun utilizing new and unique ways to address matters of mutual concern. One such issue, are Drug Courts also known as Wellness Courts.

Cass County, Minnesota and Leech Lake Band of Ojibwe entered into a joint powers agreement to run a Wellness Court. Under this approach, both a County Judge and a Tribal Nation Court Judge sit/preside on a case together. Working together, using joint resources and sharing knowledge foster the spirit of cooperation and work for the betterment of those being served by the Court. (See Appendix A for Agreement and Articles) Such agreements eliminate the conflict often raised regarding State and Tribal jurisdictional issues.

Appendix A: Leech Lake Ojibwe and Cass County "Joint Powers Agreement"

JOINT POWERS AGREEMENT

BE IT KNOWN THAT we the undersigned agree to, where possible, jointly exercise the powers and authorities conferred upon us as Judges of our respective jurisdictions in furtherance of the following common goals:

1. Improving access to justice;
2. Administering justice for effective results; and
3. Fostering public trust, accountability, and impartiality.

IN WITNESS WHEREOF, we hereunto set our hands and affix our seals this 19th day of July 2007.

Korey Wahwassuck
Korey Wahwassuck, Chief Judge
Leech Lake Tribal Court

John P. Smith, District Judge
Cass County District Court

Anita Fineday
Anita Fineday, Associate Judge
Leech Lake Tribal Court

David Harrington, District Judge
Cass County District Court

Joint Powers Agreement

BE IT KNOWN THAT we the undersigned agree to, where possible, jointly exercise the powers and authorities conferred upon us as Judges of our respective jurisdictions in furtherance of the following common goals:

1. Improving access to justice;
2. Administering justice for effective results; and
3. Fostering public trust, accountability, and impartiality.

IN WITNESS WHEREOF we hereunto set our hands and affix our seals this 22nd day of February 2008.

The Honorable Jon A. Maturi
Judge of the 9th Judicial District – Itasca County

The Honorable Korey Wahwassuck
Chief Judge of the Leech Lake Tribal Court

The Honorable John R. Hawkinson
Judge of the 9th Judicial District – Itasca County

The Honorable Anita Fineday
Associate Judge of the Leech Lake Tribal Court

The Honorable Lois J. Lang
Judge of the 9th Judicial District – Itasca County

RESOLUTION
OF THE
COUNTY BOARD OF COMMISSIONERS
ITASCA COUNTY, MINNESOTA

Adopted February 12, 2008

Commissioner Dowling moved the adoption of the following resolution:

Resolution No. 02-08-01 (Page 1 of 2)

RE: SUPPORT OF JOINT POWERS AGREEMENT BETWEEN LEECH LAKE TRIBAL COURT AND 9TH JUDICIAL DISTRICT COURT (ITASCA COUNTY)

WHEREAS, the Leech Lake Band of Chippewa Indians is a Federally recognized Indian Tribe organized under the Indian Reorganization Act of 1934, and operating under the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe; and

WHEREAS, the Leech Lake Reservation Tribal Council is the duly elected and authorized governing body of the Leech Lake Reservation; and

WHEREAS, the Itasca County Board of Commissioners is the duly elected and authorized governing body of Itasca County; and

WHEREAS, the Itasca County Board acknowledges the importance of enlisting diverse inter-governmental and inter-jurisdictional involvement in solving problems and delivering services; and

WHEREAS, the Itasca County Board places a priority on working collaboratively and creatively for better results across service delivery systems; and

WHEREAS, the Leech Lake Tribal Court and the 9th Judicial District Court (Itasca County) will execute a Joint Powers Agreement on February 22, 2008 formalizing the Courts' working relationship toward mutual goals of improving access to justice; administering justice for effective results; and fostering public trust, accountability, and impartiality;

NOW THEREFORE BE IT RESOLVED, that the Itasca County Board of Commissioners hereby makes official its support for the Joint Powers Agreement between the Leech Lake Tribal Court and the 9th Judicial District (Itasca County); and

FURTHER BE IT RESOLVED, that the Itasca County Board welcomes cooperation with the Leech Lake Tribal Council to solve issues common to both governments.

Commissioner McLynn seconded the motion for the adoption of the resolution and it was declared adopted upon the following vote:

Yeas __5__	**Nays __0__**	**District #1 __Y__**	**District #2 __Y__**
Other __N/A__		**District #3 __Y__**	**District #4 __Y__**
		District #5 __Y__	

STATE OF MINNESOTA
Office of County Coordinator
ss. County of Itasca

I, ROBERT R. OLSON, Coordinator of County of Itasca, do hereby certify that I have compared the foregoing with the original resolution filed in my office on the 12th day of February A.D. 2008, and that the same is a true and correct copy of the whole thereof.

WITNESS MY HAND AND SEAL OF OFFICE at Grand Rapids, Minnesota, this 12th day of February, A.D. 2008.

Louise A. Legue Finley

Coordinator

By _____ **Deputy**

Cass Lake Times

CASS LAKE Star of the North Country, Home of the Eagle of the Chippewa Vol. 109, No. 14 Thursday, April 5, 2007

Wellness court goal: break the cycle of dependency

THE WELLNESS TEAM PROVIDES a multi-disciplinary approach to dealing with chronic alcohol and chemically dependent offenders in Cass County. Team members include Leech Lake police officer Ryan Fisher, district court Judge John P Smith, Cass county attorney Earl Maus, Judy Tholen of the Leech Lake opioid program, Cass county chief deputy Tom Burch, and Cass county director of probation Reno Wells across the back of the picture. Then in front Pine Manor director Rachel Mueller, wellness court coordinator Pam Norenberg, tribal court Judge Korey Wahwaasuck, Leech Lake opioid director Earlene Buffalo, department of corrections agent Sue Opsahl and public defender Jay Sommer. Submitted photo.

By Daniel LeClaire

This past February, cooperation between the Leech Lake Tribal court and the Cass County District court in the formation of the Wellness Court was symbolized as Cass County district Judge John Smith accepted a Leech Lake Band of Ojibwe flag to fly in his courtroom in Walker.

Smith joins the Leech Lake Band's chief Judge Korey Wahwaasuck in presiding over the Wellness Court, the first of its kind post-conviction DWI court serving non-native as well as Tribal members. Their innovative work has drawn the interest of judges and elected officials from all over the state and at national gatherings as far away as Maryland where they have provided presentations of the workings of the court since it's inception one year ago this month.

"We're always kind of surprised that no one else has done this," Wahwaasuck said after a recent court session. "We kept looking for a model but this was the first one ever."

Smith concurred. "It's a cooperative program between Tribal and state courts that hasn't developed anywhere else. It's been positive for everyone."

Not only does the court stand as an example of coop-

WELLNESS...to page 6

Wellness court setting an example...from page 1

eration between government entities with representatives from the Leech Lake Band, Cass County and the state of Minnesota working together as part of the courts "core team," but its method of developing an inter-agency treatment program rather than relying on incarceration paves the way toward addressing the source of substance abuse.

"If we are of the philosophy that addiction is a sickness," Smith said, "we can treat it more like that. We try to keep people who are chronically addicted to chemicals from offending."

Although the Wellness Court program clientele get in to the program through alcohol convictions, the team tests for five different substances by random urinalysis during their client's 18 to 36 month participation in the program. Program members must meet a number of criteria including not having previously been convicted of a violent or predatory offense, not being registered as a gang member and not being currently supervised by another agency for a felony level violation of law, among others.

Participants must also be willing to sign a treatment contract agreeing to undergo group or individual counselling as recommended by the team and enroll in schooling, gain employment or perform community service.

"You really have to want to change," said Pam Norenberg the Wellness Court's coordinator from the ninth judicial district. "We've had people tell us that this is a lot harder" than doing jail time because the program asks a lot more from individuals.

But that doesn't deter people from choosing the program over incarceration. In fact, according to Wahwaasuck, in the year that the Wellness Court has been running not a single participant has missed a weekly court date.

"What were trying to do is change a life-style," Wahwaasuck said. "Break the cycle of get your ticket, pay your penalty and return to the same habits."

The weekly hearings provide time for the judges to visit individually with participants to determine what is working and not working in their lives. The atmosphere in the courtroom is positive and almost congenial. Although sanctions for relapse are real, the non-adversarial approach encourages participants to be ruthful without fear of additional charges being brought.

"The supervision piece is what really holds us back," Norenberg said, with very high existing work loads of county and state probation officers hampering the additional demands of the Wellness Court even with assistance from Tribal law enforcement.

The need for intense supervision and added mental health services to allow the program achieve its target of 30 clients has led team members to apply for additional funding to hire a full-time case manager and mental health professional. The court's caseload now stands at eight.

"We're doing what we can with the people we have," said Wahwaasuck. "We have a very committed team." She and Smith agreed that it was more important to provide a high level of service in the beginning and to build the program from there.

In fact, there wasn't much upon which the two judges couldn't reach an agreement, a realization that seems to fit with the whole cooperative effort. In seeking a key to the continuing success of the program, Smith hit upon the efficiency and shared benefits that go along with any forward thinking, cooperative effort.

"Because we can reach resources that are available to both (state and Tribal) systems," Smith said, the court can address these issues "in an expansive way. We have a willingness to be open to new ideas and not be self-limiting."

"No one has given up power or authority," Wahwaasuck confirmed. "We're working toward common goals, figuring out how we can work together."

That spirit may lead to further levels of cooperation on other fronts, with the work of the Wellness Court team standing as an innovative example of the power of combined knowledge and resources.

"There's lots of people who want help and don't know how to get it," Smith said citing the court's role in providing people the opportunity to make tough decisions for their own and the communities well-being.

Norenberg, speaking for the whole interdisciplinary team, agreed. "We're just helping people find their way."

<u>Appendix B</u>: Fishing License distributed by SRMT to enrolled members.

Appendix C: Hunting and Fishing the History – How We Got Here!

The following was just too noteworthy to not mention. As one can imagine the State's efforts to regulate hunting and fishing is relatively young, while the Indian's participation in those activities is considerably older! It is odd that at one point the state offered 'snake' and 'wolf' bounties to Indians.

Nonetheless, as early as 1884 locals were still reporting on their hunting/fishing excursions with the Indians (*see* Republican Paper, Aug. 17, 1881, for such an excursion in Nicholville: "These Indians understand every point on the river in that section and are trusty and helpful.") Those who ventured into what was to become the Adirondack Park appear in other historical texts as well (Bero/Sabbatis and the area that was to become Paul Smith's casino, I mean College).

Now consider that in just 8 years the following was reported: "A report comes from St. Regis that a party of the United States fishery officers were attacked Monday afternoon by Indians while endeavoring to make a seizure of illegal nets which had been used on the American side of the river." *See* Plattsburgh Sentinel, May 10, 1889. Who could it be? Well, it may have been "The trial of Connors, the St. Regis Indian, who stoned Mr. Flaherty of Massena last spring when the latter was working with Game Protector Pond to stop seining by the Indians near Hogansburg, is now in progress." *See* Malone Palladium, Oct. 24 1889. Lest we forget, at this point Indians were not citizens of the United States!! Still Pond got pounded by the pond! Connors, the non-citizen Indian ended up getting three months of hard labor at the Onondaga penitentiary (apparently no-one up north did hard labor back then) See Norwood News, Nov. 5, 1889.

Too bad Connors did not have the luck to appear in front of Judge Swift as he took action against Joseph Seymour and Mathew Tebo (two St. Regis Indians who allegedly were illegally fishing at the mouth of the Grass River [think by US Custom house] whereby: "Judge Swift said that he was satisfied

that a St. Regis Indian had a right to fish anywhere on the reservation and that State laws would not stop them…" See Norwood News, June 11, 1901. Yes, a victory. Well, not so fast.

By 1908 we were back at it, as Counsel Ward of the Fish and Game Commission determined that "[i]f the Indians want to hunt in this state hereafter they must pay for a hunter's license the same as the white man, under an opinion written by John K Ward general counsel to the State forest, fish and game commission…" See Plattsburgh Sentinel Dec. 1908. Let me see, a Ward is more Swift then a judge? Well maybe not. Not to be undone we find that the Attorney General chimes in by January 7, 1909, that "…Indians desiring to hunt and fish on their own reservations in this state may do so without a license." *See* Cape Vincent Eagle, Jan. 7, 1909. Therefore, the matter is settled. Nope, wait "Game Protectors Winfield Scott Rutherford and William Carney were out trying to find the St. Regis Indian John Sunday and sons. A few days ago the Indians were hunting muskrats, and the rats run high now that their skins are finely dressed and made into coats called 'river mink'". See Madrid Herald, Apr. 21, 1910. So someone did not get the memo?

Clearly the law was well settled, so in September of 1926 Wesley Patraw of Massena was fined for having two illegal black bass in his possession. One was below the ten inch limit, and the other, "purchased from an Indian on the St. Regis reservation…" See Plattsburgh Sentinel, Sept. 7, 1926. Indian Can, White man can't. Correct, well apparently not as we seem to have gotten bored.

"Four residents of the St. Regis Indian reservation who have been summoned by the office of the attorney general of the state of New York to answer charges before the supreme court of illegal fishing…" Where did this crime occur? "The case has arisen out of the arrest on June 2, 1932 by two state conservation department game officers of John Chief, Joe White, Dave Point and Michael Herne on charges of fishing below the dam in the St. Regis

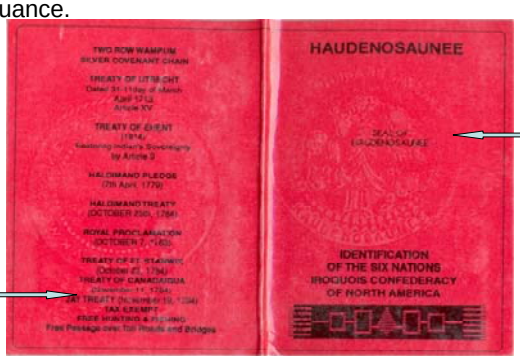
River at Hogansburg without a license and also catching certain fish out of season." *See* Plattsburgh Daily Press, Jan. 25, 1933.

That should clarify it. You should now know how to handle fishing and hunting case involving Indians.

Appendix D: Haudenosaunee Red Card

Haudenosaunee “Red Card”

The “red card” is a standardized card with the only difference being found in the inside listing the Nation and signer of issuance.



Official Seal Pine Tree surrounded by 8 Clans of the Six Nations Iroquois is surrounded by People holding hands

Free Hunting & Fishing.

Individual’s #

Tax Exempt #
Used by Confederacy
Saint Regis Mohawk Tribe

Clan

Each of the Six Nations Issue Own membership Card. This is a Mohawk Nation issued card.