The New York Federal-State-Tribal Courts Forum

THE FIRST New York Listening Conference

Report of Proceedings

April 26 – 27, 2006 • Syracuse, New York

Guswenta (Kaswentha): Two Row Wampum

The First New York Listening Conference visual theme was inspired by the Two Row Wampum, a symbol of the principles governing relationships between the Iroquois / Haudenosaunee and the European nations at the time of first contact. Degiya'göh Resources tells the story: [1]

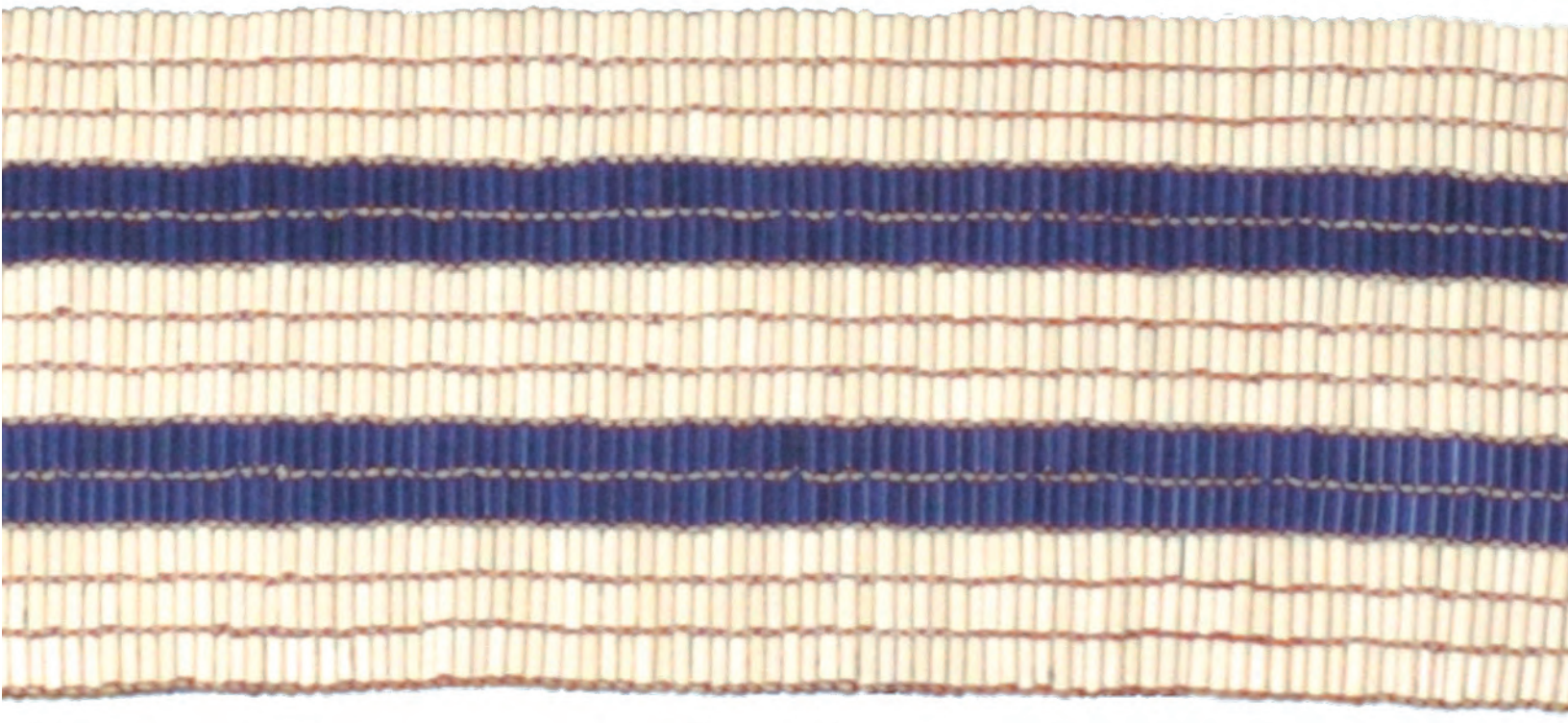
> Historically the Haudenosaunee were nations of people who practiced very sophisticated, yet simple, diplomatic principles in their dealings with other nations.
>
> When the Haudenosaunee first encountered the representatives of certain European nations, they found that they were unaware of these principles, and had the potential for disrupting the peaceful ways that Haudenosaunee people wished to live.
>
> Because our cultures and lifeways were so different, it was essential that a relationship be established based on mutual respect.
>
> The Haudenosaunee proposed a treaty of peace, respect and peaceful co-existence, known as the Kas-wen-tha, or Two Row Wampum belt.
>
> The belt was made with two parallel rows of purple wampum on a bed of white beads. The white was meant to symbolize the purity of the agreement. The two separate rows of purple beads, were made to symbolize and encompass the spirits of Haudenosaunee and non-Haudenosaunee people and ancestors. Between the two rows of purple beads, three rows of white beads, were placed. These were made to stand for the friendship, peace and respect between the two nations.
>
> It is said, that the two rows of purple beads, further symbolize, that two nations of people in separate vessels travel down the river, parallel from each other. The Onkwehonwe (Native people) are in their canoes. This symbolizes their culture, their laws, their traditions, their customs and other lifeways. The non-Native people are said to be in their own ships, which symbolizes their culture, their laws, their traditions, their customs and other lifeways.
>
> It is said that, each nation shall stay in their own vessels, and travel the river side by side. Further, it is said, that neither nation will try to steer the vessel of the other, or interfere or impede the travel of the other.
>
> The Two Row Wampum is a treaty of respect for the dignity and integrity of the other culture and stresses the importance of non-interference of one nation in the business of the other, unless invited.
>
> The early principles established in the Two Row Wampum Treaty formed the basis of all Haudenosaunee treaties with other Nations, including the Dutch, the French, the British, and then the Americans.

Navigating the River Together in the 21st Century

The purpose of the First New York Listening Conference was to bring together Indian Nation and Tribal representatives, New York State and Federal judges and officials to honor and respect the principles of the Two Row Wampum, while finding ways to avoid collisions as we navigate the complex river we travel together in the 21st Century. The goal was to find a common channel to help promote and sustain justice for all of our people.

---

[1] An Information Base for Haudenosaunee Tradition, Culture, History, Education and Current Events. http://www.degiyagoh.net/guswenta_two_row.htm (last visited, January 19, 2007)



New York Federal-State-Tribal Courts Forum

First New York Listening Conference

Syracuse, New York • April 26 - 27, 2006

Report of Proceedings

WRITER AND EDITOR

Jo Ann Harris
2006 Fellow, New York State Judicial Institute and Professor of Law, Pace Law School

CONTRIBUTORS

Hon. Marcy Kahn
Justice, New York Supreme Court

Hon. Edward Davidowitz
Justice, New York Supreme Court

Joy Beane, Esq.
New York State Judicial Institute

Valorie Perez, Esq.
New York State Judicial Institute

Todd Weber, Esq.
New York Unified Court System

Tahira Hashmi
Tribal Judicial Institute, University of North Dakota School of Law

Kristen Sentoff
Student Intern, Pace Law School

CONFERENCE AND REPORT GRAPHICS

Patricia Everson Ryan
New York State Office of Court Administration

EVENT CO-SPONSORED BY

The New York Tribal Courts Committee
The New York State Judicial Institute
Center for Indigenous Law, Governance and Citizenship, Syracuse College of Law

WITH SUPPORT FROM

The Bureau of Justice Assistance, United States Department of Justice and
Tribal Judicial Institute, University of North Dakota School of Law

New York Federal-State-Tribal Courts Forum

First New York Listening Conference

Syracuse, New York • April 26 - 27, 2006

Report of Proceedings

REPORT PUBLISHED BY

THE NEW YORK STATE JUDICIAL INSTITUTE

Printed in USA

The writing of this Report was supported by Grant No. 2004-1C-BX-1469 awarded by the Bureau of Justice Assistance (BJA).

The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes Bureau of Justice Statistics, The National Institute of Justice, The Office of Juvenile Justice and Delinquency Prevention, and the Office of Victim of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the United States Department of Justice.

The New York State Judicial Institute extends its sincere thanks to BJA and the Tribal Judicial Institute (TJI) for providing the opportunity for the New York State Judicial Institute to publish these proceedings.

The New York State Judicial Institute is solely responsible for the content of this Report.

Table of Contents

Statement by Justice Marcy L. Kahn

Progress of The New York Federal-State-Tribal Courts Forum
September 22, 2005

"Let me say it's my hope that as we go forward from this place today we'll each use the knowledge that we gained here from one another, that we'll, I hope, take strength from what we have done together today. We look forward to working together with you in the future on matters where we can work together for our mutual benefit and seek to promote better justice in New York for all of our peoples including the peoples of the first nations most particularly." Transcript of Meeting of Federal-State-Tribal Courts Forum, September 22, 2005 at 126 – 127.

Navigating the River Together in the 21st Century

Executive Summary

The First New York Listening Conference was held on April 26 and 27, 2006 in Syracuse, New York. The Conference brought together for the first time in history more than 140 participants from the Federal and State court systems and from the Indian Nations and Tribes in New York State in order to exchange information and learn about respective concepts of justice. *See Figure 1.*

This report begins with a short historical background of the nine Nations and Tribes recognized by the State of New York, noting the important historical events that shaped the relationships between New York State, the Federal Government, and the Nations and Tribes of New York State.

The report then describes the process of forming the New York Federal-State-Tribal Courts Forum, a process initiated by New York's Chief Judge Judith S. Kaye in 2003.

It details the development of the Forum to date and the accomplishments born of mutual cooperation, education and respect. The Forum emerged with three main priorities:

1. To ensure accurate application of the Federal and State Indian Child Welfare Acts;
2. To devise a means of achieving full faith and credit for judgments of tribal justice systems and Federal and State courts; and
3. To provide judicial education and training, not only about relevant law, but also about the cultures and justice systems of New York's Nations and Tribes.

Finally, this report summarizes the events of The First New York Listening Conference. The Conference educated the participants, more than half of whom were State and Federal judges, about applicable law and practice and about cultural and historical contexts. The Conference was the first step in a dialogue and ongoing educational program. Panel discussions covered basics, such as civil and criminal jurisdiction and ICWA, and explored Native justice systems and concepts of restorative justice. In addition, participants and panelists discussed potential solutions to the problems presented by different co-existing justice systems.

The participants' responses to the First New York Listening Conference were overwhelmingly positive and enthusiastic. The Conference clearly set a path for the future and affirmed the desire of all to continue the work of the New York Federal-State-Tribal Courts Forum.

FIGURE 1

Contemporary Native New York

Today there are nine recognized Native Nations and Tribes in New York State. The Six Nations of the Haudenosaunee — the Cayuga, the St. Regis Mohawk, the Oneida, the Seneca, and the Tonawanda Band of Senecas, the Onondaga and the Tuscarora — have territory in five New York Judicial Districts[2] covering 13 counties in upstate New York.[3] Each is recognized by the State, as well as the Federal Government, which acknowledges a government-to-government relationship. In addition, the Unkechaug (Poospatuck) and Shinnecock Nations, located on Long Island,[4] are recognized by the State of New York.

The 2000 U.S. Census put the Native population living in New York's Native territories at an estimated 19,000.[5] In 2005, the U.S. Environmental Agency estimated total current land holdings of the federally recognized nations at approximately 106,000 acres. Unkechaug land-holdings are estimated to be between 55 and 100 acres. The Shinnecock are said to own around 800 acres.

The justice systems of New York's Nations and Tribes span a broad range of models. The Onondaga, Tuscarora, Cayuga, and the Tonawanda Band of Senecas adhere to the oral tradition of laws and practices passed down by elders through the centuries. Their justice systems involve community healing through consensus. These Nations have no judges, no courts, and no written laws. Each nation's government centers around a clan system, and most are represented on the Haudenosaunee Council of Chiefs, which meets in the Longhouse in Onondaga territory on a regular basis.[6]

At the other end of the spectrum, the Oneida adopted a western court structure and system in 1997, with written codes and laws similar to New York State's. The continuum between the traditional Nations and those adopting western-style systems includes the St. Regis Mohawk, who are in the process of developing certain western-style courts, and the Seneca, with written laws and a constitution promulgated in 1843 when they abolished the "Chief" system and established a constitution providing for elected officials. The constitution mandates an executive branch, a legislative branch, and a judicial branch consisting of a Supreme Court (the Council), a Court of Appeals, a Peacemaker Court, and a Surrogate Court. The Unkechaug and the Shinnecock have written laws dealing with internal government structure, but they rely primarily on State courts for litigation. New York courts should apply Native law when appropriate. See 25 U.S.C. § 233 (1950).

---

2 The 4th, 5th, 6th, 7th, and 8th Judicial Districts.

3 Allegany, Cattaraugus, Cayuga, Chautauqua, Erie, Franklin, Genesee, Madison, Niagara, Oneida, Onondaga, Saint Lawrence, and Seneca counties.

4 The 10th New York Judicial District covers Nassau and Suffolk counties.

5 According to the 2000 Census, the total New York State Native population was approximately 82,000. Of those, about 60,000 lived in the New York area, making it the biggest urban concentration of Native Americans in the country.

6 A traditional government of the Mohawks (Kahniakehakal), although not recognized by the State or Federal Governments, is a member of the Grand Council.

Introduction

"Nice job…You give me hope for our future co-existence."

— comment by a Listening Conference participant

They gathered in Syracuse on April 26 and 27, 2006. Elders, Clan Mothers, Chiefs, Judges, Leaders, and interested members of New York Native Nations and Tribes, New York State Judges, Federal Judges, and other officials. They came from every direction, every Native territory, and every one of New York's twelve judicial districts. *Figures 1 and 2.* In total there were 143 attendees, including 60 representatives of New York's nine Nations and Tribes. The extraordinary turnout for New York's First Federal-State-Tribal Listening Conference demonstrated the wisdom and value of three years of dedication and determination by the New York Tribal Courts Committee and the goodwill of the Native peoples working with it. Throughout this period, there was a steady increase in Native participation, nourished by growing trust and interest by the Nations and Tribes and growing knowledge and understanding by the Committee about Native cultures and justice systems. Up against a bitter history, no punches were pulled in the three years of planning, and none were unduly hard or unfair. Openness, so essential to success, was generated by patience, mutual listening, and education.

The event was co-hosted by the New York Tribal Courts Committee, the New York State Judicial Institute, and the Syracuse University Center for Indigenous Law, Governance, and Citizenship.[7] It was the *culmination* of three years of meeting, planning, and trust-building. It was the *beginning* of an ongoing, open dialogue to address critical issues which arise at the modern intersection of New York, Federal, and Native justice systems.[8]

In a sense, the short comment from the Conference participant quoted above says it all. The Conference accomplished its goals. There is real enthusiasm for continuing the dialogue, which demonstrates the mutual respect generated by working together on the formation of the Forum and its first major Conference; it gives great hope. It will continue.

7 See Appendix I.

8 Editor's note: Of great importance to all peoples are the words chosen to identify them. As with many peoples, the indigenous people of New York are identified by many phrases, each one of them certain to offend someone. The Conference sponsors have taken these feelings very seriously and considerable time was devoted to this subject in a meeting of the Forum Planning Committee on Sept. 21, 2005. See infra p.13. It is fair to say there was no consensus, except for the acknowledgment that the only way to deal with this issue was to simply state up front that in this publication there are certain words we will not use and others that will be used only where consistent within the context. In short, we have done our best and mean not to offend anyone.

FIGURE 2

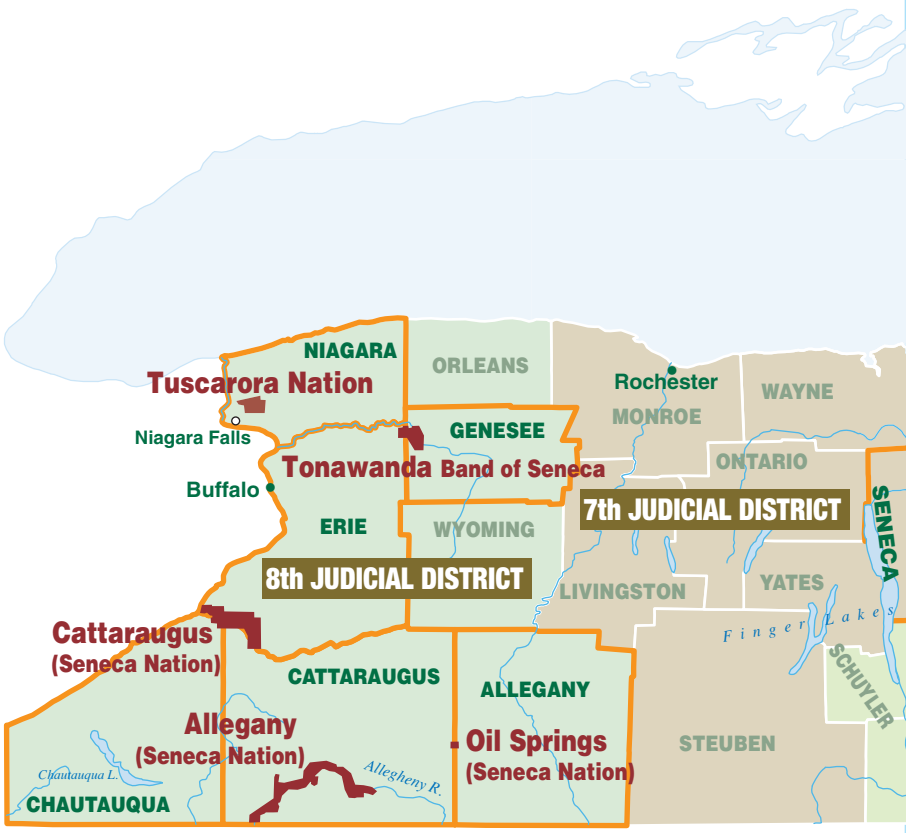
Map of New York showing Native Territories, New York Counties, and New York Judicial Districts

American Indian Reservations (AIRs) are legal entities having boundaries established by treaty, statues, and/or executive or court order. They are identified by the Bureau of Indian Affairs (BIA) as Federal Reservations. An AIR recognized by the Federal Government may be located in more than one state.

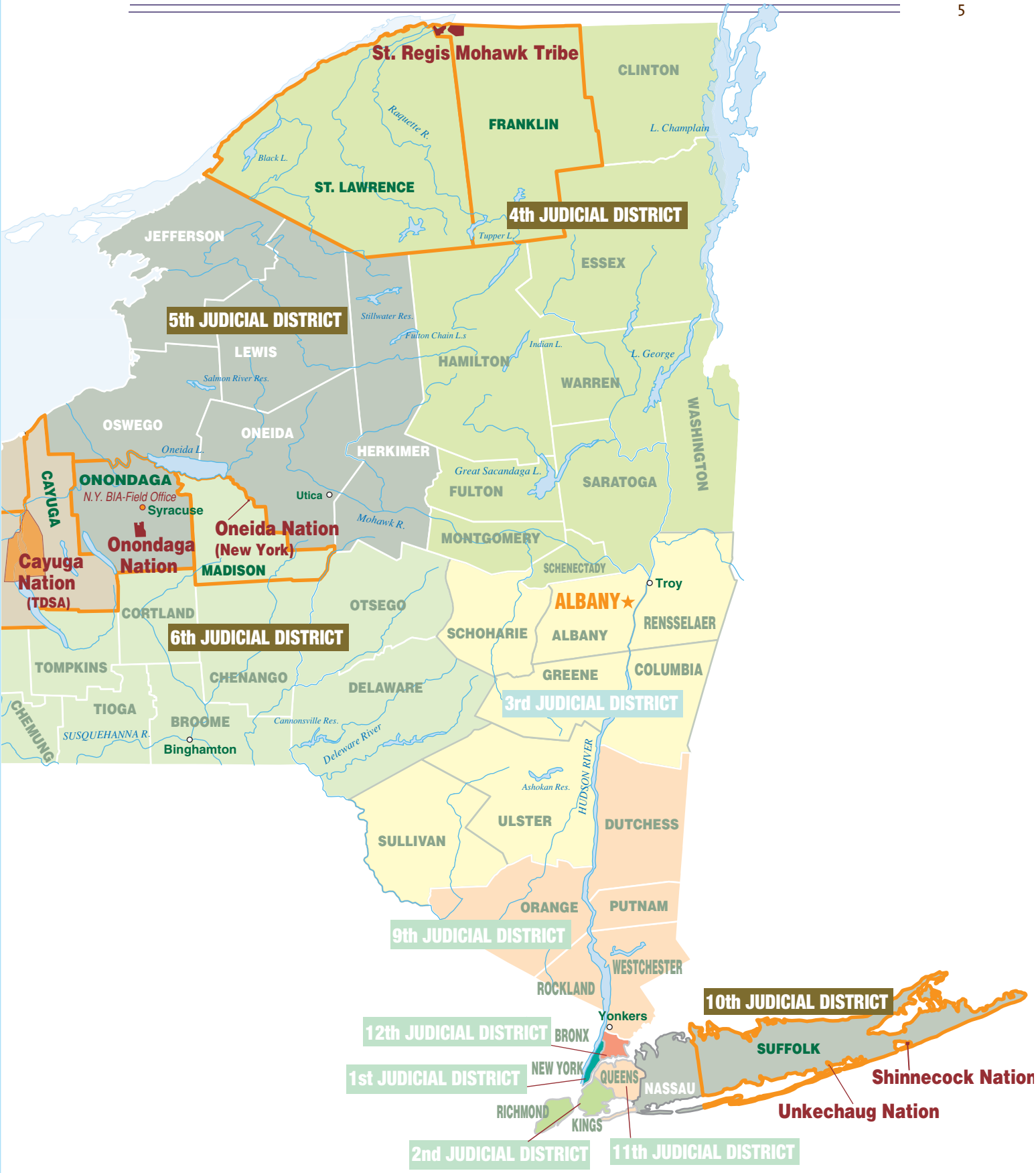
Tribal Designated Statistical Area (TDSAs) are statistical entities identified and delineated for the U.S. Census Bureau by federally recognized American Indian tribes that do not currently have a federally recognized land base (reservation or off-reservation trust land). A TDSA generally encompasses a compact and contiguous area that contains a concentration of people who identify with a federally recognized American Indian tribe and in which there is structured or organized tribal activity. A TDSA may be located in more than one state, and it may not include area within an American Indian reservation, off-reservation trust land, or state designated American Indian statistical area.

Counties with Indian Entities
New York State Counties with Indian Entities are outlined in orange with the county name in dark green.

JD **New York State Judicial District with Indian Entities**



INDIAN ENTITIES	COUNTIES	N.Y. JUDICIAL DISTRICTS
Cayuga Nation	Cayuga, Seneca	8th
Oneida Indian Nation	Madison	6th
Onondaga Nation	Onondaga	5th
Saint Regis Mohawk Tribe	Franklin, St. Lawrence	4th
Seneca Nation of Indians — Allegany Reservation	Cattaraugus	8th
Seneca Nation of Indians — Cattaraugus Reservation	Cattaraugus, Chautauqua, Erie	7th , 8th
Seneca Nation of Indians — Oil Springs Reservation	Allegany, Cattaraugus	8th
Shinnecock Indian Nation	Suffolk	10th
Tonawanda Band of Seneca Indians	Erie, Genesee	8th
Tuscarora Nation	Niagra	8th
Unkechaug Indian Nation	Suffolk	10th



Base map source: Bureau of Indian Affairs (Federal Reservations)

Historical Background

Long before there was a State of New York or a Federal Government, there were the Five Nations, the Cayuga, the Mohawk, the Oneida, the Onondaga, and the Seneca, in league together as the Iroquois Confederacy/the Haudenosaunee. In 1722, the Tuscarora joined the confederacy to form the Six Nations of the Haudenosaunee Confederacy.[9] Many scholars hold that the Haudenosaunee Confederacy model was followed by founders of the United States. In 1987, the United States Congress confirmed the debt of the United States to the Haudenosaunee with a Resolution to:

> "Acknowledge the Contribution of the Iroquois Confederacy of Nations to the Development of the U.S. Constitution ..." *Figure 3.*

While the Haudenosaunee's territory extended throughout Northern and Western New York State, New York's Algonquin people inhabited the Eastern part of the State, specifically on Long Island where the Unkechaug and Shinnecock lands are today.[10] *See Figure 2 on pages 4 – 5.*

From the birth of the American Nation, the Federal Government has claimed plenary power over Indian affairs, asserting that Indian Nations are sovereign entities and that only the United States Congress has the power to limit, or in other ways affect, jurisdictional relationships. This principle is reflected in provisions of the U.S. Constitution,[11] congressional legislation,[12] and early cases of the Supreme Court.[13]

New York did not agree with the principle of federal supremacy. As early as 1777, New York staked out its primacy in Indian affairs in its own constitution.[14] Ignoring and sometimes

9 The Tuscarora's homeland was in and near what is now North Carolina. After being forced out in the early eighteenth century and moving to New York, the Tuscarora became the sixth nation of Haudenosaunee Confederacy in 1722. Ska-ru-ren (Those of the Indian Hemp), available at http://www.pace4turtleisland.org/pages/tuscarora.htm (last modified August 2001).

10 New York recognizes nine Tribes and Nations: Cayuga, St. Regis Mohawk, Oneida, Onondaga, Seneca, Tonawanda Senecas, Tuscarora, Shinnecock, and Unkechaung. The Federal Government does not recognize the Shinnecocks or the Unkechaug Nations.

11 See U.S. Constitution art. I § 8 (Congress has the power to regulate commerce with the Indian Tribes); U.S. Constitution art. II § 2 (the President has the power, with the advice and consent of the Senate, to make treaties); U.S. Constitution art. I § 10 (barring states from entering into treaties, alliances, or confederations); U.S. Constitution art. III (extending general federal court jurisdiction of all cases arising under the Constitution, the laws of the United States and treaties); and U.S. Constitution art. VI (the Supremacy Clause which makes treaties part of the supreme law of the land and binding every state to follow federal law).

12 Indian Trade and Intercourse Acts, e.g., Act of July 22, 1970, ch. 33, 1 Stat. 137 (asserting Federal primacy over Indian affairs).

13 See, Johnson v. M'Intosh, 21 U.S. 543 (1823) (recognized legal right of Indians in their lands); Cherokee Nation v. Georgia, 30 U.S. 1,18 (1831) (upheld tribal jurisdiction, characterizing tribes as "domestic dependent nations" of the Federal Government); Worcester v. Georgia, 31 U.S. 515 (1832) (tribes have "exclusive jurisdiction" within boundaries of reservations; there is no state jurisdiction).

14 N.Y. Constitution art. XXXVII, (repealed 1962) (relating to Indian land issues and the requirement of New York consent before any sale).

flaunting the Federal Government, the State embarked upon a campaign to control the Haudenosaunee to the exclusion of any other power. The Federal Government often acquiesced. Throughout the following two centuries, New York continued to assert and exercise power over New York Indian Nations in a manner inconsistent with the spirit and the letter of Federal law regulating Indian affairs. These actions vastly complicated the relationships and jurisdictional issues between and among New York Nations and Tribes, the State of New York, and the Federal Government, and the relationships between and within the Nations and Tribes themselves.

The resulting tension between New York State, the Federal Government, and the New York Indian Nations since the beginning of the Republic has been unique, and it remains so today.

In the words of one of New York's distinguished historians and author of the definitive book on New York's Indian Policy:

Today, New York State's Indian policies are affected by the baggage of two centuries of state neglect and malfeasance and by officials' ignorance of American Indians and their communities.[15]

Working together was a challenge for all peoples from the beginning of contact.

In New York, it still is.

15 Lawrence M. Hauptman, Formulating American Indian Policy in New York State, 1970 – 1986, at 14 (State University of New York Press, 1988).

FIGURE 3

1987 Congressional Record

Congressional Record -- Senate

TITLE: SENATE CONCURRENT RESOLUTION 76 -- TO ACKNOWLEDGE THE CONTRIBUTION OF THE IROQUOIS CONFEDERACY OF NATIONS TO THE DEVELOPMENT OF THE U.S. CONSTITUTION AND TO REAFFIRM THE CONTINUING GOVERNMENT-TO-GOVERNMENT RELATIONSHIP BETWEEN INDIAN TRIBES AND THE UNITED STATES ESTABLISHED IN THE CONSTITUTION. Wednesday, September 16, 1987 100th Cong. 1st Sess.133 Cong Rec S 12214

S. CON RES. 76

Whereas, the original framers of the Constitution, including most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts, principles and governmental practices of the Six Nations of the Iroquois Confederacy; and,

Whereas, the Confederation of the original thirteen colonies into one Republic was explicitly modeled upon the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself; and,

. . . .

RESOLVED BY THE SENATE (THE HOUSE OF REPRESENTATIVES CONCURRING), That:

(1) (1) The Congress, on the occasion of the 200th Anniversary of the signing of the United States Constitution, acknowledges the historical debt which this Republic of the United States of America owes to the Iroquois Confederacy …

The New York Federal-State-Tribal Courts Forum

The Challenge

It is against an historical backdrop of mistrust, misunderstanding, and complex and contentious jurisdictional issues that Chief Judge Judith S. Kaye of New York's highest court, the Court of Appeals asked Justice Marcy L. Kahn of the New York State Supreme Court to undertake a special assignment in 2003. With great hope and respect for the State's Native peoples and governments, Judge Kaye asked Justice Kahn to organize a Forum, a means of bringing together State and Federal judges with members of New York's Native Nations and Tribes to address the many issues arising between them. The challenge was to find a safe harbor where there could be communication between representatives of the western court systems and the great range of Native governments and justice systems in New York. The goal was to help all communities navigate around the submerged hazards caused by the failure to listen to each other over the centuries.[16] Justice Kahn, joined by colleague Justice Edward M. Davidowitz, formed the New York State Tribal Courts Committee (the Committee) in 2003.[17] In three years, the Committee's work flowed into the work of the Forum Planning Group (the Group),[18] and then finally into a subcommittee preparing for the First New York Listening Conference (the Conference Planning Committee).[19] The Forum and its agenda will always be a work-in-progress, but it has built a firm foundation for

16 Editor's note: It is not the intention of this publication to focus on the failed and misguided efforts that litter the landscape of New York State's relationships with New York's Nations and Tribes. But it is important to understand that New York's Tribal Courts Committee faced this history and could not have been successful without understanding how it affected Native attitudes about the effort. Details can be found in many scholarly analyses, including Professor Hauptman's book, see supra note 10. In addition, the Conference materials contained an analysis by Professor Robert Odawi Porter, a distinguished panelist, Director of the Center for Indigenous Law, Governance and Citizenship, and Associate Dean at Syracuse University College of Law. See Robert O. Porter, *Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 Harv. J. on Legis. 497 (Summer 1990). See also Kristen Sentoff's summary in the Conference materials, *Tribal-State Relations in New York State: Past and Present*. (2005) (unpublished manuscript on file with the New York State Judicial Institute).

17 The committee's membership has changed and increased somewhat since Justices Kahn and Davidowitz began. Members are appointed by the State's Chief Administrative Judge. The Committee members at the time of the First Listening Conference are identified in Appendix I.

18 Over the three year's of its existence, approximately forty people from the Nations, the state judiciary, and the federal court system have attended the semi-annual Forum Planning Group meetings.

19 The Conference Planning Committee consisted of representatives from the Nations and the federal and state judiciaries. As the planning progressed, more people were involved in the planning of the different panels and sessions of the Conference.

future relationships among New York's many communities, hopefully assuring that no issue between or among them will fester as in the past.

The National Model

The New York Federal-State-Tribal Courts Forum has its origins in the Conference of Chief Justices, an organization of the Chief Judges of the courts of the fifty states, the District of Columbia, and United States territories.[20] In 1985, the Conference created a committee to address questions regarding state civil jurisdiction over Indians, raised by the United States Supreme Court's two decisions in *Three Affiliated Tribes v. Wold Engineering*.[21] The Committee on Jurisdiction Within Indian Country, later called the Tribal, State, and Federal Relations Committee, held a series of panels and conferences on tribal jurisdiction.[22]

In 1991, a national Conference was held in Seattle, Washington with representatives of Tribal, Federal, and State Governments and justice systems.[23] The Conference, entitled "From Conflict to Common Ground," emphasized the need for cooperative efforts between federal, state, and tribal entities. The Conference also demonstrated the strong interest of federal funders in encouraging independent state-by-state development of platforms addressing the host of different problems faced by each locality. Thus, after the initial national Conference, with encouragement from the Conference of Chief Justices and the United States Department of Justice Bureau of Justice Assistance (BJA), the idea of creating forums to address and find ways to resolve jurisdictional conflict expanded. Demonstration forums to study various models were established in Arizona, Oklahoma, and Washington. By 2003, 17 states had created tribal-state court forums.

That same year, many others, including New York, launched efforts to engage Native people in the formation of forums.[24] A National Gathering in Green Bay, Wisconsin in the Summer of 2005 provided compelling evidence of the synergistic value of working together on both a local and national level. BJA demonstrated its commitment to national efforts by funding the Green Bay Conference;[25] in 2006, it once again showed its support of local efforts with a grant to assist the State of New York in connection with the New York Listening Conference.[26]

20 Ralph J. Erickstad & James Ganje, Tribal and State Courts — A New Beginning, 71 N.D. L. Rev. 569, 569 n.1 (1995).

21 467 U.S. 138 (1984); 467 U.S. 138 (1986). This litigation presented issues of state court civil jurisdiction over a claim asserted by an Indian tribe against a non-Indian company. See National Center for State Courts, History of the Conference of Chief Justices 29 – 30 (1986), available at http://ccj.ncsc.dni.us/HistoryPt1.pdf (last visited January 25, 2007).

22 Erickstad & Ganje, *supra* note 15, at 570 – 73.

23 Id. at 572.

24 See *infra* pp. 11 – 14.

25 See 2005 *National Gathering for Tribal-Federal-State Court Relations, Walking on Common Ground, Pathways to Equal Justice,* (Report, Fox Valley Technical College / Grant from Bureau of Justice Assistance, U.S. Department of Justice) June 27 – 29, 2005. Flyers about the Walking on Common Ground Conference were distributed at the March 2005 meeting of the Forum Planning Group. At least one representative from a New York Nation, as well as representatives of New York's court system, including Supreme Court Justice John Collins, attended the Green Bay Conference. Their enthusiastic reports about the Green Bay Conference added to the motivation of the Forum Planning Group in its planning for the First New York Listening Conference.

26 Grant No. 2004-IC-BX-1469 awarded by BJA, Office of Justice Programs, U.S. Department of Justice. Through its grant, BJA provided travel and accommodation scholarships to members of the federally-recognized New York *(continued on next page)*

The New York Initiative

Listening and Learning

In March 2003, Justice Kahn was invited by the director of Native American Services of the New York State Office of Children and Family Services (OCFS) to a meeting in Liverpool, New York, with members of New York's nine Indian Tribes and Nations. The purpose of the meeting was to address protective services for Indian children in New York. Justice Kahn presented the New York Federal-State-Tribal Court Forum concept and invited Native representatives to participate in its development.

Thus began an extraordinary journey, involving ten meetings over three years. Every one of the nine Native Nations and Tribes engaged with the Committee.[27] Many joined subcommittees and the Planning Group for the Forum and contributed significantly to the First New York Listening Conference in April 2006.

Although the Conference was a significant step in this joint effort, the most important accomplishment to date has been the process itself and the fruits of working, listening, and learning together. It has been a process that has opened many minds and hearts. The process itself has created a platform for the future.

Gaining Trust and Earning Mutual Respect

The process began with the first meeting on May 22, 2003. New York's Native Nations and Tribes — curious, suspicious, hopeful — attended the first meeting and the meetings on November 3, 2003, March 29, 2004, June 24, 2004, August 23, 2004, October 14, 2004, March 25, 2005, September 22, 2005, March 30, 2006, and to the Listening Conference on April 26 – 27, 2006.

Not every Native government was represented at every meeting, but each has attended at least one, and some have not missed any. Not every Native government has agreed with the proposed formal structure for meetings of the Forum; not every one has agreed with even the possibilities for the Forum. Some Nations expressed concerns about participating in any structured arrangement with western justice systems and with Native governments which have developed in western directions. But, they continue to send representatives to the meetings and have engaged as deeply as the other Nations in the effort to identify difficulties[28]

Topics at the meetings ranged from the visionary to the very simple. For example, at one meeting, the State court judges facilitated the ability of Native officials to be heard by State judicial officers. They presented an overview of the State court system and provid-

(footnote 26 continued) tribes who requested assistance, as well as funding the program which opened the Listening Conference on Wednesday evening. As is the case with this Report of Proceedings, points of view expressed at the Conference and in the Conference materials are those of the speakers and authors and do not necessarily represent the official positions or policies of the U.S. Department of Justice.

27 In addition to the Group and Forum meetings, the Committee determined to visit each Native territory. To date, they have traveled to the territories of the Onondaga, the Tuscarora, the Oneida and the Seneca. There they listened and learned first-hand about Native concerns. They have planned more visits for this year.

28 The Committee's visit to Onondaga on September 21, 2005 provides an example. Representatives of the governments of the Onondaga, Cayuga, Tonawanda Seneca, and Tuscarora attended the Longhouse meeting for the Committee's visit. The Clan Mothers and other leaders made clear their concerns about joining any Forum, in a formal way. Their concerns were also expressed by the Tadodaho Sidney Hill (Chief of Onondaga Nation, "Wisdom Keeper" and "Fire Keeper" of the Haudenosaunee), but he also assured the Committee that the Onondaga would have people at every meeting because they need to listen in, and with the permission of the Council of Chiefs, bring back ideas. He said he knew it would help to continue the dialogue.

ed contact information for supervising judges, who had been alerted to expect and accept calls from Native leaders. This was a simple act which facilitated better communications, thereby lowering the level of frustration and misunderstanding.

Far more challenging was the task of achieving a group vision for the Mission Statement and a structure for the Forum. By the meeting of March 29, 2004, Native people and the Committee were engaged fully in the discussion relating to structure. As noted, it is still a work-in-progress and likely to remain so into the future. The important fact is that the concept of working together continues to engage all of the Nations and Tribes, regardless of their thoughts about the formality of the structure.

Similarly, all of the Nations and Tribes worked on the Forum's Mission Statement. The Mission Statement reflects agendas for the Forum, critical problems, ideas, thoughts, and visions. It is an expression of the hope for the success of this initiative. The present Forum Structure and Mission Statement are set out in *Figure 4 on page 14*.

As the meetings proceeded, each participant began to talk about personal experiences with areas of jurisdictional conflicts, and in some cases, with creative solutions to these problems. Knowledge, trust, and respect grew. Suspicion fell away; real hope surfaced. Ultimately three priorities for the Forum emerged: 1) To ensure accurate application of the Federal and State Indian Child Welfare Acts (ICWA); 2) To devise a means of achieving full faith and credit for judgments of tribal justice systems and Federal and State courts (including agreements between law enforcement and other agencies which interact); and 3) To provide judicial education and training, not only about the law impacting New York's Indians, but also about Native cultures and Tribal justice systems. Subcommittees were formed to try to develop, collect, and share creative ways to address these topics.[29]

Planning Together

The meeting of September 22, 2005 was characterized as a "first run" to demonstrate how a typical Forum meeting might proceed and how facilitators could assist in the discussion. New York Justice Hugh Gilbert, the Forum's non-Native co-facilitator, and Russ Jock, a St. Regis Mohawk and acting Native co-facilitator, led the discussion.[25] The subject was the Indian Child Welfare Act. The Group invited a special guest, Jack Klump, the Regional Director of the OCFS, the State office responsible for children's issues. The Forum setting gave participants a chance to talk face-to-face, and it gave this State official a chance to hear, first-hand, complaints and problems with his agency. There were many questions, many concerns, and many informative and useful exchanges. Mr. Klump committed to return to his office and help correct the problems discussed. Not only did his presence help cut through misperceptions about and by this agency, but the discus-

[29] It is important to note that from the beginning all agreed and understood that the Forum would not discuss pending cases, land and tax issues, and casino negotiations.

sion also surfaced the probability that, as to one problem, a complex legislative fix was not necessary; his agency simply needed to change its policy. He promised he would do so.[31]

Another highlight of the meeting was a report from the Conference Planning Committee outlining the agenda and announcing that the Tribal Judicial Institute, located at the North Dakota University Law School, had committed — through the BJA Tribal Courts Assistance Program — to support the New York Listening Conference by providing scholarship funds enabling Native peoples to attend.[32]

The value of the Forum format was demonstrated during the Group's review of the Conference Program and ICWA statute. The discussion generated a passionate exchange regarding Native reactions to some words used to describe the indigenous peoples of New York. The conversation was notable for its plain-talk, as the Native representatives undertook to educate their western colleagues about the offensiveness of many terms. The talk was characterized by good faith, honesty, and one more indication of the trust and respect that continues to grow between the justice communities — good humor.

Justice Gilbert at the end of this meeting spoke for everyone:

> *I think we have shown that we can have common ground. We can take a problem and we can talk about traditional solutions and we can talk about nontraditional or elective solutions and I don't think I've told anybody today what they have to do. I think we just said maybe if we looked at this in the privacy of our own council maybe — maybe you would decide to do something different, maybe you wouldn't. So that's how I see the Forum working. We pick topics that do have general concern. We acknowledge when there can't be a uniform ...solution but we look to see, okay, if we need three solutions, let's see if we can come up with three solutions ...* [33]

After a short meeting of the Forum on March 30, 2006, where the focus was on last minute details for the Listening Conference, the next event was the Listening Conference on April 26 and 27, 2006.

---

30 The Group has yet to achieve consensus as to a method for filling the rotating designation as "Native co-facilitator," in part because the idea of an election is contrary to many Nations' government-by-consensus model. This issue has not affected the effectiveness of the Forum because all Nations and Tribes continue to attend and participate.

31 See transcript of Meeting of Federal-State-Tribal Courts Forum, September 21, 2005 at pp. 93 – 94; 103 – 04. At the end of the meeting, Mr. Klump said:

> *Can I just say I just want to again thank you for inviting me here and I want you to know that I have about eight different points homework assignments and I assure you I will go back and address them and I'll be back in touch with you with some responses.* Id. at 123 – 24.

32 BJA (Bureau of Justice Assistance) is the office at the U.S. Department of Justice responsible for funding tribal courts projects throughout the country.

33 Transcript of Meeting of Federal-State-Tribal Courts, September 21, 2005 at 104 – 05.

FIGURE 4

New York Federal-State-Tribal Courts Forum Planning Group Second Revised Tribal Forum

Structure and Mission Statement

October 22, 2004

STRUCTURE

18 Designated Members (representing each of the 11 participating entities)
9 Tribal Representatives
(One from each of the 9 Nations & Tribes)
5 State Court Representatives
(including at least 1 court administrator)
4 Federal Court Representatives
(including at least 1 court administrator)

OBSERVERS:

- 1 Staff Person (Office of Court Administration)
- The 11 Alternate Designated Members
- Any participants in New York Federal-State-Tribal Courts Planning Group

LEADERSHIP

Facilitators (positions to rotate every 2 years)
1 Native
1 Non-Native

MEETINGS

- Open to all interested parties
- To be held at least once a year

MISSION STATEMENT

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 ICWA 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 ICWA enforcement

CONDUCT OF BUSINESS

1. The Forum may conduct its business and modify its mission as it deems appropriate, by a consensus of its 18 Designated Members.
2. Each Designated Member of the Forum will have one voice in all Forum business and decision-making.
3. Each participating entity will name an Alternate Designated Member to serve on the Forum in the event a Designated Member is unable to participate.

The First New York Federal-State-Tribal Listening Conference

Conference Goal

In 1922, Judge Cuthbert W. Pound, New York Court of Appeals, summarized the situation. He wrote:

> *Three sovereignties are thus contending over the Indians — the Indian Nations, the United States, and the State of New York — none of which exercises such jurisdiction in a full sense.*[34]

It was not so different in 2006 when the Committee, the Forum, and its Native advocates surveyed the contemporary landscape. They realized that these systems intersect at critical junctures, not well understood, involving Indian children and family issues, criminal jurisdictional issues, and respect for each others' judgments.

The unavoidable consequence of the 21st century confluence of laws and cultures is that, regardless of differences in the justice systems, collaboration and understanding are essential. To resolve the tensions between the systems, the first fundamental task of the Conference, the Planners believed, was education.

The Planners envisioned that future conferences and other events would include extensive opportunities for give and take. But for the First Conference:

1. Native communities needed the opportunity to talk freely about the Native historical perspective on the relationships between the Native peoples whose territory is within the modern day boundaries of New York; and
2. Federal and State judges needed to have the opportunity to hear not only about the contours of "New York Indian law," but also about the cultural and community considerations of New York's Native peoples.

For these reasons, the goal of this First Conference was to educate the audience of State and Federal judges as to the applicable law and practice, and about the historical context underpinning the essential elements of working together, understanding, and respect.

In short, the Planners saw the First Conference not as the end, but as the first step; not as a dialogue, but as a more formal educational program to lay the groundwork for the future. It was the beginning of a long process, one which will include many points of interest and conflict and, hopefully, agreement.

Consistent with these goals, panel discussions were planned to provide basic information as to civil and criminal jurisdiction, restorative justice, Native justice systems, ICWA, and potential solutions crafted as Native and western justice systems increasingly encounter each other in the courts of New York.

34 Cuthbert W. Pound, Nationals Without a Nation, 22 Colum. L. Rev. 97, 99 (1922).

Conference Materials

Each person attending the Conference received a remarkably comprehensive collection of basic information in a very large 3-ring binder. *Figure 5.* Assembled and produced by the New York State Judicial Institute, the materials provided a detailed examination of not only the topics of the Conference panels, but also of the historical sweep of the relationships between Native people and the State of New York. Also included with the binder was a Conference CD-Rom that included the contents of the binder itself, an extensive set of reprints, and a bibliography to guide further research.

FIGURE 5

Conference Materials

The Conference materials included a three inch binder, booklets, and a CD which contained the binder contents and additional material, as well as links to informative Internet sites. The Binder's Table of Contents is reproduced in Appendix II.

The Conference Proceedings

Wednesday, April 26, 2006

7:00 p.m. . . . . .Opening of Conference

Tadodaho Sidney Hill of the Haudenosaunee and the Onondaga Nation: *Words of Thanksgiving: "The Words That Come Before All Else"*

Justice Edward M. Davidowitz, Co-Chair, Conference and New York Tribal Courts Committee

7:15 p.m. . . . . .Dinner and Program

Restorative Justice

The spirit and intent of the Conference to understand and honor Native perspectives on justice was demonstrated by the Wednesday evening opening program. Presentations on Restorative Justice explored traditional Native models using community human resources to help simultaneously heal offenders and the breach in the community wellness caused by the negative conduct. The program set the tone for the Conference and suggested practical ways in which western courts could try to use justice systems in a similar fashion to heal, rather than punish. Specific examples were discussed by the Director of the Akwesasne Community Justice Program, a Canadian Crown attorney, a member of the Shinnecock Men's Tribal Council, and an Oneida Nation Peacemaker and Clan Mother.[35] The program was made even more pertinent and informative by a passionate presentation by a Mohawk healer about the depth and extent of the human devastation in many Native communities.

Focus Issues — *Restorative Justice*

Restorative justice is about restoring both the individual and the community.

- Traditional restorative justice can be very successful at getting to the root of a problem and finding a community solution.
- To be successful, restorative justice requires buy-in of participants and respect from outside the system. The process cannot be seen as an "easy way out" by defendants or law enforcement.
- Drug abuse and alcohol addictions that arise from destruction of community/culture and the plight of historical trauma are serious challenges.
- Community and culture are essential supports for recovering from historical and personal trauma.

35 The First New York Listening Conference Agenda, which identifies all the speakers and panelists, is reprinted at Appendix III.

Thursday, April 27, 2006

8:00 a.m. – 8:45 a.m. . . .Opening and Welcome

Niagara River Iroquois Dancers.

Welcome from Representatives of the Committee, New York and Federal officials, and Native members of the Forum.

8:45 a.m. – 10:30 a.m. . . . . .Plenary Session

Indian Country Jurisdiction 101

An Historical Review of Native American Tribal Sovereignty as Reflected in Federal and New York State Indian Law.

After a rousing opening dance by the Niagara River Iroquois Dancers, Conference panel members turned to the complex business of educating the audience, comprised of both New York and Federal judges and officials and representatives from Native communities, as to the history and complexities of the allocation of jurisdictional power between New York, Federal, and Native justice systems.

The plenary session provided an overview of the legal history of the exercise of sovereign jurisdiction by the Indian Nations since the founding of the United States. The panel examined what has been done to limit or support it through Supreme Court decisions, acts of Congress, especially those authorizing New York civil and criminal jurisdiction over Native territories, 25 U.S.C. §§ 232 and 233,[36] and shifting Federal executive branch policy. The impact of these actions, as well as certain New York executive and legislative policy measures, and the legal issues thus created were also examined, using a realistic case scenario. Appendix IV sets forth the case facts and the decision tree.

Focus Issues — *Jurisdiction 101*

- U.S. and state governments initially dealt with Indians as sovereign Nations; these treaties remain relevant and important.
- Nations are developing concepts of traditional justice systems to deal with contemporary problems.
- Recognition of tribal sovereignty both in terms of sovereign immunity and legitimacy of tribal justice systems remains a challenge. This is critical to relationships between Native justice systems and western courts.
- How do Nations feel about the Federal Government giving jurisdiction to the State; does it work for law enforcement; for settling civil disputes?
- Progress in relieving jurisdictional tensions is hard to accomplish with legislative change, but can be accomplished with informal agreements between systems.

10:45 a.m. – 12:15 p.m. . . . . .Plenary Session

Native Justice Systems in New York State

Although principles of peace and justice are the foundation for every Native system, the justice systems of New York Indian Nations and Tribes are not only separate and in most cases different from State and Federal courts, but they are also very different from each other. Each of the nine Indian Nations and Tribes in New York was invited to present an overview of the justice system governing their communities.

During this plenary session, the panelists demonstrated a range and variety of justice systems, from the Onondaga at one end of the Longhouse to the Oneida at the other. The Onondaga panelist told of an oral tradition which is community-based where family, clans, and caring community members act as the justice system. The peace and security of the community relies upon the exercise of personal responsibility and community involvement.

The Oneida provided a striking contrast. Until 1997, the Oneida had a system similar to the

[36] For more information, see text accompanying n. 44.

Onondaga, with justice issues in the control of Men's Council, Clan Mothers, and other Nation representatives. In 1997, the Nation promulgated a charter, establishing courts and comprehensive rules of procedure, similar to the New York system, for some topics. The traditional system stayed in place for other subjects, for instance, domestic matters.

Similarly, the Seneca presented a picture of a system procedurally similar to New York State's, but culturally based on principles of Peacemaking arising from the Seneca 1843 Constitution.

The St. Regis Mohawk representative outlined a work-in-progress discussing the process the Tribe is following to develop a system which is both traditional and "mainstream," including aspects of both the traditional and the western models to meet the requirements of contemporary times.

The Unkechaug's system is based on written tribal rules, customs, and regulations requiring disputes to first go to the Nation's council. Thereafter, nothing prevents people from going to New York courts. The Unkechaug are focused, and have had some success, on getting State courts to apply Unkechaug law under choice of law principles when appropriate.[37]

Finally, in addition to Native justice systems arising out of history and cultures, New York State's Indian Law includes a maze of statutes incorporating or purporting to control the law of New York's Nations and Tribes.[38]

Focus Issues — *Native Justice Systems*

- Nations without western-style courts or written law still have law and a justice system that should command respect.
- Systems that borrow from mainstream, western systems can work and can also incorporate traditional and restorative justice concepts.
- Building a tribal justice system should begin with a hard look at what is already in place and what will improve it with the help of stakeholders, including tribal council, surrounding jurisdictions, law enforcement, and tribal/state service agencies.
- Challenges include internal conflict and lack of respect for traditional and non-federally recognized systems.

37 *See, e.g.,* Magee v. Bell, 12 Misc. 3d 1157(A), 819 N.Y.S. 2d 210, 2000 WL 34857199 (N.Y. Sup.), 2000 N.Y. Slip Op. 50007 (Aug. 7, 2000); Dana v. Maynes, (Index No. 3561/35 N.Y. Co. Ct., Suffolk Co.); Bennett v. Fink Const. Co., 47 Misc. 2d 283, 262 NY.S. 2d 331 (N.Y. Sup. Ct. Aug. 10, 1965).

38 As early as 1779, legislation was enacted regulating conduct on New York's Indian territories. This legislation, augmented and amended from time to time, is the genesis of New York Consolidated Law, Chapter 26, Arts. 1 – 114 (New York Indian Law). In 1978, many of these statutes were repealed or renumbered. Many seem to have no contemporary purpose or effect, but remain on the books.

INDEX TO NEW YORK'S "INDIAN LAW" McKINNEY'S, ch.26
NY INDIAN Refs & Annos
CHAPTER 26 OF THE CONSOLIDATED LAWS
ARTICLE 1 – SHORT TITLE
ARTICLE 2 – GENERAL PROVISIONS
ARTICLE 3 – THE ONONDAGA TRIBE
ARTICLE 4 – THE SENECA INDIANS
ARTICLE 5 – THE SENECA INDIANS ON THE ALLEGANY AND CATTARAUGUS RESERVATIONS
ARTICLE 6 – THE SENECA INDIANS ON THE TONAWANDA RESERVATION
ARTICLE 7 – THE TUSCARORA NATION
ARTICLE 8 – THE SAINT REGIS TRIBE
ARTICLE 9 – THE SHINNECOCK TRIBE
ARTICLE 10 – THE POOSPATUCK (UNKECHAUGE) INDIAN NATION
ARTICLE 15 – LAWS REPEALED; WHEN TO TAKE EFFECT

- Funding and conflict among leaders are challenges for the development of justice systems. There is a need to look to the supports that are already in place.

The dialogue among the Native panelists, whose justice systems range from the very traditional to the very western, demonstrated that dedicated people with open minds can sit down, talk, and educate each other and the larger audience. For example, the Onondaga representative, while strongly advocating the traditional system, acknowledged that different factors may drive different styles of governance, noting that Nations committed to the traditional system have small populations, while others, such as the St. Regis Mohawk, with its larger population and unique border issues, might need a different system.

Luncheon Speaker

Oren Lyons, *Faith Keeper, Onondaga Nation*

Oren Lyons, a Chief of the Turtle Clan and Faith Keeper of the Onondaga Nation of the Haudenosaunee, spoke passionately about Native people's history, values, and prophecies. He spoke of respect for nature, of the spiritual basis of law, the importance of participating in community, and of responsibility to future generations. He spoke of the Great Law of Peace, which has guided the Confederacy through five centuries. He explained the Grand Council of the Haudenosaunee; he told of the right of each Nation to regulate its own matters and described the Council's power to resolve disputes between member Nations. His unvarnished words emphasized the negative impact of western policies on Native peoples throughout history. It was a message that needed to be sent. It cleared the air for more positive interactions. It provided a valuable perspective for all Conference participants.

1:30 p.m. – 3:00 p.m. . . . . Concurrent Sessions

SESSION A:

Indian Children in State Family Courts
Understanding and Applying ICWA in New York

From the beginning of the dialogue between the Committee and the Native people who shared its work and Mission, the treatment of Indian children in New York State courts has been the single most pressing concern.[39] The Federal and State statutory scheme is designed to give Indian Nations and Tribes a leading voice whenever issues relating to the care and placement of Native children come before New York State courts. In spite of congressional findings,[40] the requirements of the Federal statute,[41] the State statutes and regulations,[42] and the best

39 *See supra* pp.12 – 14.

40 *See* 25 U.S.C. § 1901. Congressional Findings, stating among other things, at subsection (5) that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities."

41 Indian Child Welfare Act, 25 U.S.C., §§ 1901 – 1963.

42 N.Y. Comp. Codes R. & Regs. Tit. 18, § 428.9, 18 NYCRR, §§ 428.9, 430.11 – 12, 431.18. *See also* N.Y. Soc. Serv Law §§ 2,39,358 – a,b; (June 15, 2006); N.Y. Family Ct. Act § 1089 Art. 10 (July 26, 2006).

efforts of the State's Office of Children and Family Services,[43] Native peoples complain that New York State Family Courts are not following the letter and spirit of these very special laws. An especially disturbing grievance is the lack of respect given by some judges to Native people. Whether driven by ignorance of Native cultures, a narrow view of Indian people, or a failure to understand the law, the perception and reality of this attitude exacerbates an already difficult and usually tragic legal entanglement. This panel was designed to show how the statute is supposed to work through use of frequently encountered scenarios. In fact, the panelists never got to the hypotheticals, due to the urgent need for Native peoples to tell the story of their fears and frustrations in real cases.

Focus issues — *The Indian Child Welfare Act*

Education essential for all communities

- For judges: in spite of materials available, few have read the ICWA statutes.
- For Native peoples: to improve the system within the community.
- Law guardians: must be trained, too; don't always want to know if a child is Indian.
- Nations and judges must be informed about higher levels of proof required in these cases.
- Nations and judges must understand the role of an expert witness in the process.
- Judges must understand that expert witness qualifications in this context are designated by Tribes and may not be based on routine education and experience.
- Nations should be treated as a "third parent;" not just support for individual parent.

Courts must understand that there are considerations which must be taken into account relating to notice and a Nation's decision as to whether to intervene.

- Judges must understand that reaching a decision may take longer because of a Nation's process, e.g., Clan Mother deliberations.
- Native deliberative processes take longer than the time permitted by courts.
- Notice is problematic because of lack of phone services.
- Placement priorities take time to accomplish: extended family, within the clan, then the Nation, then another Nation.
- Judges should ask to see a copy of the notice given to the Nation.
- To assure that response to the notice required by statute is authorized, judges should insist that it is in writing.

Session B:
Criminal Jurisdiction in Indian Country
The Application of 25 U.S.C. Section 232

The panelists focused on a Federal statute enacted in the late 1940s after fierce lobbying by the State of New York, which empowered

[43] The Office of Children and Family Services (OCFS) has created an "Indian Child Welfare Act Compliance Desk Aid for New York State Child Welfare Workers" (OCFS Publication # 5046) (Rev. 9/06) which sets forth in clear terms what is mandatory under the federal statute and the New York State regulations. Conference attendees received this very useful aid as part of their Conference materials. Each attendee also received a booklet produced by OCFS entitled "A Guide to Compliance With the Federal Indian Child Welfare Act in New York State." (OCFS Publication # 4629).

New York to exercise concurrent criminal jurisdiction in Native territories. At the time, no state had been given such sweeping jurisdiction.[44] Criminal matters in Indian Country were handled by the Federal and Tribal Governments. The panel addressed the impact of the New York statute in light of other Federal laws purporting to regulate and guide the various and complex paths to State, Federal, and Native prosecution.[45] Through the use of charts and a typical case scenario, panelists and the audience worked through the complex jurisdictional analysis requiring — in every case — consideration of the nature of the crime, the criminal, the victim, and where and when the crime occurred. *See Figure 6 and Appendix V.*

Focus Issues — *Criminal Jurisdiction*

- New York is different from most of the country because local enforcement authorities have the power to police Native territories. Is this working or regarded as an intrusion?
- Can the risk of problems created by intrusion be mitigated by agreements with local law enforcement?
- Cooperative agreements between tribal law enforcement courts and state can make the process go more smoothly.
- Cooperation does not need to take the form of formal agreements.
- Lack of federal involvement — is this an issue? Does a combination of State and Native justice systems adequately address safety and security concerns?
- There is a need to recognize difficulties that Federal and New York State court systems impose on Natives and the need to improve cultural competency of these courts.
- There are several challenges to Natives using Federal and State courts including distance and some lack of cultural competency in those courts.

3:15 p.m. – 4:15 p.m. . . . . .Plenary Session

Problem Solving — *Hopes/Wishes for Justice Systems and Interface Between Native and Non-Native Justice Systems*

The First Listening Conference ended with a panel intended to generate an ongoing dialogue focusing on the unavoidable instances where powerful currents push Native and non-Native justice systems on collision courses. As one Native speaker put it, although the Two Row Wampum and 18th century treaties expressed separate spheres of jurisprudential sovereignty, in contemporary times the two parallel rows often converge in matters involving delivery of equal justice to the people of New York Nations and Tribes, the State of New York, and the Federal Government.

---

44 25 U.S.C. § 232. Jurisdiction of New York State over offenses committed on reservations within State.

> 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, of 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.

This statute eventually served as the model for Public Law 280 by which — with some important differences — the U.S. Congress gave criminal jurisdiction to several states.

45 The two most important are the General Crimes Act of 1817, 25 U.S.C. § 1152, limiting the power of Indian nations to police their own territories by providing for exclusive federal jurisdiction over non-Natives committing crimes in Indian Country; and the Major Crimes Act of 1885, 25 U.S.C. § 1153, asserting federal jurisdiction concurrent with tribal jurisdiction for an enumerated list of felonies committed in Indian Country, regardless of the race of the offender or the victim. The Indian Civil Rights Act, passed in 1968, effectively reduced tribal criminal jurisdiction to the misdemeanor level. 25 U.S.C. § 1302.

FIGURE 6

United States Department of Justice Indian Jurisdiction Analytical Chart

II. Summary Chart

The following Chart sets forth in summary form which government entity has jurisdiction in various types of scenarios.

A. WHERE JURISDICTION HAS NOT BEEN CONFERRED ON THE STATE

OFFENDER	VICTIM	JURISDICTION
Non-Indian	**Non-Indian**	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	**Indian**	Federal jurisdiction under 18 U.S.C. § 1152 is exclusive of state and tribal jurisdiction.
Indian	**Non-Indian**	If listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. If not listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but not of the tribe, under 18 U.S.C. § 1152. If the offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state law is assimilated under 18 U.S.C. § 13.
Indian	**Indian**	If the offense is listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. See section 1153(b). If not listed in 18 U.S.C. § 1153, tribal jurisdiction is exclusive.
Non-Indian	**Victimless**	State jurisdiction is exclusive, although federal jurisdiction may attach if an impact on individual Indian or tribal interest is clear.
Indian	**Victimless**	There may be both federal and tribal jurisdiction. Under the Indian Gaming Regulatory Act, all state gaming laws, regulatory as well as criminal, are assimilated into federal law and exclusive jurisdiction is vested in the United States.

This Chart and the other information in this outline comes from the "United States Attorneys' Manual" published by the Executive Office for United States Attorneys and is distributed to each United States Attorney's Office and Litigating Division of the Department of Justice. Requests for copies should be submitted in writing to the Executive Office for United States Attorneys, Manual Staff, Main Justice Building, Rm. 1627, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530. Copies are available for other federal agencies by calling 202-514-4633. The Manual is made available to the public through the Government Printing Office (GPO). Mail orders should be sent to the following address: Superintendent of Documents Subscription Entry U.S. GPO Washington, D.C. 20402. Telephone orders: 202-512-1800.

FIGURE 6 *(continued from pg. 23)*

B. WHERE JURISDICTION HAS BEEN CONFERRED BY PUBLIC LAW 280, 18 U.S.C. § 1162

OFFENDER	VICTIM	JURISDICTION
Non-Indian	**Non-Indian**	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	**Indian**	"Mandatory" state has jurisdiction exclusive of federal and tribal jurisdiction. "Option" state and Federal Government have jurisdiction. There is no tribal jurisdiction.
Indian	**Non-Indian**	"Mandatory" state has jurisdiction exclusive of Federal Government but not necessarily of the tribe. "Option" state has concurrent jurisdiction with the federal courts.
Indian	**Indian**	"Mandatory" state has jurisdiction exclusive of Federal Government but not necessarily of the tribe. "Option" 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 in an option state if impact on individual Indian or tribal interest is clear.
Indian	**Victimless**	There may be concurrent state, tribal, and in an option state, federal jurisdiction. There is no state regulatory jurisdiction.

C. WHERE JURISDICTION HAS BEEN CONFERRED BY ANOTHER STATUTE (25 U.S.C § 232, CONFERRING CERTAIN CRIMINAL JURISDICTION ON NEW YORK STATE)

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.

It is hoped that the issues raised by this Problem Solving panel will lead to an increasingly deep and broad discussion of surfacing issues, identifying problems, wishes, and actual models for working together, while respecting the principles of the Two-Row Wampum.

Repeatedly, the panelists used simple, people-to-people language to describe successful practical strategies. Again and again they referred to "working face-to-face," "getting away from preconceived ideas about each other," and "hope for respect."

Some of the cooperative models presented by this panel and by others throughout the Conference are:

1. ICWA.

A. Model agreements with New York State. The St. Regis Mohawk shared a Child Welfare Services Agreement the Tribe has with the New York State Department of Social Services. The document provides for Tribal control and State reimbursement for services relating to foster care, preventive services, and adoption services to Indian children, pursuant to Section 39(2) of the Social Services Law. The agreement, executed in August 1993, sets forth the Tribal plan, which may serve as a useful model for other Nations and Tribes interested in similar agreements.

B. Strategy to improve knowledge and communications with law guardians. A Tuscarora representative described her initiative to bring together law guardians in her district with members of the Nation to talk about the importance of Tuscarora heritage and ICWA. The idea not only provided other attendees with a model, but the Conference also advanced the project significantly because the Supervising Judge of the Family Court of the relevant district was in the audience and later met with the Tuscarora representative in an effort to support and implement the idea.

2. ACHIEVING FULL, FAITH AND CREDIT FOR JUDICIAL JUDGMENTS AND COMITY FOR ORDERS. From the first meeting with Native members of the Planning Committees, the issue of whether New York State courts are according "full, faith and credit" to Native judgments has been a matter of great concern.

A. ICWA. In the ICWA context it was made clear that the reciprocal recognition of the judgments of non-Native and Native courts is mandated by law. The real question for future dialogue is exactly which judgments does the law encompass?

B. Comity and reciprocal arrangements. Another means of assuring full faith and credit for certain judgments of Native courts was included in the Oneida Ordinance No. 0-97-02, Art. 18. The Article provides for recognition of specified final judgments of other courts, conditioned upon reciprocity.

C. Orders of protection. The United States Attorney's Office for the Western District of New York has produced a manual for handling domestic violence cases including an explanation of the provisions of the Federal Violence Against Women Act (VAWA), 18 USC § 2265, codified in New York State law, NY CPL

140.10 (b). Under the law, New York must enforce valid orders of protection issued by tribal courts as if they were issued by a New York court. The excerpt from the manual applying to tribal orders was distributed to attendees as part of the Conference materials. The manual sets forth a helpful checklist.

3. **LAW ENFORCEMENT AGREEMENTS.** Three different approaches to cooperation between Tribal and local law enforcement in New York were presented. The first was from the Onondaga who have no police force or written codes of conduct, and who resolve disputes through their community-based clans. However, because of 25 U.S.C. § 232, the fact is that local, non-Native law enforcement officers have the power to enter upon the Nation's territory and enforce New York State law. Long ago the Onondaga worked out an agreement, recognized by New York courts, with the Onondaga County Sheriff's office whereby the local law enforcement officers do not come onto the territory unless they are invited by the Chief, or in the case of a life threatening situation.[46] The Onondaga also reported an arrangement with the local town court whereby cases can be taken out of the court and returned to the Nation if the Nation's member accepts responsibility and the authority of the Nation. In the words of the Onondaga panelist, this is a good example of the power of "peacemaking and the use of the good mind," an important aspect of Onondaga justice principles.

The St. Regis Mohawk Tribe, on the other hand, supported by community desire to have a Tribal Police Force, persuaded the New York State legislature to enact a statute empowering the Mohawk Police Force.[47] After training and certification, the St. Regis Mohawk police are cross-deputized with the Franklin County Sheriff's office. With the exception of the geographic limitation to St. Regis Mohawk territory, they are in all other respects New York State officers and can enforce State as well as Tribal law against Native and non-Natives.

The Shinnecock — with no formal western-style courts and no police force — must deal directly with New York authorities for law enforcement and community safety. Their representative described a successful strategy to reduce tensions when local authorities came into Shinnecock territory to serve orders of protection. The insensitive and disrespectful conduct of the servers was changing the focus from protecting an abused person to resentment for the intrusion. The matter was resolved when New York State judges came to the Shinnecock Nation, met with leaders, and agreed that when an order is issued requiring intrusion, or removal, the Nation will be contacted first and, if desired, the servers can be

46 See Papineau v. Dillon, No. 93-CV-491 (N.D.N.Y. , August 26, 1993) (recognizing the agreement and upholding its constitutionality). Unpublished opinion included in Conference materials.

47 N.Y. Indian Law ch. 26 § 114 (2005).

escorted onto the territory. This simple show of deference to the Nation has greatly reduced tensions.

C. Sample MOUs. Conference participants were also given a sample Federal Memorandum of Understanding (MOU) and protocol controlling the way in which Federal and Tribal law enforcement agencies work together for the most effective use of resources to ensure the security and safety of Native peoples.

4. **OTHER MODELS FOR RESOLVING DISPUTES AND WORKING TOGETHER.** Among the materials provided to Conference attendees was the agreement reached just five weeks earlier between the Oneida and the City of Oneida, resolving the decades-old, bitterly divisive lawsuits regarding real estate taxes. The words of the preamble of the agreement presages commitment to future cooperative problem-solving:

   Whereas the City and the Nation share an interest in resolving the disputes between them, and in promoting cooperation between them, that will promote the general welfare with respect to issues involving public finance, health, and safety ...

5. **INCORPORATING PRINCIPLES OF TRADITIONAL HEALING INTO JUSTICE SYSTEMS MODELED ON NON-NATIVE COURTS.** Some of New York's Nations have recently adopted non-Native models for their evolving justice systems, but in each instance the principles of restorative justice are emphasized in codes and rules. For example, when the Oneida Nation voted to form the Oneida Nation Court, modeled on New York courts, the Criminal Rules set out a specific policy — unique to the Oneida — emphasizing restitution and reconciliation of the offender, victim, and Nation in order to restore the offender to harmony with the community.

6. **INCORPORATING NON-NATIVE STRUCTURE AND PROCEDURE IN CONNECTION WITH TRADITIONAL JUSTICE CONCEPTS.** The Seneca Nation described a system that has many of the indices of a non-Native justice system. There are lower courts and appellate courts, both with rules of procedure, but the method of dispensing justice is in the Peacemaker tradition. This system has been functioning since the 1843 Seneca Nation Constitution.

7. **URGING NEW YORK COURTS TO APPLY CHOICE OF LAW PRINCIPLES AND TO APPLY TRADITIONAL AND CUSTOMARY LAW WHEN APPROPRIATE.** The Unkechaug talked of yet another model for integrating the non-Native law of New York and the traditional and customary law of the Nation, using choice of law concepts.

Focus Issues — *Hopes and Wishes*

- Need to have the State system recognize the role of Clan Mothers.
- Others working with Native people to understand culture and community.
- Need to avoid preconceived notions of each other to work together.
- Understanding Native culture and getting involved on a personal level is the key to working successfully with Nations.

- Respect includes recognition of the impact of law enforcement intrusions.
- Need to develop agreements to work together on law enforcement and security issues.
- Volatility of American politics undermines cooperation because of the lack of a consistent policy and the inability to make long-term agreements.
- Need to face racism and inequity.

4:15 p.m. .....Closing

Oneida Nation Dancers
Justice Hugh Gilbert, *Forum Co-Facilitator*

Traditional closing .....Tadodaho Sidney Hill

The Future

Navigating the River Together in the 21st Century

". . .Continue this excellent effort on the local level in every county where there are tribal nations, especially re: ICWA, domestic violence (VAWA full faith and credit), interstate custody (USSJEA) + support (UIFSA)—all laws treating tribes as nations—judges, attorneys, agency workers, cops, law guardians all need training."

— One of many positive comments from participants

The response to the Conference was overwhelmingly positive. The audience of State and Federal judges and officials and representatives and members of New York's Nations and Tribes praised the concept, the program, the quality of the Native and non-Native panelists, and urged future activities. In session after session the attendees reported that they had received valuable information. Even those Nations that adhere to traditional justice systems gave the Conference high marks and urged the organizers and the Forum to continue the initiative.[48]

The Forum next met on October 19, 2006, and it was clear that the Conference had energized, and indeed galvanized, the Forum as participants discussed ways to use the enormous enthusiasm generated to maintain the momentum and further the Mission of the Forum.[49] The Conference evaluations have given the members of the Forum valuable guidance as to next steps. A sampling:

"We need more time — for discussion, for questions, and to get to know one another.

48 In the words of one participant who gave the Conference an Excellent rating:

Not use[ful] to the Onondaga and Towanda Seneca Nations — as we disagree with a lot that was said. However you must be ready to continue this as this was the first since the beginnings of the U.S.A. Thank you very much for how this was started (must use the people who are not here).

49 For example, three subcommittees were formed at the October 19th Forum meeting, each a clear product of the Conference. A subcommittee was formed to focus on issues of full faith and credit and to develop a proposal for a court rule to clarify the law and guide judges in this area. A second committee was formed to review court clerk training with an eye to including the tribal court clerks. And finally, the Oneida and Seneca jointly proposed that a subcommittee be formed to develop a website for the Forum, which would in effect enable the listening begun at the Conference to continue. Also notable at this Forum meeting was the decision initiated by the Nations to hold a meeting at the Seneca Nation to discuss a mechanism for designating Native co-facilitators to the Forum.

Let's start working on the next Conference and continue to emphasize sovereignty."

"A yearly Conference such as this. Mandate lawyers, law guardians, and judges to be here. Let's keep moving forward, do not stop here!"

"... an incredible amount of information fitted into the Conference; maybe a little more time for audience questions? No time for attendees to talk among themselves and exchange ideas or information. So much to learn and share! This was a fabulous, ambitious and historic undertaking ... Thank you for doing this!"

"... I would strongly encourage continuing ongoing communications, education, and dialogue. This Listening Conference was a terrific and important step."

"Continue communicating. Why is there no education re: tribal issues ... in the education systems for lawyers, judges, etc.?"

"Excellent program. Should be part of all judicial training."

"The training materials — unbelievable! This should support regional meetings! Maybe also a statewide curriculum for multi-disciplinary partners — legal and child welfare."

"Just keep them going ... if you could make sure that someone from every county is in attendance."

Well aware that the success of future efforts to work together necessitated an airing of past grievances, and understanding that a large amount of information needed to be imparted, the First Listening Conference, by design, left little time for talking.

The next vital step for the Forum is to formulate an agenda for the future that gives many people a chance to exchange information and to share insights across cultural divides; to learn to travel the river together in the 21st Century.

New York has an impressive beginning and a strong commitment and support to continue the journey together.

Appendix I

Sponsors and Participating Entities

New York Tribal Courts Committee

The New York Tribal Courts Committee was established by Judith S. Kaye, Chief Judge of the State of New York, and John M. Walker, Chief Judge of the United States Court of Appeals for the Second Circuit, to explore setting up a tribal justice forum in New York State. Appointed from the New York State Unified Court System and from the New York federal courts, the members of the committee are: Hon. Marcy L. Kahn, Justice of the New York Supreme Court, Co-Chair; Hon. Edward Davidowitz, Justice of the New York Supreme Court, Co-Chair; Hon. John Collins, Administrative Judge of the New York Supreme Court, Bronx County; Hon. Hugh Gilbert, Supervising Judge of the New York Family Courts for the Fifth Judicial District; Hon. Lizabeth Gonzales, Bronx Civil Court Judge; Hon. Norman Mordue, Chief Judge, United States District Court, Northern District New York; Hon. Hugh B. Scott, United States Magistrate Judge, Western District New York; Karen Greve Milton, Second Circuit Executive for the United States Courts for the Second Circuit; Janice Kish, Esq., Assistant Circuit Executive for the United States Courts for the Second Circuit; Joy Beane, Esq., Associate Counsel, New York State Judicial Institute; Mary B. Curran, Chief Clerk, St. Lawrence County; Lisa Meyer, Chief Clerk, Ogdensburg City Court; Todd W. Weber, Esq., Principal Law Clerk to the Deputy Chief Administrative Judge for the New York State Courts Outside of New York City.

New York State Judicial Institute

The New York State Judicial Institute is a year-round center for judicial education and training, focused on keeping New York State Judges and their court staff abreast of current developments in the law, as well as related disciplines that influence the law. The Judicial Institute is headed by the Honorable Robert G.M. Keating and is located in White Plains, New York.

Center for Indigenous Law, Governance and Citizenship at Syracuse University College of Law

The Center for Indigenous Law, Governance and Citizenship is a research based law and policy institute focused on Indigenous nations and their development and interaction with the United States and Canadian governments. Robert Odawi Porter is the Founding Director of the Center, and Carrie Garrow, Esq. is the Executive Director. http://www.law.syr.edu/academics/centers/ilgc.

Tribal Judicial Institute

The Tribal Judicial Training Institute at the University of North Dakota School of Law was founded in 1993 with a grant from the Bush Foundation to provide technical assistance and training to the tribal justice systems in the Northern Plains area.. The Tribal Judicial Institute's Director is Honorable B.J. Jones; the Assistant Director is Michelle Rivard Parks; the Staff Attorney is Tahira Hashmi. http://www.law.und.nodak.edu/npilc/judicial/index.php.

Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice

Robert H. Brown is the Senior Policy Advisor, Tribal Justice, at the Bureau of Justice Assistance, who has been an early and enthusiastic supporter of the First New York Listening Conference. The New York Listening Conference is supported in part by Grant No.2004-IC-BX-1469 awarded by the Bureau of Justice Assistance, Office of Justice Programs, United States Department of Justice. Points of view expressed at the Conference and in the Conference materials are those of the speakers and authors and do not necessarily represent the official positions or policies of the United States Department of Justice.

Appendix II

Materials Binder Table of Contents

2006 New York Listening Conference
Marx Hotel, Syracuse, New York • April 26 – 27, 2006

TABLE OF CONTENTS

b. Indian Children in State Family Courts: Scenarios
   - St. Regis Mohawk Tribe's Child Welfare Services Agreement
   - In re Baby Boy C, 805 N.Y.S.2d 313 (1st Dept. 2005)
   - United States Department of the Interior, Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings
   - Address and Telephone Numbers of New York State Indian Nations/Tribes, New York State Office of Children and Family Services

8. Criminal Jurisdiction in Indian Country: The Application of 25 U.S.C. ' 232

a. Criminal Statutes Applicable in New York:
   - 25 U.S.C. ' 232
   - 18 U.S.C. ' 1152
   - 18 U.S.C. ' 1153

b. Practical Applications of Indian Law
   - Memorandum of Understanding Re: Indian Law Enforcement Reform Act

c. Policy Issues on Criminal Prosecutions in Indian Country
   - Kenneth K. Washburn, The Federal Criminal Justice System in Indian Country and the Legacy of Colonialism, March/April 2005, THE FEDERAL LAWYER
   - Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)

d. Selected Criminal Statutes
   - 18 U.S.C. ' 7
   - 18 U.S.C. ' 13
   - 18 U.S.C. ' 1162
   - 25 U.S.C. " 1301 – 1303

9. Problem-Solving: Hopes/Wishes for Justice Systems and Interface Between Native and Non-Native Justice Systems

- Cross-Deputization Agreement Memorandum of Understanding between St. Regis Mohawk Police and Franklin County Sheriff's Office
- NY Indian Law ' 114
- Tax and Regulatory Memorandum between Oneida Indian Nation and the City of Oneida
- Special Deputization Agreement (and Notice of Termination) between the County of Oneida and Oneida Indian Nation
- Special Deputization Agreement (and Notice of Termination) between the County of Madison and Oneida Indian Nation
- Memorandum of Understanding between the United States Department of Justice and the City of Oneida

Appendix III Listening Conference Agenda

Wednesday, April 26, 2006

7:00 p.m. — **Opening** — **Lafayette Room**

OPENING — **Opening Words of Thanksgiving: "The words that come before all else"**
Tadodaho, Sidney Hill *of the Haudenosaunee and the Onondaga Nation*

GREETING — **Hon. Edward Davidowitz,** *Conference Co-Chair, New York Tribal Courts Committee Co-Chair*

7:15 p.m. – 9:30 p.m. — **Dinner and Program** — **Lafayette Room**

Restorative Justice

This program will address principles of restorative justice and its use in traditional tribal judicial systems.

PROGRAM CHAIR — **Todd Weber, Esq.**

SPEAKERS — **Rena Smoke,** *Director, Akwesasne Community Justice Program*
Murray MacDonald, Esq., *Crown Attorney for Stormont, Dundas, and Glengarry Counties, Province of Ontario*
Valerie Staats, *Native American Council on Alcoholism and Substance Abuse, Inc.*
Reverend Mike Smith, *Shinnecock Men's Tribal Council*

COMMENTARY — **Marilyn John,** *Oneida Nation Peacemaker and Clan Mother*

Thursday, April 27, 2006

7:30 a.m. – 8:00 a.m. — **Registration and Breakfast**

8:00 a.m. – 8:45 a.m. — **Welcoming Greetings** — **Lafayette Room**

Hon. Marcy L. Kahn, *Conference Co-Chair and New York Tribal Courts Committee Co-Chair*
Hon. Ann Pfau, *First Deputy Chief Administrative Judge, New York State Unified Court System*
Hon. Richard C. Wesley, *Circuit Judge, United States Court of Appeals for the Second Circuit*
Mr. Brian Patterson, *Oneida Nation Men's Council*
Niagara River Iroquois Dancers

8:45 a.m. – 10:30 a.m. — **Plenary Session** — **Lafayette Room**

Indian Country Jurisdiction 101: An Historical Review of Native American Tribal Sovereignty as Reflected in Federal and New York State Indian Law

This panel will provide an overview of the legal history of the exercise of sovereign jurisdiction by the Indian Nations since the founding of the United States, and what has been done to limit it, or support it, over the years through United States Supreme Court decisions, acts of Congress, and executive branch policy. The impact of these actions, as well as certain New York executive and legislative policy measures, and the legal issues thus created will also be examined, using realistic case scenarios. Time will be reserved for a question and answer session.

MODERATOR — **Hon. Marcy L. Kahn**

SPEAKERS — **Professor Robert Odawi Porter,** *Syracuse University College of Law*
Professor Carrie Garrow, *Executive Director, Center for Indigenous Law, Governance and Citizenship*
Professor Jo Ann Harris, *Pace University School of Law*
Peter Carmen, *General Counsel, Oneida Nation*

10:30 a.m. – 10:45 a.m. — **Break**

10:45 a.m. – 12:15 p.m. — **Morning Plenary Session** — **Lafayette Room**

Native Justice Systems in New York State

Speakers from the Indian Nations in New York will discuss the formal court systems as well as the more traditional concepts of justice used by their Nations.

MODERATOR **Hon. Edward Davidowitz**

SPEAKERS **Joseph Heath,** *General Counsel, Onondaga Nation*
Hon. Stewart Hancock, *Chief Appellate Judge, Oneida Nation*
Russ Jock, *former Tribal Courts Research and Development Coordinator for the St. Regis Mohawk Tribe*
Chief Harry Wallace, *Unkechaug Nation*
Hon. Robert Pierce, *Administrative Judge of the Supreme Court of the Seneca Nation; Councilor of the Seneca Nation Council*

12:30 p.m. – 1:30 p.m. **Lunch** **Horizons**

KEYNOTE SPEAKER **Oren Lyons,** *Faithkeeper, Onondaga Nation*

1:30 p.m. – 3:00 p.m. **Afternoon Concurrent Sessions** **Lafayette: Rooms A and B**

SESSION A — Indian Children in State Family Courts: Understanding ICWA and Applying ICWA in New York

Panelists will use frequently encountered scenarios to illustrate the Indian Child Welfare Act (ICWA) and its application in New York.

MODERATOR **Hon. Hugh Gilbert,** *Supervising Judge of New York State Family Courts for the Fifth Judicial District*

SPEAKERS **Hon. Barbara (Cree) Potter,** *St. Lawrence County Family Court*
Margaret Burt, Esq.
Jamie Bay, *Assistant Executive Director, St. Regis Mohawk Tribe*
Jamie Gilbert, *Tuscarora Home School Coordinator*

OR

SESSION B — Criminal Jurisdiction in Indian Country: The Application of 25 U.S.C. § 232

This panel will address the various paths of prosecution and how the jurisdiction is actually applied and will discuss the effect of federal law on the jurisdiction of state courts over crimes committed by Natives or non-Natives in Indian Country, the extent and limits of federal criminal jurisdiction over Natives and non-Natives in Indian Country, and the effect of federal law on the authority of Native courts to conduct criminal prosecutions.

MODERATOR **Hon. Marcy L. Kahn**

SPEAKERS **Hon. Hugh Scott,** *U.S. Magistrate Judge, W.D.N.Y.*
Peter Carmen, *General Counsel, Oneida Nation*
Professor Jo Ann Harris, *Pace University School of Law*

3:00 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:15 p.m. **Afternoon Plenary Session** **Lafayette Room**

Problem-Solving: Hopes / Wishes for Justice Systems and Interface Between Native and Non-Native Justice Systems

The focus of this panel will be meeting challenges that arise at the interface of different court systems. Speakers will address areas in which cross-jurisdictional efforts have proven successful and will identify others where similar initiatives might prove fruitful, including possible development of jurisdictional protocols.

MODERATOR **Professor Carrie Garrow**

CO-COORDINATOR **Hon. John Collins,** *Administrative Judge, New York Supreme Court, Bronx County*

SPEAKERS **Jamie Gilbert,** *Tuscarora Home School Coordinator*
Marguerite A. Smith, Esq., *Shinnecock Nation Representative, Suffolk County Executive Task Force to Prevent Family Violence*
Andrew Thomas, *St. Regis Mohawk Tribe Police Department*
Oren Lyons, *Faithkeeper, Onondaga Nation*

4:15 p.m. – 5:00 p.m. **Closing**

Oneida Nation Dancers

Closing Remarks **Hon. Hugh Gilbert,** *Forum Co-Facilitator*

TRADITIONAL CLOSE **Tadodaho, Sidney Hill** *of the Haudenosaunee and the Onondaga Nation*

Appendix IV

Hypothetical Civil Case Study for Jurisdiction 101 Panel

By Peter D. Carmen
General Counsel, Oneida Indian Nation

An Indian Tribe and General Contractor enter into an agreement for construction of a new building on reservation land. A dispute arises over the construction relating to alleged delays and workmanship issues. The Tribe withholds payments from the General Contractor due to its complaints.

1. (a) Can the General Contractor sue the Tribe in New York State Supreme Court?
   (b) Does it make a difference if the contract includes a "choice of law" provision?
   (c) A forum selection clause?
2. The Tribe wishes to recover payments already made to the General Contractor due to poor workmanship. (a) Can the Tribe sue the General Contractor in Supreme Court? (b) If the Tribe asserts the claim, can the General Contractor counterclaim against the Tribe in Supreme Court?
3. Instead, suppose the construction occurred off reservation land. (a) Can the General Contractor sue the Tribe for non-payment? (b) Can the Tribe sue the General Contractor for recovery of payments already made? (c) Can the General Contractor counterclaim against the Tribe?
4. (a) Can the General Contractor, or any of its unpaid subcontractors, assert mechanic's liens on the Tribe's reservation property?
   (b) Can they assert a mechanic's lien on the Tribe's non-reservation property?
5. Recognizing the tribal sovereign immunity problem, the General Contractor looks for ways to assert its claim against parties who do not have immunity. (a) Can the General Contractor sue individual tribal leaders instead of the Tribe? (b) Can the General Contractor sue non-Indian managers or employees (e.g., a director of finance) to compel them to make payment? (c) Can the General Contractor sue the Tribe's outside project manager or architect, as the party responsible for contract compliance, based upon the Tribe's failure to comply with the contract?

The Answers

An Indian tribe and a General Contractor enter into an agreement to construct a building. A dispute arises over delays and workmanship. The tribe withholds payment from the General Contractor based on the tribe's complaints.

1. **Can the General Contractor sue the Tribe for contract damages?**
   (a) Tribes recognized by the Federal Government (on a list published by the U.S. Department of the Interior, more or less annually in the Federal Register) are immune from suit in state or federal court, unless immunity is abrogated by Congress or waived by the tribe. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998). Sovereign immunity "is a necessary corollary to Indian sovereignty and tribal self-governance." Three Affiliated Tribes of Ft. Berthold Reseervation v. Wold Eng'g, P.C., 476 U.S. 877, 890 (1986). Regarding tribal sovereign immunity generally, see William V. Vetter, Doing Business with Indians and

the Three S's: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction, 36 Ariz. L. Rev. 169 (1994).

(b) Tribal sovereign immunity extends to commercial as well as governmental activities. Kiowa, 523 U.S. at 752 – 54; Doe v. Oneida Indian Nation, 278 A.D.2d 564, 565 (3d Dept. 2000).

(c) Tribal sovereign immunity does not depend on whether the site of the construction is reservation land or non-reservation land purchased by the tribe for commercial purposes. Kiowa, 523 U.S. at 754 – 56.

(d) Even if the tribe has waived sovereign immunity, the waiver can be limited and can define who can sue, and where, including requiring that suit be brought in tribal court. See Demontiney v. United States, 255 F.3d 801, 812 (9th Cir. 2001) (tribe's limited waiver authorized suit only in tribal court).

(e) A state or federal court may also be required to abstain from adjudicating a dispute until tribal remedies have been exhausted. Garcia v. Akwesasne Housing Auth., 268 F.3d 76, 79 (2d Cir. 2001); Basil Cook Ent. v. St. Regis Mohawk Tribe, 117 F.3d 61 (2d Cir. 1997). The courts are divided about whether exhaustion is limited to tribal proceedings that are already underway. Garcia, 268 F.3d at 89 (noting majority rule in the federal circuits is that exhaustion requirement is not so limited); Seneca v. Seneca, 293 A.D.2d 56 (4th Dept. 2002).

2. What constitutes a waiver of tribal sovereign immunity?

(a) A waiver of sovereign immunity must be "clear." C & L Ent., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001). An agreement to arbitrate, coupled with a provision identifying an Oklahoma court as "having jurisdiction," is a waiver of sovereign immunity, at least in a contract prepared by the tribe. Id. The Supreme Court held that an agreement to arbitrate is an agreement to have the arbitration effectuated through periodical enforcement of the arbitration award.

(b) A "sue and be sued" clause is not a waiver of tribal sovereign immunity to suit in state or federal court. Garcia v. Akwesasne Housing Auth., 268 F.3d 76, 86 – 87 (2d Cir. 2001); Ransom v. St. Regis Mohawk Educ. and Communit, 86 N.Y.2d 553, 562 – 64 (1995).

(c) A forum selection clause alone is not enough to waive sovereign immunity — at least in a boilerplate commercial agreement. American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985); Danka Funding Co. v. Sky City Casino, 329 N.J. Super 357, 368 (N.J. Super. Law Div. 1999).

(d) That fact that a contract is governed by a particular state's law is not a waiver of sovereign immunity. Sungold Gaming USA, Inc. v. United Nation of Chippewa, Ottawa, 2002 WL 522886 (Mich.App.,2002); James Joseph Morrison Consultants, Inc. v. Sault Ste. Marie Tribe, 1998 WL 1031492 (W.D.Mich.,1998).

(e) Only Congress, which has exclusive and plenary authority over Indian tribes, can abrogate tribal sovereign immunity. A state cannot abrogate tribal immunity or burden its exercise, for example, by denying a tribe access to its courts unless it agrees to waive sovereign immunity. Three Affiliated Tribes of Ft. Berthold Reservation. The federal law conferring state court jurisdiction over civil disputes involving tribal members, 25 U.S.C. 233, did not abrogate tribal sovereign immunity. Ransom v. St. Regis Mohawk Educ. and Community, 86 N.Y.2d 553, 560 n.3 (1995).

3. Can the General Contractor assert a mechanics lien on the Tribe's property?

(a) Absent a waiver of tribal sovereign immunity in the contract, a lien against tribal property cannot be enforced and must be dismissed. Ledford v. Housing Auth. Of Sac and Fox Tribe of Missouri, 609 F.Supp. 211 (D. Kan. 1985) (finding waiver); Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983) (same).

4. Can the General Contractor avoid tribal immunity by suing tribal officials or tribal entities?

(a) Tribal officials are immune to suit when acting in their official capacity. Zeth v. Johnson, 309 A.D.2d 1247, 1248 (4th Dept. 2003); Romanella v. Hayward, 933 F.Supp. 163, 167 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997). A tribal official acting outside his or her tribal authority in violation of federal law can be "stripped" of immunity. Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 359 – 60 (2d. Cir. 2000).

(b) Tribal instrumentalities, including tribal businesses, have sovereign immunity even when they are incorporated under state law. Ransom v. St. Regis Mohawk Educ. and Communit, 86 N.Y.2d 553, 560 & n.3 (1995) Worrall v. Mashantucket Pequot Gaming Ent., 131 F. Supp.2d 328 (D. Conn. 2001).

5. If the Tribe sues, can the General Contractor counter-sue?

(a) The tribe retains sovereign immunity even to compulsory counterclaims. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991).

(b) Tribal sovereign immunity does not ban claims for recoupment, that is, a counterclaim that would reduce the tribe's recovery and that arises out of the same transaction or occurrence as the tribe's suit. United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506 (1940).

Appendix V

Hypothetical Criminal Case Study, Criminal Jurisdiction Panel

Criminal Jurisdiction in Indian Country within the State of New York[50]

Professor Jo Ann Harris

I. CRIME BY AN INDIAN AGAINST AN INDIAN

A. Major Crime

Andrew Smith, a member of the Oneida Nation, assaults his wife, Barbara Smith, a member of the Onondaga Nation, on the Allegany Reservation (Seneca Nation). The assault results in serious bodily injury to Barbara. Which courts have jurisdiction?

Federal, state, and tribal concurrently. The federal courts will have jurisdiction pursuant to the Major Crimes Act, 18 U.S.C. ' 1153, because assault with serious bodily injury is one of the sixteen major crimes specifically enumerated within the Act. The State of New York will have concurrent jurisdiction pursuant to 25 U.S.C. ' 232. See United States v. Cook, 922 F.2d 1026 (2d Cir. 1991). Tribes may exercise jurisdiction concurrently with federal and state governments in crimes by an Indian against another Indian. Moreover, the fact that Andrew is a member of the Oneida Nation and the crime occurred on the Allegany reservation is immaterial as Tribes may prosecute non-member Indians. U.S. v. Lara, 541 U.S. 193 (2004).

B. Other Crime

Chris Smith, a member of the Seneca Nation, shoves his brother, David Smith, a member of the Seneca Nation. The assault occurs on the Cattaraugus Reservation. Chris did not mean to seriously harm David, and David's injuries were minor. Which courts have jurisdiction?

State and tribal concurrently. The State of New York will have jurisdiction pursuant to 25 U.S.C. ' 232. Tribes may exercise jurisdiction concurrently with state governments in crimes by an Indian against another Indian.

II. CRIME BY AN INDIAN AGAINST A NON-INDIAN

Eli Smith, a member of the Seneca Nation, murders his wife, Frances Smith, a non-Indian, on the Oil Springs Reservation. Which courts have jurisdiction? Federal, state, and tribal concurrently. The federal courts will have jurisdiction pursuant to the Major Crimes Act, 18 U.S.C. ' 1153, because murder is one of the sixteen major crimes specifically enumerated within the Act. The State of New York will have jurisdiction pursuant to 25 U.S.C. ' 232. Tribes may exercise jurisdiction concurrently with federal and state governments in crimes by an Indian against a non-Indian.

[50] Appreciation for assistance in preparation of these hypotheticals is expressed to Tracy Toulou, Esq., Director, Office of Tribal Justice, United States Department of Justice, and his interns and his assistant Rose Weckenmann in the Office of Tribal Justice, United States Department of Justice.

III. CRIME BY A NON-INDIAN AGAINST AN INDIAN

Greg Smith, a non-Indian, murders his wife, Hannah Smith, a member of the Oneida Nation, on the Oneida Reservation. Which courts have jurisdiction?

Federal and state concurrently. The Major Crimes Act would not apply because it covers only crimes by Indians. However, the Federal Government may prosecute under the Indian Country Crimes Act, 18 U.S. ' 1152. The State of New York will have jurisdiction pursuant to 25 U.S.C. ' 232. The Tribe may not prosecute in this instance because Tribes have no authority to prosecute non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

IV. CRIME BY A NON-INDIAN AGAINST A NON-INDIAN

Isaac Smith, a non-Indian, assaults his friend, John Smith, a non-Indian, with a chain saw on the St. Regis Reservation. Which courts have jurisdiction?

State only. Crimes by a non-Indian against a non-Indian within Indian country are prosecuted exclusively in state court. U. S. v. McBratney, 104 U.S. 621. The Tribe may not prosecute in this instance because Tribes have no authority to prosecute non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

V. VICTIMLESS CRIME BY AN INDIAN

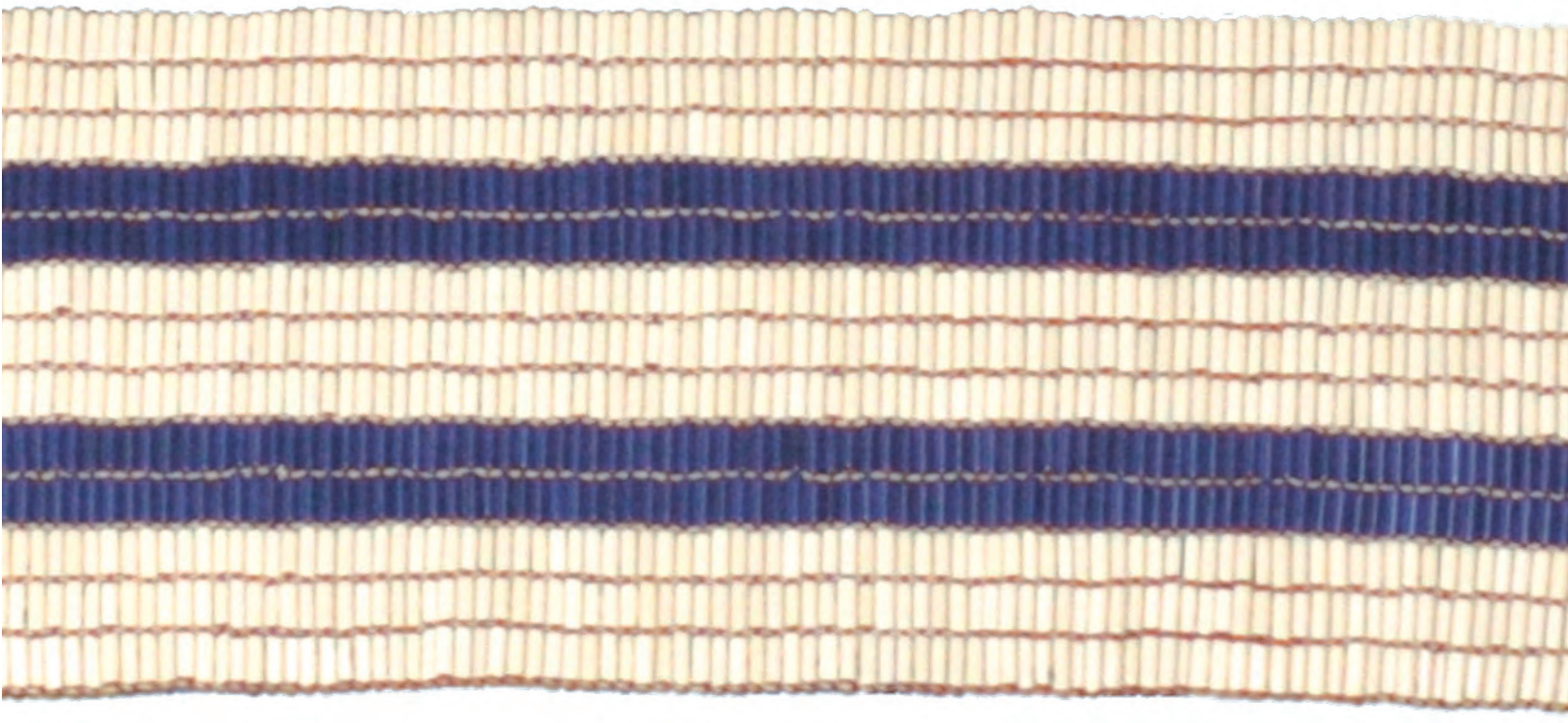
Karl Smith, a member of the Oneida Nation, is arrested for public intoxication on the Tonawanda reservation (Tonawanda Band of Senecas). Which courts have jurisdiction?

State and tribal concurrently. The State of New York will have jurisdiction pursuant to 25 U.S.C. ' 232. Tribes may exercise jurisdiction concurrently with the state government in a victimless crime by an Indian.

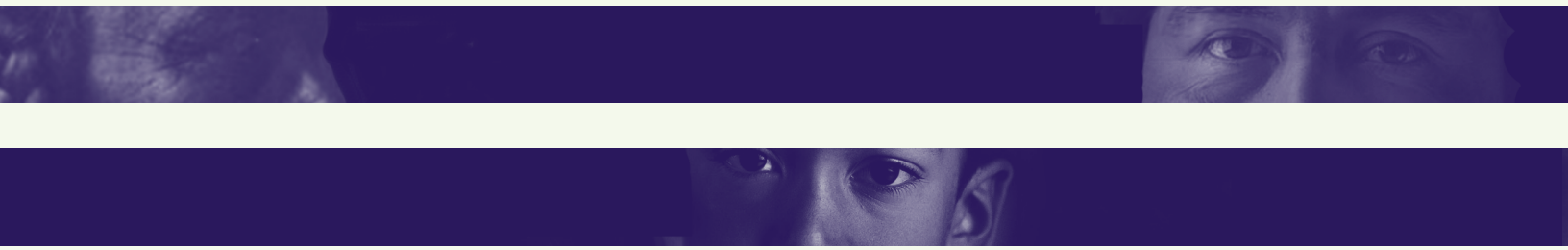
VI. VICTIMLESS CRIME BY A NON-INDIAN

Lisa Smith, a non-Indian, is arrested for disturbing the peace for discharging a shotgun in the air while standing in a housing development on the Tuscarora Nation. Which courts have jurisdiction?

State only. In most instances of a victimless crime by a non-Indian, only the state would retain jurisdiction under McBratney. However, on these facts, federal jurisdiction may also attach if it can be shown that discharging the firearm created a specific threat to tribal interests. The Tribe may not prosecute in this instance because Tribes have no authority to prosecute non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).



ALL PHOTOGRAPHY BY: TEODORS ERMANSONS



Co-Sponsored By

The New York Tribal Courts Committee,

The New York State Judicial Institute, and

The Center for Indigenous Law, Governance and Citizenship

in affiliation with the New York Federal-State-Tribal Courts Forum